

Cause and Damage

Interpretation of Liability-activating Causation Terms in Property Insurance

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1 Introduction

1.1 *The Object and Aims of the Study*

Every insurance contract specifies events, such as, for example, death or fire, that will activate the insurer's liability to pay compensation. Under some insurance policies, e.g. life insurance, compensation is paid upon the occurrence of the covered event alone, regardless of its consequences. In other types of insurance, e.g. property insurance, compensation is paid only if the covered event has caused damage.

Contract terms that specify events covered by the insurance contract can be called liability-activating event terms.² Inasmuch as such liability-activating event terms require a causal connection between the covered event and damage, they can be said to constitute *liability-activating causation terms*.³ The nature of

¹ This paper constitutes an abbreviated version of the authors' doctoral thesis, published recently in Swedish (see, Radetzki (1998)). The author expresses his sincere thanks Bill Dufwa, Bertil Bengtsson, Jan Kleineman, Peter Sande and Erland Strömbäck for valuable comments on the work. The text has been translated into English by Teresa Bjelkhagen who has provided the following explanation note: *The structure of the English legal system differs somewhat from the structure of the Swedish legal system in the fields of tort and contract law. English tort law specifies torts and the relevant remedies. Tort law refers solely to relationships not arising out of contract, whereas contract law embraces contractual relationships only. Damages are one of the remedies available under tort law as well as under contract law. In Sweden the law of damages constitutes a separate branch of law, covering both contractual and extra-contractual relationships. We may thus speak of the contractual law of damages covering contractual relationships under the law of damages, as well as of the extra-contractual law of damages covering relationships not arising out of contract. The reader may well bear this in mind when expressions such as "the applicable contractual rules of the law of damages" are encountered.*

² Cf. Schmidt (1943) p. 198.

³ Cf. Schmidt (1943) p. 198.

the requisite causal connection can vary. It can be the question of factual (logical) causality alone, but the term might also require that causality be adequate, direct or meet some other additional requirement. The liability-activating causation terms stipulate the requisite *nature of causation*.

The present work examines the formulation and interpretation of the liability-activating causation terms. It aims to determine the nature of the causal relation between the covered event and damage, which is necessary under the above-mentioned terms for the damage to be covered by the insurer's liability. In addition, the study means to analyse and critically evaluate the present state of the law, as well as discuss measures that could be introduced in order to formulate the liability-activating causation terms in such a way as to promote their more effective application.

The present study can thus be said to address the issue of the scope of the insurer's liability as a function of causality. This issue has been addressed frequently enough in the doctrine. With few exceptions, however, it has been treated in such a way as to hardly ever make any reference to the insurance contract and its regulatory framework. The aim of the various presentations seems to have been restricted to a large degree to the clarification of what could be considered as optional law in a given context. In reality, however, the question concerning the scope of the insurer's liability from the point of view of causality is the object of contractual regulation in the majority of cases. To discuss this subject matter without a proper link to this regulatory framework seems, therefore, unrealistic. It would be more fruitful to let the liability-activating event terms, which are the actual instrument regulating the scope of the insurer's liability with regard to causality, make the starting point of the investigation, as has been done in this work. Obviously, the question concerning the scope of the insurer's liability as a function of causality is *a question of contract law interpretation*. In order to be able to answer the question in a satisfactory way, we have to treat it as such.

1.2 *Limitations*

It has been shown that the contract terms at issue require a causal connection between the covered event and damage. The question about the meaning of this basic requirement of factual (logical) causality belongs, most probably, to the field of logic.⁴ As mentioned before, it is not treated in this study⁵ which focuses instead on the requisite nature of the causal relation.

The study is restricted to liability-activating causation terms in property insurance contracts. As it is, the terms in question are also common in accident and health insurance policies.⁶ For this reason problems equivalent to those treated in the present study with regard to property insurance should also appear

4 See, Herre (1996) p. 333. The literature concerning this issue is very extensive. As regards law, refer, for example, to Hart & Honoré (1985) and Peczenik (1979).

5 These questions receive a short treatment in sections 4.2.3.1 and 11.6.3.

6 In other types of insurance contracts liability-activating causation terms appear as well, although not with the same regularity as in property insurance, accident insurance and health insurance.

in accident and health insurance. In order to widen the scope of the studied material to some degree attention is called sometimes to material concerning such insurance. It should also be possible to transfer some of the results of the present study to the area of accident and health insurance. However, such transfer should not be made without a good measure of caution. In comparison with property insurance, accident and health insurance have a number of distinctive features. One of such distinctive features which might be of importance in the present context is constituted in the fact that the issue in accident and health insurance is personal injury in which, for social reasons, compensation can be considered as more urgent than in the case of property insurance.

This study embraces primarily individual insurance policies, but its results should probably be applicable to some extent also to collective insurance contracts (group insurance). One must be careful, however, when transferring the investigation results, since the rather specific contract law relationships⁷ prevailing in collective agreements might sometimes be able to influence the interpretation of a contract. The study examines direct insurance only – reinsurance is not discussed at all.

The work concerns the interpretation of *liability-activating* causation terms only. Insurance policies contain also so called *liability-exempting* causation terms. In accordance with these the insurer is not liable for damage resulting from a specified event, expressly excluded from the policy. Insurance coverage frequently excludes damage arising as a result of war. In the event of the causal requirement specified by a liability-activating causation term being satisfied (making the damage a compensable consequence of the covered event), the insurer may nevertheless refer sometimes to another cause of the damage, consisting in an event whose consequences have been excluded from the policy's coverage. It then becomes necessary to determine whether the causal relationship between the event excluded and the damage satisfies the demands concerning the nature of the causal relation necessary for the application of the exclusion. This process is undeniably similar to the determination process of the connection between the cause and the damage when applying the contract's liability-activating causation terms.⁸ Nevertheless, there are at least two major differences between the two. The requirements of the exception terms concerning the nature of causation differ frequently from the requirements of the liability-activating causation terms in this respect. Whereas the liability-activating causation terms usually require that the damage be caused by, or directly by, an event covered by the insurance contract, it is often sufficient under the liability-exempting causation terms that the damage constitutes a *direct or indirect* consequence of the event excluded.⁹ In addition, circumstances ascribable to the parties¹⁰ may result in the fact that the causal requirement stipulated by an exception term is main-

7 As regards these relationships, see, Baldini (1990) p. 291 ff. Cf. also Dufwa (1995a) esp. p. 415 ff as regards insurance policies provided on the basis of collective agreements.

8 See, Schmidt (1943) p. 223.

9 See further section 4.2.1- 4.2.2.

10 For example, the insurer's need to calculate in advance premiums equivalent to the assumed risks, or the insured's need of protection against certain types of damage.

tained less strictly than the equivalent requirement stipulated by a liability-activating clause or vice versa.¹¹

If the connection between the event excluded and damage is of such a nature that the exclusion is applicable, yet another problem appears, which has no equivalent in the application of liability-activating cause-clauses. In such a situation there are two causes of damage predetermined by the insurance policy: partly the covered event and partly the event excluded. The question is whether any of the two causes shall be prioritised so that full compensation is paid, or whether no compensation shall be paid at all. And how shall the choice between the two causes be decided? Shall the amount of compensation be adjusted perhaps?¹²

The interpretation of liability-exempting causation terms involves problems that bear much resemblance to those appearing when interpreting liability-activating causation terms, but it also involves problems that have no equivalent in the latter circumstances. This is the reason why the liability-exempting causation terms have been excluded from the remaining part of the study.

1.3 Material

After the coming into force of FAL, DFAL, FFAL (1933) and NFAL (1930) the law of insurance contracts in Sweden, Denmark, Norway and Finland was, in principle, uniform for a long period of time. More recent legislation has upset that uniformity to a certain extent, however. The issue of the interpretation of liability-activating causation terms has been, on the other hand, the object of regulation by law only to a limited extent, and belongs to those issues which are still generally assessed in a uniform way.

The following presentation examines in the first place Swedish law. Due to the above-mentioned conditions the study has come to embrace also Danish and Norwegian law.¹³ It should be mentioned, however, that the latter legal orders have not been studied equally thoroughly and intensively as the Swedish one. Insufficient knowledge of the Finnish language has been a barrier to any proper investigation of Finnish law.

In order to put the investigated conditions in Scandinavia into perspective and facilitate their proper understanding¹⁴ the wording and interpretation of the liability-activating causation terms are also discussed in a non-Scandinavian country - England.

¹¹ Cf. Selmer (1982) p. 223.

¹² The literature on the subject is rather extensive; see, for example, Bache (1940) p. 135 ff; Christrup (1941) p. 166 ff; Brækhus and Rein (1993) p. 258 ff; Bull (1980) p. 77 ff; Grundt (1950) p. 90 ff; Grundt (1941) p. 539 ff; Hoel (1938) p. 149 ff; Jacobi (1941) p. 17 ff; Lyngsø (1994) p. 187 ff; Hellner (1965) p. 105 ff; Schjelderup (1927); Schjelderup (1919) p. 1 ff; Schmidt (1943) p. 223 ff; Selmer (1982) p. 288 ff; Øvergaard (1938a) p. 474 ff and Øvergaard (1938b) p. 171 ff.

¹³ It can thus be said to examine Scandinavian law.

¹⁴ Cf. Bogdan (1993) p. 29 f and David & Brierley (1985) p. 11.

With a few exceptions, only the material which was accessible before 1 January 1999 is discussed.

2 The Criteria of the law of Damages in Contractual and Extra Contractual Relationships Governing the Nature of Cause

2.1 Introduction

This study concerns the scope of the insurer's liability as a function of causality. An analogous issue arises in the law of damages as regards the liability of tortfeasors. In accordance with the general principle of the law of damages the tortfeasor is liable for damage resulting from adequate causes only. The doctrine of adequacy has attracted a lot of attention in the literature concerning the law of damages, and its content and application have been extensively discussed.

The scope of the insurer's liability is, as stated above, governed by the insurance policy's liability-activating causation terms. This study will show these terms are often assumed to require adequacy. In insurance law literature, however, the doctrine of adequacy is seldom addressed. It is often only noted cursorily that a particular insurance policy includes the covered event's adequate consequences. Sometime a reference is made to the law of damages from which the doctrine is said to be derived. Some authors also suggest that the doctrine of adequacy should not be applied as strictly in insurance law as in the law of damages. The reasons for this, however, are stated only summarily or not at all.

Since the determination of causation in insurance law has its roots in the adequacy doctrine of the law of damages, knowledge of that doctrine is a necessary prerequisite for a productive study and demonstration of the scope of the insurer's liability as a function of causality. The adequacy doctrine of the law of damages is therefore addressed in the following sections. Initially, relationships not arising out of contract are treated, and after that relationships in contract law to the extent in which they are deviant. The aim of this presentation is to provide a background for the following treatment of the liability-activating causation terms' interpretation. What is presented in this chapter is therefore restricted to the provision of a systematic compilation of the legal system based primarily on the existing doctrine.

2.2 Limitations on Liability in Tort

Under the general principle of the law of damages the amount of damages shall be decided in accordance with the doctrine of difference, which states that the economic situation in which the injured party would have been if the damage had not occurred shall be estimated and compared with the economic situation after the damage. The difference constitutes the amount of damages.¹⁵

¹⁵ See, von Eyben, Nørgaard & Vagner (1995) p. 219 f; Hellner (1995) p. 357 f and Lødrup (1995) p. 342.

2.2.1 The Requirement of Causal Connection

The injured party is thus entitled to full compensation for the damage that has been *caused* by the tortious act. Traditionally, the question of causal connection has been treated in two steps. The first task is to ascertain whether the damage constitutes a factual consequence of the act in question. In this assessment the legal responsibility is rather extensive in character. In order to suitably limit the scope of legal responsibility from the point of view of legal policy causal adequacy¹⁶ is required in the second step.

As stated in section 1.2, the meaning of the basic requirement of factual causality is not treated in this study,¹⁷ which is why in the following sections only the requirement of adequacy is discussed.

2.2.2 The Doctrine of Adequacy

2.2.2.1 Function

An act can be the cause of an infinite number of harmful consequences. If only one requirement - that of factual causality - should limit liability for damages, then that liability would be unlimited. That such a system can hardly be considered as desirable¹⁸ can be illustrated by the following example. As a result of A's carelessness X receives injuries requiring hospitalisation. X dies in the hospital, not because of the above-mentioned injuries, but as a result of lightning that caused fire. Obviously, A's carelessness is the factual reason of X's death. Despite this fact, in the opinion of the majority of people it would be unreasonable to impose liability on A for the death of X, since his loss of life was a wholly accidental consequence of A's carelessness. This is why, in addition to the requirement of factual causality, the requirement of adequacy must also be satisfied. The function of the latter is to set the outermost boundary for liability for damages.¹⁹

2.2.2.2 Content

The doctrine of adequacy is not uniform. According to Conradi there are hardly two authors that agree on its proper meaning.²⁰ It is clear, on the other hand, that the object of any assessment of adequacy is the causal connection between two events - action and damage.²¹ Such assessment means evaluation of the causal connection.²² In order to be considered adequate, the causal connection must be

¹⁶ See, Dufwa (1993) 2401.

¹⁷ See, however, sections 4.2.3.1 and 11.6.3.

¹⁸ See, for example, Dufwa (1993) 2401 and Karlgren (1972) p. 44.

¹⁹ See, Andersson (1993) p. 90; Schmidt (1943) p. 206 and Vinding Kruse (1951) p 364.

²⁰ See, Conradi (1974) p. 37.

²¹ See, for example, Andersson (1993) p. 94.

²² See, Andersson (1993) p. 95.

of a specific character.²³ With regard to the required nature of causation there is a difference of opinion.²⁴ In one view, adequacy exists if the damage is connected with the dangerous features of the tortious act.²⁵ According to a similar formulation it is required that the damage flows from the dangerous features of the act.²⁶ Several authors claim that the requirement of adequacy leads to a test of probability: adequacy exists only if the relevant act has increased to some extent the probability of damage (risk, danger).²⁷ Yet another adequacy formula holds that the damage must constitute a, to some extent, likely,²⁸ predicable,²⁹ foreseeable³⁰ or typical³¹ result of the relevant act. Finally, the requirement of adequacy has been said to entail the view that too remote consequences of a wrongdoer's act fall outside his responsibility.³²

At first glance the above-formulated causal requirements seem similar to each other. In practice, the different formulations should lead to equivalent assessment results on a number of occasion. A closer analysis reveals, however, certain, not so insignificant, differences.

The requirement that the damage be *connected with the dangerous features of the tortious act* seems to imply that the damage shall have benefited (that is, the probability of damage shall have exceeded the minimum of danger that is connected with the activities of normal life) from the characteristics of the wrongdoer's culpable behaviour or from behaviour leading to strict liability.³³ Also the formulation *flows from the dangerous features of the act* seems to imply the requirement of a connection between the risk and the damage that accompanied the act. The second formulation does not seem to be as biased as the first one in favour of the connection between the characteristics of the act and the damage. It seems to leave at least some scope for the evaluation of other factors, for exam-

²³ See, Andersson (1993) p. 95 and Saxén (1962) p. 19 f.

²⁴ In the following section a number of the most common adequacy formulations are presented. The presentation does not lay claim to being exhaustive.

²⁵ See, Vinding Kruse (1951) p. 373, (1989) p. 158 and 165. Cf. Agell (1973) p. 801 ff, in which the author emphasises the connection between the elements of negligence in the tortfeasor's actions and the following damage; Sindballe (1948) p. 257 f; Trolle (1965) p. 247 and Ussing (1946b) p. 150 f.

²⁶ See, Andersson (1993) p. 98; Bengtsson (1982) p. 170; Hellner (1995) p. 204; Karlgren (1972) p. 45; Lødrup (1995) p. 292; Saxén (1962) p. 32 and Strahl (1964) p. 326.

²⁷ See, Andersson (1993) p. 95; Bengtsson, Nordenson & Strömbäck (1985) p. 42 f (Nordenson's presentation); von Eyben, Nørgaard & Vagner (1995) p. 283 f; Hellner (1995) p. 204; Lødrup (1995) p. 292 and Vinding Kruse (1989) p. 158.

²⁸ See, for example, Andersson (1993) p. 98; Dufwa (1993) 2545; Lødrup (1995) p. 289 ff and Nygaard (1992) p. 348.

²⁹ See, for example, Andersson (1993) p. 98; Bengtsson (1982) p. 170 as well as prop 1972:5 p. 22.

³⁰ See, for example, Andersson (1993) p. 98; Bomgren (1968) p. 355 and Saxén (1962) p. 44.

³¹ See, Andersson (1993) p. 98; Bengtsson (1982) p. 170; Bengtsson, Nordenson & Strömbäck (1985) p. 42 (Nordenson's presentation) as well as prop 1972:5 p. 22.

³² See, Lødrup (1995) p. 294 f and Nygaard (1992) p. 357 ff.

³³ See, Saxén (1962) p. 32.

ple, more general probability discussions in which the general and typical considerations are emphasised in connection with the damage.³⁴

The requirement that the relevant act should *increase the probability of damage* needs hardly any explanation. It should be emphasised, however, that in accordance with this formulation of the adequacy requirement it is not necessary for the damage to constitute a probable consequence of the act.³⁵ What is required is a certain degree of probability increase. There is undeniably some difference between the two formulations discussed above, particularly the requirement set by Vinding Kruse that the damage shall be connected with the dangerous features of the act and the requirement of probability increase. It is namely possible to think of cases in which an action has increased the possibility of damage, but where this was not due to those characteristics of the act which entailed that it has been perceived as negligent.³⁶ In the example provided in section 2.2.2.1 the risk of lightning followed by the fire does not seem to have been bigger in the hospital area than in other areas. If, on the other hand, the risk of lightning followed by fire should have been, for some reason, bigger in the hospital area than in other areas, then the action which caused X's initial bodily injury would seem to have actually increased the probability of the fatal outcome in question. The requirement of probability increase would therefore be considered to have been satisfied.³⁷ Since the probability increase in our example does not depend on the characteristics of the act, making that the act has been judged negligent, the damage can neither be said to be connected with the dangerous features of the act, nor to flow from them.

The expressions stipulating that if the damage is to be considered adequate it shall constitute a, to some extent, *likely, predictable or foreseeable consequence* of the act must be understood as synonymous in this context.³⁸ It should even be possible to equate the expression *typical consequence* with the foregoing, since those consequences of an action which are considered as likely, predictable and foreseeable should be exactly the ones that constitute typical results thereof. Very frequently the current requirements of likelihood or the like coincide with the above-discussed adequacy formulations. Deviations are not impossible, however. Let us assume that an air-traffic controller directs negligently air plane A to a height to which also air plane B has been directed. At this height plane A collides not with plane B but with a large bird, which makes it crash.³⁹ Obviously, it is the controller's negligence which constitutes the cause of the damage.

³⁴ See, Andersson (1993) p. 119. The above-mentioned conditions are also mentioned by Karlgren (1972) p. 45.

³⁵ See, Andersson (1993) p. 97 and Saxén (1983) p. 408.

³⁶ See, Agell (1973) p. 802.

³⁷ This under the assumption, of course, that the degree of probability increase was sufficiently big.

³⁸ According to Karlgren (1972) p. 45, the term 'predictable' is misleading because it implies that the damage is to be expected, i.e. probable. Bonnevie (1942) p. 10, distinguishes between the terms 'expected' and 'predictable' in such a way that the former is considered to refer to an estimate and the latter to a calculation.

³⁹ The example supplied by Bengtsson, Nordenson & Strömbäck (1985) p. 42 (Nordenson's presentation).

The question is whether the damage can be considered adequate. In the meantime it has been shown that the airfield in question was teeming with birds, not only at the height to which A had been wrongly directed, but also at almost any other height, including the height to which A should have been directed. In these circumstances the damage cannot be said to be either connected with the dangerous features of the negligent act, or flow from the dangerous features of the act. The controller's negligence cannot either be said to have increased the probability of the loss incurred, since the risk of collision with a bird was just as big at the height to which A should have been correctly directed. Plane A has been, however, directed to a height teeming with birds. The collision with a bird can therefore be said to have constituted an, at least in some degree, likely, predictable, foreseeable or typical result of the controller's action. In accordance with these criteria, and in contrast to the assessment resulting from the earlier criteria, it would be possible to consider the damage as adequate.

The common feature of the adequacy formulations discussed so far seems to be that they do not so much examine the connection between an action and damage in an individual case, but rather that they seem to determine whether the damage, as *commonly seen*, is connected with the dangerous features of the act, or flows from its dangerous features, or whether, *as commonly seen*, the action has increased the probability of the type of damage in question, or finally, whether the damage constitutes, *as commonly seen*, a, to some extent, likely (or similar) result of the action.

By way of conclusion the meaning of one adequacy formulation will be discussed, which seems to examine more profoundly the relationship between an act and damage in an individual case. As mentioned earlier, the requirement of adequacy has sometimes been formulated in such a way that in order to be considered as adequate the damage must not be too *remote a consequence of the act*. A closer examination reveals that this formulation seems to focus partly on the time that has passed between the act and the damage, and partly on the course of events connecting these two (and then especially on the number of intervening events). In this context one should hardly ask whether the damage, as commonly seen, constitutes a remote consequence of the act. The question should rather concern, as implied, the determination of the course of events in each individual case. Even though an evaluation performed according to the present formulation will most frequently lead to the same result as an evaluation performed according to the formulations discussed above, it is obvious that in some cases the evaluation's result may be different. Not seldom (even though not always) deviations will probably depend on the above-stated relationship in which the adequacy criterion in question concentrates more than other criteria on the course of events in a given case. Even very remote damage can be thought at times to be connected with, or flow from, the dangerous features of the act. Conversely, proximate damage should sometimes be unable to satisfy the requirements placed by the currently mentioned adequacy criteria. The current criterion cannot either be equated with the earlier discussed requirement of probability increase and likelihood (or similar). Even if the probability of damage has somewhat increased, or even if the damage can be considered to be, in some measure, a likely consequence of the act, it may still be deemed to be too remote a conse-

quence to be covered by the wrongdoer's liability in a particular case. Conversely, very proximate damage can sometimes constitute such an improbable or surprising consequence of a given act that the requirement of probability increase or likelihood (or similar) cannot be considered to be satisfied.

The analysis above supports the initial statement that the adequacy doctrine is not uniform. The adequacy requirement has been formulated in a number of ways. These different formulations result frequently in equivalent adequacy determination results. Sometimes the outcome depends, however, on the type of adequacy formulation that has been applied. A number of authors seem also to be unwilling to put forward a particular adequacy formulation, excluding the remaining ones.⁴⁰ The fact that the adequacy doctrine cannot be condensed into a uniform formula seems to be a more or less accepted fact.⁴¹ On the other hand, with regard to Danish law, certain tendencies concerning the primary content of the adequacy requirement can be detected. Adequacy determination seems to involve there, to a larger extent than in Swedish and Norwegian law, the connection between the damage and the dangerous features of the act.⁴² Neither in Norwegian nor in Swedish doctrine can any tendencies be found suggesting that one of the above-discussed adequacy criteria is to be considered of special importance. In Norway there is a tendency instead to include also other factors than just those discussed above in the adequacy evaluation. Kristen Andersen in particular has claimed that in their evaluation of adequacy the Norwegian courts take into consideration also such factors as the responsible person's degree of guilt and the scope of the damage.⁴³ Andersen seems to think that if this is correct, then one should openly admit that the question of the boundaries of liability is not restricted to the determination of adequacy in the sense stipulated here, but that it is rather a question of a general test of reasonableness, in which other factors, such as the two above-mentioned ones, will also acquire significance.⁴⁴ Other Norwegian presentations seem also to be characterised by this outlook to a certain degree.⁴⁵

⁴⁰ See, for instance, Bengtsson (1982) p. 170; von Eyben, Nørgaard & Vagner (1995) p. 283 ff; Hellner (1995) p. 202 ff and Lødrup (1995) p. 291 ff, who discuss a number of the above-mentioned adequacy criteria.

⁴¹ The difficulty in being able to recapitulate the adequacy doctrine has been specifically pointed out in e.g. Hellner (1995) p. 206 and Nygaard (1992) p. 348.

⁴² This transpires already from the fact that Vinding Kruse, and also Sindballe, Trolle and Ussing, held that the so called danger connection was of central importance for the evaluation of adequacy. See footnote 25 and also Andersson (1993) p. 88 and 118 f.

⁴³ See, Andersen (1970) p. 63.

⁴⁴ See, Andersen (1970) p. 68. The current topic is discussed in more detail in Andersen (1941) p. 299 ff. Bengtsson (1980) p. 608, has also pointed out that determination of adequacy in Norway has a stronger element of reasonableness testing than an equivalent assessment in Sweden or Denmark.

⁴⁵ See, for example, Lødrup (1995) p. 291 ff, and Nygaard (1992) p. 346 ff.

2.2.2.3 Reasons for the Application of the Adequacy Doctrine

The adequacy doctrine's application has been justified in the tort law literature in various ways, such as, for example, by reference to the sense of justice.⁴⁶ The public would not accept liability for damages without requesting a clear causal connection between action and damage.⁴⁷ The term 'sense of justice' is rather vague, however, which is why this argument should be used with caution.⁴⁸

The doctrine of adequacy has also been justified with the help of legal-technical arguments, such as the need for a limitation rule that would be easy to handle.⁴⁹ It has been shown, however, that in reality the adequacy doctrine is anything but easily handled.⁵⁰ Seen against this background the quoted argument appears a bit odd.

The adequacy doctrine's application has also been justified by referring to the deterrent effect of damages.⁵¹ Liability for damages can only avert damage which is likely to happen.⁵² Widening the scope of liability to refer also to unlikely damage would not imply greater caution.⁵³

Finally, the requirement of adequacy has been justified by the wrongdoer's need of protection against too wide liability.⁵⁴ In accordance with a similar view liability for random loss would be contrary to the fundamental requirements of legal security.⁵⁵

2.2.2.4 Determination of Adequacy

Application of the adequacy doctrine is not problem-free. This is caused partly by the somewhat elusive content of the doctrine. In addition, a number of questions appear in connection with the determination of adequacy, which are discussed below.

2.2.2.4.1 *Appropriate Evaluator*

Determination of adequacy constitutes an objective assessment.⁵⁶ This is why the question of whether the damage appears to the actual wrongdoer as adequate

⁴⁶ See, Andersson (1993) p. 91 and Ussing (1946b) p. 151.

⁴⁷ Cf. Andersson (1993) p. 91; Bengtsson (1963) p. 321; Grönfors (1952) p. 55 and Schmidt (1943) p. 206 f.

⁴⁸ See, Vinding Kruse (1989) p. 156.

⁴⁹ See, Andersson (1993) p. 91 and Saxén (1962) p. 40.

⁵⁰ See section 2.2.2.4.

⁵¹ See, Andersson (1993) p. 92; Grönfors (1952) p. 55; Ussing (1946b) p. 150 and Øvergaard (1951) p. 37.

⁵² See, Andersson (1993) p. 92; Lundstedt (1923) p. 113 f and Schmidt (1943) p. 206.

⁵³ See, Andersson (1993) p. 92 and Schmidt (1943) p. 206.

⁵⁴ See, Andersen (1970) p. 58; Andersson (1993) p. 92 and Nygaard (1992) p. 347. The value of this argument is mitigated, however, to some extent by the fact that liability in damages is usually covered by insurance (see, Andersson (1993) p. 93).

⁵⁵ See, Schmidt (1943) p. 207.

⁵⁶ See, von Eyben, Nørgaard & Vagner (1995) p. 286; Hellner (1995) p. 205 and Lødrup

or not is irrelevant. The starting point for the determination of adequacy shall be instead the view of an imagined evaluator.

The level of competence of the imagined evaluator is of great importance for the result of the adequacy assessment. If the evaluator is knowledgeable, the possibilities that the damage will be found adequate are greater than if he is ignorant. According to a number of Norwegian authors the evaluator shall have the knowledge of an average person of ordinary prudence, accompanied by the knowledge possessed by the actual wrongdoer.⁵⁷ In Sweden and Denmark the evaluator is required to have the knowledge of a particularly judicious person.⁵⁸ At times the evaluator has also been compared to a know-all.⁵⁹ The knowledge possessed by an average person of ordinary prudence, a particularly judicious person, or a know-all, cannot be determined in a general way, however. Despite the opinions presented above, there remains therefore some uncertainty in this respect.

2.2.2.4.2 The Relevant Point in Time for the Determination of Adequacy

The evaluator's knowledge is thus of great importance for the result of the determination of adequacy. This makes that even the point in time which is relevant for the determination of adequacy can be rather important. What has been unknown to the evaluator at the time of the tortious act may later become known to him, making that it can be taken into consideration if adequacy is determined at a later date. According to a number of Danish and Norwegian authors the point in time relevant for the determination of adequacy is the time when the tortious act was performed.⁶⁰ A number of Swedish authors claim, however, that adequacy should be determined later on, i.e. at the time of the court trial of the question of liability in damages.⁶¹

2.2.2.4.3 Description of the Course of Events

Yet another issue in the determination of adequacy concerns the description of its object, i.e. the course of events leading to damage. Obviously, the description of the above has great importance for the determination result. If, in the case of a person's death, the description of the event contains no details, such as, for example, that the subject was hit by a bicyclist on a pedestrian crossing, the event may come to be regarded as inadequate since the collision will not be considered to have sufficiently increased the probability of injuries with a fatal outcome. If, on the other hand, the cause of death receives a more detailed description which

(1995) p. 291.

⁵⁷ See, Andersson (1993) p. 101; Bonnevie (1942) p. 34; Stang (1919) p. 81 and Øvergaard (1951) p. 42 f.

⁵⁸ See, Andersson (1993) p. 101; Dufwa (1993) p. 2545; Grönfors (1952) p. 54; Hellner (1995) p. 205 and Karlgren (1972) p. 47. Cf. von Eyben, Nørgaard & Vagner (1995) p. 286.

⁵⁹ See, Andersson (1993) p. 101; Vinding Kruse (1951) p. 363 and prop 1972:5 p. 22.

⁶⁰ See, Stang (1919) p. 78; Bonnevie (1942) p. 18 and Ussing (1946b) p. 150. With regard to the Swedish doctrine, see Bengtsson, Nordenson & Strömbäck (1985) p. 43 (Nordenson's presentation).

⁶¹ See, for example, Dufwa (1993) 2545; Hellner (1995) p. 205; Karlgren (1972) p. 48 f and Lech (1973) p. 32.

mentions the fact that at the time of the accident the bicyclist was going at a very high speed, the possibilities for the loss to be considered as adequate increase. Such a determination result presupposes, however, that the loss and the circumstances around it receive a concise description, as shown. If, on the other hand, also certain specific circumstances concerning the loss of life are noted, so that the loss is described as death resulting from gross negligence in connection with the medical treatment received by the subject after the accident, the adequacy determination result will change again. It may be claimed that the bicyclist's speed has not increased the probability of the loss, as described now, in a sufficiently high degree, and that the causal connection is therefore inadequate.

In the view of the majority of authors both the tortious act and damage shall be given a relatively concise description.⁶² It is thus of secondary importance whether the particular course of events analysed in more detail has been adequate. At the same time it has also been held that too far-reaching generalisations can bring about unsuitable results.⁶³ It is unclear how far one can go in this respect.

2.2.2.4.4 *The Level of the Adequacy Requirement*

It has been shown that the adequacy requirement can be formulated in a number of ways.⁶⁴ A common factor in all these formulations is that they refer to some sort of evaluation.⁶⁵ Like other evaluation activities determination of adequacy is a problem of drawing borderlines. Where should a borderline be drawn between adequacy and inadequacy? What is the level of the adequacy requirement?

If the adequacy doctrine has been formulated in such a way as to require that the damage be connected with the dangerous features of the tortious act, it is necessary, as has been shown above, that the probability of damage should have increased as a result of those features of the tortfeasor's act that have made the act to be regarded as careless. A similar, though not identical, requirement of the increase in probability can be found when the adequacy requirement has been formulated as a demand that the damage should flow from the dangerous features of the act. The adequacy doctrine can even be formulated in a more general way, requiring that the act in question shall have increased the probability of damage. As can be seen, all of these adequacy formulations require a certain measure of probability increase. This leads, naturally, to the question of the *degree of probability increase* that is necessary for the damage to be regarded as adequate. An equivalent problem appears when the adequacy requirement is considered to imply the requirement that the damage must to some extent constitute a likely, predictable, foreseeable or typical result of the act. What *degree of likelihood or the like* shall be required? The same applies if the adequacy requirement has been formulated as to require that the damage shall not constitute

⁶² See, for example, Andersson (1993) p. 99 f. Cf. Hellner (1995) p. 204; Karlgren (1972) p. 50; Lødrup (1995) p. 292 and Saxén (1962) p. 55.

⁶³ See, Saxén (1962) p. 56.

⁶⁴ Regarding these formulations, see section 2.2.2.2.

⁶⁵ It has been shown that the determination of adequacy is an evaluation of the causal connection; see section 2.2.2.2.

too remote a consequence of the tortious act. The question then concerns *the necessary proximity of the damage* to be considered as adequate.

The majority of authors do not discuss the level of the adequacy requirement at all. Some imply, however, that this level is relatively low.⁶⁶ This is not more than a vague intimation of what is required, however. It is therefore hardly possible to describe in general terms how much is needed in the above respect for adequacy to exist.

2.2.2.5 Criticism

The fact that the doctrine of adequacy is not uniform is accompanied by a number of other issues that have to be settled when determining adequacy. Who is the relevant evaluator, and what skills must he be assumed to possess? What is the relevant point in time for the determination of adequacy? How shall the course of events constituting the object of adequacy determination be described? What is the level of the adequacy requirement? Even though these questions have been widely discussed, it has often been impossible to find a clear answer to them. All this has contributed to making the adequacy doctrine unpredictable and therefore subject to criticism.⁶⁷

It has been stated that the doctrine of adequacy is used by the courts as pseudo justification of their standpoint concerning the question of limitations on liability for damages. According to this line of reasoning the doctrine of adequacy, as it is formulated with its requirements of increase in probability, likelihood or the like, is not applied by the courts. The amount of damages is decided on the basis of other criteria, such as, for example, general reasonableness, which does not prevent the doctrine of adequacy from being quoted as grounds for a decision, however. The real reasons for the courts' decisions are therefore concealed, so to say, behind the doctrine of adequacy.⁶⁸

To sum up, it can be said that to claim that the doctrine of adequacy is a kind of *rule* according to which the injured party's right to recovery is limited in a *certain way* may be too daring. The doctrine is too vague for that. It is better to regard it as a way of reasoning around the issue concerning the boundaries of legal liability. With this less daring point of departure the doctrine should be acceptable to most.⁶⁹

⁶⁶ Cf. Hellner (1995) p. 204 and Karlgren (1972) p. 46.

⁶⁷ See, for instance, Andersson (1993) p. 107 ff; Jørgensen (1953) p. 45 f; Karlgren (1972) p. 46 ff; Persson (1962) p. 79 ff and Strahl (1964) p. 327 ff.

⁶⁸ See, Andersson (1993) p. 108 and 114; Jørgensen (1960) p. 197; Strahl (1964) p. 335 f and Strahl (1976) p. 73. Cf. Trolle (1969) p. 408 and SOU 1995:33 p. 383. Cf. even what has been said in Sect. 2.2.2.2. about determination of adequacy in Norwegian law.

⁶⁹ Cf. Bengtsson (1982) p. 170; Dufwa (1993) 2401 and 2539 and Nygaard (1992) p. 348.

2.3 Limitations on Liability in Contract

Damages for breach of contract shall enable the plaintiff to assume the position which would have been his if the contract had been properly carried out.⁷⁰ Similarly to liability in tort, the amount of contractual damages is decided in accordance with the doctrine of difference.⁷¹ To put it in a different way, the plaintiff is entitled to full recovery.⁷²

The plaintiff is thus entitled to full reparation for damage caused by contract breach. Just as in extra-contractual circumstances, in breach of contract it is also required that there be a causal connection between the breach of contract and damage for recovery to be considered. In the law of contract the causal requirement is also discussed in two steps. First, the question of whether there is a factual (logical) causal connection between the breach of contract and damage is examined.⁷³ After that, whether the causal connection is adequate.⁷⁴

2.3.1 The Doctrine of Adequacy

2.3.1.1 Function, Content and Reasons for the Application of the Adequacy Doctrine

It is obvious that the adequacy doctrine's function in contract law is the same as in the extra-contractual law of damages: to set the outward boundary for the wrongdoer's (i.e. the party who is guilty of contract breach) liability.⁷⁵

As regards the content of the adequacy doctrine it can be noted that there is no agreement on this issue in the contract law literature. The difference of opinion seems to be less extensive, however, than in the extra-contractual doctrine of tort law. Requirements such as those that are encountered in the context of extra-contractual relationships, demanding that the damage shall be connected with, or flow from the dangerous features of the tortious act hardly ever appear in con-

⁷⁰ Damages are thus equivalent to what is commonly called 'the positive contract interest'. See, for example, Arnholm (1966) p. 284; Hellner (1996b) p. 207 and Ussing (1961) p. 106.

⁷¹ As regards the application of the doctrine of difference in contract law, see, Herre (1996) p. 312 ff and Rodhe (1956) § 45 ff. A similar method for the calculation of damages due to breach of contract is discussed in Hellner (1996b) p. 210 ff. Hellner (1985) p. 267, states the following about the doctrine of difference: "The general principle assumes that the injured party's economic situation, as it would have been if no damage had occurred, is compared with the situation that has come to pass because of the damage. The *determination of the difference* between the two is therefore said to characterise the calculation of damages".

⁷² See, for example, Taxell (1993) p. 43 and 173.

⁷³ See, for example, Bergem & Rognlien (1991) p. 360; Hellner (1996b) p. 206; Hellner & Ramberg (1991) p. 240; Krüger (1989) p. 819; Ramberg (1995b) p. 655 and Ussing (1961) p. 142. It has been mentioned in section 1.2. that the meaning of the requirement of factual causality is not treated in this work (see, however, section 4.2.3.1 and 11.6.3).

⁷⁴ See, for instance, Arnholm (1966) p. 285 f; Hellner (1996b) p. 206; Hellner & Ramberg (1991) p. 240; Herre (1996) p. 321; Krüger (1989) p. 820; Nørager-Nielsen & Theilgaard (1993) p. 421; Ramberg (1995b) p. 645; Ussing (1961) p. 144 and Vinding Kruse (1951) p. 408.

⁷⁵ See, Taxell (1993) p. 178. Cf. Rodhe (1956) § 28 footnote 7 ff and Ramberg (1995b) p. 645.

tract law.⁷⁶ Likewise, the adequacy requirement is seldom described in such a way as to imply the general requirement that the breach of contract should have increased the probability of the damage in question.⁷⁷ The requirement stating that the damage must have constituted a, to some extent, likely,⁷⁸ predictable,⁷⁹ foreseeable⁸⁰ or typical⁸¹ consequence of the breach of contract is much more common.⁸² Some other formulations appearing in the text that could be considered as synonymous state that the damage shall constitute a, to some extent, normal⁸³ or expected⁸⁴ consequence of the breach of contract. In addition, the adequacy requirement is formulated quite often in such a way as to require that the damage must not constitute too remote a consequence of the breach of contract.⁸⁵ As regards the implications of these terms and differences between them, the reader is referred to the presentation in section 2.2.2.2, which should also be applicable in the current context.

To sum up, Sweden, as well as Denmark and Norway can be said to show strong inclinations to describe the adequacy requirement in contractual relationships as the requirement of likelihood (or similar). In addition, it is also often required, however, that the damage must not be too remote a consequence of the contract breach.

Finally, as regards the reasons for the application of the adequacy doctrine, there is nothing that would suggest that they should differ from the reasons applying to the extra-contractual law of damages presented and discussed in section 2.2.2.3.⁸⁶

⁷⁶ Cf. however, Herre (1996) p. 359 (it is unclear here, however, whether the author means that the requirement stating that the damage should flow from the dangerous features of the act should also be applicable in the law on the sale of goods).

⁷⁷ See, Herre (1996) p. 355 (in which the author seems to want to equate, however, the requirement of a certain increase in probability with the requirement of predictability).

⁷⁸ See, for example, Augdahl (1972) p. 236; Gomard (1995) p. 188; Hellner & Ramberg (1991) p. 240; Krüger (1989) p. 820; Lehrberg (1996b) p. 118; Nørager-Nielsen & Theilgaard (1993) p. 421; prop 1988/89:76 p. 193; Taxell (1993) p. 178; Ussing (1961) p. 144 as well as Vinding Kruse (1992) p. 69.

⁷⁹ See, Bengtsson (1960a) p. 24; Rodhe (1956) § 28 after footnote 11 and Taxell (1993) p. 178. Cf. Almén (1960) p. 317.

⁸⁰ See, Saxén (1995) p. 143 and Taxell (1993) p. 178.

⁸¹ See, for example, Krüger (1989) p. 820 and Taxell (1993) p. 178.

⁸² The following list makes no claim to being complete.

⁸³ See, for example, Lehrberg (1996b) p. 118 and prop 1988/89:76 p. 193.

⁸⁴ See, for example, Rodhe (1956) § 28 after footnote 12.

⁸⁵ See, for example, Augdahl (1972) p. 236; Krüger (1989) p. 820; Lehrberg (1996b) p. 118; prop 1988/1989: 76 p. 193 and Rodhe (1956) § 28 after footnote 12. Cf. Hellner (1996b) p. 206 and Taxell (1993) p. 178.

⁸⁶ Two observations support together this statement. Firstly, that the adequacy doctrine is sometimes considered to have been brought into contract law from the extra-contractual law of damages (see, for example, Vinding Kruse (1992) p. 69). Secondly, that the reasons for the application of the adequacy doctrine in the doctrine of contract law seems to have hardly been the object of close attention.

2.3.1.2 Determination of Adequacy

2.3.1.2.1 Relevant Evaluator

By means of the adequacy requirement liability for damages is restricted to refer to damage that the party guilty of contract breach can be reasonably expected to have reckoned with.⁸⁷ Just as in the extra-contractual relationships the adequacy determination in the contractual law of damages constitutes an objective assessment. The evaluator is assumed to have the knowledge of a person familiar with the prevailing market conditions in a given business sector as well as any other knowledge possessed by the party in breach.⁸⁸

2.3.1.2.2 Relevant Point in Time for Adequacy Determination

The point in time relevant for the determination of adequacy in contract law depends on whether liability for damages is based on culpa or not. In cases based on culpa liability the point in time of the damage-causing act, i. e. the contractual breach, shall be applied.⁸⁹ In the case of strict liability the determination of adequacy shall relate to the time of contract conclusion.⁹⁰ The same should apply to other types of liability which are not based on culpa, such as liability in *res ipsa* cases.⁹¹ This means that the scope of non-culpa liability is more restricted than that of culpa liability.

The reasons stipulating why in cases of contractual non-culpa liability the determination of adequacy should relate to the point in time of contract conclusion have not been extensively discussed by any of the quoted authors. The main reason seems to be connected with the fact, however, that the liability in question is based *exclusively* on contract, which is, in turn, an expression of the parties' free will at the time of contract conclusion. The scope of liability should not therefore exceed the extent of the defendant's intentions at that time. As it is highly improbable that the defendant's intention was to assume responsibility for damage other than that which could be foreseen at the time of contract conclusion, it is more reasonable that the determination of adequacy should relate to the conditions applicable at this point in time.⁹²

⁸⁷ See, Almén (1960) p. 317 and Peczenik (1979) p. 264.

⁸⁸ See, Herre (1996) p. 339 f.

⁸⁹ See, Almén (1960) p. 317; Gomard (1995) p. 188; Hellner (1966) p. 305; Herre (1996) p. 341; Lando (1991) p. 289; Nørager-Nielsen & Theilgaard (1993) p. 421 and Ussing (1961) p. 144.

⁹⁰ See, Almén (1960) p. 317; Bengtsson (1960a) p. 24; Gomard (1995) p. 188; Hellner (1966) p. 305; Lando (1991) p. 289; Herre (1996) p. 343; Nørager-Nielsen & Theilgaard (1993) p. 423; Rodhe (1956) § 28 footnote 22; Stang (1919) p. 88 f (especially footnote 22); Ussing (1961) p. 144 and Vinding Kruse (1951) p. 408. According to Ramberg (1995b) p. 648 and (1991) p. 103 (with reference to NJA 1991 p. 217), this view is not necessarily shared by the Swedish law in force.

⁹¹ See, Herre (1996) p. 343.

⁹² Cf. Bengtsson (1960a) p. 24; Ussing (1961) p. 144 and Vinding Kruse (1992) p. 69.

2.3.1.2.3 *Description of the Course of Events*

Similarly to extra-contractual situations, the adequacy requirement in the contractual law of damages applies not only to economic loss but also to the conditions in which that loss has been incurred.⁹³ The issue of how exactly the course of events must be described from the time of contract breach to the incurrence of loss has been hardly considered in the doctrine of contract law. Similarly to the extra-contractual law of damages it is clear enough, however, that a relatively concise description of the course of events is desirable for adequacy determination.

2.3.1.2.4 *The Level of the Adequacy Requirement*

According to a number of authors determination of adequacy in contractual relationships is more stringent than in the law of damages.⁹⁴ Various reasons have been quoted in support of this position. One of them is the fact that in the context of contract, damages are often based solely on the contract, which is why the question of adequacy must not go beyond the intentions of the party in breach at the time of contract conclusion, which could be the case if the adequacy requirement were to be interpreted more liberally.⁹⁵ There is also a risk that a more liberal adequacy requirement might entail that when evaluating her or his potential liability resulting from different contracts, the party would be forced to heed individual peculiarities of each of the other contract parties.⁹⁶ Such a situation would be particularly unsuitable in the case of standardised collective agreements.⁹⁷ Yet another reason for a certain amount of stringency in the application of the adequacy doctrine in contractual relationships is the fact that contractual liability for damages is often strict, which is why there exists a special need for delimiting it.⁹⁸ Also the fact that in contractual relationships it is often the question of compensation for pure economic loss has been considered as a good enough reason for a particularly strict view of adequacy determination.⁹⁹ It has also been claimed that since a contract obliges the parties to perform a specific duty, the consequences of contract breach should be relatively easy to foresee. In this way, even though the requirement of adequacy in contract law is relatively strict, this does not mean that liability is more restricted than in tort law.¹⁰⁰ Finally, it has also been held that applying the adequacy doc-

⁹³ See, for example, Herre (1996) p. 356; Nørager-Nielsen & Theilgaard (1993) p. 423; Rodhe (1956) § 28 at footnote 26 and SOU 1976:66 p. 162. The opposite view stating that the adequacy requirement embraces only economic loss has been presented by Hult (1952) p. 158 ff.

⁹⁴ This point of view is held especially by Danish writers; see, Nørager-Nielsen & Theilgaard (1993) p. 423; Ussing (1961) p. 144 and Vinding Kruse (1989) p. 166. Cf. Peczenik (1979) p. 263 f and Saxén (1995) p. 143.

⁹⁵ See, Nørager-Nielsen & Theilgaard (1993) p. 423.

⁹⁶ What is necessary is thus individual assessment of the respective party's sensitivity towards different kinds of contract breach.

⁹⁷ See, Nørager-Nielsen & Theilgaard (1993) p. 423 and Ussing (1961) p. 144.

⁹⁸ See, Saxén (1995) p. 146.

⁹⁹ See, Saxén (1995) p. 146.

¹⁰⁰ See, Saxén (1962) p. 166.

trine in contractual relationships in a similar way to the one applied in extra-contractual relationships can bring about unreasonable results.¹⁰¹

Despite the above-quoted viewpoints the issue of the exact requirements necessary for damage to be considered as adequate in the above-mentioned circumstances remains unclear. This is not surprising at all. Just as in the extra-contractual law of damages,¹⁰² in contract law one cannot describe the required level of adequacy other than in a relatively general, ineffectual way.

2.3.1.3 Criticism

Even in the contractual law of damages the result of adequacy determination is highly unpredictable. It is therefore self-evident that the doctrine of adequacy may be the target of a good deal of criticism. It can also be added that in contract law the doctrine of adequacy constitutes sometimes a convenient justification which is supposed to conceal the real causes (for example, a discussion of general reasonableness) of the outcome in different actions for damages.¹⁰³

Even as regards contract law it may be noted that the adequacy doctrine is a way of reasoning about the issue of limitations on liability, rather than a rule under which the claimant's right to compensation is restricted in some particular way.

2.3.2 Art. 74 CISG

A rule closely related to the doctrine of adequacy can be found in art. 74 CISG. The rule, which concerns international sale of goods, has been incorporated into the Swedish, Danish and Norwegian legislation¹⁰⁴ and applies in this area instead of the adequacy doctrine. The relevant part of art. 74 CISG reads as follows:

”Damages for breach of contract... may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.”

Art. 74 CISG originates from a principle well known in, among other systems, English law.¹⁰⁵ In England¹⁰⁶ the principle was originally established in *Hadley*

¹⁰¹ Peczenik (1979) p. 263 f gives the following example. Assume that B deposits a case in a restaurant cloakroom, paying the usual, low fee. The case disappears. In accordance with the extra-contractual determination of adequacy the depoistary would be responsible for the loss due to the case's disappearance, even if it contained jewels worth a great deal of money. Cf. Bengtsson (1976) p. 92 f.

¹⁰² See about this section 2.2.2.4.4.

¹⁰³ Regarding criticism of the adequacy doctrine, see section 2.2.2.5. For a short summary of the latter in the context of contract, see, Herre (1996) p. 358.

¹⁰⁴ See, for Sweden, The International Sale of Goods Act (1987:822); for Denmark, § 1 Lov no. 733 af 7 december 1988 om Internationale løvsørekøb and for Norway, § 70 (3) NKL.

¹⁰⁵ See, for example, Hellner (1981) p. 14 and Håstad (1998) p. 195 footnote 6.

v. Baxendale.¹⁰⁷ In this case the crankshaft of a mill had got broken and was sent to a manufacturer as a model for a new crankshaft. The transport was delayed, which made that the production stoppage at the mill was longer than necessary. The mill's owner demanded compensation from the conveyor. Alderton B, the judge who formulated the judgement, stated that: "[t]he damages ... should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach".¹⁰⁸ The production stoppage was by no means a natural consequence of the delay. It would have been more natural if the mill's owner had a spare crankshaft. Neither could *both* parties have foreseen the production stoppage as a likely consequence of the contract breach. The conveyor had not been informed, after all, that a delay would cause a production stoppage at the mill. In these circumstances the court came to the conclusion that the production stoppage was too remote a consequence for the conveyor to be held liable for damages.

The principle that is manifested in *Hadley v. Baxendale* can be summarised as follows. The defendant is liable for damage that constitutes a normal consequence of contract breach. He is also liable for damage that arises in consequence of extraordinary circumstances if at the time of the conclusion of the contract he had sufficient knowledge of the facts that would imply that such damage would be likely.¹⁰⁹

It has been held that the principle in *Hadley v. Baxendale* has been validated by means of art. 74 CISG with regard to international sale of goods.¹¹⁰ Other authors claim, however, that it is unclear whether art. 74 CISG shall be applied exactly as in *Hadley v. Baxendale*.¹¹¹ The rules have very much in common, however, which is why the English rule can very well be regarded as a guiding principle when interpreting art. 74 CISG.¹¹²

Art 74 CISG implies a requirement of foreseeability. The party in breach is liable for the loss that he foresaw or should have foreseen as a possible consequence of the contract breach. The determination of foreseeability is thus an objective requirement,¹¹³ where the appraiser is assumed to possess knowledge of the business sector in question and any other knowledge possessed by the party in breach.¹¹⁴

Art. 74 CISG expressly stipulates that the point in time which is relevant for the determination of foreseeability is the time of the conclusion of the contract.

¹⁰⁶ The following is based on Treitel (1995) p. 870. As regards the Scandinavian doctrine, see especially, Herre (1996) p. 362 ff.

¹⁰⁷ 1854, 9 Exchequer Reports, 341.

¹⁰⁸ P. 354.

¹⁰⁹ See, Atiyah (1995) p. 465.

¹¹⁰ See, Hellner (1996b) p. 206. Cf. Hellner & Ramberg (1991) p. 302.

¹¹¹ See, Herre (1996) p. 399; Kleineman (1991) p. 86 f and Ramberg (1995b) p. 647.

¹¹² See, Kleineman (1991) p. 86 f.

¹¹³ See, Herre (1996) p. 399.

¹¹⁴ See, Lando (1991) p. 290 f.

Information available after that time is irrelevant. Since this applies irrespective of whether it is the question of strict liability or culpa liability,¹¹⁵ it is clear that art. 74 CISG implies slightly more severe restrictions on liability for damages than the doctrine of adequacy.

Whether the requirement of foreseeability applies only to financial loss, or whether it includes also the events that have led to it (and how exactly they must be described in that case) cannot be answered on the basis of the wording of art. 74 CISG. The treatment of this question in the literature has not been very productive either.¹¹⁶

According to art. 74 CISG the liability of the party in breach embraces loss which the party foresaw or ought to have foreseen as a *possible* consequence of the contract breach. For a sufficiently imaginative person anything at all should thus be possible, in principle. One interpretation of this rule could therefore be that a low degree of foreseeability would be sufficient for the party in breach to be held liable for the loss.¹¹⁷ The provision should be hardly interpreted in this way, however. It has been suggested rather that art. 74 CISG implies more stringent requirements with regard to foreseeability than those following from the adequacy doctrine.¹¹⁸

The only clear difference between art. 74 CISG on the one hand, and the adequacy doctrine on the other, applies to the point in time relevant for the determination of foreseeability as regards liability in negligence. Another possible difference has to do with the requirement of foreseeability itself, which should be slightly more strict when applied under art. 74 CISG, as compared to the application under the adequacy doctrine. Both of these differences support the view that art. 74 CISG should imply a more far-reaching restriction on liability for damages than the adequacy doctrine. This observation is also supported by more general pronouncements that can be found in the literature.¹¹⁹ The legal situation is, however, far from clear, since, similarly to the doctrine of adequacy, art. 74 CISG is vague inasmuch as it leaves unanswered a number of questions important from the point of view of application.

¹¹⁵ See, Herre (1996) p. 409; Lando (1991) p. 292 and Ramberg (1995b) p. 647 f. Cf. Bergem & Rognlien (1991) p. 649.

¹¹⁶ See, Herre (1996) p. 403 ff with further references.

¹¹⁷ See, Herre (1996) p. 408, and Ramberg (1995b) p. 646 f.

¹¹⁸ See, Ramberg (1995b) p. 647.

¹¹⁹ See, Håstad (1998) p. 195 and Ramberg (1995b) p. 646.

3 Interpretation of Insurance Contracts

3.1 Introduction

This chapter describes the fundamental principles for the interpretation of insurance contracts. Its objective is to provide a background for the presentation which follows, concerning the interpretation of liability-activating causation terms. The presentation in this chapter is thus limited to a systematic review of the legal situation, based in the main on the existing doctrine.

3.2 Subjective Interpretation

Insurance contracts are interpreted in accordance with the same rules as other contracts.¹²⁰ In the first place interpretation of contracts aims to establish the common will or the joint intentions of the parties.¹²¹ Since this stage of the interpretation process aims to determine the subjective will or intentions of the respective contract parties, it can be referred to as subjective interpretation.

The great majority of insurance contracts consists of standard contracts drawn up by the insurer.¹²² Only a small number of policy holders show some concern for the terms of the contract which they are about to conclude.¹²³ It is therefore impossible to identify any common will of the parties except in extraordinary situations, which makes that the subjective interpretation becomes frequently a fruitless and futile task.¹²⁴

3.3 Objective Interpretation

If it is impossible to establish the joint intentions of the parties, the question of the contract's content must be decided by an objective determination of the parties' promises.¹²⁵ We speak here of objective interpretation, which is the dominant interpretation method in the context of insurance.¹²⁶

¹²⁰ See, for example, Arntzen (1974) p. 27; Bengtsson (1992a) p. 39 and Lyngsø (1994) p. 71 f.

¹²¹ See, for example, Adlercreutz (1996) p. 34 and 47 f; Bernitz (1996) p. 43; Gomard (1996) p. 249; Huser (1983) p. 378; Lehrberg (1995) p. 19 and Ramberg (1995a) p. 129.

¹²² It is thus the question of what is usually referred to as unilaterally drawn standard contracts. One must not forget, however, in this context the relatively extensive state control of insurance contract terms in many countries. In Sweden it is the Finance Inspection Board which is responsible for this control, backed up by the principle of reasonableness stipulated in chapter 19, § 6 of FRL.

¹²³ Cf. Bengtsson (1960b) p. 19 and Eriksson & von Heijne (1988) p. 273 f.

¹²⁴ Cf. Bengtsson (1992a) p. 39; Selmer (1982) p. 60 and Sørensen (1997) p. 82.

¹²⁵ See, for example, Bernitz (1996) p. 45; Lehrberg (1995) p. 33 and 43 and Ussing (1950) p. 423.

¹²⁶ This applies also to the interpretation of the so called 'agreed documents', i.e. standardised insurance contracts drawn up in the way of co-operation between representatives of both insurers and policy holders. In some respects the principles of interpretation of such contracts are different, however. These discrepancies are discussed in section 3.5.

3.3.1 Factors that may Influence the Interpretation of Insurance Contracts

Objective interpretation can be based on a number of different factors. The following sections discuss factors relevant for the interpretation of insurance contracts.

3.3.1.1 Wording

The aim of the objective interpretation of contracts is, as mentioned earlier, to objectively determine the meaning of the promises given to each other by the contract parties. Regarding the interpretation of insurance contracts, which are in principle always in the written form, the prevailing opinion is that the starting point should be the contract's wording, which shall be interpreted in accordance with common language usage.¹²⁷ According to a number of authors, specialised terminology, for example technical or legal expressions, shall be interpreted in accordance with their specialised meaning, irrespective of how they are understood by non-specialists.¹²⁸ Another view proposes, however, that in the case when a specialised term has another *generally accepted* alternative meaning, it is that meaning which should apply.¹²⁹ According to yet another opinion expressions of the latter kind shall be regarded as unclear,¹³⁰ making that the expression alone cannot be considered decisive for the interpretation.¹³¹

3.3.1.2 Other Factors

In the majority of cases the wording of an insurance contract gives a relatively clear picture of the content of the contract. The interpretation of the contract does not involve any particular difficulties in such a case. At times the wording of a contract can be unclear, however. The interpretation can then be influenced by other factors,¹³² such as for example, the *context* in which the term in question is found.¹³³ Only in exceptional circumstances a questionable contract term should be given an interpretation which entails that the content of the whole contract becomes contradictory. Likewise, the purpose of a contract term may influence the interpretation.¹³⁴ If it is clearly stated that the purpose of a disputed

¹²⁷ See, Arntzen (1974) p. 28; Bengtsson (1960b) p. 23; Dufwa (1995b) 58; Larsson (1988) p. 14; Lyngsø (1994) p. 72 and Sørensen (1997) p. 85.

¹²⁸ See, Hellner (1965) p. 73 f; Lyngsø (1994) p. 75; Selmer (1982) p. 61 and Sørensen (1997) p. 85.

¹²⁹ See, Arntzen (1974) p. 28. Cf. Dufwa (1995b) 59.

¹³⁰ See, Bengtsson (1960b) p. 22 f.

¹³¹ As regards the factors that may influence the interpretation of the text in these cases, in addition to the wording of the text, see section 3.3.1.2.

¹³² Exceptionally, other factors can influence the interpretation of even clear contracts (cf. Lyng Andersen, Madsen & Nørgaard (1997) p. 382 and Madsen (1983) p. 63 - both as regards contract interpretation in general). See also section 3.3.2.

¹³³ See, Arntzen (1974) p. 28 f; Bengtsson (1960b) p. 23 f and Dufwa (1995b) 60.

¹³⁴ See, Lyngsø (1994) p. 74 and Sørensen (1997) p. 86 f.

term is to exempt the insurer from liability for a certain type of damage, this is to mean that the policy holder should not receive compensation for damage of that kind and vice versa. Further, also the insurer's *earlier application of contract terms* may influence the interpretation. Here it is required, however, that this practice be uniform.¹³⁵ The *current status of the law*, such as, for example, optional legislation or judicial practice, can also influence the interpretation of a contract.¹³⁶ Those who wish to give a contract the content deviating from optional law should thus use clear language.¹³⁷ Also general tests of reasonableness should be able to influence the interpretation from time to time.¹³⁸

In addition to the above, the insurance contract has two characteristic features which may potentially influence its interpretation. One of these is constituted in the fact that the very *objective of insurance is to provide protection for the insured in case of damage*. If the policy holder's right of compensation is worthy of consideration, this indicates that insurance terms specifying the perils ought to be interpreted extensively.¹³⁹

The other characteristic feature that may be important in this context is the fundamental prerequisite for all insurance business that the insurer must always have sufficient capacity to discharge his obligations towards the policy holders. It is therefore absolutely necessary for the insurer to be able to calculate in advance the amount of insurance premiums equivalent to the risks written. To be able to do that two basic conditions must be satisfied. Firstly, it must be possible to calculate the expected compensation costs, i.e. the probability of loss multiplied by the amount of probable loss. Information about these probabilities is normally collected from empirical data which report, for example, how many houses of a certain kind are destroyed by fire during a year and the average loss that follows. Secondly, the number of risks insured independently of each other must be so large that the total amount of loss suffered in reality correspond to these data.¹⁴⁰ Claims statistics do not specify whether a small number of particular houses will catch fire during the coming year. Insuring only a small number of houses would thus mean that the insurer would not be able to confidently calculate the amount of premiums corresponding to the amount of damages. With an increasing number of houses carrying insurance the total amount of loss suffered in reality will successively approach that statistical probability. It is often said that insurance is based on the *law of large numbers*.

With the help of empirical data and the law of large numbers an insurer can thus calculate premiums equivalent to the risks written. This applies, however, on the condition that there is no doubt as to the insurance coverage. Let us assume, for example, that an insurer has to calculate an insurance premium for an

¹³⁵ See, Selmer (1982) p. 61. Earlier application of contract terms will probably have special importance if it benefits the policy holder (see, Arntzen (1974) p. 42).

¹³⁶ See, Arntzen (1974) p. 30 and 37; Hellner (1965) p. 74 and Schmidt (1943) p. 172.

¹³⁷ See, Hellner (1965) p. 74 f.

¹³⁸ See, Arntzen (1974) p. 42.

¹³⁹ See, Bengtsson (1960b) p. 38 ff and Selmer (1982) p. 68. The opposite applies, of course, when interpreting exceptions.

¹⁴⁰ See, Radetzki & Radetzki (1997) p. 3.

insurance policy against *damage or loss by fire*. In such a case, he will need information about earlier fires. In order to support the calculation of the premium with *relevant data* he will need to know the exact meaning of the terms *damage*, *loss* and *fire*, as well as of the statement that compensation shall be paid for damage or loss *by fire*. If the insurer has no access to precise answers to these and other questions concerning the scope of the insurance, there is an obvious risk that the calculation in question will be based on *irrelevant data*, and that the premium will probably be at variance with the risk insured. The insurer risks here incurring losses, and ultimately being unable to fully discharge his obligations.¹⁴¹

When interpreting a contract, all this means that from the point of view of the insurer, or, if you prefer, from the perspective of the policy holders collective, it is extremely important that the terms which positively specify the scope of the insurance are interpreted restrictively.¹⁴² A more extensive interpretation in favour of the insured ought to be therefore avoided since there is a risk that compensation may be paid even for damage that according to the insurer's calculations falls outside the insurance coverage and for which no premium has been paid.¹⁴³ The extent to which such *actuarial arguments* are allowed to influence the interpretation of insurance contracts has been discussed by Bengtsson¹⁴⁴ with the following conclusions. If insurance would not have been provided at all if the interpretation maintained by the insured had been anticipated by the insurer, the insurer's reference to the actuarial technique as an interpretative factor should always be heeded. If insurance had been provided even if the insurer had been acquainted with the interpretation alternative of the insured, but for a higher premium, then a reference to the actuarial technique as an interpretative factor should be considered only if the insured understood or should have understood the importance of the contract term in question for the premium charged.¹⁴⁵

Most authors do not mention expressly the actuarial technique as a factor with a potential effect on policy interpretation.¹⁴⁶ The technique is not dismissed either, however, as such a factor.¹⁴⁷ As mentioned before, it has been claimed that the interpretation of a contract term can be influenced by the term's *pur-*

¹⁴¹ That the above-described circumstances lead to the insurer becoming insolvent is naturally highly improbable but not impossible.

¹⁴² The opposite applies, naturally, when interpreting excluded events.

¹⁴³ See, Bengtsson (1992a) p. 40.

¹⁴⁴ See, Bengtsson (1960b) p. 25 ff.

¹⁴⁵ See, Bengtsson (1960b) p. 32 and 35. See also, Hellner (1965) p. 75 f. Cf. Bengtsson (1992b) p. 223, where it is suggested that the importance of the actuarial technique for the interpretation of contracts may be even greater in the case of company insurance (see esp. footnote 27) and Bengtsson (1997) p. 33 ff. Cf. also, Trolle (1956) p. 242.

¹⁴⁶ In the literature concerning general contract law it is frequently emphasised, however, that the compensation which a salesman has managed to negotiate for a product or service may have great importance for the interpretation of the contract (see, for example, Adlercreutz (1996) p. 54; Hov (1993) p. 90; Huser (1983) p. 520; Lynge Andersen, Madsen & Nørgaard (1997) p. 366; Lehrberg (1995) p. 65 and Woxholth (1997) p. 411).

¹⁴⁷ The only exception seems to be Dufwa (1995b) 64.

pose. If, therefore, the purpose of a contract term is to limit the scope of the insurance, which is relatively often the case, it should support the view that the term should be interpreted in favour of the insurer. This line of reasoning seems definitely being able to contain a reference to the actuarial technique. The reason why the scope of an insurance becomes restricted is often, after all, the insurer's absolute necessity to be able to calculate premiums equivalent to the risks written in advance. As mentioned, also *general reasonableness* constitutes a factor that may affect the interpretation. This factor seems also to be able to contain a reference to the actuarial technique as an interpretative factor, since an interpretation which implies that an insurance covers loss for which a premium has not been paid could very well be regarded as unreasonable with regard to the insurer.

3.3.2 Internal Relationship Between Factors that Influence the Interpretation

It has already been showed that the starting point for the interpretation of an insurance contract is its wording. A clearly formulated text will frequently determine the interpretation on its own.¹⁴⁸ If the insurance contract is formulated vaguely, the interpretation will be influenced, as a rule, also by other factors. The more vague the text of the contract, the bigger the influence the other factors of interpretation will have. No hierarchical relationship exists among these factors. All the factors of interest for the evaluation are taken into consideration in order to formulate an interpretation which seems fair in the context of the whole situation.¹⁴⁹

3.3.3 The Rule of Ambiguity

3.3.3.1 General Remarks

In addition to the interpretation factors mentioned earlier there exists a number of general rules for the interpretation of unclear or ambiguous contract terms. According to the rule which enjoys currency in the context of insurance, unclear or ambiguous contract terms shall be interpreted to the disadvantage of the party who drew up the contract. The ambiguity rule is an established rule which has been used in judicial practice for a long time now. It has a strong position.¹⁵⁰

¹⁴⁸ This is the ultimate reflection of the freedom of contract principle, or more specifically, the so called freedom of content. The degree of clarity which is required for the text to be the decisive factor when interpreting the contract cannot be decided on general grounds, of course. The issue is, however, discussed in section 11.4.2.

¹⁴⁹ Cf. Bernitz (1972) p. 434 and Ramberg (1995a) p. 172 (both with regard to the interpretation of contracts in general).

¹⁵⁰ Regarding the interpretation of contracts in general, see, for example, Adlercreutz (1996) p. 95 ff; Bernitz (1996) p. 50 f; Gomard (1996) p. 257 f; Huser (1983) p. 553 ff and Lehrberg (1995) p. 84 ff. As regards legislation reference can be made to SOU 1974:83 p. 115 and prop 1975/76:81 p. 116. Regarding the interpretation of insurance contracts, see, for example, Arntzen (1974) p. 34 ff; Bengtsson (1992a) p. 39 ff; Hellner (1965) p. 72 f; Krüger

The purpose of the rule is to provide an incentive for the party responsible for contract-making to write clear, intelligible contracts, and to protect the party on the other end against unexpected results.¹⁵¹

The ambiguity rule was codified in Sweden, Denmark and Norway in 1995.¹⁵² § 10 AVLK has the following wording:¹⁵³

”If the meaning of a contract term which has not been individually negotiated is unclear, the term shall be interpreted in favour of the consumer in case of a dispute between the consumer and the undertaking.”

It can be noted that the ambiguity rule in its codified form has a limited scope. It applies only to contracts between undertakings and consumers that have not been individually negotiated.¹⁵⁴ Other contracts fall outside the statutory regulation. In such cases the ambiguity rule is applied with the aid of case law, however.¹⁵⁵

It is still too early to say whether the codification of the ambiguity rule will make that the legal situation will change in some way. The following sections discuss therefore the state of the law as it was at the time of codification (which constitutes the law in force when interpreting contracts that are not embraced by the statutory regulation). After that, in section 3.4, possible consequences of the codification are discussed.

(1989) p. 531; Lyngsø (1994) p. 72 ff; Selmer (1982) p. 66 ff and Sørensen (1997) p. 82 ff. The rule of ambiguity has a strong position even in an international perspective. It can be found in both French and German legislation (Code Civil, art. 1162, and AGB-Gesetz, § 5, respectively; regarding the latter and its position in the German doctrine of contract interpretation, see Adamsen (1995) p. 342. It shall be noted, however, that the rule of ambiguity is no longer applied in Germany to the interpretation of insurance contracts; see, Hellner (1968) p. 290 and Wilhelmsson (1977) p. 148 f.) In England, where the ambiguity rule has since long been applied by the courts, (see, Lewison (1997) p. 168 ff, with further references), the rule was codified with regard to standard agreements between sellers of goods or suppliers of services and consumers in 1994, in art. 6 of the Unfair Terms in Consumer Contracts Regulations (SI 1994, no. 3159), which came into force on July 1, 1995. These regulations have come about in connection with the issue of the 93/13/EEC Directive, which stipulates the ambiguity rule in art 5 in connection with standard contracts between sellers or suppliers and consumers. It is expected to apply in the future in the whole territory of the Union. In the USA the ambiguity rule is also a well-established rule in judicial practice (see, Farnsworth (1990) p. 518). It has also been codified in § 206 of the half-official rule collection Restatement (1981); see, Dufwa (1993) 982.

¹⁵¹ See, for example, Adlercreutz (1996) p. 98; Bengtsson (1960b) p. 8 and 18 f; Fohlin (1989) p. 123; Hellner (1965) p. 71 and Lehrberg (1995) p. 96.

¹⁵² As in England, (see footnote 150) this was done in order to adapt to 93/13/EEC's art. 5.

¹⁵³ AVLK - the Swedish Consumer Contracts Act 1994:1512; equivalent provisions were introduced in § 38b DAvtL (for Denmark) and in § 37 NAvtL (for Norway).

¹⁵⁴ As regards the dividing line between contracts that have been the object of individual negotiations on the one hand, and those that have not, on the other, see, Gade & Christensen (1995).

¹⁵⁵ Cf. Ramberg (1995c) p. 66.

3.3.3.2 Scope

According to the ambiguity rule unclear contract terms are interpreted to the detriment of the party who drew up the contract. At first glance the rule appears very easy to apply. Closer examination reveals that this is not so. The rule gives no indication whatsoever as to how unclear or ambiguous a term must be for the rule to apply. The first question that must be answered is thus whether the ambiguity rule can be applied as soon as the wording of a term is unclear. Or is the rule subsidiary in the sense that it is applicable only if other interpretation factors give no proper clue either?¹⁵⁶

The work devoted to the codification of the ambiguity rule manifests that the rule (in its codified form and otherwise) is subsidiary.¹⁵⁷ In the courts' application of the ambiguity rule nothing more is usually held than that the meaning of the contract term in question is unclear, or that the interpretation is doubtful.¹⁵⁸ Such pronouncements do not reveal in any way whether the ambiguity rule is regarded as a subsidiary rule. In Rt 1965 p. 140, the Norwegian Supreme Court referred to the ambiguity rule as an emergency rule. This definitely implies that the Court regarded the rule as subsidiary in relation to other interpretation factors.¹⁵⁹ In NJA 1963 p. 683, the Supreme Court stated that reasons worthy of consideration could be quoted in support of both parties' opinions. Crucial importance should be attached to the fact, however, that the pre-formulated, standard insurance terms have been one-sidedly formulated by the insurance companies, which is why their responsibility for the consequences of the ambiguity inherent in these terms should be greater than that of the policy holders. The Court's opening statement that reasons could be presented for the support of both parties' opinions suggests definitely that prior to resorting to the application of the ambiguity rule one tried to solve the question of interpretation with the aid of not only the wording of the current terms but also other factors of interpretation. The case seems therefore to indicate that the rule of ambiguity has been regarded as subsidiary.¹⁶⁰

At times, however, the ambiguity rule seems to have been applied as if it were of equal value when compared with the above-presented factors of contract interpretation.¹⁶¹ A possible reason for this might obviously be the emphatic application of consumer protection policies over the past 25 years.¹⁶² This may be an illusory state of affairs on many occasions, however. Assume that in order to provide an interpretation to a contract term a court is considering the following alternatives: (a) the term shall be interpreted in favour of A with the aid of one of the above-discussed interpretation factors; (b) the term shall be deemed as

¹⁵⁶ Cf. Bengtsson (1996b) p. 71.

¹⁵⁷ See, *ot prp* no. 89 (1993-94) p. 15 (Norway); Cf. *prop* 1994/95:17 p. 101 (Sweden); and *Lovforslag* no. L 27 1994-95 p. 15 (Denmark).

¹⁵⁸ See, Huser (1983) p. 566.

¹⁵⁹ Cf. Huser (1983) p. 565 f.

¹⁶⁰ Cf. Bengtsson (1996b) p. 71.

¹⁶¹ See, Adlercreutz (1996) p. 96 and Huser (1983) p. 566.

¹⁶² Cf. Adlercreutz (1996) p. 96.

unclear when consideration is taken of all the interpretation factors, and in accordance with the ambiguity rule it shall be interpreted in favour of A. Since the term is going to be interpreted in favour of A anyway, further examination by the court of which of the two alternatives should apply is meaningless. It is therefore clear enough that in order to make the whole thing as simple as possible the court will substantiate its interpretation by reference to the ambiguity rule only. There arises an obvious risk in such cases that the court's decision will give a false impression that the ambiguity rule has been applied as a rule of interpretation of primary importance.¹⁶³

A number of authors support the view that the ambiguity rule is subsidiary.¹⁶⁴ All in all, there is a relatively strong support for the view that the ambiguity rule constitutes a subsidiary rule.¹⁶⁵ The rule shall thus be applied only if the content of a contractual term is unclear even after the above-discussed interpretation factors have been considered. But how unclear must a term be for the rule to apply? Considered from another angle, this question has to do with the degree of applicability of the different interpretation factors.¹⁶⁶ Naturally, this question cannot be answered in general terms. A number of guidelines useful for judging the issue can be found, however, in the literature.

According to the majority of authors the required degree of ambiguity depends on the type of insurance or the type of insurance terms in question. The requirement of ambiguity would be particularly weak when interpreting terms which imply a deviation from optional law,¹⁶⁷ and also when interpreting liability-exempting terms.¹⁶⁸ The application area of the ambiguity rule would also be particularly extensive when the controversial term is found in a consumer insurance contract.¹⁶⁹

In addition to this a number of more general and partly contradictory pronouncements can be found. According to Lyngsø the ambiguity rule has a considerable scope and effectiveness. A small amount of ambiguity would thus be

¹⁶³ See, Huser (1983) p. 566 with references to Rt 1958 p. 158 and RG 1938 p. 593.

¹⁶⁴ See, Bernitz (1972) p. 433 f; Jørgensen (1971) p. 186 f; Hov (1993) p. 82; Huser (1983) p. 565; Lehrberg (1995) p. 84 and 89; Ramberg (1995a) p. 147 and 172 ff; Vahlén (1960) p. 271 and Woxholth (1997) p. 421 - all concerning interpretation of contracts in general. Regarding interpretation of insurance contracts only a small number of authors discuss the position of the ambiguity rule in the current respect; see, Bengtsson (1960a) p. 592 and (1960b) p. 40, as well as Hellner (1994) p. 271 (even though the latter article is concerned with the interpretation of standard contracts in general, the statement referred to concerns, however, insurance contracts).

¹⁶⁵ The rule is perceived so also abroad, for example in the USA. This does not apply, however, to insurance contracts in which the ambiguity rule has come to be looked upon as a primary interpretation rule in the majority of states (see, Stempel (1994) p.175 f and 180 f.). A similar tendency in which the insurance contract is treated in a special way in the current context has not been observed in Scandinavian law.

¹⁶⁶ When these are highly applicable, the question of ambiguity is seldom considered to exist, which is why the scope of the ambiguity rule becomes relatively restricted.

¹⁶⁷ See, Schmidt (1943) p. 172 and Sørensen (1997) p. 83. Cf. Baur & Roos (1979) p. 9 f.

¹⁶⁸ See, Arntzen (1974) p. 30 and Hellner (1965) p. 76.

¹⁶⁹ See, Bengtsson (1992a) p. 40 and Schmidt (1943) p. 172 f.

sufficient for the rule to apply.¹⁷⁰ Hellner is more cautious. If a formulation is ambiguous to such an extent that it gives rise to doubts not only in special and unusual situations, but also in typical cases which the insurer should have been able to reasonably foresee, then the resulting ambiguity should be considered as his fault.¹⁷¹ According to a similar, more cautious opinion, the rule of ambiguity should be applicable only when the insurer can be blamed for the ambiguity. Hence, if the insurer was unable to formulate a given contract term in a more clear way, without thereby making it too extensive, the ambiguity rule shall not apply.¹⁷²

3.4 *Interpretation of Future Insurance Contracts*

Is the fact that the ambiguity rule has been codified¹⁷³ going to affect its scope? It has already been shown that the codification was not meant to change the subsidiary status of the rule.¹⁷⁴ In general, certain changes should be thinkable, however.¹⁷⁵ The codification should imply, for example, that the ambiguity rule should receive priority¹⁷⁶ as compared to other interpretation rules¹⁷⁷ (such as, for example, the minimum rule). Also, in relation to the above-discussed interpretation factors the codification may be expected to lead to the increase in the scope of the ambiguity rule, due to the fact that the degree of ambiguity required for the application of the rule is somewhat lower. This assumption is based on the fact that the preamble to the EC directive which is the basis of the legislation, and in whose spirit § 10 of AVLK, § 38 b DAVtL and § 37 NAVtL shall be interpreted, imply that the ambiguity rule shall be given a large scope.¹⁷⁸

Outside its application area the legislation presently discussed should not be allowed to influence the status of the law.¹⁷⁹ Nevertheless, such influence cannot be excluded. If, therefore, § 10 AVLK, § 38b DAVtL and § 37 NAVtL lead to the fact that the ambiguity rule receives a larger scope when interpreting standard contracts between undertakings and consumers, it is not out of the question that with time this may come to imply similar changes in the law when applying the rule also in other contexts.¹⁸⁰

¹⁷⁰ See, Lyngsø (1994) p. 72.

¹⁷¹ See, Hellner (1965) p. 72.

¹⁷² See, Arntzen (1974) p. 35; Bengtsson (1960b) p. 24 f and Wilhelmsson (1977) p. 382.

¹⁷³ See, § 10 AVLK; § 38 b DavtL; § 37 NavtL as well as section 3.3.3.1.

¹⁷⁴ See, section 3.3.3.2.

¹⁷⁵ See, however, Ot prp no. 89 1993-94 p. 10.

¹⁷⁶ See, prop 1994/95:17 p. 101, and Lovforslag nr. L 27 1994-95 p. 15. In insurance contexts this should not be of any major importance, however, since the ambiguity rule has been the principal interpretative rule there for a long time.

¹⁷⁷ These interpretation rules shall not be confused with the interpretation factors discussed in this work.

¹⁷⁸ See, 93/13/EEC and Bernitz (1995) p. 631.

¹⁷⁹ This more or less self-evident fact is pointed out in prop 1994/95:17 p. 101, Lovforslag no. L 27 1994-95 p. 13, and Ot prp no. 89 1993-94 p. 15.

¹⁸⁰ See, Bernitz (1995) p. 632.

3.5 Interpretation of Agreed Documents

It has already been mentioned that agreed documents are, as a rule, interpreted objectively, which conforms in general with the usual interpretation of standard contracts.¹⁸¹ The fact that agreed documents are drawn up by representatives of *both* parties makes, however, that their interpretation differs in at least three respects from that described above. (a) The preparatory work of a contract constitutes a central factor in its interpretation.¹⁸² (b) In the case of interpretation of commercial contracts the ambiguity rule is not applicable since none of the parties has drawn up the contract alone.¹⁸³ As regards consumer insurance this difference does not come into play since the ambiguity rule in its codified form may be applied to all contracts that have not been the object of *individual* negotiations between the parties, being then interpreted in favour of the *consumer*.¹⁸⁴ In consumer insurance the ambiguity rule is thus applicable despite the fact that the contract in question constitutes an agreed document.¹⁸⁵ (c) In the case of agreed documents reasons for considering the existing legal situation as a factor that might influence the interpretation of the document are not as serious as when interpreting standard contracts. This is particularly applicable to the interpretation of comprehensive contracts covering large areas.¹⁸⁶

4 Regulation of Contracts

4.1 Introduction

The scope of the insurer's liability as a function of causality is regulated by the liability-activating causation terms of the insurance contract. This chapter illustrates and categorises these terms whose object is obviously to restrict the insurer's liability in certain respects (section 4.2). The insurer's liability is restricted, of course, also in other respects. In order to further elucidate the importance of the liability-activating causation terms for the insurance coverage, this chapter also briefly presents the environment in which they are found, i.e. a number of other methods commonly used for the delimitation of the risk for which the insurer is responsible (see section 4.3). The presentation is based on a collection of first of all Swedish, but even Danish and Norwegian, property insurance terms.

181 See, footnote 125.

182 See, Bull (1988) p. 108 and 110 f as well as Selmer (1982) p. 70 f.

183 See, Bull (1988) p. 108 as well as Lyngsø (1994), p. 70.

184 See, § 10 AVLK; § 38b DavtL and § 37 NavtL.

185 See, Jønsson (1996) p. 48.

186 See, Bull (1988) p. 109.

4.2 The Liability-activating Causation Terms

The liability-activating causation terms have been formulated in a number of ways. The differences between them are, however, very small, so that the majority of them can easily be placed in one of the two categories.

4.2.1 The Requirement of Factual Causality

In one of these categories terms formulated in the following way can be found (the examples have been taken from fire insurance policies):

The insurance contract covers loss or damage caused by fire
The insurance contract covers loss or damage resulting from fire.
The insurance contract covers loss or damage due to fire.
The insurance contract covers loss or damage occasioned by fire.

These clauses require a causal connection between the covered event and loss. It is not required that the causal connection be of any specific nature. The terms can be said to entail, and will henceforward be referred to, as *requirements of factual causality*.¹⁸⁷

4.2.2 The Requirement of Direct Causality

In the second category terms of more varied types can be found. In the majority of cases terms belonging to this category have been formulated along to the following lines (the examples have been taken from fire insurance policies):

The insurance contract covers loss or damage caused directly by fire.
The insurance contract covers loss or damage occasioned directly by fire.
The insurance contract covers direct loss of or damage to the insured object through fire.
The insurance contract covers loss or damage which constitutes an immediate consequence of fire.

The feature shared by all these clauses is that they establish requirements not only of causality, but also of *direct causality* between the covered event and loss in order for the latter to be covered by the insurer's liability. Direct loss is thus compensated for by the insurance, whereas indirect loss falls outside the insurance cover. The terms are referred to in the following sections as *requirements of direct causality*.¹⁸⁸

In the above-illustrated clauses the requirement of direct causality is shown relatively clearly. Sometimes it is, however, only hinted at. Such a term appearing in a fire insurance contract, for example, can be formulated in the following way:

The insurance contract covers fire damage

¹⁸⁷ As regards the linguistic implications of the above, refer to section 4.2.3.1.

¹⁸⁸ Regarding the linguistic analysis of the above, see section 4.2.3.2.

The fact that compensation is to be paid for fire damage and not for damage *caused by fire*, for example, undeniably suggests that only damage which has a direct relation to the fire is covered by the insurance..

Another term which implies in a similar way a requirement of direct causality, commonly found in theft insurance policies, has the following wording:

The insurance reimburses theft of the insured property.

At first glance it seems that this term implies that in the case of theft compensation will be paid irrespective of its consequences. No question of causality should therefore arise at all. This kind of term application would lead, however, to absurd results. The term must therefore be perceived to imply the requirement that the theft has caused loss. In this way there emerges a question concerning the required nature of causal connection. Just as in the case of the previously mentioned fire insurance terms, the above term can be said to suggest that compensation will be paid for direct loss only.

Yet another type of term implying the requirement of direct causality can be found in insurance against the consequences of water escape. It has the following wording:

The insurance will pay compensation when the insured property has been damaged by unpredictable escape of water.

The requirement that the property shall have been damaged *by* the escaping water seems to imply that compensation is paid only for damage resulting from the fact that the insured property has come into contact with the escaping water. In relation to the damage that can be brought about by escape of water, such damage seems to be direct in character, which is why even this contract term can be related to those which imply a requirement of direct causality.

To summarise, it can be said that the term requirements of direct causality illustrated in this section can be divided into two groups: partly, terms which expressly set forth the above-mentioned requirement, and partly, terms that only suggest it.

4.2.3 Linguistic Implications

4.2.3.1 Factual Causality

The requirement of factual causality between an event insured and loss means that all loss resulting from the event insured is covered by the insurance. All that is required is that there be a factual (logical) causal connection between the event insured and the loss. The nature of the causal connection is of no importance.

As has been shown in section 1.2, the question as to what is required for an event to constitute the cause of another, later event, is of a general nature, and belongs properly to the domain of general logic. The question, which has never

been given a uniform solution,¹⁸⁹ falls therefore outside the frame of this presentation. Despite that, the following sections contain a roughly outlined description of the main lines according to which the question of causation is usually evaluated in legal contexts.¹⁹⁰ The objective here is to throw some light on the extent of the notion of causation, and in this way convey a picture of the scope of responsibility which an insurer seems to undertake when providing insurance whose scope is limited from the causal point of view by the requirement of factual causality only.

One often starts discussing the meaning of the notion of causation by considering the concepts of sufficient and necessary conditions. Event X constitutes a *sufficient condition* for event Y to take place if, in accordance with the laws of nature, X leads to Y. The person who performs act X can be said to exercise *positive control* over Y, inasmuch as he can bring about the occurrence of Y. Event X constitutes a *necessary condition* for event Y if, had X not occurred, Y would not have taken place either. The person who performs X can be said to exercise *negative control* over Y inasmuch as he can stop Y from happening.¹⁹¹ In simple terms the concept of cause is said to imply a requirement that X must have exercised some form of control over Y, whether positive or negative.¹⁹² The following main rule can thus be formulated: *X is the cause of Y provided that X is a sufficient or a necessary condition for Y*. X is therefore the cause of Y if: (a) X constitutes both a sufficient and a necessary condition of Y;¹⁹³ (b) X constitutes a necessary but not a sufficient condition of Y (this shows that X is regarded as a factual cause of Y even if X constituted only one of several contributing causes of Y);¹⁹⁴ (c) X constitutes a sufficient but not a necessary condition of Y (the fact that in addition to X there are also other sufficient conditions for the damage to occur, and that it could have occurred without the presence of X, does not detract from X's role as a cause).

The above description constitutes only the main rule, and exceptions do occur. As already suggested, the criteria according to which the different exceptions shall be determined could not be established uniformly. However, already the main rule shows the potential enormity of the scope of the concept of causation.¹⁹⁵ It must therefore be concluded that an insurance whose cover is limited in respect of causation solely by the requirement of factual causality implies

¹⁸⁹ Cf., for example, von Eyben, Nørgaard & Vagner (1995) p. 281; Nygaard, Hagen & Nome (1986) p. 21 as well as Rodhe (1956) § 28 at footnote 6.

¹⁹⁰ The description is based on the various pronouncements found in the tort law literature, in which the concept of cause has often been the object of analysis and debate. The principal views which are presented should be applicable, however, even outside tort law.

¹⁹¹ See, Hellner (1976b) p. 143 ff.

¹⁹² See, Hellner (1976b) p. 145.

¹⁹³ In these circumstances we speak of a strong cause (see, Peczenik (1979) p. 13).

¹⁹⁴ It is thus not required that X be the only or the most important cause of Y (see, Lech (1973) p. 27 and Hellner (1995) p. 197 f).

¹⁹⁵ Cf. Rodhe (1956) § 28 after footnote 7.

from the linguistic point of view an extremely extensive, not to say infinite, insurance liability.¹⁹⁶

4.2.3.2 Direct Causality

In contract terms requiring direct causality it is not only a factual causal connection between the covered event and loss which is necessary, but it is also that the causal connection must be of a direct nature. Direct loss is compensated for, whereas indirect loss falls outside the insurance coverage. The requirement of direct causality leads therefore to the question concerning the distinction between direct and indirect loss.

A linguistic analysis of these two concepts shows that loss which is an immediate consequence of the event insured, i.e. a consequence occurring without any supervening events, constitutes direct loss in relation to that event.¹⁹⁷ If, on the other hand, supervening events take place, the loss becomes indirect in character in relation to the insured event.¹⁹⁸ If the roof of a building has been devastated by fire, after which the building's interior is damaged by rain, the damage of the roof constitutes direct damage in relation to the fire. The fire's direct effect - that of burning - has damaged the roof. There are no supervening events. In the same way, the damage to the interior of the building constitutes direct damage in relation to the rain. In relation to the fire the damage of the interior constitutes indirect damage. Between the fire and the damage to the interior an intervening event has taken place: the rain.

A serious problem in determining as whether any damage is to be seen as direct or indirect is that it is strongly dependent on the precision of the analysis of the course of events leading to the damage. A very careful causal analysis of the above example indicates that, in contrast to what has just been stated, the roof damage cannot be seen as direct damage in relation to the fire. In reality, the fire resulted in a chemical reaction which caused, in its turn, the roof damage.¹⁹⁹ In a precise causal analysis the roof damage would thus constitute indirect damage in relation to the fire. An equivalent line of reasoning can also be applied to the chemical reaction which could be broken down by an expert into a number of smaller events following each other. A very detailed analysis of the course of events in the causation chain would show that even the chemical reaction could not be considered as a direct cause of the damage. Theoretically, it should be possible to break down the chain of causation into an infinite number of events following one another.

¹⁹⁶ In practice, this liability should be more limited, however, as a result of the fact that the burden of proof regarding the causal relation between the event insured and the damage lies with the insured (cf. Rodhe (1956) § 28 at footnote 10, and section 11.6.3).

¹⁹⁷ For damage to be regarded as direct it is thus necessary that the insured event be its last operative cause.

¹⁹⁸ The insured event is not the last operative cause of the damage then. See, Hult (1936) p. 137 f and Jørgensen (1961) p. 201. Cf., for example, Gawinetski & Jønsson (1988) p. 34; Hellner (1965) p. 100; Lyngsø (1994) p. 190; Schmidt (1943) p. 199 f (especially the examples) and Selmer (1982) p. 305.

¹⁹⁹ With regard to the chemical processes accompanying fires, see, Renmar (1997) p. 44 f.

This kind of causal analysis belongs hardly in the field of law, however. The question is therefore how far the analysis of the causation chain should be taken in the present context. Assume that the insurance covers in the current example direct consequences of a fire. The question then is whether the fire constitutes a direct cause of the roof damage. The answer will depend here on the kind of events that are embraced by the notion of fire from the point of view of language.²⁰⁰ The concept of fire can be said to be a composite term embracing a series of events, including chemical reactions and other kinds of events, which taken together lead to what the human senses perceive as fire. From the linguistic point of view the chemical reaction seems to be included in the concept of fire. According to general language usage the roof has been damaged not because of one or more chemical reactions, but as a result of fire. The chemical reactions shall not therefore be regarded as separate, supervening events, making that the roof damage can be regarded as indirect fire damage. The roof damage constitutes instead direct damage in relation to the fire.

The interior damage to the building which occurs in our example as a result of rain constitutes, on the other hand, an indirect consequence of the fire. In contrast to the chemical reactions the rain cannot be subsumed under the concept of fire. The rain constitutes therefore a supervening event and the damage to the interior of the house is indirect damage in relation to the fire.

The fact that the chemical reactions should fall within the framework of the concept of fire and that the rain falls outside this concept may seem quite obvious. There are situations, however, in which the question of whether a certain event can be subsumed under a certain concept or notion is more difficult to answer, and where, consequently, drawing a border line between direct and indirect damage may be difficult. Assume that the fire in question produced heavy smoke which damaged articles of clothing stored in a nearby warehouse, or that the heat accompanying the fire destroyed a consignment of perishable products. The question is then whether the smoke and the heat respectively shall be subsumed under the concept of fire, or whether they shall be considered as independent, supervening events. Opinions differ on that issue in the literature. According to Bache both smoke and heat can be included in the notion of fire.²⁰¹ Hult, on the other hand, seems to hold the opposite view, at least as regards development of smoke, which he considers to be an independent event.²⁰² This more restrictive interpretation may be regarded as justifiable in the present context to some extent. The claim that both smoke and heat fall under the concept of fire in general language usage in the same way as the above-mentioned chemical reactions does not sound completely convincing.

In summary it can be noted that determination of whether any damage constitutes a direct or an indirect consequence of the event insured is strongly dependent on the precision of the analysis of the course of events in a causation chain.

²⁰⁰ Cf. Bache (1905) p. 44.

²⁰¹ See, Bache (1905) p. 44 and 71.

²⁰² See, Hult (1936) p. 137 f. Cf. Schmidt (1943) p. 199, where the author is reluctant to equate damage due to heat and smoke with damage resulting from the process of burning as such.

The degree of precision that must be observed shall be decided by the linguistic implications of the insurance contract's description of the event insured. The way a language is used varies, however, both among persons and over time. The distinction between direct and indirect damage is therefore far from unproblematic.²⁰³

4.3 *Elements of Coverage in the Vicinity of the Liability-activating Causation Terms*

This study examines the scope of the insurer's liability as a function of causality. The question is thus whether and to what extent the insurer is liable for indirect consequences of the insured event.²⁰⁴ The issue depends ultimately on the interpretation of the liability-activating causation terms. The question of interpretation becomes operative only if the damage in question does not fall outside the insurer's liability as a result of other, more general limitations on the insurance policy's cover. Such limitations have the potential of bringing relief to the liability-activating causation terms as regards delimitation of the insurer's liability for consequential damage. It is therefore reasonable to briefly describe a number of general limitations on the insurer's liability, commonly appearing in property insurance.²⁰⁵

The covered event. Similarly to other insurance contracts, a property insurance policy specifies one or several events covered by the insurance, i.e. events whose occurrence constitutes a prerequisite for compensation, e.g. fire, theft or escape of water.

Excepted causes. In the majority of property insurance policies damage or loss resulting from certain specified events, such as for example war, is excepted from the insurer's liability.²⁰⁶

The subject matter of the insurance. The subject matter of property insurance includes certain specified property. The loss of or damage to any other property falls outside the insurance coverage.

Interests insured. The extent of property insurance is often limited and refers to a special interest in the property insured, for example, the interest that the property's value should not decrease or get lost. Other interests in the property, for example the interest to benefit from the profit brought by the property, fall outside the insurance coverage in such cases.

Consequences of the covered event. In the majority of property insurance policies compensation is paid only for specified consequences of the covered event. Frequently, but not always, the specified consequences are given a wide definition. Frequently the insurance covers *loss* arising from the covered event.

Duration of the insurance. The majority of insurance policies are effective during a limited time period. Frequently the cause of loss principle is applied,

²⁰³ Cf. Jørgensen (1961) p. 201 and Rein (1946) p. 12. See also section 11.6.2.

²⁰⁴ Cf. Hellner (1965) p. 100.

²⁰⁵ The following is based primarily on the classification in Patterson (1957) chapter 6.

²⁰⁶ This type of exception clause may lead to similar, though not identical, questions as the ones treated in this study. Regarding this matter refer to section 1.2.

which can be of great importance not only with regard to consequential loss discussed in this study.²⁰⁷

Geographical coverage. Often enough the coverage of the property insurance is limited geographically. The insurance applies only when the property is kept in a specified place or area.

Amount of the insurance. The majority of insurance policies contain limitations on the amount of the insurer's liability for loss suffered by the insured. These amounts can be fixed in advance. In property insurance it is more usual, however, that the actual loss is indemnified up to a certain, previously specified maximum sum.

As mentioned before, all these limitations aim to circumscribe the insurer's liability in various ways, and can make that both direct as well as indirect loss falls outside the insurance coverage. Two of them, those concerning interests insured and consequences of the covered event, seem to be particularly suitable if the insurer's aim is to limit his liability for various types of consequential loss. If the insurance contract provides that only the insured's interest in the insured property's not losing its value is covered, various kinds of indirect loss will be excluded from the insurance coverage, such as, for example, loss resulting from the fact that the insured property cannot be used as planned. This will take place without having to examine the question of the interpretation of the liability-activating causation terms. It is the same in the case when the policy limits the consequences of the covered event, for example by excepting damage to products which are stored in refrigerators, whose direct cause is the fact that the refrigerators stopped working, but whose indirect cause frequently consists in the covered event (for example fire).

5 Legislation

5.1 Introduction

It has been shown that the present study concerns the scope of the insurer's liability as a function of causality. The starting point has been that this issue is regulated by the insurance contract's liability-activating causation terms. These terms have been presented in sections 4.2.1 – 4.2.2. The issue before us now is the interpretation of these terms. Neither the legislation in force, its travaux préparatoire, nor legislation currently under proposal give any explicit answers to this practically-oriented question. An important reason for this is that these materials do not tackle the question of the scope of the insurer's liability as a function of causality from the starting point of the current regulation by contract, but on the contrary, from the premise that such regulation is lacking. The objective thus appears to be restricted to the explanation of what constitutes optional law in this respect. The fact that the legislator has chosen this point of departure is

²⁰⁷ With regard to the cause of loss principle, see, Lyngsø (1994) p. 139 ff; Selmer (1982) p. 279 ff and Sørensen (1997) p. 119 f. A more general discussion of the issue can be found in Wilhelmssen (1997).

not really surprising. Tying up the legislation to something so changeable as terms of an insurance policy would be hardly defensible.

In the legislative material we can find, however, a small number of more general pronouncements concerning the scope of the insurer's liability in terms of causality, or, to put it differently, pronouncements relating to the nature of the causal relation required between the covered event and the loss. We can also find a number of provisions concerning the insurer's liability for special kinds of indirect loss. Even though these pronouncements and provisions do not give a direct answer to the question concerning the interpretation of the liability-activating causation terms, they should doubtless be able to influence it.

5.2 *General Remarks Concerning the Required Nature of Causal Relation*

Neither FAL, DFAL, nor NFAL contains any general provision concerning the required nature of causal relation between loss and the covered event. In an early draft proposal for FAL presented at a meeting in Geilo in 1920 there is a provision under which the insurer would be responsible for each consequence of the covered event which could not be considered so unusual or improbable that it could not have been taken into consideration by the insurer. The rule thus constituted a rule of adequacy focusing on matters which could have been or should have been foreseen by the insurer. During the following period of legislative work the rule disappeared from the draft proposal for some unknown reason.²⁰⁸

Neither does the draft proposal for SkFL carry any general provision concerning the required nature of causal connection between the covered event and loss. However, in the explanation accompanying the draft the Insurance Law Committee points out that, as before, the requirement of adequate causality is assumed to apply in this respect. In the Committee's view the adequacy requirement applies to indirect loss only.²⁰⁹ In the case of direct loss the adequacy requirement would thus not be applicable.²¹⁰ According to the Committee the requirement of adequacy implies that the insurer's liability is limited to losses of a reasonably foreseeable and typical kind. On the other hand, in the present context the Committee would like to give the doctrine of adequacy an application which deviates to some extent from its application in the law of damages. In the context of insurance the issue of adequacy shall be assessed within the framework of the insurance policy, where both the nature of the insurance contract and its terms will thus receive essential importance. In addition, the insurer's possibilities to limit the scope of cover by the policy terms shall be taken into consideration when determining adequacy. In this way it is suggested that the requirement of adequacy should not be too high. At the same time it is held that the absolute necessity of the insurer to be able to calculate in advance premiums equivalent to the risks written makes that the requirement of adequacy should not be too low either.²¹¹

²⁰⁸ See, Bengtsson (1995) p. 357 footnote 4.

²⁰⁹ See, SOU 1989:88 p. 330.

²¹⁰ As regards this kind of adequacy application, see section 8.3.3.

²¹¹ See, SOU 1989:88 p. 330.

5.3 *Special Types of Indirect Loss*

In addition, the legislation now in force contains a number of different provisions concerning the insurer's liability for special types of indirect loss. Firstly, 53 and 82 §§ FAL and DFAL as well as § 6-4 NFAL contain provisions which give the insured, under certain conditions, the right to recovery of loss resulting from measures undertaken in order to minimise the consequences of the covered event (rescue measures), and where the covered event constitutes an indirect cause of loss. These provisions disregard the question of the required nature of causal connection between the covered event and the loss. Instead, there appears a question concerning the nature of the causal relation between the rescue effort and the loss. The starting point of the assessment of the causal connection moves therefore one step forward in the causation chain according to these provisions. This increases the possibility of the nature of causal connection being regarded as adequate and therefore also of the insured's loss recovery.

As regards the central question in the present context regarding the nature of the required causal connection between the rescue attempt and the loss none of the above-mentioned provisions stipulates any other requirement than a requirement of factual causality. No travaux préparatoire discussing the interpretation of §§ 53 and 82 can be found, and there are few statements regarding this issue in the literature. In Norwegian doctrine it has been claimed, however, that § 53 can be considered to imply the requirement that the loss must have been a close and likely consequence of the rescue attempt – a kind of adequacy requirement.²¹² In addition it is held, partly, that the adequacy requirement seems to be somewhat more stringent in the present context than what is usual in the general law of damages,²¹³ and partly, that assessment of uncertain cases constitutes really a test of reasonableness.²¹⁴ These pronouncements should be seen, however, in the light of the fact that compensation which the insurer may be liable to pay under § 53 does not constitute, as has been shown, insurance compensation, but rather a kind of profit compensation (the insurance company makes a 'profit' since the insured prevented the occurrence of damage or loss). It is therefore hardly suitable to quote these statements in cases of compensation from the insurance.

The question of interpretation of § 82 with regard to the current issue does not seem to have received any attention in the literature. It may have been caused by the fact that the question is impractical. In reality, the question of the insurer's liability for loss resulting from rescue measures is often regulated by the terms of the contract, which is why § 82 will not apply. In any case, the question concerning the nature of causal connection required under § 82 does not differ much from the question concerning interpretation of contract terms requiring factual causality. Interpretation of § 82 with regard to the current issue

²¹² See, Arntzen (1963) p. 154; Selmer (1982) p. 338 f (both regarding § 53 NFAL (1930) corresponding in practice to § 53 FAL and DFAL); and NOU 1987:24 p. 117 f (also regarding § 53 NFAL (1930)) and p. 124.

²¹³ See, Selmer (1982) p. 338 f.

²¹⁴ See, Arntzen (1963) p. 154.

should therefore be equivalent to the interpretation of these contract terms. The latter constitutes one of the principal objects of the present study. As regards the interpretation of § 82 FAL and DFAL the reader is therefore referred to the following presentation concerning interpretation of contract terms, especially to section 9.3.1. Already here it can be mentioned, however, that adequate consequences of a rescue effort should be considered as compensable according to § 82, whereas inadequate consequences fall outside the insurer's liability.

Secondly, FAL and DFAL contain a provision (§ 79) under which fire insurance covers not only direct but also indirect consequences of a fire.²¹⁵ The travaux préparatoire to the Danish provision demonstrates, however, that this applies only to losses which are adequate in relation to the covered event.²¹⁶ Nothing is said, however, about the exact meaning of the adequacy requirement formulated in this way. It is not shown whether, and if so how, the indirect fire losses, which are covered according to the Swedish provision, shall be limited. Finally, FAL and DFAL contain a number of provisions under which special types of indirect loss are covered without any enhanced requirement of causality. One of these provisions (§ 82) means that fire insurance covers loss resulting from the fact that objects perish in one way or another in connection with the fire. The other provisions (§§ 61 and 64) apply to hull insurance which covers, in special circumstances, compensation that the insurer is liable to pay to the third party as an indirect consequence of the covered event.

5.4 Legislation, Travaux Préparatoire, Proposed Legislation and the Interpretation of the Insurance Contract's Causation Terms

It is obvious that provisions and pronouncements of the type in question can influence the interpretation of an insurance contract. This applies, however, only on the condition that the situation in which the question of interpretation arises corresponds to the situation referred to by the provision or pronouncement in question. In this context it seems that the pronouncements and rules presented in this chapter are able, with few exceptions, to influence the interpretation of the liability-activating causation terms. The exceptions consist of § 53 FAL and DFAL and §§ 6-4 NFAL, which, unlike the liability-activating causation terms, do not regulate the insured's right to the insurance benefit, but rather to something that constitutes in reality a kind of profit compensation.

The next issue concerns the extent to which the pronouncements and the rules in question (disregarding § 53 FAL and DFAL as well as §§ 6-4 NFAL) influence the interpretation of the liability-activating causation terms. More specifically, this issue can be said to examine the question of whether the terms' requirement of factual and direct causality respectively can be said to be sufficiently clearly formulated in order to disregard the rules and pronouncements in question. As a result of the starting point described above and adopted by the

²¹⁵ See, § 79 FAL and DFAL. The fact that the Swedish provision has a general application does not transpire from the text of the act, but from a clearly formulated statement in the travaux préparatoire (see, SOU 1925:21 p. 180).

²¹⁶ See, Udkast (1925) p. 123 and Lyngsø (1992) p. 297.

legislator in order to tackle the question of the scope of the insurer's liability as a function of causality, this question has not been explained at all by the relevant material. We must thus search for the answer in the literature and judicial practice.²¹⁷

6 Judicial Practice

6.1 Introduction

Unlike the legislator, the courts have to deal with the practical problem which is at the centre of the current study, concerning the interpretation of the liability-activating causation terms. Judicial practice can be therefore expected to provide concrete guidance regarding the interpretation of the requirement of factual and direct causality respectively (see sections 6.2 and 6.3 respectively) in a completely different way than the material examined in chapter 5.

The number of court cases is not very large, however. In addition, many of the decisions are quite old. This does not mean, however, that the question of the interpretation of the liability-activating causation terms lacks practical importance.²¹⁸ The limited number of court cases is rather the result of the fact that the great majority of Scandinavian disputes concerning the interpretation of insurance contracts have been decided by different insurance boards.²¹⁹ Disputes which have been handled by such committees are discussed in chapter 7.

The majority of cases presented below have been decided in the court of highest instance. Due to the limited number of such cases, a number of cases decided in lower courts are also discussed.

Court cases from Sweden, Denmark and Norway are treated side by side. Naturally, the different decisions cannot be ascribed direct significance outside their respective source country. On the other hand, development of the law has been quite similar in the three countries, which is why, indirectly, one should be able to ascribe some importance to these decisions in the whole of Scandinavia.

6.2 Requirement of Factual Causality

One Danish judgement shows that contract terms requiring factual causality were taken earlier on to imply the requirement of causal connection of a direct nature.²²⁰ When compared with a number of later cases this interpretation ap-

²¹⁷ In sections 9.3.1 – 9.3.2 the current question is treated in the context of all the judicial source material.

²¹⁸ Cf. Lyngsø (1988) p. 414 and Oding (1974) p. 385.

²¹⁹ Regarding these insurance boards, see section 7.2.

²²⁰ See U 1894.740. According to Schmidt (1943) p. 210, even NJA 1926 p. 508 can be said to give an expression of the fact that contract term requirements of factual causality were interpreted earlier as implying a requirement of causality of a direct nature. It is, however, questionable if such an interpretation is correct. As far as can be seen, the Supreme Court makes a statement in this case only as regards the question of factual causality.

pears, however, somewhat out-of-date.²²¹ Two Norwegian judgements show that the requirement of factual causality is not considered to preclude compensation for indirect loss.²²²

In Rt 1919 p. 104, a ship had been insured against perils of the sea. After running aground (peril) during the First World War it was carried to an English harbour. The English authorities decided that they would carry out repairs provided that the ship was placed at their disposal for the rest of the war. Since it was impossible to move the ship, the insured accepted this condition and claimed compensation for the loss suffered. This request was turned down by the insurer who claimed, among other things, that the cause of the loss was the war hostilities, which was why the loss was not covered by the insurance. The Supreme Court, referred to an expert's report by prof. Platou, stating that the insurer takes over the risk or risks which have been considered when calculating the premium. In the context of this statement The Supreme Court decided that the insured was not entitled to compensation. The court pointed out that such an unpredictable, external circumstance as that of a foreign government forcing the shipping company to a disadvantageous contract was not foreseeable, and that the insurer could not therefore be regarded as having assumed responsibility for it.

It is true that in this case the insured's claim for the recovery of loss which was indirect in relation to the covered event was dismissed. On the other hand, no requirement of direct causality was made at all. Instead, the insurer's liability seems to have been limited by the doctrine of adequacy.²²³ As regards the application of adequacy the Supreme Court seems to have selected as a starting point the loss statistics which constituted, in its view, the basis of the insurer's calculation of the premium. In relation to this loss statistics the loss in question was regarded as unexpected, and therefore falling outside the insurance cover.²²⁴

In Rt 1920 p. 463, the insurer's liability has also been limited with the aid of the doctrine of adequacy.

In this case a ship had been insured against all loss resulting from war hostilities and from the state authorities' right of control in this connection. For military reasons the insured ship was ordered to leave the port in which it was anchored. During the transport of the ship, which was carried out without the aid of a pilot-boat, the ship ran against an object situated at the bottom of the sea, and got damaged. The insured's claim to recovery was rejected by the insurer who maintained, among other things, that this was ordinary damage by perils of the sea, which was non-recoverable under the war hostilities insurance in question. In the view of the Supreme Court the damage could not be seen as constituting an adequate consequence of the order to remove the ship, since it was unforeseeable in the prevailing circumstances. In these circumstances the insured's claim for recovery therefore failed.

²²¹ Cf. Sindballe (1921) p. 80.

²²² See also ND 1917.139.

²²³ See, Bredal (1918) p. 274; Brækhus & Rein (1993) p. 257; Grundt (1950) p. 83; Steen-Olsen (1977) p. 253 and Øvergaard (1938b) p. 182.

²²⁴ See, Brækhus & Rein (1993) p. 257 (who seem to show a critical attitude towards such application of adequacy) as well as Steen-Olsen (1977) p. 253.

The fact that contract term requirements of factual causality are not considered to limit the insurer's liability to the direct consequences of the covered event is also demonstrated by cases decided in Sweden and Denmark

In NJA 1937 p. 662, a house carrying fire insurance had been damaged by fire. The insured demanded compensation for the loss he had suffered due to the fact that as a result of the decision of the authorities he was not allowed to rebuild the house on the undamaged grounds of the house. The claim was rejected by the insurer who claimed, among other things, that the current damage was occasioned by strange circumstances falling outside the insurance cover. In contrast to the lower courts, the Supreme Court decided that the loss caused indirectly by the fire fell, in principle, within the insurance cover.

In U 1960.652²²⁵ cattle have been insured against loss caused by lightning. A pipeline in the insured's cowshed was struck by lightning and became live. Three cows that came into contact with the pipeline were killed. The insured claimed that the loss had been suffered as a result of the lightning and demanded recovery. The claim was rejected by the insurer who claimed that it could not be regarded as proved that the loss had been caused by lightning. In the opinion of the Court of Appeal the lightning constituted the factual cause of the loss. As a result, and due to the fact that the insurance coverage had not been restricted to immediate or direct loss, the insurer was considered to be liable to pay the required benefit.²²⁶

In contrast to the two Norwegian decisions, neither NJA 1937 p. 662, nor U 1960.652 provide any criterion for drawing a borderline between recoverable and non-recoverable loss over and above the requirement of factual causality. This is why it cannot be excluded that the causation terms have been interpreted in these cases in accordance with their wording, in which the insurance has been regarded to cover all loss that has actually been caused by the covered event. Such an interpretation would make that that the discussed decisions would deviate from both Rt 1919 p. 104 and Rt 1920 p. 463.²²⁷ It is therefore not at all certain that the above-mentioned decisions, coming, partly, from another country, and partly, concerning sea insurance marked by its special traditions, have been considered as guiding principles by the Supreme Court and Court of Appeal respectively in their NJA 1937 p. 662, and U 1960.652 decisions. At the same time, the disputed losses in both NJA 1937 p. 662, and U 1960.652 (which were considered, as stated above, to fall within the insurance policy's cover) can be doubtless considered to constitute adequate consequences of the respective events insured. This is why it cannot be excluded that an adequacy requirement had been formulated in both of these cases, but that this fact was never expressed in the opinions of the court.²²⁸ It is thus unclear whether the contract

²²⁵ Note that this case went no further than to the Court of Appeal, which is why it is of a somewhat limited value.

²²⁶ See also, U 1946.256.

²²⁷ See especially, Rt 1920 p. 463, in which the Supreme Court (p. 464) declares that the covered event has been the factual cause of the loss, pointing out immediately afterwards that this is, naturally, not a sufficient reason for the loss to be covered by the insurance.

²²⁸ Despite the fact that this does not transpire from the findings of the Court of Appeal, Lyngsø (1994) p. 191 seems to assume that the adequacy doctrine was applied in the 1960

term requirements of factual causality in NJA 1937 p. 662, and U 1960.652 have been interpreted in accordance with their wording, or whether they have been considered to imply a requirement of adequacy (alternatively enhanced causality of some kind).

The fact that contract term requirements of factual causality are not interpreted according to the wording transpires clearly from NJA 1943 p. 319.

In this case a number of horses were insured against loss by thunderbolt. As a result of a thunderbolt which hit a dwelling-house some light and telephone lines were exposed to each other and became conductive. The latter became live. A telephone pole a few kilometres away had been blown down. Two horses were killed. One of the horses had come into contact with the charged telephone line, the other with some barbed wire which had also become charged, having come into contact with the telephone line. The policy holder's claim for compensation for the lost horses was rejected by the insurer who argued that the loss had not been caused directly by the thunderbolt. The Supreme Court dismissed the plaintiff's claim for compensation. The Court pointed out that the stated loss of the horses did not stand in such a relation to the thunderbolt as to be regarded as loss by thunderbolt.

In this case the insured was refused recovery, despite the fact that it was a thunderbolt which was the actual cause of the loss. Factual causality has thus been considered equally insufficient for the loss to be covered by the insurance in this case as in Rt 1919 p.104, and Rt 1920 p. 463. An enhanced requirement of causality has been set forth. On the other hand, as regards the identity of the required nature of causation a certain amount of uncertainty prevails. According to the insurer causality of a direct nature was required. It cannot be excluded that the Supreme Court had such a requirement in mind when it decided that the loss did not have such a relation to the thunderbolt as to be regarded as loss by thunderbolt. If this had been the case, however, the Court would have probably given expression to this point of view in one way or another. It is more likely that the Court meant by the expression 'such a relation' a causal connection of the adequate type.²²⁹ In addition to the thunderbolt, the collapse of the telephone pole was a necessary condition for the occurrence of the loss. In these circumstances it is not unlikely that the Court regarded the loss of the horses as an inadequate and therefore non-compensable consequence of the thunderbolt.

The cases referred to in this section are few and most of them are old. The court decisions clearly demonstrate, however, that contract terms requiring factual causality are not considered to limit the insurer's liability to the direct consequences of the covered event. Rt 1919 p. 104, and Rt 1920 p. 463, and to some extent also NJA 1943 p. 319, suggest instead that these terms imply that adequate loss falls within the scope of the insurance, whereas inadequate loss falls outside of it. It is unclear whether the adequacy doctrine has also been applied in NJA 1937 p. 662 and U 1960.652, but one cannot exclude this possibility.

year's case.

²²⁹ See, Arntzen (1974) p. 293 and Hult (1947) p. 515. Cf. Hellner (1965) p. 104 and Persson (1953) p. 50 footnote 39, p. 54 footnote 57 and p. 192 footnote 7.

6.3 *Requirement of Direct Causality*

A number of cases²³⁰ demonstrate that the requirement of direct causality between the event covered by the insurance and loss is interpreted remarkably advantageously for the insured.²³¹

In NJA 1924 A 445 an insurance policy had been signed for death as an immediate and direct consequence of an accident. The insured had an accident in which he suffered from loss of blood in one of his legs. After about a week puss started to form and the insured developed erysipelas (gangrenous inflammation of the skin, known also as Saint Anthony's fire). Some time later the insured died of general blood poisoning caused by the erysipelas. The claim for the payment of benefit submitted by the family of the deceased was rejected with reference to the fact that the insured's death did not constitute a direct consequence of the accident. This point of view was not accepted, however, by the Supreme Court which pointed out that the loss of blood was the necessary condition for the development of erysipelas, and that the insured's death was therefore to be regarded as an immediate and direct consequence of the accident. The plaintiff's claim was therefore granted.

In Rt 1935 p. 986, a building had been insured against damage through fire, indirect damage having been excepted from the insurance cover, however. Only direct fire damage was thus covered. The building got damaged by fire, but the insured was refused to rebuild it by the decision of an authority. He was instead forced to pull down the remaining parts of the building. Reparation for the total extent of damage was claimed. In the insurer's opinion, however, the damage caused by the decision of the authority fell outside the cover of the insurance. The Supreme Court granted the claim of the insured, pointing out that the legal rule on which the authority's decision was based had been in force both at the time of the conclusion of the contract and at the time of the fire. In these circumstances the damage arising from the decision of the authority could also be regarded as a direct consequence of the fire.

In NJA 1941 B 895 goods that were to be shipped from New Orleans to Gothenburg had been insured against damage, loss or expenses caused directly by enemy fire, bombs, mines or torpedoes... or by other measures undertaken by the enemy at war. Due to the German blockade of the Skagerrak in connection with the occupation of Denmark and Norway the ship was unable to reach Gothenburg, and had to return to an American port where the insured goods were sold at a loss. The claim for insurance compensation was rejected by the insurer who pointed out that the loss was caused only indirectly by the event insured. In accordance with the Supreme Court's decision the loss was to be compensated for.

²³⁰ Some of them have, however, a limited value to a certain degree. Both Swedish decisions were published in a short form only. Both Danish cases did not go further than to the Court of Appeal.

²³¹ See also, U 1997.1105 and U 1964.557. Cf. Rt 1911 p. 181, in which, even though the insured's claim to compensation was rejected by the Supreme Court, the grounds for the decision imply that the requirement of direct causality has not been interpreted in accordance with its wording. The issue of causation seems to have been decided instead in accordance with the doctrine of adequacy or *causa proxima*. No clear conclusions can be drawn, however, in this respect. Cf. also, U 1917.492, U 1918.331, U 1920.383 and U 1992.803.

It was held that the stated military operations had to be assumed to constitute an obstacle for the ship to continue its journey to the Swedish port. The loss suffered by the company was consequently considered to have the kind of direct relationship to the measures undertaken by the country at war which was presumed by the insurance terms for liability to apply.

In U 1985.779 a number of pigs kept in a pigsty had been insured against direct damage through escape of water. When this happened, the pigsty's ventilation system got damaged and several pigs died as a result of choking due to the lack of oxygen. The insured's claim for recovery was rejected by the insurer, since the loss of pigs was, in his opinion, an indirect consequence of the water outpour. According to the Court of Appeal the insured was, however, entitled to recovery. It was held that since at the time of the contract's conclusion it had to be assumed that the insurer knew of the existing risk for the type of damage in question, the contract's limitation to refer to direct damage only could not imply any restriction on the insurer's liability in the event of loss which constituted a typical consequence of water outpour.

In U 1988.90 a chicken farm was insured against intentional damage, where only direct damage was covered. Some stranger closed off the ventilation of the insured's poultry-house. As a result of the following lack of oxygen the chickens died. The insurer rejected the insured's recovery claim, referring to the fact that the death of the chickens had to be considered as indirect damage. The Court of Appeal decided that the loss was recoverable, however. The closure of the ventilation system was considered to constitute intentional damage. The court further held that since the loss of the chickens was a natural consequence of the intentional, damage-causing act, the loss that followed could be considered as the kind of direct damage that the insurer was liable to make good according to the contract.

The different insurers have thus been obligated to pay recovery in these cases for something that must be considered from the perspective of a linguistic definition as indirect consequences of the covered event.²³² The contract terms' general requirements of direct causality have not been strictly observed by the courts.²³³ The question is thus whether the courts have established any alternative requirement of enhanced nature of causal relation, and what this requirement would then imply. The two Danish decisions, U 1985.779 and U 1988.90, give relatively clear guidance in this respect. In these cases the contentious loss was considered to fall within the framework of the insurer's liability since it was regarded to constitute a typical consequence of the covered event in the first case, and a natural consequence in the second. Even the contract terms requiring direct causality seem thus to have been interpreted to imply an adequacy requirement. In Rt 1935 p. 986, the loss was considered compensable with reference to the fact that the authority's decision which was the direct cause of the loss was based on the law that was in force at the time of the conclusion of the contract and at the time of the fire. The grounds for the decision can be at least said to imply that the argument of adequacy played a role in the court's judge-

²³² As regards the language content of the concepts of direct and indirect damage, see sections 4.2.3.1 – 4.2.3.2.

²³³ Cf. Schmidt (1943) p. 211, concerning the Swedish cases from 1924 and 1941.

ment.²³⁴ Since the decision of the authority was based on a law which had been in force at the points in time mentioned, the loss constituted a not completely unexpected consequence of the fire. The two Swedish decisions, NJA 1924 A 445 and NJA 1941 B 895 do not give much guidance with regard to the current issue. Since the loss, which was considered to fall within the frame of the respective insurer's liability, should be able to be regarded as adequate, one cannot exclude the possibility, however, that the adequacy doctrine has also been applied in these cases, but that this has never been reflected in the grounds for the courts' decisions.

6.4 *The Doctrine of Adequacy*

6.4.1 Content

Despite the requirement of factual or direct causality stipulated by the policy terms, in a number of cases related above the courts seem to have formulated a qualification that can be regarded as a requirement of adequate causality in order to limit the scope of the insurer's liability.²³⁵ The remaining cases do not give a clear answer to the question of how compensable and non-compensable loss shall be distinguished regarding the present issue. It cannot be excluded, however, that the doctrine of adequacy has been applied even in these cases.²³⁶ As regards the content of the adequacy requirement there is, on the whole, a uniformity of opinion on this matter. In the cases in which the doctrine has been applied the courts have set requirements of likelihood²³⁷ or similar.²³⁸

6.4.2 Determination of Adequacy

The fact that the courts have bestowed a uniform meaning on the doctrine of adequacy does not mean, however, that the doctrine is applied in a uniform way. The following sections examine the question of what the above-discussed cases of adequacy have to say about the evaluator's identity (section 6.4.2.1), the relevant point in time for adequacy determination (section 6.4.2.2), the description of the course of events which constitutes the object of the adequacy determination (section 6.4.2.3) as well as the level of the adequacy requirement (section 6.4.2.4).

²³⁴ See Selmer (1982) p. 306 f.

²³⁵ See especially, Rt 1919 p. 104; Rt 1920 p. 463; U 1985.779 and U 1988.90. Possibly also Rt 1935 p. 986 and NJA 1943 p. 319.

²³⁶ This is applicable with the exception of U 1894.740, which case must be considered, however, out-of-date.

²³⁷ See, Rt 1919 p. 104.

²³⁸ In Rt 1920 p. 463, the court seems to have established a requirement of foresightedness. In U 1985.779 and U 1988.90 respectively the courts refer to the fact that the damage constituted a typical or a natural consequence respectively of the covered event. It has been shown in section 2.2.2.2 that one should be able to equate the above-mentioned causal requirements with the requirement of likelihood. Rt 1935 p. 986 and NJA 1943 p. 319 are not instructive in any way as regards the current issue.

6.4.2.1 Relevant Evaluator

Under the doctrine of adequacy only damage which is considered likely (or similar) to occur in relation to the covered event is compensable. Whether the damage can be considered as adequate or not is thus a question of opinion. It is therefore important to establish the identity of the relevant evaluator. Is this a question of subjective determination in the sense that the court must ask whether the insurer or the insured regarded the damage as likely? Or shall the adequacy determination be objective in the sense that the court must assume an imagined evaluator? What kind of competence must this evaluator possess in such a case? In Rt 1920 p. 463, the court discusses the issue of what could have been reasonably foreseen.²³⁹ This suggests that the determination of adequacy has been objective. The question of competence of the imagined evaluator has been, however, left unanswered. In the remaining cases²⁴⁰ the courts' pronouncements regarding the nature of the causal connection have not been accompanied by any remarks concerning the perspective from which this assessment has been made. Perhaps this too can be said to suggest that the evaluation has been objective.

6.4.2.2 The Relevant Point in Time for the Determination of Adequacy

The issue of the relevant point in time for the determination of adequacy can be of great importance for its result.²⁴¹ Some of the earlier discussed cases²⁴² might be said to suggest that the relevant point in time was considered to be the time of the conclusion of the contract. In one case, Rt 1935 p. 986, both the time of the conclusion of the contract and the time of the occurrence of the covered event seem to have been taken into consideration. One cannot be sure, however, whether it was really required that the loss appeared to be an adequate consequence of the covered event on both of these occasions. Another case, Rt 1920 p. 463, can be said to imply that the point in time of the covered event has been taken into consideration in the determination of adequacy. The remaining cases²⁴³ give no indication in this respect.

6.4.2.3 Description of the Course of Events

The result of the determination of adequacy is also influenced by the description of its object, i.e. the course of events from the covered event to damage.²⁴⁴ Due

²³⁹ See, p. 464.

²⁴⁰ Rt 1919 p. 104; Rt 1935 p. 986; NJA 1943 p. 319; U 1985.779 and U 1988.90.

²⁴¹ Regarding the importance of the determination of the point in time, see section 2.2.2.4.2.

²⁴² Rt 1919 p. 104 and U 1985.779.

²⁴³ NJA 1943 p. 319 and U 1988.90.

²⁴⁴ Concerning the way in which the determination of adequacy is influenced by the description of the course of events, refer to section 2.2.2.4.3. It should also be pointed out that the description of the course of events used by the courts as the basis of their assessment of adequacy should be dependent to a large degree on the course of events quoted by the parties.

to the fact that grounds for the decision are frequently vaguely formulated it is often impossible to make positive statements concerning all the details of the course of events that the different courts have used as the basis for their determination of adequacy.

In a number of cases²⁴⁵ it seems that the covered event has been described in accordance with the description of this event provided by the insurance terms in question. In two cases, however, the description of the covered event underlying the court's determination of adequacy has been more detailed than the equivalent description provided by the insurance terms. In Rt 1920 p. 463, an insurance contract was signed against, among other things, *the state authorities' right of control on account of war hostilities*. In the assessment of adequacy the covered event is described, however, as *an order on the part of the state authorities to move the insured vessel from the harbour in which she was anchored at the time*. In U 1988.90 the insurance terms identified *intentional damage* as one of the events covered by the insurance contract. The court based its determination of adequacy, however, on the fact that *a stranger closed off the ventilation of the insured's poultry house* (which act was considered by the court to constitute intentional damage). One cannot be certain, however, whether these differences exemplify the fact that there is no uniform view on what constitutes a relevant description of the covered event in the determination of adequacy. The difference can be explained equally well by the fact that the courts have had different opinions regarding the more general question of how exhaustive the grounds for their decision should be. The descriptions of losses resulting from the covered event, made by the courts the basis of their respective assessments of adequacy seem to be relatively detailed in the sense that it is not only the loss itself which is embraced by them, but also the course of events leading to it.²⁴⁶ One example of the above is case Rt 1919 p. 104, in which the loss suffered was described as financial loss resulting from a particular decision of the authorities. Another example is case U 1985.779 in which the loss was described as the demise of a number of pigs resulting from the lack of oxygen occasioned by the escape of water.

6.4.2.4 The Level of the Adequacy Requirement

The question of the degree of likelihood (or similar) which is necessary for damage to be considered as adequate cannot be answered in general terms without the answer becoming meaningless.²⁴⁷ Already this makes it seem unavoidable that the level of the adequacy requirement must vary, at least to some extent, from case to case. Neither can one exclude the possibility that the level of adequacy required in a specific case depends on factors assignable to that specific case, such as the type of insurance in question or the formulation of the causation terms. No court decision demonstrates explicitly, however, that the courts let such factors influence the level of the adequacy requirement. Also, since the

²⁴⁵ Rt 1919 p. 104; Rt 1935 p. 986; NJA 1943 p. 319 and U 1985.779.

²⁴⁶ This seems to apply to all the cases mentioned in footnote 235.

²⁴⁷ Cf. Hult (1947) p. 515 and Lyngsø (1994) p. 191.

different decisions concern courses of events which differ to a large extent from one another, it makes it difficult, if not impossible, to show variations in this respect.

It is clear, however, that the requirement of adequacy has not been applied very strictly in this context. This is indicated by a number of adequacy cases discussed above, in which not always expected loss consequences were regarded as adequate. This seems to have applied irrespective of both the insurance type and the formulation of contract terms. A good example is case U 1985.779 in which the escaping water caused damage to the ventilation system, which resulted in the demise of a number of pigs due to lack of oxygen, and in which the death of the pigs was regarded as an adequate consequence of the escape of water.²⁴⁸ Not even the cases in which the contentious loss was considered inadequate indicate that the doctrine of adequacy has been stringently applied.²⁴⁹ An example illustrating this is Rt 1919 p. 104. The arising damage was considered to constitute in this case an inadequate consequence of the ship's running aground. The reason for this was, however, the fact that the direct cause of the loss was an unexpected and, to say the least, surprising, decision of the authority after the occurrence of the covered event.

7 Insurance Board Decisions

7.1 Introduction

In Scandinavia the majority of disputes concerning interpretation of contract terms in insurance contract law are not decided by the courts but by different kinds of insurance boards.²⁵⁰ Liability-activating causation terms are therefore frequently interpreted in Sweden by, among other institutions, ARN or SkVN in Sweden, AK in Denmark, or FSN in Norway. Similarly to the courts, these insurance boards have to face the practical problem of interpretation of the liability-activating causation terms. The boards' decisions can therefore also be expected to give guidance as regards the interpretation of, partly, the terms' requirements of factual causality (section 7.3), and partly, their requirements of direct causality (section 7.4). To start with, the insurance boards in question shall receive a short presentation (section 7.2).

7.2 The Insurance Boards²⁵¹

ARN²⁵² has the status of an authority. Its insurance section²⁵³ was founded in 1975. The Board decides disputes concerning consumer insurance at the request

²⁴⁸ See also, Rt 1935 p. 986 and U 1988.90.

²⁴⁹ In addition to the case mentioned below, see Rt 1920 p. 463 and NJA 1943 p. 319.

²⁵⁰ Cf. Hellner (1982) p. 389.

²⁵¹ General facts concerning insurance boards in the Nordic countries and Europe can be found in Radetzki (ed.) (1993) and Wiisbye (1987) respectively.

²⁵² The following description is based for the most part on Radetzki (1996) p. 109. A more

of consumers. The Board is competent to make decisions, and employs a legally trained chairman, as well as a number of members, half of whom represent consumers' interests, and half the insurer's side. There is a written procedure in the Board whose decisions are not binding on the parties.

SkVN²⁵⁴ is a private board set up by the insurance sector in 1947. The Board, whose main task is the promotion of a uniform application of contract terms in insurance against damage, provides at the request of the insurer interpretation of the terms of insurance contracts. SkVN consists of both legally trained members, as well as members possessing knowledge concerning insurance against damage. In contrast to ARN, no-one represents the interests of the policy holders. The Board has a written procedure, and its decisions are not binding on the parties.

AK²⁵⁵ was founded in 1975 by an agreement between the State Consumer Agency and the Insurers Society. This Board decides disputes concerning primarily consumer insurance at the request of policy holders. Other types of insurance (partly motor vehicle insurance, and partly other types of insurance that do not substantially deviate from consumer insurance) can sometimes also be the object of trial by AK. AK is competent to make decisions, and employs a legally trained chairman, as well as a number of members, half of whom represent the policy holders' interests, and half the insurer's side. A written procedure applies in practice,²⁵⁶ and the decisions arrived at are not binding on the parties.

FSN²⁵⁷ was founded in 1970 by an agreement between the State Consumer Agency and the Insurers Society. FSN decides disputes concerning interpretation of insurance contracts or legislation in the field of insurance law, but it does not concern itself with issues relating to evaluation or the amount of recovery. Disputes can be settled at the request of both the insurer and the policy holder. Disputes concerning marine or transport insurance fall, however, outside FSN's field of authority. FSN is competent to make decisions, and employs a legally trained chairman, as well as a number of members, half of whom represent the policy holders' interests, and half the insurer's side. A written procedure applies, and the decisions arrived at are not binding upon the parties.

exhaustive presentation of ARN and its activities can be found in Lindell-Frantz (1998) p. 83 ff.

253 When ARN is mentioned in the future, it is its insurance section that is referred to.

254 The following description is based in the main on Radetzki (1996) p. 110. A more exhaustive treatment of SkVN and its activities can be found in Lindell-Frantz (1998) p. 89 ff.

255 The following is based on the comprehensive presentation of AK and its activities in Sørensen (1997) p. 301 ff. See also Munksgaard Nielsen (1992) p. 184 f.

256 AK has the possibility to summon the parties to a hearing, but this possibility is not used in practice.

257 The following presentation is based on NOU 1987:24 p. 191 f and Berthelsen (1993) p. 48 f.

7.3 *The Requirement of Factual Causality*

Contract terms requiring factual causality are not the object of literal interpretation. This is well illustrated by a number of decisions in which the Insurance Boards rejected claims for recovery of indirect loss.²⁵⁸

In SkVN 103/1977 an insurance policy was taken out against damage from explosion. During a heavy rainfall the policy holder's staff were busy rescuing a stock of wallpaper from the water pouring in from outside. At the same time a boiler situated in the warehouse exploded, which led to a heavy build-up of smoke. Owing to this, the staff were ordered by the fire brigade to leave the warehouse, which resulted in water damage of the wallpaper. The policy holder's claim for recovery was rejected by the insurer, according to whom the damage in question had not come about through explosion. The Insurance Board established that the damage to the wallpaper did not have such a relation to the explosion of the boiler that it could be considered to have arisen from it, which is why it fell outside the insurance cover.

For damage to be covered by the insurer's liability it is clearly required that the causal connection be of a special kind. As regards the required identity of the nature of causal connection the different decisions give conflicting impressions. In one case the decision of the Insurance Board has been motivated by reference to the ambiguity rule.

In SkVN 15/1994 an insurance contract had been signed against damage through lightning. As a result of a stroke of lightning the insured's freezer stopped working, in consequence of which the frozen stuff melted and caused water damage to the floor and walls. The insured's claim for recovery was rejected by the insurer who claimed that the direct cause of the damage was leakage and that other circumstance surrounding the case had no relevance. According to the Insurance Board the expression *through* suggested that even certain kinds of indirect damage that arose due to a stroke of lightning were covered by the terms of the contract. With regard to this as well as the lack of clarity of the expression used, the Insurance Board decided that the damage should be regarded as damage through lightning and that it should be made good.

The reference to the ambiguity rule shows that when choosing between the interpretations provided by the insurer and the insured, the insurance institution decided that the term in question was ambiguous, which is why the Board interpreted it in the way asserted by the insured. The nature of causal connection between the lightning and the damage which was required to induce the insurance institution to arrive at this interpretation cannot be deduced, however, from the grounds for the decision.²⁵⁹

²⁵⁸ See also, for example, SkVN 91/1954; SkVN 132/1979; FSN no. 1183 and FSN no. 2930.

²⁵⁹ If, for example, the damage for which the insured demanded recovery was very distant in both time and place, and constituted in addition a surprising consequence of the covered event, the lack of precision rule would have hardly applied. The insurance board would have then chosen instead the interpretation alternative proposed by the insurer.

In some earlier decisions SkVN quoted similar grounds for its interpretation given in favour of the insured.²⁶⁰

In SkVN 12/1980 an insurance contract had been signed against damage through flashover. A flashover in an aerial line located several miles from the insured's place caused power failure, in consequence of which a water-heated drying oven was damaged by frost. The insured's claim for recovery was rejected by the insurer. According to the latter, insurance coverage was limited to direct damage. In any case, the damage could not be considered to have had such a close relation to the covered event that it could be regarded as having arisen through it. SkVN pointed out that the quoted insurance term did not require that the primary damage should have occurred at the insured's place, or that, otherwise, the relationship between the covered event and damage should have a special character. The damage was therefore covered by the insurance.

The Insurance Board's explanation stating that the insurance terms did not limit the scope of the insurer's liability from the point of causality can be said to imply that in its opinion the insurance terms did not give a clear enough expression to the limitation of liability pleaded by the insurer, which is why they were interpreted in favour of the insured. These two decisions do not show either, however, which criterion has been used by the Insurance Board to limit the insurance coverage.

In some of the cases in which recovery has been granted, the decision has been justified by the fact that damage constituted a direct consequence of the covered event.²⁶¹

In AK 17.705 a car had been insured against damage through wilful destruction. An oil pipe in the car's engine had been cut off. When, quite unaware of the fact, the insured started driving, the oil leaked out and the engine broke down. The insured's claim for recovery was rejected by the insurer with reference to the fact that the damage did not arise from wilful destruction. In the view of the Insurance Board the damage was regarded as a direct consequence of the tortious act, which is why it had to be compensated for from the insurance.

From the linguistic point of view the damage suffered in these cases constitutes a typical example of indirect damage.²⁶² According to the Insurance Boards, however, the damage is of a direct character, resulting in the fact that it is also compensable. It is impossible to say, however, what the Insurance Boards actually mean when stating that the damage is of a direct nature.²⁶³ Neither do the above-discussed decisions give any guidance as regards the criterion for drawing a borderline between compensable and non-compensable damage applied by the Insurance Boards to contract terms requiring factual causality.

²⁶⁰ See also SkVN 91/1973.

²⁶¹ See also ARN 91-5267; ARN 93-3235 and FSN no. 930 (described below).

²⁶² As regards the linguistic implications of the concept of direct and indirect loss, refer to sections 4.2.3.1 – 4.2.3.2.

²⁶³ Cf. ARN 85/R6550 (described below) in which the insurance board seems to give the concept 'direct' two different meanings.

A handful of decisions of the Insurance Boards suggest, however, that the scope of the insurer's liability in respect of causality has been restricted with the help of the adequacy doctrine.

In ARN 85/R6550 a caravan had been insured against damage through traffic accident. In a minor traffic accident a small grating placed above the air intake in the caravan fell off. It made it possible for mice to enter the caravan and destroy a number of seat-cushions. The insured's claim for recovery was rejected by the insurer who claimed that the damage was not caused by the traffic accident. According to the Insurance Board the contract term had to be interpreted in such a way that not only direct damage caused by the traffic accident was covered, but also such consequential damage that was directly and naturally related to the accident. The Board established that the objective of the grating was to prevent small animals from entering the caravan. The damage was therefore considered to have had such a direct relation to the traffic accident and the fact that the grating was not in its place that the insured was entitled to recover.

In AK 26.149 an insurance contract had been signed against damage by short-circuit. A thermostat in the insured's washing machine was damaged due to a short-circuit. The water in the washing machine boiled away, which damaged the laundry. According to the insurer the insurance contract did not cover this and similar types of short-circuit damage. In the view of the Insurance Board the damage constituted a close and natural consequence of the short-circuit, and the insured was entitled to recovery.

In FSN no. 285 an insurance contract had been signed against damage caused by burglary. After a burglary a number of windows and a door to the cellar were left open in the insured's house. This made that mice entered the house, causing damage to a number of insured objects. The insured's claim for recovery was rejected by the insurer who referred to the fact that the requirement of a likely causal connection between the burglary and the damage had not been satisfied. In the Insurance Board's view the causal connection between the burglary and the damage was not unlikely, and the insurer was held liable.

In FSN no. 930 an insurance contract had also been signed against damage caused by burglary. After a burglary into the insured's business premises a window was left open, which made that the cold caused damage to a number of insured objects. The insured's claim for recovery was rejected by the insurer with reference to the fact that the damage did not constitute a likely consequence of the burglary. In the Insurance Board's view the damage in question was directly caused by the burglary, and, additionally, it was a likely consequence of the latter. The insured was thus entitled to recover.

In some cases in which the covered event was followed by human action causing damage, the insurance institutions seem to have based their decision with regard to the question of loss recovery on the assessment of whether that action was normal or not.²⁶⁴

In SkVN 111/1986 a car had been insured against damage by exterior accident. When driving the car, the insured did not notice road works on the road in time, and thus drove into a hole and hit the chassis. He continued to drive unaware of

²⁶⁴ Cf. SkVN 64/1994; SkVN 132/1979 (discussed above) and FSN no. 328.

the fact that the chassis had been damaged and that oil was leaking out from the engine. After about one kilometre the motor broke down. The insured's claim for recovery was rejected by the insurer with reference to the fact that the damage had not been caused by any exterior type of accident (traffic accident). In the Insurance Board's opinion the damage to the engine had a close connection to the damage that caused the leakage. The Board further claimed that the insured's conduct, who continued to drive after the initial event, did not deviate from that of a normal driver. In this context the engine's break-down was regarded to have been caused by the traffic accident, and the insured was entitled to recover.

It is possible that the Insurance Board used elements of the adequacy doctrine to arrive at this decision. Since the insured's conduct was considered normal, the damage was regarded as adequate and therefore also compensable.²⁶⁵

To sum up, it can be said that the Insurance Boards do not interpret the liability-activating causation terms' requirements of factual causality strictly according to their wording. An enhanced requirement of causality is also present. As regards the required nature of the causal connection, a number of decisions show that a requirement of adequate causality has been applied. The remaining cases do not show anything in this respect. In none of the latter cases one can say, however, that the enhanced requirement of causality did not contain an adequacy requirement.

7.4 The Requirement of Direct Causality

Contract requirements of direct causality are unusual in Norway,²⁶⁶ so that only a handful of decisions issued by FSN concerning interpretation of such terms has been found. This is why the following sections discuss the interpretation of contract terms requiring a direct causal connection, issued, with a few exceptions, only by the Swedish and Danish Insurance Boards. The decisions seem to be lacking in consistency. This depends primarily on the fact that different variants of the presently discussed type of contract terms have been interpreted in different ways. Sometimes even the interpretation of similar terms has varied from case to case, however.

First, the interpretation of *terms which require explicitly direct causality between the covered event and damage* will be discussed. A number of decisions suggest more or less clearly that these terms have been the object of literal interpretation.²⁶⁷

This is especially clear in the case of ARN 88/R5209. A boat had been insured against damage on the sea arising directly from running aground. Having run aground, the insurer tried to back up the boat, when the engine bearer gave way

²⁶⁵ On the contrary, if the insured's conduct had been considered abnormal, the resulting damage would have been regarded as inadequate and consequently non-compensable. (cf. Hellner (1965) p. 104.)

²⁶⁶ See, Selmer (1982) p. 305.

²⁶⁷ See also, SkVN 21/1992; SkVN 28/1980; ARN 80/R6035. Cf. FSN no. 417; FSN no. 1631 and FSN no. 2547.

and the engine fell into the sea, getting damaged. The insured's claim for recovery in respect of the damaged engine was rejected by the insurer with reference to the fact that the direct cause of the damage was not running aground but backing. The Insurance Board pointed out that the insured stated himself that the damage occurred when he put the engine into reverse after running aground in order to get away from the shallows. Since the damage did not arise directly from running aground it was not covered by the insurance.

AK 26.865 concerned theft insurance which was limited to cover direct damage. The keys to the insured's home had been stolen. As a result of this, the insured changed the locks and demanded that the costs for this operation be refunded from the insurance. The insured's claim was rejected by the insurer with reference to the fact that the insurance contract covered direct damage only. According to the Insurance Board the change of locks constituted the kind of indirect consequence of the theft that was not covered by the insurance.

Other decisions show the reverse pattern, however. Despite the contract terms' requirements of direct causality the Insurance Board decided in these cases that the insurer was liable for indirect damage as well.

In AK 22.105 a building had been insured against direct loss by fire. As a result of a fire in the boiler room the insured had extra heating costs for which he claimed compensation from his insurance. His claim was rejected by the insurer with reference to the above-mentioned policy term. According to the Insurance Board the costs constituted consequential loss of the fire, and were thus covered by the insurance contract.

In ARN 78/R5300 a sailing boat had been insured against damage arising directly and immediately from strong wind (where the average wind force exceeded 14 meters per second). While sailing, the boat's mast hasp got damaged in a wind that could be considered as strong from the point of view of the insurance terms. Since the mast could be temporarily repaired, the crew continued sailing. A little later the mast broke down in a wind that could not be considered as strong from the point of view of the insurance terms. The insured's claim for recovery for the final breakdown of the mast was rejected by the insurer with reference to the fact that the accident had not been caused directly and immediately by the strong wind. According to the Insurance Board even the final breakdown of the mast constituted a direct and immediate consequence of the strong wind, since the primary damage, which was decisive for the ensuing course of events, was caused by it, and since the crew could not be regarded to have acted negligently after the primary damage.

In the cases related above the contract term requirements of direct causality have not received literal interpretation. The implications of the contract terms in question are not, however, completely clear. AK 22.105 gives no indication in this matter whatsoever. In ARN 78/R5300 it can be said that the argument concerning non-negligence may imply that the Insurance Board has formulated an adequacy requirement,²⁶⁸ but no definite conclusions can be drawn, however.

²⁶⁸ Cf. Hellner (1965) p. 104.

Contract terms which only *imply a requirement of direct causality between the covered event and damage* appear in a number of forms.²⁶⁹ An example of such terms will be those stipulating, for example, that *fire damage, short-circuit damage or burglary* are covered by the insurance. Decisions concerning interpretation of contract terms formulated in this way indicate, however, that such terms do not exclude indirect damage from the ambit of the insurer's liability.²⁷⁰

In AK 21.462 an insurance contract had been signed against short-circuit damage. Due to a short circuit the water in the insured's washing machine had cooked away, and the laundry had been damaged. The insured's claim for recovery was rejected by the insurer with reference to, among other conditions, the quoted contract term. According to the Insurance Board the damage to the laundry constituted a close and natural consequence of the short-circuit damage and was therefore covered by the insurance contract.

A similar type of terms cover, for example, *damage caused by escape of liquid*. According to the Insurance Boards these terms do not exclude either the possibility of compensation for indirect damage.²⁷¹

In SkVN 142/1985 the contract term in question stipulated that indemnity would be paid if the building which was the object of the insurance should be damaged by unforeseen escape of liquid. Escaping water damaged the gravel bed under the insured building, with the following settlement damage. The insured's claim for recovery for the latter damage was rejected by the insurer with reference to the fact that it was non-compensable consequential damage. According to the Insurance Board, however, even consequential damage had to be regarded as compensable under the contract term in question, which is why the insurer was obligated to compensate the insured for the damage in question.

Contract terms which make *explicit requirements of direct causality* have thus been interpreted in a number of decisions in accordance with their wording, making that indirect damage has fallen outside the scope of the insurance. On the other hand, a number of decisions may be found in which the result is just the opposite. In these cases the explicit requirement of direct causality did not stop the Insurance Board from recommending that the insurer should pay compensation even for indirect damage. When contract terms formulate the requirement of direct causality in less clear terms, the decisions of the Insurance Boards are more clear-cut. Such terms are not generally considered to exclude indirect damage from the scope of the insurer's liability. Not only direct but also indirect damage is thus considered as compensable.

To sum up, it can be said that the Insurance Boards do not always strictly observe the requirement of a direct causal connection, stipulated by the insurance contract terms. In a small number of cases the Insurance Boards seem to have

²⁶⁹ As regards such terms, see section 4.2.2.

²⁷⁰ See also AK 20.916 and AK 27.761.

²⁷¹ See also ARN 84/R7560 and ARN 91-5537.

formulated an adequacy requirement.²⁷² Naturally, this requirement could have been formulated *instead of* the contract terms' requirement of direct causality. There is another possibility, however, and that is that the Insurance Boards applied the argument of adequacy as the last resort when it was impossible to decide whether the damage was a direct consequence of the covered event or not. The Insurance Board's statement in AK 21.462 that the damage constituted, partly, a close consequence, and, partly, a natural consequence of the covered event, may be said to suggest such an application.²⁷³ If this is correct, it may give a reasonable explanation of why in some cases the Insurance Boards applied the requirements of direct causality stipulated by the contract terms according to their wording, whereas in other cases they were of the opinion that what is here considered to be indirect damage should also fall within the framework of insurance cover. It cannot be stated with any degree of certainty, however, that the doctrine of adequacy has been applied in the cases discussed here in this way.

The remaining cases do not reveal much about the causal requirement established by the Insurance Boards. It cannot be excluded, however, that the doctrine of adequacy has been applied even in these cases.

7.5 *The Doctrine of Adequacy*

7.5.1 Content

The practice of the Insurance Boards shows that the liability-activating causation terms are considered frequently enough to imply that adequate consequences of the covered event are embraced by the insurance coverage, whereas non-adequate consequences are not.²⁷⁴ As regards the meaning of the adequacy requirement, similarly to the courts, the Boards tend to set a requirement of likelihood²⁷⁵ or similar.²⁷⁶ In a few cases it seems, however, that the relevant Insurance Board appeared also to require that the damage be a close consequence of the covered event.²⁷⁷

²⁷² See especially AK 21.462; possibly also ARN 78/R5300. Cf. FSN no. 216 (which case, however, is not quite comparable since in contrast to the remaining cases, it concerns the interpretation of an exception).

²⁷³ This is, however, undermined by case AK 26.149 (see section 7.3) concerning the interpretation of a contract term requiring factual causality, in which the insurance board used the equivalent way of expression.

²⁷⁴ See, ARN 78/R5300 (one should be careful, however, as to the conclusions that can be drawn from this decision); ARN 85/R6550; AK 21.462; AK 26.149; FSN no. 285 and FSN no. 930.

²⁷⁵ See, FSN no. 285 and FSN no. 930.

²⁷⁶ In ARN 85/R6550, AK 21.462 and AK 26.149 the fact that the damage constituted a natural consequence of the event covered by the insurance seems to have been of essential importance for the decision to grant the insured's claim. That it should be able to equate such a requirement with the requirement of likelihood has been shown in section 2.2.2.2.

²⁷⁷ See, AK 21.462 and AK 26.149. In the former case this requirement may equally seem to be the reflection of the contract terms' requirement of causality of a direct nature. Refer

7.5.2 Determination of Adequacy

As regards the Insurance Boards' determination of adequacy, one or two cases can be said to suggest that the necessary requirement of likelihood or similar appears to be applied in a relatively liberal way.²⁷⁸ In general, the decisions in question, whose grounds are not seldom inadequate, cannot constitute the basis of any conclusions whatsoever in this matter.

8 Doctrine

8.1 *The Principles of Interpretation*

The doctrine contains a number of pronouncements concerning the scope of the insurer's liability as a function of causality. This issue is frequently treated, however, not from the basis adopted in the present work in which it is the question of interpretation of a number of commonly used contract terms. Instead, the majority of authors, as well as the legislator, discuss the scope of the insurer's liability as a function of causality adopting only a weak, if any, connection to the regulatory framework of the insurance contract. What the presentations of the different authors revolve around is therefore not the interpretation of the liability-activating causation terms, but rather the nature of the causal relation between the covered event and damage which is required under *optional law* for the insurer to be liable. The issue is thus about different interpretation rules concerning the requisite nature of causation between the covered event and damage.²⁷⁹

further to section 7.4.

²⁷⁸ See, for example, ARN 85/R6550.

²⁷⁹ See, Federspiel (1901) p. 155; Stang (1919) p. 89; Sindballe (1921) p. 73; Bentzon (1931) p. 301; Grundt (1950) p. 84; Hult (1936) p. 138; Schmidt (1943) p. 201; Rein (1946) p. 16; Tybjerg (1952) p. 84; Persson (1953) p. 53; Hellner (1965) p. 101; Jørgensen, Lyngsø & Thranow (1965) p. 55; Arntzen (1974) p. 287; Steen-Olsen (1977) p. 240 and 255 and Gawinetski & Jønsson (1988) p. 34 and (1993) p. 54. All these authors make it reasonably clear that the recommended rules constitute interpretation rules. Other authors only suggest it, by discussing, for example, the possibility of special insurance for indirect damage or similar. See, Bache (1905) p. 75 f; Bentzon & Christensen (1954) p. 364; Holmgren & Lindbohm (1939) p. 45 f; Lyngsø (1994) p. 190; Selmer (1982) p. 308; Sørensen (1997) p. 117 and Zetterman (1990) p. 19. Some authors display such a weak connection to the insurance contract and its regulatory framework that it is questionable whether the postulated requirement of connection between the covered event and damage is intended to be applicable independently of the contract terms (see, Øvergaard (1938b) p. 182 ff; Ussing (1946a) p. 229 and Vinding Kruse (1951) p. 409 and (1963) p. 36 f). Considering the overall regulatory framework of insurance contract law it appears improbable, however, that such mandatory connection requirement could be meant by anyone.

8.2 *Scope*

For an interpretation rule to be of any value it is necessary to possess knowledge about the situations in which it is applicable. In the present context the question concerns the following: what types of causation terms are applicable with regard to the suggested interpretation rules? Or, conversely, how shall a causation term be formulated in order to avoid the application of the suggested interpretation rules? Since the majority of authors discuss the current issue without any closer connection to the insurance contract, these questions are only scantily addressed, and sometimes they are not raised at all. Some authors refer to terms requiring factual causality, and other authors to those requiring direct causality as sufficiently unclear to justify the application of the interpretation rules in question.²⁸⁰ The latter probably think that the interpretation rules in question are also applicable to contract terms requiring factual causality, since these requirements show even less clearly than requirements of direct causality what is necessary in terms of causation for damage to fall within the scope of the insurer's liability. If this is correct, then it can be said that neither contract terms requiring factual causality nor those requiring direct causality are able to displace the different interpretation rules that have been suggested in the doctrine.

8.3 *Content*

8.3.1 **General Remarks**

The interpretation rules proposed in the course of this century aiming at restricting the insurer's liability as a function of causality have all focused on the causal relation between the covered event and damage, where different requirements of causality have been formulated as a prerequisite for loss recovery. The following sections discuss the implications of these different requirements which often find reflection in the claims of the different authors stating that the scope of the insurer's liability should be limited with the aid of some special causal rule.

8.3.2 **Different Rules Preceding the Doctrine of Adequacy**

Already at the beginning of the century Bache maintained that the insurer's liability should be restricted to direct loss.²⁸¹ It seems, however, that among the later authors only Holmgren and Lindbohm²⁸² have accepted this rule, which is why it should be possible to exclude it from the following discussion as obsolete.

²⁸⁰ See, Federspiel (1901) p. 159; Bache (1905) p. 91; Tybjerg (1952) p. 87; Arntzen (1974) p. 294; Gawinetski & Jønsson (1993) p. 55 and 58 and Vegner (1997) p. 115 f, as regards contract terms requiring factual causality; Grundt (1939) p. 98; Schmidt (1943) p. 214; Rein (1946) p. 17; Persson (1953) p. 54; Hellner (1965) p. 75 and 105; Lyngsø (1994) p. 190 f; Selmer (1982) p. 306; Gawinetski & Jønsson (1988) p. 34 and Sørensen (1997) p. 117 as regards contract terms requiring direct causality.

²⁸¹ See Bache (1905) p. 71 f.

²⁸² See, Holmgren & Lindbohm (1939) p. 45 f.

Hult suggested with a certain degree of caution that an insurance contract should cover direct loss as well as such indirect loss which constituted an inevitable consequence of the covered event.²⁸³ This limitation rule was regarded as unclear²⁸⁴ and was not supported by any other author later on. It should thus be possible to dismiss even this rule from any further discussion in the present work. This point of view may be based, however, on a misunderstanding. What Hult proposes is a rule which is equivalent to § 83 of VVG. In Germany this rule is considered to give an expression to the requirement of adequacy.²⁸⁵ Even though it cannot be explicitly demonstrated, it appears that in these circumstances the rule proposed by Hult may in reality be an adequacy rule.

According to Schmidt, when nothing else has been agreed upon, an insurance contract should cover all loss which, in the view of an ordinary person, can be naturally explained by the emergency situation in which the insured has found himself as a result of the covered event.²⁸⁶ This proposal met with a kindly reception.²⁸⁷ In this context it is somewhat surprising that other authors have not given their full support to the interpretation rule proposed by Schmidt. Despite this, Schmidt's influence on the development of the law within the area in question cannot be said to have been negligible. This matter will be discussed again in section 8.3.3.3.

The causation rule proposed by Tybjerg,²⁸⁸ which bears a similarity to the English *causa proxima* doctrine,²⁸⁹ has not been accepted by the later authors. Similarly to the rule proposed by Bache it should be possible to dismiss this rule as obsolete.

8.3.3 The Doctrine of Adequacy

The majority of authors establish what can be considered as an adequacy requirement in order to distinguish between loss which is embraced by the insurer's liability and loss which falls outside.²⁹⁰ According to some of these authors, however, the requirement of adequacy is applicable only with regard to indirect loss.²⁹¹ It is difficult to find any reasons why the doctrine of adequacy

283 See, Hult (1936) p. 138.

284 See, Schmidt (1943) p. 218.

285 See, Aspelin (1997) p. 16.

286 See, Schmidt (1943) p. 219.

287 See, Hult (1944) p. 897 and Ussing, (1944) p. 141.

288 See, Tybjerg (1952) p. 87 f.

289 Regarding the latter, refer to section 10.4.2.

290 These authors include: Federspiel (1901) p. 158; Stang (1919) p. 89; Bentzon & Christensen (1954) p. 364; Øvergaard (1938b) p. 182; Grundt (1950) p. 83 f; Ussing (1946a) p. 229; Rein (1946) p. 17 f; Persson (1953) p. 54; Vinding Kruse (1951) p. 409 and (1963) p. 37; Hellner (1965) p. 103 f; Lyngsø (1994) p. 191; Arntzen (1974) p. 293 f; Selmer (1982) p. 306 ff; Steen-Olsen (1977) p. 251 f; Gawinetski & Jønsson (1993) p. 58 and (1988) p. 34; Zetterman (1990) p. 19; Sørensen (1997) p. 117 f and (1990) p. 121 f.

291 See, Øvergaard (1938) p. 182; Rein (1946) p. 17; Persson (1953) p. 49 f; Vinding Kruse (1963) p. 36 and Steen-Olsen (1977) p. 251. Schmidt, who dismisses the doctrine of adequacy in the present context, understands it also in this way (see his work (1943) p. 209 f).

should apply in certain cases only. This position can be therefore criticised from the theoretical point of view. In practice it should not matter, however, whether the requirement of adequacy should apply to direct loss as well, since direct but at the same time inadequate loss occurs extremely rarely, if at all.

8.3.3.1 Content

As regards the content of the doctrine of adequacy there is some disagreement. The majority of authors would like to see, however, the requirement of likelihood²⁹² or similar²⁹³ as part of the concept of adequacy. Others would prefer to set the requirement of an increase in probability or risk.²⁹⁴ The requirement that the damage should flow from the dangerous features of the act also appears,²⁹⁵ as well as a wish to apply a test of reasonableness in which a number of circumstances could be considered.²⁹⁶

8.3.3.2 The Reasons for the Application of the Adequacy Doctrine

The reasons for the application of the adequacy doctrine in the present context have not been much discussed. Many authors do not even mention this issue. Some authors regard the adequacy doctrine's application to be justified by actuarial reasons, i.e. the insurer's absolute necessity to be able to calculate premiums equivalent to the risks written.²⁹⁷

8.3.3.3 Determination of Adequacy

It has been shown that the result of adequacy determination depends primarily on four factors, namely, the identity of the evaluator, the point in time for adequacy determination, the description of the course of events on which adequacy determination focuses, and the level of the adequacy requirement.²⁹⁸ In the insurance law literature the first three factors have been hardly the object of atten-

See also SOU 1989:88 p. 330 which shows that even the Swedish Insurance Law Committee perceives the doctrine of adequacy as applicable only with relation to indirect loss (refer to section 5.2 about this issue).

²⁹² See Bentzon & Christensen (1954) p. 364; Ussing (1946a) p. 229; Rein (1946) p. 18; Jørgensen, Lyngsø & Thranow (1965) p. 55; Arntzen (1974) p. 293 f and Sørensen (1997) p. 118.

²⁹³ See Federspiel (1901) p. 158; Persson (1953) p. 45; Lyngsø (1994) p. 191; Gawinetski & Jønsson (1993) p. 58, and (1998) p. 34 and Sørensen (1997) p. 117 f. All of these authors talk about predictable, normal, natural or typical consequences of the covered event. See also Zetterman (1990) p. 19, where the author regards those losses as adequate which could have been reasonably foreseen.

²⁹⁴ See, Vinding Kruse (1963) p. 37 and Hellner (1965) p. 103.

²⁹⁵ See, Hellner (1965) p. 103.

²⁹⁶ See, Steen-Olsen (1977) p. 255.

²⁹⁷ See especially, Grundt (1950) p. 83. The quoted argument is also suggested by Øvergaard (1938b) p. 183 f; Persson (1953) p. 53 and Hellner (1965) p. 102.

²⁹⁸ See especially sections 2.2.2.4.1 – 2.2.2.4.4.

tion. An exception is Rein's presentation in which the insurer is liable for those consequences of accidents that are *objectively* likely from the medical point of view.²⁹⁹ It appears here that adequacy determination is objective when the evaluator is a hypothetical person with a certain amount of medical knowledge. Also Zetterman³⁰⁰ and Bentzon³⁰¹ suggest that adequacy determination constitutes an objective assessment. The latter claims further, similarly to Steen-Olsen, that the relevant point in time for the determination of adequacy is the time of the conclusion of the contract.³⁰² These two qualifications have been left out for some reason in Bentzon & Christensen. Vinding Kruse has further suggested that determination of adequacy shall be limited in the present context to refer to questions of whether or not the incurred type of damage has increased from the general point of view as a result of the covered event.³⁰³ The question of whether the damage has been incurred in a surprising manner in a given case lacks therefore importance. Vinding Kruse seems to argue that the damage and the circumstances surrounding it (which constitute together with the covered event the course of events on which adequacy determination focuses) shall be given a moderately summary description.

The discussion of adequacy in insurance law has focused to a much higher degree on the level of the adequacy requirement. Those authors who argued early on for the application of the doctrine of adequacy in the present context did not devote, however, much attention to this issue either.³⁰⁴ This should be probably taken as pretext for the view held by these authors that the doctrine of adequacy was supposed to be applied as strictly as it was applied in the law of damages whence from it had been taken. With time, the different authors' requirements of adequacy became more and more weakened. It all started already in the 1930s,³⁰⁵ probably as a result of the more insurance-friendly spirit that followed FAL, DFAL, and NFAL (1930). Tendencies towards increasingly weaker adequacy requirements became really conspicuous, however, only after Schmidt presented his views on insurance and adequacy in 1943. He held that the basic idea of insurance was that unpredictable damage should be compensated for, and that the doctrine of adequacy which implied that unpredictable damage should be excluded from the insurance cover was in conflict with that idea. This is why in Schmidt's opinion the doctrine of adequacy should not be applicable in the context of insurance.³⁰⁶

As mentioned earlier, Schmidt's contribution met with a kindly reception.³⁰⁷ Nevertheless, other authors seem to have been unwilling to give their full sup-

²⁹⁹ See, Rein (1946) p. 18.

³⁰⁰ See, Zetterman (1990) p. 19.

³⁰¹ See, Bentzon (1931) p. 301.

³⁰² See, Bentzon (1931) p. 301 and Steen-Olsen (1977) p. 266 footnote 89.

³⁰³ See, Vinding Kruse (1963) p. 37. Cf. Hellner (1965) p. 103.

³⁰⁴ See, Federspiel (1901) p. 158; Stang (1919) p. 89 and Ussing (1940) p. 215.

³⁰⁵ See, Øvergaard (1938b) p. 183 f and Grundt (1939) p. 94.

³⁰⁶ See, Schmidt (1943) p. 215 f.

³⁰⁷ See section 8.3.2.

port to the critique expressed by Schmidt. It is this criticism of the adequacy doctrine which has nonetheless exercised influence on the later authors, who advocate relatively liberal requirements of adequacy with regard to insurance law. Ussing suggests that only remote and totally unexpected consequences of the covered event shall fall outside the insurer's liability.³⁰⁸ According to Rein the traditional doctrine of adequacy can sometimes lead to too severe limitations on the insurance coverage.³⁰⁹ Persson refers to Ussing, suggesting that the doctrine of adequacy shall not necessarily be applied in the same way in insurance law as in the law of damages.³¹⁰ Hellner proposes that the main rule should be that an insurance contract should cover even damage that has a more remote relation to the covered event. He also points out that the requirements of the above-mentioned relation should not be equally comprehensive as in the law of damages.³¹¹ All these pronouncements were made before the beginning of the 1970s. After that matters seem to have progressed even further. Selmer propounds a limitation rule in which basically all consequences of the covered event shall be embraced by the insurance coverage.³¹² If this rule contains any requirement of adequacy at all, it is in a much weakened form. In Lyngsø's view such an extraordinarily weakened requirement of adequacy constitutes the law in force in Denmark.³¹³ In Sweden Zetterman proposes that the adequacy requirement in insurance law should not be particularly strict.³¹⁴

The reasons for this development progressing in the direction of an increasingly more liberal adequacy requirement are very skimpily discussed by the different authors. It has been possible, nevertheless, to identify five different arguments supporting the above. *First of all*, that the statistics underlying the insurers' calculations of premiums include also relatively odd and peculiar chains of events.³¹⁵ *Secondly*, that strict application of the adequacy doctrine causes uncertainty as regards the scope of the insurance cover.³¹⁶ *Thirdly*, that since the idea of the insurance business is loss compensation, strict application of the adequacy doctrine would be in stark contrast to this idea.³¹⁷ *In the fourth place*, that the costs entailed by a particularly low level of adequacy requirement would be so low that the insurers would be quite able to meet them.³¹⁸ *In the fifth place*, that insurers who so wish may protect themselves in the insurance policy against the consequences of a liberal requirement of adequacy.³¹⁹

308 See, Ussing (1946a) p. 229.

309 See, Rein (1946) p. 17 f.

310 See, Persson (1953) p. 55 footnote 59.

311 See, Hellner (1965) p. 103 f.

312 See, Selmer (1982) p. 308.

313 See, Lyngsø (1994) p. 191.

314 See, Zetterman (1990) p. 19.

315 See, Øvergaard (1938b) p. 183 f.

316 See, Selmer (1982) p. 307.

317 See, Zetterman (1990) p. 19.

318 See, Hellner (1965) p. 103.

319 See, Hellner (1965) p. 102 f; Selmer (1982) p. 307 and Zetterman (1990) p. 19.

8.3.4 The Doctrine of Primary Cause

In addition to the doctrine of adequacy many authors discuss the so called doctrine of primary cause. The great majority of these authors make it clear that the doctrine is applicable only to the interpretation of liability-exempting causation terms, which is why it has no significance in the present context.³²⁰ There are some authors, however, who cannot be said to agree that the application area of the doctrine of primary cause should be limited in this way.³²¹ For this reason one cannot eliminate the possibility that even when interpreting liability-activating causation terms, these authors would also like to set, in addition to the requirement of adequacy, a requirement stating that the covered event must constitute the primary cause of the loss.³²² In such a case this would clearly mean a further limitation of the insurer's liability.³²³ Since the presently discussed view is expressed by way of vague suggestions only by a small number of authors, and since it contradicts the prevailing view of the doctrine, as well as, since it has no support in judicial practice,³²⁴ it should be possible to banish it from further discussion in the present work.

9 Summing-up and Conclusions

9.1 Introduction

The present study concerns the scope of the insurer's liability as a function of causality in property insurance. Its point of departure consists in contract terms which are the primary regulatory instrument of this issue. It thus concerns the question of the formulation and interpretation of liability-activating causation terms. The question of the scope of the insurer's liability as a function of causality has been the object of discussion in the legislative work in the field of insurance contract, in judicial practice and insurance board decisions, as well as the

³²⁰ Some authors express this explicitly; see, for example, Vinding Kruse (1963) p. 38; Sørensen (1990) p. 108 and (in addition to the work presented in this chapter) Bull (1980) p. 77 ff. With regard to other authors this can be seen from the fact that the doctrine of primary cause is discussed only in connection with the question of interpretation of liability-exempting causation terms. See, for example, Schmidt (1943) p. 223 ff; Ussing (1946a) p. 227 ff; Rein (1946) p. 19 ff; Grundt (1950) p. 90 ff and Selmer (1982) p. 289 ff (all of them with reference to practice concerning interpretation of liability-exempting causation terms).

³²¹ See, Hellner (1965) p. 105; Lyngsø (1994) p. 187 f; Steen-Olsen (1977) p. 261; Zetterman (1990) p. 19 and possibly also Venger (1997) p. 112 ff.

³²² As regards some of the authors in question, it could very well be so that they were really concerned only about the interpretation of liability-exempting clauses when discussing the doctrine of primary cause, but did not manage to demonstrate the right way it in their presentations.

³²³ The importance of this should not be exaggerated, however, If the covered event has caused loss in an adequate way, it should also constitute the primary cause of the loss in the majority of cases.

³²⁴ Refer in this regard to chapter 6 (Judicial Practice) and chapter 7 (Insurance board decisions).

literature (doctrine). Neither in the legislative work or the literature the point of departure was, however, the existing contractual regulation, but instead the assumption that such regulation was absent. This is why in the material mentioned above the primary question of this work concerning the interpretation of the liability-activating causation terms has been seldom given a clear answer.

In these circumstances the present investigation has not been given a problem-oriented structure. It has been considered instead as more correct to start by demonstrating what each respective legal source has to say about the overall issue of the scope of the insurer's liability as a function of causality from its own vantage point, and in this connection, and to the degree when this was not immediately evident, try to establish how this influences the interpretation of the liability-activating causation terms. After the introductory presentation of the liability-activating causation terms (Chapter 4), the legislative work has been presented and analysed (Chapter 5), followed by judicial practice (Chapter 6), insurance board practice (Chapter 7) and the literature (Chapter 8). In the present chapter the whole material which has been so far examined forms the basis of a problem-oriented synthesis whose object is to establish applicable law³²⁵ with regard to the issue of interpretation of the liability-activating causation terms.

9.2 *The Liability-activating Causation Terms*

The liability-activating causation terms can be divided into two categories: (a) terms which express only a requirement of factual causality; (b) terms that set a requirement of direct causality. Terms belonging to the latter category can be divided in turn into terms that express explicitly the aforementioned requirement of direct causality, and terms that only suggest it.³²⁶

9.3 *Interpretation*

9.3.1 *The Requirement of Factual Causality*

Under Swedish and Norwegian case law contract term requirements of factual causality cannot be the object of literal interpretation. Despite the wording of the terms, there is an enhanced requirement of causality.³²⁷ The Danish courts' interpretation of the contract terms in question cannot be said, however, to give proper support to any other view than that a factual causal connection between covered event and damage is required for the latter to be covered by the insur-

³²⁵ Rodhe (1996) p. 1 is critical of this concept since it is not sufficiently clear whether it concerns (a) a description of facts; (b) a prediction of the courts' decisions or (c) a recommendation for the courts as to how they should decide. In order to avoid any misunderstandings it should be therefore pointed out that what is presented in the present chapter constitutes a compilation of the facts presented in chapters 4 - 8, and a prediction based on these facts as to how the courts can be expected to judge in the present context.

³²⁶ With regard to the formulation of the terms in question, refer to sections 4.2.1 – 4.2.2.

³²⁷ See section 6.2.

ance. Danish court cases cannot, however, be said to rule out an enhanced requirement of causality.³²⁸

Insurance board decisions in Sweden, Denmark, and Norway support the view that contract terms requiring factual causality are not to be interpreted literally. For compensation to be considered it is thus not sufficient that the covered event has caused the damage. An enhanced causal connection is required.³²⁹

The question concerning interpretation of terms requiring factual causality has been addressed by a handful of writers only. These writers seem to concur, however, that the terms in question cannot be the object of literal interpretation. A lot points towards this view being shared by the other writers in the currently discussed field.³³⁰

At least with regard to Swedish and Norwegian law it seems reasonable to conclude on the basis of the quoted facts that contract terms requiring factual causality are not objects of literal interpretation. In spite of the wording of the terms, there is a requirement of enhanced causality between the covered event and damage. This conclusion appears to apply also to Danish law, for which reservation is, however, warranted, since such interpretation still lacks explicit support in the courts.

This conclusion indicates that the term requirements of factual causality can hardly prevent application of optional legislative provisions concerning the right of the insured to compensation for special kinds of indirect damage. Under §§ 61 and 62, as well as § 82 (point one) of FAL and DFAL, the insurer is responsible as soon as damage of the kind that the law in question refers to is caused by the covered event.³³¹ Paradoxically, this is so despite the fact that, as pointed out earlier, the terms in question are considered to be unable to function as the object of literal interpretation.

In the remaining cases there arises a question concerning the specific character of the required causal relation. In this context § 82 (second and third point) of FAL and DFAL is important in the sense that if damage arises as a result of fire-related rescue measures, the requirement of the causal relation does not apply to the relationship between covered event and damage, but between damage and rescue measures discussed in the statute.³³² It is obvious that this increases the possibilities of the causal relation being regarded as having the requisite nature. As regards the specific character of the required causal relation no guidance is given by the statute in question, however.

As regards the latter issue fire insurance policies seem to occupy a unique position. According to the explanatory statement to § 79 of DFAL the boundary between compensable and non-compensable fire damage shall be determined by the doctrine of adequacy.³³³ The requisite nature of the causal relation in a fire insurance would thus consist of the requirement of adequacy. More generally, it

328 See section 6.2.

329 See section 7.3.

330 See section 8.2.

331 See section 5.3.

332 See section 5.3.

333 See section 5.3.

is stated in the proposal for SkFL that the requirement of adequacy is the criterion by which compensable damage shall be distinguished from non-compensable damage.³³⁴

This view also finds support in Norwegian court cases. Possibly, one Swedish decision may also be said to lend support to this standpoint.³³⁵ Danish court cases, on the other hand, cannot be said to support the view that the contract terms in question should be interpreted as containing an adequacy requirement. On the other hand, Danish judicial practice does not suggest any alternative interpretation either.³³⁶ It cannot therefore be ruled out that even the Danish courts tended to interpret contract terms requiring factual causality as if an adequacy requirement had been implied. The Danish doctrine seems to rest on the premise that such is the case.

The required nature of causation appears only seldom in the decisions of the insurance boards. A number of cases in Sweden, Norway as well as Denmark suggest, however, that the different boards have also interpreted the requirement of factual causality as entailing an adequacy requirement.³³⁷ Similarly, according to the prevailing view in the literature, contract terms requiring factual causality are taken to imply a requirement of adequacy.³³⁸

In summary, it appears that policy terms requiring factual causality are considered not only to require causality between covered event and damage but also *adequate* causality.³³⁹ With regard to Danish, and to some extent even Swedish law, certain reservations should be made, however, since the cited conclusion has not yet been expressly established by the courts.

9.3.2 The Requirement of Direct Causality

Swedish, Danish and Norwegian court cases interpret contract term requirements of direct causality broadly. Direct but also indirect damage has been deemed to fall within the scope of the insurance protection.³⁴⁰ Literal interpretation has not thus been applied.

Insurance board decisions give us a more fragmented picture as regards interpretation of the terms in questions. In a number of cases, as in judicial case law, the policy requirements of direct causality have been deemed to cover even indirect damage. In other cases, however, the policy requirements of direct causality seem to have been interpreted literally, thus excluding indirect damage from the insurance coverage.³⁴¹

334 See section 5.2.

335 See section 6.2.

336 See section 6.2.

337 See section 7.3.

338 See section 8.3.3.

339 As regards the meaning and application of the above, see section 9.4.

340 See section 6.3.

341 See section 7.4.

Many authors declare with different degrees of precision that they do not accept a literal interpretation of the term requirements of direct causality.³⁴²

In summary, there seems to exist rather strong support for the view that term requirements of direct causality are not to be objects of literal interpretation. Although the policy terms stipulate direct causality, this sometimes covers compensation for indirect damage. This conclusion cannot reasonably be altered by a handful of board decisions that have ruled the opposite.

Contract terms requiring direct causality should therefore not be able to prevent application of the optional provisions of the different statutes concerning the insured's right to compensation for special types of indirect damage. Even when the scope of the insurer's risk is limited in this way, §§ 61 and 64 as well as § 82 (first point) of FAL and DFAL entail that the insurer becomes liable as soon as any damage of the kind referred to by the law in question has been caused by the covered event.³⁴³

Similarly to the interpretation of contract term requirements of factual causality, in the remaining cases there arises a question of the required nature of causation. Even in this context § 82 of FAL and DFAL (second and third point) becomes important in the sense that if there is damage arising from fire-related rescue measures, the requirement concerning the nature of cause will not have to do with the connection between the covered event and damage, but between the rescue measures and the damage.³⁴⁴ As regards the required nature of causation in the latter case the statute in question gives no indication, however.

As regards the latter issue, fire insurance policies once again enjoy a special position, since according to the explanatory statement to §79 DFAL only adequate consequences of damage by fire fall within the scope of the insurer's liability.³⁴⁵ More generally, it is stated, as mentioned earlier, in the proposal to SkFL that the requirement of adequacy is the criterion by which compensable damage shall be distinguished from non-compensable damage.³⁴⁶

This view finds support in Danish, and to some extent, also Norwegian court cases.³⁴⁷ Swedish case law is more difficult to interpret. It can neither be said to support a requirement of adequacy, nor to rule out that such a requirement does in fact exist.³⁴⁸

Nor do the insurance board decisions give a clear-cut answer to the question of the interpretation of contract term requirements of direct causality. A handful of Swedish and Danish decisions indicate that these have been interpreted as

³⁴² See section 8.2.

³⁴³ See section 5.3.

³⁴⁴ See section 5.3.

³⁴⁵ See section 5.3.

³⁴⁶ See section 5.2.

³⁴⁷ See section 6.3.

³⁴⁸ See section 6.3.

entailing a requirement of adequacy.³⁴⁹ Norwegian insurance board decisions on the subject are rare and cannot therefore form the basis of any conclusions.³⁵⁰

Authors commonly consider that policy term requirements of direct causality should be interpreted as requiring adequacy.³⁵¹

In summary, there appears to be rather strong support for the conclusion that policy term requirements of direct causality entail a requirement of adequacy. For Sweden's, and to some extent, Norway's part a certain reservation is warranted, since the foregoing conclusion has not yet been confirmed by the courts.

9.4 *The Doctrine of Adequacy*

9.4.1 Content

Much indicates that the liability-activating causation terms' requirement of factual and direct causality entails a requirement of adequacy. There seems to be a broad base of agreement as to the content of the adequacy doctrine. Adequacy cases decided by the courts have established a requirement of likelihood or the like.³⁵² The same view is followed, with a few exceptions, in insurance board decisions,³⁵³ statements in the literature³⁵⁴ and legislative proposals.³⁵⁵

9.4.2 Determination of Adequacy

A party desiring to know whether or not any particular loss is covered by certain insurance needs, besides knowledge of the adequacy requirement's content, to know how the adequacy doctrine is applied. Who is to determine the presence of adequacy? At what point in time is the determination to be made? How specifically should the underlying course of events be described? These issues have been little discussed in the insurance contract law preparatory materials or the literature. Judicial practice and insurance board decisions does not provide any indication either of how the courts and insurance boards have reasoned about this issue.

In addition, knowledge of the required degree of likelihood (or the like) that is necessary in order to consider damage as adequate is needed. The question can also apply to the level of the adequacy requirement. In contrast to the recent issue, this question has been extensively discussed, especially in the literature, but also in the Swedish legislative proposal to SkFL. According to the latter, the doctrine of adequacy is to be applied against the background of the policy, including the nature of the insurance and the insurance terms. This appears to open the door to a particularly low level of adequacy requirement in certain contexts.

³⁴⁹ See section 7.4.

³⁵⁰ See section 7.4.

³⁵¹ See section 8.3.3.

³⁵² See section 6.4.1.

³⁵³ See section 7.5.1.

³⁵⁴ See section 8.3.3.1.

³⁵⁵ See section 5.2.

Also to be considered in determining adequacy is that the insurer has the option of limiting the scope of the insurance in the policy itself. No doubt, this also suggests that the adequacy requirement should not be made too stringent. On the other hand, it is also stated that the insurer's possibilities of calculating insurance premiums corresponding to assumed risks should be considered when determining adequacy. This statement suggests that it is unlikely that the adequacy requirement becomes overly diluted.³⁵⁶

Both judicial case law³⁵⁷ and insurance board decisions³⁵⁸ indicate that the adequacy requirement is not a stringent one. In many cases somewhat unexpected damage has been deemed to fall within the scope of insurance protection. In the literature a development can be discerned towards less stringent requirement of adequacy. This development is perhaps due to, in a large degree, the dichotomy between insurance (which seeks to compensate unexpected damage) on the one hand, and the adequacy doctrine's requirement of likelihood, on the other, which has been the basis of some criticism of the adequacy doctrine's application in insurance law. This development is also very much in line with the increasing social and policy-holder orientation of insurance law doctrine in recent decades. Since the middle of the 1970s the proposed adequacy doctrine differs only slightly from a requirement of factual causality alone.³⁵⁹

In summary, the insurance law adequacy requirement of likelihood or the like appears rather liberal. There is, however, no definite support for the proposal that the requirement of adequacy has in reality become so attenuated that it effectively amounts to a requirement of factual causation alone. At the same time, however, the level of this requirement cannot, any more than its tort law counterpart, be framed generally, without its becoming overly vague. It follows from this that the stringency of the requirement will vary from case to case. What is more, courts and insurance boards can allow the stringency of the requirement to depend on the circumstances of the individual case, such as the type of insurance in question or the wording of the causation terms. To what extent, if any, this actually occurs, is, however, uncertain.

10 England

10.1 Introduction

In order to put the status of the law in Sweden, Denmark and Norway into perspective the present chapter discusses the formulation and interpretation of the liability-activating causation terms in a non-Scandinavian country, England. The presentation is short and has been based mainly on the existing doctrine. Case law is presented for the purposes of illustration.

356 See section 5.2.

357 See section 6.4.2.4.

358 See section 7.5.2.

359 See section 8.3.3.3.

10.2 Contractual Regulation³⁶⁰

The English liability-activating causation terms in the property insurance contracts can also be quite easily divided into a number of different categories. Similarly to the Scandinavian countries, contract term requirements of factual and direct causality are common even there. Under the foregoing, compensation is paid for *loss caused by, arising from, originating from, resulting from, in consequence of or due to* the covered event (for example fire). Under the latter, the insurance contract covers *loss caused directly by or immediately by* the quoted event. In addition, yet another type of causation terms appears, which is different from the terms commonly used in the Scandinavian context. Under these terms the insurer is responsible when the covered event (for example fire) constitutes *the dominant cause or the effective cause of the loss*. It is thus obvious that these terms establish a requirement of enhanced causality. For compensation to apply it is required that the covered event shall be the most important cause of the loss.

10.3 Legislation

Legislation is not an important legal source in the field of insurance law.³⁶¹ An exception is the field of marine insurance, which was codified already back in 1906 in the Marine Insurance Act (MIA).

MIA contains no rules which focus on the interpretation of the above-illustrated causation terms. On the other hand, section 55 (1) of MIA contains a provision concerning the scope of the insurer's liability as a function of causality. The statute, which most definitely influences the interpretation of the liability-activating causation terms, has the following wording:

"Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against."

This rule illustrates the so called *causa proxima* doctrine, or the doctrine of proximate cause.³⁶² The damage is thus compensated for from the insurance only if the covered event constitutes its closest, or proximate, cause. What the doctrine of proximate cause really means is not transparent however, and there are no explanatory statements that would elucidate its meaning. This is why we must search for its content in the literature and judicial practice.³⁶³

³⁶⁰ The presentation in this section is based on a collection of a number of English insurance policy terms.

³⁶¹ English insurance law is made up instead of a patchwork of different rules that are manifested first of all in judicial case law (cf. Fontaine (ed.) (1990) p. 83.)

³⁶² See Schmidt (1943) p. 203.

³⁶³ See further in section 10.4.2.

10.4 Interpretation

The following section discusses the interpretation of causation terms mentioned in section 10.2. As earlier, liability-activating clauses are especially examined. English insurance policies contain, naturally, also terms according to which the insurer is free from liability in the event of loss being a consequence of a particularly designated, and therefore excluded, event. Not seldom, these liability-exempting causation terms set requirements concerning the nature of the causal relation which are equivalent to those set by the liability-activating terms. Sometimes, the causal requirements of the liability-exempting terms are, however, different from the latter. In the English doctrine the question of the content of the causal requirements formulated in this way is treated without regard being taken as to whether the formulation in question can be found in a liability-activating or a liability-exempting causation term.³⁶⁴ In the following sections references are therefore made to materials concerning interpretation of both liability-activating and liability-exempting terms.

10.4.1 The Content of the Terms

Causation terms of the English insurance policies are in no manner objects of literal interpretation. It is rather that the specific details of the terms' wording seem to lack importance.³⁶⁵ Requirements of both factual and direct causality are interpreted as entailing a reference to the *causa proxima* doctrine.³⁶⁶ The same applies to terms requiring that the covered events shall have been the most important cause of the damage.³⁶⁷

10.4.2 The Doctrine of Proximate Cause

10.4.2.1 The Matter at Issue

The insurance policy states one or several events covered by the insurance. The matter at issue in this context is whether any of these events can be considered to

³⁶⁴ See, for example, Clarke (1997) p. 691 ff; Colinvaux (1997) p. 105 ff and MacGillivray (1997) 19-1 ff. All of these authors distinguish between liability-activating and liability-exempting terms at a later stage only, i.e. when damage can be considered to have been caused, as defined by the contract, by both a covered and an excluded event, when the question arises as to which of these causes shall be prioritised (cf. section 1.2).

³⁶⁵ Cf. Ivamy (1993) p. 408.

³⁶⁶ As regards term requirements of factual causality, see, Arnould (1981) 778 (concerning the expressions *arising from*, *caused by*, *due to* and *resulting from*); Clarke (1997) p. 964 (*caused by* and *arising from*); Colinvaux (1997) p. 106 (*originating from*) as well as MacGillivray (1997) 19-4 (*originating from*, *in consequence of* and *arising from*), all of them with references to case law. Regarding term requirements of direct causality, see Clarke (1997) p. 694 and MacGillivray (1997) 25-39 and 25-41 (both concerning the expressions *caused directly by* and *caused immediately by*), and their references to case law.

³⁶⁷ See, Arnould (1981) 762 and Clarke (1997) p. 694 (both concerning the expressions *dominant cause* and *effective cause*), and their references to case law.

constitute the proximate cause, or *causa proxima*, in relation to incurred loss. From the language point of view the determination of *causa proxima* is quite simple. "A proximate cause is not the first, or the last or the sole cause of the loss; it is the dominant or effective or operative cause."³⁶⁸ In practice, however, the application of the *causa proxima* doctrine, i.e. being able to show in each individual case "the dominant or effective or operative cause", is anything but simple.³⁶⁹

10.4.2.2 Successive and Concurrent Causes

The content of the *causa proxima* doctrine is strongly dependent on whether the loss in question has been caused by a course of events consisting of successive or concurrent causes.³⁷⁰ Successive causes operate one by one. When cause (a) stopped operating before cause (b) came into operation, both causes are successive. This applies irrespective of whether or not (a) is also the cause of (b). Let us assume that a person (X), who is in the process of putting up commercial posters in a tube station, suddenly collapses and remains lying on the tracks. He soon regains consciousness, but does not manage to get away from the approaching train which kills him. In this course of events X's collapse can be said to be a completed event when the train causes his death. Following the line of reasoning presented above, X's collapse and the traffic accident would constitute successive causes of X's death.

Concurrent causes operate at the same time. When cause (b) comes into operation, cause (a) is still in progress. Let us assume that a person employed at a nuclear power station receives a radioactive injury, partly due to radioactive emission, and partly due to deficient control of the existing radiation values performed at regular intervals. When the emission starts, the control of the existing radiation values has already been deficient for some time. Both these causes constitute simultaneous causes of the injury. It is irrelevant for the concept of concurrent causes whether one of the causes starts operating prior to the other. It is equally irrelevant whether the concurrent causes constitute cause and effect in relation to each other.³⁷¹ The concurrent causes may, as in the above example, be concurrent in the sense that none of them would have caused the injury alone.³⁷² They can also be competitive, however, in that each of them alone would have been able to cause the damage.³⁷³

³⁶⁸ See MacGillivray (1997) 19-1. See also Birds (1997) p. 228; Clarke (1997) p. 694; Colinvaux (1997) p. 105 and Jess (1993) p. 291.

³⁶⁹ See Clarke (1981) p. 284 f; Colinvaux (1997) p. 107 and MacGillivray (1997) 19-1.

³⁷⁰ The great majority of authors make this distinction; see, for example, Clarke (1997) p. 701 ff; Colinvaux (1997) p. 106 ff; Ivamy (1993) p. 409 ff; MacGillivray (1997) 19-3 and Merkin B.6.1-06 ff. Against this background it is remarkable that the content of the concepts 'successive' and 'concurrent causes' has been the object of discussion to such a limited extent. The fact that in reality it can be quite difficult to decide whether certain damage is the result of successive or concurrent causes can be seen in section 10.4.2.5.

³⁷¹ See Ivamy (1993) p. 415.

³⁷² See Clarke (1997) p. 702 f.

³⁷³ See Clarke (1997) p. 703 f.

10.4.2.3 Determination of Causa Proxima in Successive Causes

Both direct and indirect causes of damage can constitute its proximate cause.³⁷⁴ In common understanding an event is considered to constitute a proximate cause in relation to loss or damage under the condition that "there is no break in the sequence of causes from the peril insured against to the last cause, each cause in the sequence being the reasonable and probable consequence, directly and naturally resulting in the ordinary course of events from the cause which precedes it".³⁷⁵

This can be illustrated by the *Reischer v Borwick* case³⁷⁶ in which a ship collided with a floating tree trunk. The collision caused a number of holes in the hull through which seawater poured into the ship. The crew managed to block the holes, thus avoiding losing the ship. When the ship was to be towed into the harbour a little later, the emergency reparation gave way and the hull broke. This time it was impossible to stop the incursion of water and the ship was lost. The collision was considered to be the proximate cause of the loss of the ship.

Inversely, if "the sequence of causes is interrupted by the intervention of a fresh cause which is not the reasonable or probable consequence directly and naturally resulting in the ordinary course of events from the peril insured against but is an independent cause, the cause of the loss within the meaning of the policy is not the peril insured against, but the intervening cause".³⁷⁷

This can be illustrated by the *Pink v Fleming* case³⁷⁸ in which goods were being unloaded from a ship while it was being repaired after a collision, to be loaded back on the ship after the reparation. The collision was not considered to be the proximate cause of the damage to the goods, which arose as a result of the above-mentioned handling of the goods.³⁷⁹

The principles described above seem to focus primarily on situations in which loss has been caused only indirectly by the covered event. They should also be applicable, however, when the loss is a direct consequence of the covered event.

³⁷⁴ See Ivamy (1993) p. 412: "The operation of the doctrine of proximate cause is not affected by the number of causes that may intervene between the peril and the loss." See also MacGillivray (1997) 19-2: "The peril insured against need not be the actual instrument of destruction".

³⁷⁵ See Ivamy (1993) p. 410 f. See also similar pronouncements made by Colinvaux (1997) p. 109 f; MacGillivray (1997) 19-2 and Merkin B.6.1-17 ff.

³⁷⁶ 1894, 2QB 548. See also *Leyland Shipping Co Ltd v Norwich Union Fire Ins Sy Ltd*, 1918, AC 350 and *Fitton v Accidental Death Insurance Co*, 1864, 17 CB (NS) 122. For further references to case law, see Ivamy (1993) p. 410 ff and Merkin B.6.1-17 ff.

³⁷⁷ See Ivamy (1993) p. 412 f. Similar pronouncements have been made by Colinvaux (1997) p. 109; MacGillivray (1997) 19-3 and Merkin, B.6.1-17 ff.

³⁷⁸ 1890, 25 QBD 396.

³⁷⁹ In order to constitute the proximate cause, an event must thus not only make the damage possible, but actually cause it (see Colinvaux (1997) p. 108 f and Birds (1997) p. 229). For further references to case law, see Ivamy (1993) p. 412 f; MacGillivray (1997) 19-3 and Merkin B.6.1-17 ff.

Intervening events do not occur then, and the covered event can be safely considered to constitute the proximate cause of the loss.³⁸⁰

Clarke's understanding of what is necessary for an event to be considered as *causa proxima* is slightly different. According to him, *causa proxima* is constituted in that event which "in all the circumstances prevailing at the time of the event, led inevitably to the kind of loss in question".³⁸¹ He adds that if loss "was the inevitable result of a peril, the full extent of that kind of loss will be recoverable, if the extent, although not inevitable at the time of the peril, was not unlikely to result or, in other words, was a natural consequence in the circumstances".³⁸²

This can be illustrated by the *Lawrence v Accidental Insurance Co Ltd* case³⁸³ in which the insured suffered a stroke while standing on a railway platform, fell on the tracks, and was killed by a passing train. In this case, it was not the stroke but the passing train that was considered to be the proximate cause of the insured's death.

In the context of this decision Clark makes the following statement: "If a man has a fit on a station platform, it is not inevitable that he will fall under a train".³⁸⁴ This explains why the stroke is not considered to be the *causa proxima* of the insured's death. The fact that the train and not the stroke is considered to be the proximate cause is explained in the following way: "If a man does fall under a train, injury is inevitable, and death not unlikely."³⁸⁵

According to the general principle proposed by Ivamy and a number of other authors, the covered event constitutes the proximate cause of all loss that has been caused by it in an uninterrupted chain of events. The slightly divergent principle proposed by Clarke seems a bit more narrowly formulated. The covered event constitutes the proximate cause of loss which is an inevitable consequence thereof. Strictly speaking, nothing is inevitable, says Clarke. "God may reach down and stop the train or the chain."³⁸⁶ In reality, however, Clark wants to give the concept of *causa proxima* a broad interpretation. He points out that a cause can be considered to be the proximate cause if it "operated with reasonable certainty to occasion the loss".³⁸⁷ In addition, the requirement of inevitability does not apply to the whole of the loss. If only a part thereof constitutes an inevitable consequence of the covered event, the latter constitutes, as has been shown, the proximate cause of the remaining loss of the same kind, provided that

³⁸⁰ Cf. Ivamy (1993) 409 f.

³⁸¹ See Clarke (1997) p. 694; equivalent statement can be found in Clarke (1981) p. 289.

³⁸² See Clarke (1997) p. 697; equivalent statement can be found in Clarke (1981) p. 289.

³⁸³ 1881, 7 QBD 216. The rule is also well illustrated by the *Reischer v Borwick* case just quoted. For further references to case law, see Clarke (1981) p. 285 ff and (1997) p. 697 f.

³⁸⁴ See Clarke (1997) p. 695.

³⁸⁵ See Clarke (1997) p. 695.

³⁸⁶ See Clarke (1997) p. 694.

³⁸⁷ See Clarke (1997) p. 695. This statement is a quotation taken from the American *Ore v Aetna Life Ins Co* case no. 435 F 2d 957, 959 (6 Cir, 1970).

the loss does not appear as an improbable consequence of the covered event. In this context it does not seem that Clark's definition of the proximate cause is so much lower in reality, as compared to the definition proposed by the other authors.

In the majority of cases the two principles seem to lead to similar results. The fact that the stroke related in *Lawrence v Accidental Insurance Co Ltd* was not considered to constitute the proximate cause of the insured's death may be explained, for example, partly by the fact that the passing of the train was a supervening event, which is why the stroke did not cause the loss through an uninterrupted chain of events,³⁸⁸ and partly by the fact that the insured's falling on the tracks cannot be considered an inevitable consequence of a stroke.³⁸⁹

Similarly to the adequacy doctrine, a number of issues of extraordinary importance for the determination result appear in the application of the *causa proxima* doctrine. Who is to determine the presence of the proximate cause? At what point in time is the determination to be made? How shall the underlying course of events be described? What degree of conformity to the laws of nature shall be required in relation to the course of events?

The first two questions can be answered at least to some extent. It has been stated that the determination of the proximate cause shall be performed by the application of 'common sense'.³⁹⁰ It may thus be taken that determination is to be an objective process in which the evaluator is taken to be a hypothetical person with knowledge and values corresponding to those of an ordinary man. It may not be easy, however, to establish the exact nature of this knowledge and values. It has been further demonstrated that while determining the proximate cause, one examines the question of whether or not a given course of events has taken place in a normal and natural way. As far as can be seen determination of the proximate cause shall therefore take place *ex post*.³⁹¹

The last two questions are much more difficult to answer. Moreover, they have not been treated with much attention in the insurance law literature, which has certainly contributed to making the doctrine of proximate cause unpredictable.

10.4.2.4 Determination of *Causa Proxima* in Concurrent Causes

The determination of whether an event constitutes a proximate cause according to the above described principles is not influenced by the fact that in addition to the covered event there is another cause of loss which too constitutes a proximate cause.³⁹²

³⁸⁸ See Ivamy (1993) p. 417.

³⁸⁹ See, Clarke (1997) p. 695.

³⁹⁰ See Clarke (1997) p. 691 with references to Lord Denning in *Wayne Tank & Pump Co Ltd v Employers' Liability Assurance Corp Ltd*, 1973, 2 Lloyd's Rep 237, 240. See also Schmidt (1943) p. 204 and 216.

³⁹¹ See Schmidt (1943) p. 216.

³⁹² See Ivamy (1993) p. 414 and Colinvaux (1997) p. 106 f. Cf. MacGillivray (1997) 19-5 and Merkin B.6.1-22a. Also Clarke (1997) p. 702 ff discusses situations in which there are sev-

This can be illustrated by *The Miss Jay Jay*³⁹³ case in which a ship which was not seaworthy had been damaged as a result of adverse weather conditions, which were not worse, however, than those in which a seaworthy ship would have managed well. The court found that the damage was due to two concurrent causes. Partly, the bad weather, and partly the ship's lack of seaworthiness. The first cause was covered by the insurance. The latter was not covered, but it had not been expressly excepted either. In this situation the insurer was held liable for the damage.

10.4.2.5 Conclusions

Of great importance to whether an event covered by the insurance constitutes the proximate cause of loss is the question of whether that event and other loss causes are perceived as successive or concurrent. If the event which has caused the loss in addition to the covered event is regarded as an intervening event in a chain of events following each other successively, there is a risk that the causal chain may be regarded as broken, and that the covered event will not be regarded as the proximate cause of the loss. If, on the other hand, the other event is considered to act simultaneously with the covered event, the latter cannot be deprived of its role of *causa proxima*. The final determination result depends therefore very much on whether the covered event is regarded as finished or as still ongoing when the other cause comes into operation.³⁹⁴ At times both alternatives are possible, which is illustrated by the *Miss Jay Jay*³⁹⁵ case in which the courts had a problem to decide whether the causes of the loss were successive or concurrent.

The somewhat diffuse border line between successive and concurrent causes allows the courts frequently enough to obtain the result which is considered as the most convenient one in a given case.³⁹⁶ It can be advantageous, in a way, that the rules are so elastic. On the other hand, this advantage is gained at the price of lesser predictability of the courts' adjudication, which appears to be clearly limited, partly as a result of the above-quoted conditions, and partly due to the prevailing uncertainty surrounding the application of the *causa proxima* doctrine in successive causes.

10.5 *Conclusions and Comparison*

The English liability-activating causation terms in property insurance contracts can be divided into three different categories. Similarly to the Scandinavian countries, however, linguistic nuances seem to lack importance with regard to the interpretation of contract terms. All terms in question are interpreted as entailing a reference to the doctrine of proximate cause. For loss to be covered by

eral simultaneous causes of loss, but only such in which one of these causes has been expressly excluded from the insurance coverage.

³⁹³ 1987, 1 Lloyd's Rep 32. For further references to case law, see Ivamy (1993) p. 415.

³⁹⁴ See Clarke (1997) p. 705.

³⁹⁵ See section 10.4.2.4.

³⁹⁶ See Clarke (1997) p. 705.

the insurance contract it is thus required that the proximate cause of the loss shall be the covered event.

In the legal literature the doctrine of proximate cause has been given varying content. In practical application, however, the existing variations seem meaningless on the whole. In brief, the covered event can be said to constitute the proximate cause of all the loss that has been caused by it in a natural, conformable to law course of events. The doctrine's application has been the object of limited attention only, which is why the determination result is highly unpredictable. In this respect the situation in England is similar to that in the Scandinavian countries where questions concerning application of the doctrine of adequacy could not be answered in a satisfactory way.

As a result of the above-mentioned lack of clarity it is difficult to establish the exact differences between the two doctrines. In one respect it is, however, obvious that the doctrine of proximate cause differs from the doctrine of adequacy. When determining adequacy, in addition to the covered event all the causes that have been operative concurrently with or after that event are taken into consideration. When determining the proximate cause, in addition to the covered event only those causes are considered which were in operation after that event. Determination of whether the covered event constitutes the proximate cause is thus made without taking into consideration all of the existing causes. In the application of the *causa proxima* doctrine it is therefore extremely important to determine whether any alternative cause of loss was in operation concurrently with or only after the covered event. Only in the latter case shall the alternative cause be considered. And only in this case may the occurrence of the alternative cause result in the deprivation of the covered event of its *causa proxima* role. The question as to whether an alternative cause was in operation simultaneously with or only after the covered event may be difficult to answer. Sometimes both views are possible. This contributes no doubt to further limiting the predictability of the determination result of the proximate cause.

It may be that the conditions described above suggest that the doctrine of proximate cause limits the scope of the insurer's liability less effectively than the doctrine of adequacy does. As already suggested, there is, however, great uncertainty as regards the application of the two doctrines. General conclusions must therefore be drawn with great care. A general impression gathered from case law suggests that despite their differences both doctrines lead to similar practical results. This is not really surprising, as both the adequacy doctrine and the *causa proxima* doctrine give the courts a relatively free hand. The assessment is based to a large extent on reasonableness. Both the cultural and the socio-economic environment in which the doctrines are applied is similar. In these circumstances it is only natural that the courts should arrive at similar solutions.

11 Analysis and Perspectives

11.1 *Background: a Short Summary of the Applicable law*³⁹⁷

The liability-activating causation terms can be divided into two categories: terms which do not give expression to any other requirement than that of *factual causality*, and terms which require *direct causality*. The latter requirement is sometimes stipulated explicitly, and on other occasions it is only implied.

None of the above-mentioned terms are interpreted literally. Instead of the terms' requirements of factual and direct causality respectively, an adequacy requirement is applied (even though due to a limited amount of legal material this conclusion should be approached with caution in some cases). The requirement of adequacy entails in the present context a requirement of likelihood or the like. As regards other aspects of the adequacy doctrine's application the state of the law remains, however, unclear. The requirement of likelihood does not either seem to be applied very strictly.

11.2 *Requirement of Adequacy in Insurance law*

The literature suggests that the adequacy doctrine as applied in the present context derives from tort law.³⁹⁸ In the absence of more specific reasons it appears highly likely that it is an influence from tort law which prevails upon the courts and insurance boards to make use of the doctrine of adequacy in their decisions concerning the problems of causation. In this section such influence of tort law on insurance law is evaluated.

Insurance law has been associated with tort law for a long period of time now.³⁹⁹ Both the existence of insurance and the possibility of acquiring insurance protection may influence the design and interpretation of the provisions concerning liability in damages, and this influence applies to both liability insurance and insurance on the part of the claimant.⁴⁰⁰ The fact that the quoted insurance conditions are to a large degree governed by the regulatory framework of insurance law is obvious. Tort law is therefore indirectly influenced also by the above. Since the prevailing insurance conditions may influence both the tortfeasor's ability to pay damages as well as the injured party's claim, certain influence of insurance law on tort law seems to be well justified.

When determining whether and to what extent the insured is entitled to recover under the insurance policy, it is not quite as natural to consider in a similar

³⁹⁷ A more exhaustive summary concerning applicable law with plenty of references to different sections concerning the investigation can be found in chapter 9.

³⁹⁸ See Hellner (1965) p. 102; Schmidt (1943) p. 206 and Tybjerg (1952) p. 80.

³⁹⁹ The two fields of law, tort law and insurance law (social insurance law as well as private insurance law) have been given a common name of *compensation law*, a term proposed by Hellner (1976a), in which the author discusses the possibilities of compensation for loss in general, and thus the injured party's possibilities to receive damages as well as different types of insurance compensation.

⁴⁰⁰ See, for example, Dufwa (1993) 4935.

way whether the injured party is entitled to damages. Insurance entails risk transfer in exchange for money. The very concept of insurance consists in the fact that the insured's right to compensation is independent of factors other than the insurance policy and the terms stipulated by it. There is therefore hardly any room for tort law to affect insurance law in the same way as the one in which insurance law affects tort law.

The influence of tort law on insurance law which comes into play in the present study appears, however, to be of a different character than the one mentioned above. The issue is, as we know, not the fact that the insured's possibilities of recovery are allowed to influence the interpretation of the insurance policy's causation terms, but instead the fact that a general tort law principle has been transferred into insurance law, thus affecting the interpretation of insurance policies.

Such influence which consists in the fact that a generally applicable principle in one legal field is transferred into another is not so unusual. When calculating damages for property damage the current value principle⁴⁰¹ taken over from insurance law is frequently applied. Insurance law may thus affect tort law also in this way. It is quite natural that tort law may exert influence upon insurance law in a similar way. Already back in 1908 such influence was discussed by Engströmer.⁴⁰² The real object of the discussion was Federspiel's view that property insurance should include not only the value of the insured object, but also all the interests of the insured in this object.⁴⁰³ The insurance policy should thus cover the whole economic loss of the insured as a result of the insurance case.⁴⁰⁴ According to Engströmer, this proposal brought about the culmination of the tendency to transfer rules concerning liability in damages to insurance law.⁴⁰⁵

Even though Engströmer appears to be strongly critical of the interest principle proposed by Federspiel, his presentation contains nothing that would suggest objections of a more fundamental type against the transfer of tort law principles to insurance law. Engströmer's criticism seems to be wholly based on the fact that the interest principle from tort law which was proposed by Federspiel to be applied also in insurance law is not suitable for the application in the context of the latter.⁴⁰⁶ This seems to be a reasonable premise. What the question is about is an analogous application of tort law norms in the context of insurance law.

It should be difficult to find objections of a fundamental kind to this view. On the contrary, such application might be able to contribute to making the law

401 Regarding this principle refer, for example, to Hellner (1995) p. 416 ff.

402 Engströmer (1908) p. 8. Other authors have also discussed this kind of tort law influence on insurance law, in some measure, for example, Vihma (1946) p. 509 and Øvergaard (1938b) p. 180.

403 See Federspiel (1901) p. 188 f.

404 See Tullberg (1994) p. 23.

405 See Engströmer (1908) p. 8.

406 Engströmer claims that it is impossible from the actuarial point of view to calculate the insurance benefit in the way proposed by Federspiel; Engströmer (1908) p. 19. Cf. Hult (1936) p. 72.

more uniform.⁴⁰⁷ Each application of the type discussed above has to be critically examined before it is put into practice, however. In this context what is effectively at issue is the question of whether a tort law situation and an insurance situation display sufficient similarities in order to justify application of the doctrine of adequacy in insurance law.⁴⁰⁸

The doctrine of adequacy⁴⁰⁹ is applied in tort law in order to set the outermost boundary for the tortfeasor's liability. The limits of liability could be, however, determined in a number of ways. A number of arguments have been proposed for the use of the adequacy doctrine in this context. Two of these seem to be of particular importance. Firstly, in order to meet the preventive objectives of damages nothing more than legal responsibility for adequate damage. Secondly, that the tortfeasor is in need of protection against too extensive liability, and that limitation to adequate damage appears to be suitable from the point of view of legal security.

In the insurance context there is also a need for the outermost limit on liability. It is, however, not so obvious that the doctrine of adequacy constitutes a suitable instrument with which to draw the borderline between compensable and non-compensable damage. Schmidt, who seems to be the only Scandinavian writer who has extensively discussed the application of the adequacy doctrine in insurance contexts, is strongly critical towards it. The way of approaching problems appearing in connection with the interpretation of a liability-activating causation term is, in Schmidt's opinion, completely different from that in tort law. It is not the question of society's reaction in order to persuade people to exercise caution. Neither is it the question of transferring the loss from the injured party to the wrongdoer. The object of an insurance contract is instead to distribute losses of a certain type among the members of a collective consisting of all the policy holders within the same group. According to Schmidt, the guiding principle of the insurance service has thus to do with compensation of losses which are unpredictable from an individual's point of view. The adequacy theory assumes, however, that in the case of consequential damage one shall this principle and pay compensation only for damage which appears predictable. No reason has been given, however, for such an exception.⁴¹⁰

According to Schmidt even inadequate loss or damage should be covered under certain conditions. It is obvious that in the context of insurance no deterrent effect can be invoked in support of the application of the adequacy doctrine. It is also often difficult to raise objections to the view that application of adequacy in the stated way entails a departure from the guiding principles of the insurance business.⁴¹¹ This is not a universally prevailing view, however. In the case when

⁴⁰⁷ Cf. Hellner (1996a) p. 29.

⁴⁰⁸ Cf. Steen-Olsen (1977) p. 250, and, from a more general point of view, Strömholm (1988) p. 81 and (1996) p. 437.

⁴⁰⁹ The following is a summary of the material discussed in sections 2.2.2.1 and 2.2.2.3.

⁴¹⁰ See Schmidt (1943) p. 215 f.

⁴¹¹ A probable objection, however, would be that the standpoint presented by Schmidt is based on the assumption that there is congruence between that which from the point of view of the policy holder constitutes unpredictable damage, on the one side, and on the

also inadequate loss is covered by the insurance protection there is a departure from another, equally fundamental in the context of insurance principle, namely, that the insurer shall be able to calculate premiums corresponding to risks written in advance.⁴¹² If also inadequate damage is covered by the insurance, the insurer's risk exposure can be difficult to assess. The insurance business is adverse to risk. It specialises in actuarial calculations, and none other. When the scope of risk is uncertain, insurers tend to charge premiums which are much higher than what would be justifiable by existing risk assessments.⁴¹³ It can therefore be hardly suitable to let insurers be responsible also for risks which are difficult to assess without any contractual agreement concerning this issue.⁴¹⁴ The fundamental departure discussed by Schmidt seems to be therefore well-founded. In a similar way as done in section 11.3.2.3 one could counter this standpoint by stating that inadequate loss is relatively rare, and that liability for this type of loss would affect the insurer's economy in a negligible degree only. Such point of view is, however, hardly correct. Even if each single issue concerning the extent of cover may be of only limited importance for the economy of the insurer, all such issues taken together should be of great importance. One can therefore consider it hardly defensible when discussing individual issues of the type in question to disregard the economic significance of the different alternative solutions.

For actuarial reasons the insurer's liability should be limited to adequate damage. The adequacy doctrine, with its requirement of likelihood or the like, can be considered as suitable to be applied also in the context of insurance, where the insurer's absolute need of being able to calculate premiums equivalent to assumed risks already at the time of contract conclusion is a central element. When a comparison is made with the conditions in tort law, this reason for the application of the doctrine of adequacy can be said to correspond to the tortfeasor's need of limiting his legal responsibility in a way which would be acceptable from the point of view of legal security.⁴¹⁵

The fact that a number of authors support the adequacy doctrine's application in the context of insurance has been shown in section 8.3.3. The point of view presented by Schmidt seems to have had some importance, however. It is especially more recent authors who seem to advocate an adequacy requirement of a milder kind than the corresponding requirements proposed in tort law. An important reason thereof may well be the contradiction between insurance and ade-

other, that which constitutes unpredictable damage according to the adequacy doctrine. In some cases it is doubtful whether such congruence really exists. Loss which can appear as unpredictable for the policy holder may be thought to be adequate on some occasion. This is applicable not the least because determination of adequacy in insurance law tends to be relatively liberal (refer in this connection to section 9.4.2, and immediately below). When there is lack of congruence, the adequacy criticism presented by Schmidt loses its value.

412 Refer to section 3.3.1.2 for discussion.

413 See Radetzki & Radetzki (1997) p. 3 ff. Cf. Skogh (1996) p. 6.

414 Among the small number of authors who have discussed the reasons for the application of the adequacy doctrine in the present context a few have also pointed out actuarial considerations (see, Grundt (1950) p. 83).

415 Cf. Lyngsø (1994) p. 190.

quacy proposed by Schmidt. The liberal application of adequacy advocated in the insurance law literature seems thus to exemplify, at least to some extent, a compromise between the discussed points of view.

Against the application of the adequacy doctrine in the present context one could propose additionally the general view stipulating that the adequacy doctrine is unpredictable.⁴¹⁶ Doubtless, it is this that is its weak point. No alternative limitation rule has been, however, suggested that could distinguish in a more predictable way between compensable and non-compensable damage, and which could also be considered as generally acceptable.⁴¹⁷ The stated view cannot be therefore allowed to supersede the adequacy doctrine in the present context. Nevertheless, it is a valuable element. As mentioned before, it emphasises the adequacy doctrine's weak point and therefore the need to make its content and application as precise as possible.⁴¹⁸

To summarise, application of the adequacy doctrine in insurance law can thus be considered as justifiable. However, since the insured's right to full compensation has its basis in a contractual relationship, the above applies only under the condition that the insurance contract does not state otherwise. In the latter case the question of causation should be decided in accordance with the contract.

11.3 Interpretation of Policy Terms

Judging by the wording, a policy against loss *caused by*⁴¹⁹ fire, for example, covers all loss actually caused by fire. A policy against loss *caused directly by*⁴²⁰ fire, for example, covers only loss which has been caused by fire, without any intervening events. In the light of the foregoing, as well as the conclusion in the preceding section stating that the doctrine of adequacy in insurance law should be applied only when the insurance policy does not indicate the opposite, it can be surprising that the terms in question are not interpreted literally, but as if entailing a requirement of adequate causality.

11.3.1 Reasons

What are then the reasons for this interpretation of policy terms? The question can be answered most simply by reference to case law. Requirements of both factual and direct causality have been considered for a long time to entail an adequacy requirement. A more thorough analysis cannot stop, however, at references to case law. The task becomes instead one of clarifying the reasons for the present shape of case law.

⁴¹⁶ This type of criticism is quite common in the tort literature. Refer in this regard to section 2.2.2.5 and 2.3.1.3.

⁴¹⁷ Cf. section 8.3.2.

⁴¹⁸ An attempt at this in the field of insurance law can be found in section 11.6.1.

⁴¹⁹ Even other formulations with equivalent linguistic content can be found. See section 4.2.1.

⁴²⁰ Even other formulations with equivalent linguistic content can be found. See section 4.2.2 (with the exception of those terms that only suggest the requirement of direct causality).

This is not an easy task. Neither judicial case law⁴²¹ nor the insurance board decisions⁴²² give any explanation as to why the liability-activating causation terms' requirements of factual and direct causality had to give way to the requirement of adequacy. Nor can any real discussion around this issue be found in either the legislative work⁴²³ or the literature.⁴²⁴

The starting point for the interpretation of an insurance policy is its wording. If the wording is clear, it is often the only factor determining the interpretation of the policy. If, on the other hand, the wording of a policy is not clear, other factors may also influence the interpretation, which may result in a deviation from the wording of the term in question.⁴²⁵ It should thus be generally possible to explain the fact that an insurance term has not been interpreted in accordance with its wording by that it has not been formulated clearly enough. This is also what seems to be the reason for giving policy terms requiring factual and direct causality respectively a different interpretation in relation to their wording.⁴²⁶

Even if a promise to compensate for loss *caused by* fire, for example, does not give an expression to anything else than a requirement of factual causality, the idea that factual causality is the only factor which is required in respect of causation for the compensation to be paid does not transpire explicitly from the wording of the term. The wording of the term is thus not completely clear, and other factors are therefore allowed to affect the interpretation. As already mentioned, the study of case law has not enabled us to ascertain what these factors really are. One factor which may very well influence the interpretation in question consists, however, in the fact that simple causal expressions lacking exact definition are, traditionally, not interpreted literally when appearing in legal contexts. It is considered that there is an implicit requirement of adequate causality. Another factor may entail the fact that liability for also inadequate loss would make the insurer's prospects of being able to calculate premiums corresponding to assumed risks in advance much poorer.

A requirement of direct causality implies that the insured's right to compensation is strongly limited in relation to what follows from optional law. Special requirements of clarity and precision may therefore be set if the wording itself is to be decisive for the interpretation.⁴²⁷ The terms' requirements of direct causality formulated in a general way are obviously considered insufficient to be able to live up to these special requirements. This is why there are other factors which are also allowed to influence the interpretation. Not even in this context is it possible, however, to ascertain what these factors really are. It is, however, possible that the interpretation of the terms in question is influenced by the insured's need of protection, in which context liability for direct consequences of the covered event solely is considered to be too limited.

421 See chapter 6.

422 See chapter 7.

423 See chapter 5.

424 See chapter 8.

425 See sections 3.3.1.1 – 3.3.1.2 and 3.3.2.

426 Cf. Steen-Olsen (1977) p. 240.

427 See section 3.3.1.2.

11.3.2 Consequences

11.3.2.1 Restricted Scope of Legal Security

When term requirements of factual and direct causality respectively are interpreted as if entailing a requirement of adequacy, it is then a question of what may be designated as covert control of terms.⁴²⁸ Such control is not at all irreconcilable with the law in force. The starting point for objective interpretation of a written contract is, however, that if the wording of the contract is clear, it shall be respected.⁴²⁹ With regard to clear contract terms the scope of covert control would thus be strongly limited.⁴³⁰ At times stringent requirements of clarity are set, however.⁴³¹ Such requirements may sometimes bring about quite unexpected results for one or the other of the contracting parties.

This is well illustrated by the interpretation of the terms in question. When the insurance terms do not give expression to any other requirement than a requirement of factual causality, the insured may reasonably expect that his policy will cover all the loss caused in fact by the covered event. If it is showed when interpreting the terms that the insurance coverage shall be determined with the aid of the adequacy doctrine, the scope of the insurer's liability becomes considerably restricted as regards these, in principle well-founded, expectations. In a similar way, when explicit term requirements of direct causality exist, the insurer should have good reasons not to have to answer for any indirect consequences of the covered event. As a result of the adequacy doctrine's application the scope of the insurer's liability expands, however, in relation to what would otherwise be expected. Not only direct, but also indirect loss is covered, under the condition that it is adequate. It can thus be concluded that interpretation of terms which entails covert control of the causation terms in question can be considered troublesome from the point of view of legal security.⁴³²

⁴²⁸ Covert control of contract terms can be said to constitute one of several methods intended to control contract terms from the legal point of view. The most common method of exercising such control in civil law is by way of mandatory legislation and regulations concerning the content of particular contract types (regarding this issue refer to Lundmark (1996) p. 116 ff). Terms' control can also be exercised through the courts. Such control can be open, and the court may adjust undesirable contract terms with the aid of express statutory provisions or general legal principles (refer about this to Lundmark (1996) p. 109 ff). Contract terms' control can also be covert, as in the current case, when it is based on particularly strict requirements in order to consider standard terms to be incorporated into the individual contract or special principles of contract interpretation (regarding this, see Lundmark (1996) p. 97 ff).

⁴²⁹ See section 3.3.1.1 – 3.3.1.2 and 3.3.2.

⁴³⁰ See Bernitz (1995) p. 54. Cf. Adlercreutz (1996) p. 92 and Jørgensen (1974) p. 20.

⁴³¹ This applies not least to Grönfors (1989) p. 30, who suggests that even clear terms may sometimes become the object of what is here called covert control (cf. Grönfors (1988a) p. 459 and (1988b) p. 321 ff). See also Lynge Andersen, Madsen & Nørgaard (1997) p. 382 and Madsen (1983) p. 63.

⁴³² Cf. Adlercreutz (1996) p. 92, in which the author proposes an overt control of terms as a comparatively more satisfactory method from the point of view of legal security; Lundmark (1996) p. 218 and SOU 1974:83 p. 116. Cf. also Wilhelmsson (1980) p. 127 (in which the

11.3.2.2 Transaction Costs

The fact that the currently discussed terms receive a content which deviates from what is indicated by the relatively clear wording of the policy terms should often give rise to conflicts between insurers and policy holders. It seems obvious in this context that the currently discussed interpretation of terms implies increased transaction costs.

11.3.2.3 Standard Causal Requirements

It has been shown that the currently discussed causation terms can be divided into two types. The first type expresses only a requirement of factual causality between covered event and loss. The other type sets a requirement of direct causality. When interpreting the terms, both requirements, i.e. that of factual as well as of direct causality, are considered to entail, however, a requirement of adequate causality. The terms' interpretation can therefore be said to imply the fact that the causal requirements set by the terms have been standardised.

This conclusion could be countered by saying that the degree of stringency in the application of the adequacy doctrine may vary, depending on the wording of the causation terms.⁴³³ Such adequacy application implies that the requirement of likelihood (or the like) would be more stringent in the case of term requirements of direct causality as compared to term requirements of factual causality. The fact that the adequacy doctrine is applied in this way cannot be substantiated, however, nor can such possibility be excluded. In the event this should be the case, the objection raised is certainly correct to some extent. There can be no question of complete standardisation in this case. The fact that the application of the causation terms becomes *standardised to some extent* even in the case of such adequacy application seems, however, to be self-evident.⁴³⁴

The fact that a sole requirement of factual causality entails very extensive, not to say unlimited, insurance protection has been shown before.⁴³⁵ Such extensive legal responsibility makes that it can be sometimes difficult for the insurer to determine a premium corresponding to the assumed risk. It has also been shown that a requirement of direct causality entails a strongly restricted insurance protection.⁴³⁶ It seems obvious that the majority of policy holders would perceive such insurance protection as unsatisfactory. On a scale of stringency with which different causation terms limit the insurer's liability, the requirements of factual and direct causality respectively end up on the opposite ends of the scale, with

author is critical of covert control, referring, among other things, to the importance of proper evaluation of case law) and Gorton (1989) p. 725.

433 Refer in this regard to sections 6.4.2.4 and 9.4.2.

434 Even if the degree of likelihood required in the case of term requirements of factual causality were to be much lower than in the case of requirements of direct causality, the difference between the two causal requirements would still be much smaller than in the case of literal interpretation.

435 See section 4.2.3.1.

436 See section 4.2.3.2.

the actually applicable requirement of adequate causality somewhere in between. The standardisation of the causal requirement in question, entailing that an insurance policy covers the insured event's adequate consequences, even if the policy terms can be said to give expression to something else, could thus be said to imply a badly needed protection for the insurer and the insured respectively against the consequences of causal terms which stipulate very extensive or very limited liability respectively. One could maintain that this might justify the prevailing interpretation of contract terms, despite the negative consequences pointed out in sections 11.3.2.1 – 11.3.2.2.

A closer analysis shows, however, that the protection of insurers and policy holders that should consequently follow from the current interpretation according to the viewpoint stated above constitutes a kind of illusion. Seen from the point of view of economics, the standardised interpretation cannot be said to benefit anybody.

As stated above, interpretation of term requirements of factual causality implies that the insurer's liability is limited in relation to what follows from the insurance contract. To claim that this benefits the insurer would be, however, wrong if taken in a wider perspective. Assuming that the insurance market is competitive, the fact that the scope of insurance protection does not cover all the factual consequences of the covered event but only its adequate consequences, will affect the policy holder's willingness to pay, and therefore the price of the insurance products in questions. In consequence of the terms' interpretation, the price of insurance policies whose scope is limited by requirements of factual causality will correspond to the price of policies whose scope has been expressly limited to adequate loss, all else being equal. In reality, the interpretation of the terms in question cannot be said to be advantageous to any insurer.

Interpretation of term requirements of direct causality entails that the policy holder receives a more extensive coverage than according to what follows from the insurance contract. To claim that this interpretation benefits the policy holder would be equally wrong for similar reasons as the ones stated above. The fact that the insurers are forced to compensate not only for direct, but also for indirect adequate loss implies a change in prices in a free market. The policy holders will have to pay the market price for the wider insurance coverage. As a result of the terms' interpretation, an insurance policy covering direct consequences of the insured event will fetch the same price as a policy whose scope has been expressly limited to adequate loss, all else being equal. It seems obvious in these circumstances that the interpretation in question cannot be said to improve the policy holders' situation.⁴³⁷

⁴³⁷ This type of economic analysis of insurance contract application with extended liability appears commonly in the North American literature. See, for example, Miller (1988) (concerning the consequences of extensive application of the ambiguity rule); Abraham (1988) and Priest (1987) (both as regards the consequences of the fact that the scope of liability insurance has been constantly expanding as a result of changes in the provisions concerning liability in damages). In Sweden the reader may want to refer to Kleineman (1989) p. 108 (the consequences of an adjustment under § 36 AvtL of company insurance terms to the advantage of the policy holder have been shown to be that the company has to add a special, supplementary charge to their future calculations of insurance premiums). In general,

A possible objection to the above-presented analysis might be that the interpretation of terms in question has only a limited influence on the price of the insurance. An important reason for this might be that also other insurance terms than those concerning the causal connection⁴³⁸ limit the scope of the insurance policy, and that as a result thereof the compensation costs are affected by the causal rules in question to a limited degree only.⁴³⁹ According to Bengtsson significant changes in the risk insured are necessary if they are to be reflected in the setting of the premium.⁴⁴⁰ Other factors not related to risk, such as the insurer's operation costs and the prevailing competition conditions should be of far greater importance as regards the amount of the premium.⁴⁴¹ The small changes in the cost of risk in question would be quite insignificant when distributed among all the policy holders. The terms' interpretation in question in favour of the insurer or, alternatively, of the insured would not thus be frustrated by price changes in the way described above. Despite the above-presented line of reasoning, it should therefore be possible to defend the interpretation of terms by arguing that the insurer or the policy holder respectively may be in need of protection against too wide or too limited insurance coverage with regard to causation.

The fact that the interpretation of terms influences the insurance economy, and therefore the amount of the premium, in only a limited degree does not constitute, however, a tenable reason for disregarding the economic consequences of the interpretation when analysing the consequences. When considered separately, the majority of issues concerning the interpretation of the insurance pol-

this type of analysis can be found in the legal literature primarily in a different context, namely as regards the effects of mandatory legislation. Such legislation gives often an impression that the purchasers' rights have been in some way extended. In a free market such extension of rights means, however, that the price of the utility in question will also rise. It is the purchaser that pays the market price for the consumer protection (see, for example, Atiyah (1995) p. 30; Ekstedt (1996) p. 96; Skogh (1982) p. 61; Skogh & Lane (1993) p. 88 and Wilhelmsson (1993) p. 442 f.) If the purchaser had been prepared to pay the price for the extended protection he could have bought it in a well-functioning market in the first place, before the mandatory law came into force. (see, Atiyah (1995) p. 30). No purchaser benefits therefore from such legislation. On the contrary, legislation of this kind seems to be able to bring disadvantages to a number of purchasers. The purchaser who cannot or does not wish to purchase the extended protection is deprived through the mandatory legislation the possibility of buying the commodity with a narrower scope of protection for the lower price (see Atiyah (1995) p. 30 and Ekstedt (1996) p. 95 f). To be sure, this problem can also be remedied by mandatory legislation with regard to the price of the commodity in question. But even this kind of regulation will finally hit back at the consumer collective that it aims to protect, by changes in the supply range, making that certain categories of buyers will be left wholly or partly without any possibility of contract (see Skogh & Lane (1993) p. 88 and Wilhelmsson (1997) p. 158).

438 Regarding such insurance terms, see section 4.3.

439 See Hellner (1965) p. 102 f.

440 See Bengtsson (1992b) p. 223, with reference to the insurance companies' fears that KFL would entail very severe premium increases (30% according to LU 1979/80:18 p. 31); it took a long time for those increases to materialise, however, and when that happened they were much milder than expected. See also Hellner (1993) p. 95, and cf. Bengtsson (1997) p. 29 ff as well as Bengtsson (1996a) p. 27 ff with regard to liability insurance.

441 See Bengtsson (1992b) p. 223. Cf. Bengtsson (1997) p. 29 ff and, as regards liability insurance, Bengtsson (1996a) p. 27 ff.

icy may be more or less unimportant for the economy of the insurance. Taken together, however, these interpretation questions become quite important for the amount of the premium. If the economic importance of such questions is ignored to a large extent so that risk changes regarding the protection of insurers or policy holders are made possible time after time, the total risk change will eventually become so great that it will considerably influence the amount of the premium. It must therefore be concluded that when analysing the effects of the interpretation in question, each factor influencing the economy of the insurance must be taken into consideration. Hence, the fact that the interpretation in question affects the price of the insurance in a limited degree only cannot change the conclusion that this particular term interpretation can be hardly said to benefit either the insurer or the policy holder.

This conclusion is valid only, however, under the condition that the actors on the insurance market possess knowledge necessary to decide what it is that will best promote their own interests in the present context. The insurers, who usually have to formulate the insurance policy, are assumed to be able to provide the desired coverage and calculate premiums corresponding to assumed risks. It should be reasonable to assume that all insurers, without exception, possess such knowledge. As regards the policy holders, who usually do not participate in the policy formulation, the requisite knowledge is limited in the present context to the ability of being able to choose in a rational way from among the products offered at the insurance market. Even though the requirements necessary for this task cannot be considered as particularly heavy, it is possible that at least a small group of policy holders may lack this ability. In the case when term requirements of direct causality are interpreted literally, the price of such insurance would be relatively low according to what has been demonstrated earlier on. It cannot be excluded that as a result hereof less knowledgeable clients would take out insurance policies against direct damage only, without realising that they would be getting very limited protection.⁴⁴² Even though from the financial point of view these policy holders can be said to receive the insurance protection for which they have paid, it is clear that they benefit from the present situation in which insurance whose scope is limited in this way cannot be normally bought on the insurance market. It is thus obvious that protection of this group of policy holders constitutes an important reason for the prevailing interpretation of term requirements of direct causality. Since, however, as mentioned earlier, insurers can be assumed to possess the requisite knowledge, one should not be able to put forward an equivalent argument in support of the prevailing interpretation of term requirements of factual causality.

11.4 Changes

The fact that the currently discussed causation terms are given an interpretation which deviates from what appears clearly enough from their wording can be annoying from the point of view of legal security. In addition, the interpretation seems to lead to litigation, and therefore to increased transaction costs. More-

⁴⁴² Cf. Ekstedt (1996) p. 100.

over, the interpretation of terms entails that the commonly appearing causal requirements become standardised, at least to some extent. At first glance the latter appears beneficial, since it seems to protect insurers and policy holders from too wide or too limited insurance protection respectively. A closer analysis reveals, however, that the standardised interpretation does not benefit anyone, except possibly a small group of policy holders who do not possess sufficient knowledge in order to determine which insurance product will suit their interests best, when choosing from among a variety of such products. Taken together, the present situation can hardly be considered satisfactory. The following sections discuss the ways in which the stated problems might be solved.

It should be pointed out right at the start that the reason for the negative effects of the interpretation in question is not the fact that the adequacy doctrine applied by the courts and insurance boards is somehow unsuitable. On the contrary, as already mentioned, the doctrine seems to be very suitable for application in the context of insurance.⁴⁴³ As has been seen, the problems in question appear to be caused instead by the fact that when interpreting them the causation terms are given different content than that indicated by their wording.

What one should strive for is thus a situation in which the causation terms of an insurance contract can be interpreted in accordance with their wording. In the context of the currently prevailing formulation of terms literal interpretation is not considered possible, however. Even though this cannot be explicitly shown, both courts and insurance boards must be assumed to believe that the reasons for the currently applicable interpretation practice outweigh the reasons against it. Against the background of the analysis performed above this standpoint could become an object of criticism. One could claim that at least explicit term requirements of direct causality should be interpreted literally. This could perhaps even apply to term requirements of factual causality. Such criticism of the courts' and insurance boards' evaluation of the reasons for and against a certain way of terms' interpretation would be, however, hardly productive. A more constructive attitude would be to start by examining the factual decisions made by the courts and insurance institutions, and investigate how the causation terms in question should be formulated in order to make their interpretation conform with the exact wording of the terms.

11.4.1 More Clarity and Precision in the Formulation of Terms

The more precisely a contract term is formulated, the greater the possibility that its wording will be respected when interpreting it.⁴⁴⁴ When contract terms are very clear, the possibility of the court interpreting them in a way that will deviate from their wording is very small. Hence, in order to induce courts and insurance institutions to interpret the causation terms in question literally, these terms should be framed clearly and precisely. Such a process does not need to be particularly complicated. Two aspects must be, however, carefully observed,

⁴⁴³ See section 11.2.

⁴⁴⁴ See section 3.3.2.

namely (a) that the terms give expression to what has been intended and (b) that this intention is clearly expressed.

11.4.1.1 The Requirement of Adequate Causality

It is obvious that insurers who provide insurance against loss *caused by*,⁴⁴⁵ for example, fire do not mean to compensate all the loss that has actually been caused by it. What they mean is that they have posited an adequacy requirement by means of the selected wording.⁴⁴⁶ Because the terms are so laconically formulated, courts and insurance boards can also interpret them in this way. The policy holder who relies on the wording of the terms will be misled.

If the insurer's intention is to compensate for the adequate consequences of the covered event only, this should be clearly demonstrated by the wording of the terms. In addition, the concept of adequacy should be defined in such a way as make the clause understandable for the ordinary man. In fire insurance, for example, the term in question could be formulated in the following way:

The insurance covers loss which constitutes an adequate (likely) consequence of fire.

11.4.1.2 The Requirement of Direct Causality

Requirements of direct causality between covered event and damage are sometimes only implied by the insurance terms.⁴⁴⁷ If courts and insurance boards are to be persuaded to follow these requirements rigorously, then the causation terms cannot be formulated in such a vague way. The requirements must be stated explicitly. Even when explicit requirements of direct causality have been used, courts and insurance boards would sometimes decide that in certain circumstances indirect damage should fall within the scope of the insurance protection. This is why even these explicit requirements of direct causality need to be made more precise and clear. The easiest way to do that would be by appending an explanation to the requirement of direct causality, specifying what the latter means. In fire insurance, for example, the term in question could be formulated in the following way:

The insurance covers loss that has been caused directly by fire, i.e. without the intervention of any supervening events.

11.4.1.3 The Requirement of Factual Causality

If the insurer aims to compensate for the factual loss resulting from the covered event, this intention should clearly transpire from the wording of the terms in

⁴⁴⁵ Other formulations with equivalent linguistic content also occur. Refer in this connection to section 4.2.1.

⁴⁴⁶ If nothing else, this can be seen from the courts' and insurance institutions' materials analysed in sections 6.2 and 7.3.

⁴⁴⁷ As regards this type of causation terms, see section 4.2.2.

order to avoid unnecessary misunderstandings. In fire insurance, for example, the term in question could be formulated in the following way:

The insurance covers all loss whose factual cause is fire.

11.4.2 The Suggested Terms and the Doctrine of Interpretation

It has been emphasised in many places in this work that the fundamental basis of an objective contract interpretation is that clear and precise wording of contract terms shall be decisive for the interpretation result. The question is, however, what degree of clarity and precision is to be required in order to be able to follow this fundamental principle. Obviously, this question cannot be answered with any exactitude. One should start from the fact, however, that terms which specify precisely what they refer to should be interpreted accordingly. In addition, one should be able to require that contract terms avoid as far as possible, or, alternatively, that they try to explain, concepts that can be difficult to understand by any of the parties to the contract. At times, it should be possible to require exemplification, or some other explanation of what is meant.

The terms suggested in sections 11.4.1.1 – 11.4.1.3 seem to satisfy the above-mentioned requirement of precision. In addition, the concepts that may give rise to misunderstanding are explained. If courts and insurance boards should still refuse to accept the suggested terms, they could be made clear with the help of examples of loss which is typically compensable, or typically non-compensable, under each term. If terms are formulated in this way, it should be possible to demand that courts and insurance institutions respect their wording when interpreting them. This is important especially as interpretation results which are considered to be unfair can be adjusted under § 36 AvtL, DAvtL and NAVtL respectively.⁴⁴⁸ If, despite the satisfaction of the requirements of clarity and precision as stated above, the terms should still be regarded as entailing an adequacy requirement, then it would mean that the requirement of clarity and precision has been taken too far. The process of clarification can, naturally, continue for ever. This cannot be justified, however, in all cases. Increasing demands of clarity lead to increasing contract costs. The contracts in question constitute, however, a form of standard collective agreements, which is why cost increases should be limited. In the majority of cases the above-mentioned cost increases would be in all probability more than outweighed by a decrease in control costs, which would be another consequence of the greater clarity and precision of the terms. All things considered, the transaction costs would therefore fall. A limiting factor of profound importance is that the insurance terms must not be too extensive so that they undermine the policy holder's possibilities of gathering information about his rights and duties under the policy. When the requirement

⁴⁴⁸ It has been pointed out in many different contexts that the necessity of covert control decreases as the possibilities of overt control increase. See, for example, prop 1975/76:81 p. 116; Adlercreutz (1996) p. 93; Bernitz (1996) p. 54; Grönfors (1995) p. 253; Hagström (1994) p. 164; Kleineman (1989) p. 106 f; Lundmark (1996) p. 97; Ramberg (1995a) p. 167 and Woxholth (1997) p. 419. Cf. Dufwa (1995b) 58 and Hellner (1990) p. 214.

of clarity produces terms which are too extensive, this can be counterproductive, so that it will be impossible to satisfy the requirement of clarity at all.

Unreasonable clarity requirements give rise to a situation similar to the one occurring in mandatory legislation in which it is practically impossible to give a contract the desired content. In this way an interpretation which entails unreasonable clarity requirements circumscribes freedom of contract,⁴⁴⁹ which is why it can become the object of extensive criticism of economic character.

The aim of modern market economy is to maximise the welfare of society. One starts from the premise that each individual knows what will promote his interests best. The goal is to achieve a situation in which no one can, in his own opinion, improve his position without someone else's position deteriorating in an equivalent degree. Such a situation, in which allocation of resources is optimal, is usually referred to as Pareto-effective.⁴⁵⁰ Pareto-effectiveness is achieved by the exchange of assets between individuals, each transaction being such that each party to the transaction considers himself to have improved his prosperity.⁴⁵¹ The key to Pareto-effectiveness is thus a situation in which individuals and companies make voluntary agreements with one another. In order to create a Pareto-optimal situation a number of conditions must be satisfied. The most important of these conditions all should be, however, that unlimited freedom of contract must apply.

Restrictions on freedom of contract are counterproductive to market economy's quest for Pareto-effectiveness. This is why freedom of contract should be circumscribed only when the positive effects of such circumscription can be considered to outweigh the losses of effectiveness that will result from it. The question of how far one should go in this respect is a political one.⁴⁵² Naturally, it is impossible to make any general pronouncements in this regard – each case must be tried separately.⁴⁵³ As mentioned before, the question concerns restrictions on contract freedom based on the contract's content. Such restrictions are only seldom perceived as unconditionally justified.⁴⁵⁴ Despite this, in the twentieth century freedom of contract has been the object of comprehensive content-oriented restrictions.⁴⁵⁵ These have been performed above all by parliamentary legisla-

449 The concept of 'freedom of contract' entails several meanings, and is more of an umbrella designation of three related freedoms. Taxell (1997) p. 36 and (1987) p. 32, speaks of the individual's freedom to conclude or not to conclude a contract, freedom to choose a party to a contract, as well as freedom to decide upon the content of a contract. As regards freedom of contract and its meaning in a historical perspective, see Atiyah (1979) and (1989).

450 See, for example, Farnsworth (1990) p. 7; Skogh & Lane (1993) p. 52 and Werin (1982) p. 66.

451 See Atiyah (1995) p. 4.

452 Cf. Sandgren (1993) p. 660.

453 See Hellner (1993) p. 95.

454 An example of such content-oriented limitations on freedom of contract that should be able to win most people's support is the general principle under which a contract is not legally enforceable if its objective is unlawful.

455 Grönfors (1989) p. 18 f (cf. (1988b) p. 318 ff) has claimed that nowadays freedom of contract is rudimentary and that it is the object of supervision. This pronouncement has been modified, and Grönfors (1993) p. 28) now speaks of the supervisory and low-degree free-

tion, where the positive effects of such restrictions have been considered to outweigh their disadvantages. The most distinct example of the above is the comprehensive consumer protection legislation in the field of contract law. Even though the suitability of such regulation may sometimes be questionable,⁴⁵⁶ as a result of the way in which it has come about it must be fully accepted.

Should courts and insurance boards choose to comply with the adequacy requirements which are traditionally applicable in the current context even when clear requirements of factual or direct causality are present, as stipulated in sections 11.4.1.2 – 11.4.1.3, then this would seem to be the question of restrictions on freedom of contract resting on completely different premises. Not only would such an interpretation of terms lack substantial reasons, but also the accompanying freedom of contract restrictions would lack the legitimacy of the legislation, which is why it could easily be challenged.

11.5 Consequences

The above-proposed formulation and interpretation of terms would make that insurance policies whose cover has been limited from the point of view of causation solely by the requirement of factual causality would entail very extensive, not to say indefinite, insurance liability.⁴⁵⁷ To the extent in which such insurance protection would be offered at all, it would be provided for the insurance of precisely specified risks only, or for insurance policies that would be very costly. Insurance policies whose scope has been limited by the requirement of direct causality would cover only the immediate consequences of the event insured. The determination of the scope of risk would be no problem to the insurer: there would be few compensable losses. The insurance policy would provide a relatively cheap basic insurance protection.

The great majority of policy holders would request, however, insurance whose scope and price would lie somewhere between these two extremes. This demand would be met by the insurance business by providing insurance covering the insured event's adequate consequences.

The proposed formulation and interpretation of terms would thus imply that, as in the present situation, the majority of policy holders would be given protection against adequate loss, whereas inadequate loss would fall outside the scope of the insurance protection. In all probability this insurance protection would command a price which is equivalent to the current price of insurance with this coverage. In contrast to what is the case at present, the scope of insurance protection as a function of causality would follow, however, directly from the wording of the liability-activating causation terms. Interpretation of these terms would thus not lead to what the insurer or the insured perceive as surprising re-

dom of contract. A more cautious attitude to the issue in question is shown by Lehrberg (1996a) p. 465. The basic motives concerning the restrictions in question are well described by Slawson (1996) p. 22 ff.

⁴⁵⁶ Cf. footnote 437. As regards discussion concerning the limits of freedom of contract from the economic point of view, the reader is referred to Trebilcock (1993).

⁴⁵⁷ See section 4.2.3.1.

sults. The number of processes and therefore also the transaction costs would be most probably lower than at present.

The proposed formulation and interpretation of terms would obviously entail certain differentiation in the range of insurance products. Insurance protection against the covered event's direct, adequate, and perhaps even factual consequences would be obtainable. An increase in the range of products means that the policy holder's possibilities of obtaining the desired insurance protection would also increase. This should in turn lead to a growing demand for insurance. The widening of the range of products that would be the consequence of the proposed arrangements seems therefore to be an attractive possibility for both insurers and policy holders.⁴⁵⁸

A wider range of products is not always advantageous, however. When a range of products increases, the requirements of competence concerning all the market actors also increase. In the case of the insurers, products' design, determination of premiums, as well as settlement of claims become more complicated.⁴⁵⁹ As regards the clients it is the choice of the insurance product which becomes more complicated. This problem should lose some of its importance, however, with the growing number of insurance contracts mediated by insurance brokers, whose task it is to ensure that the client receives goal-oriented protection.⁴⁶⁰ The fact that even insurance brokers are affected by the requirements of higher competence entailed by the currently discussed development is thus quite obvious. All this ought to lead to the insurance policies in question becoming more expensive. Generally speaking, however, this ought to be more than coun-

458 This view seems also to be supported by the Insurance Commission of Enquiry which, in order to stimulate competitiveness with regard to the determination of premiums and formulation of terms, has suggested that the principle of reasonableness in FRL be rescinded (see, SOU 1995:87 p. 106 and 131).

459 During the 1990s there was a shift between bank and insurance branches. Ideas about financial department stores have led to banks buying insurance companies or starting insurance businesses (See Gunnarson, Kleverman & Norrby (1996) p. 176. Not least in such newly founded and often small insurance companies should the increasing knowledge criteria be thought to constitute a problem.

460 Until the beginning of the 1990s insurance brokerage was in practice impossible in Sweden as a result of the insurance sector's marketing agreement prohibiting the insurance companies to pay commission or similar compensation to anyone else than a registered insurance agent (re-insurance brokerage was, however, possible) (see Dufwa (1992) p. 3). The main reason for this prohibition was that the entrance on the market of an insurance broker would imply a break in a direct contact between the insurer and the client, and one was afraid that this would imply cost increases of 10 -15% (see Radetzki (ed.) (1992) p. 352). After many years of debate the controversial prohibition of insurance brokers' activities was lifted. The marketing agreement was rescinded and the business of insurance brokerage became regulated by FML. The most important reason for this reform is supposed to have been the assumption that business activities of insurance brokers should increase competition on the insurance market (see SOU 1986:55 p. 122 f; prop 1988/89:136 p. 12 and Dufwa (1992) p. 3). Another reason that might be particularly interesting in the present context was the view that the different insurance products were considered to show increasing complexity and variation (not least due to the fact that co-operation within the insurance sector producing standardised terms had ceased). In this situation the clients were considered to be in need of impartial expert help when choosing insurance (see SOU 1986:55 p. 83 and 124; prop 1988/89:136 p. 12 and Dufwa (1992) p. 3).

terbalanced by the above-described advantages of the proposed formulation and interpretation of terms.

As mentioned earlier,⁴⁶¹ there is also a risk that a small group of clients will be tempted in these circumstances to take out cheap insurance policies covering only the insured event's direct consequences, not because they would wish to obtain such basic cover for rational reasons, but because they will be unaware of the limited coverage of such insurance and tempted by its low price.⁴⁶² The fact that in the case of loss these policy holders will receive compensation for the covered event's direct consequences only is not at all remarkable from the economic point of view; they will have the protection they have paid for. It is, clear, however, that under the proposed scheme the less knowledgeable policy holders will be deprived of the protection which is their due under the present scheme.⁴⁶³ In the case when insurers start differentiating their insurance products in the way suggested in this work, it is important that the clients are carefully informed before the conclusion of a contract about the different alternatives that are available to them as well as about their different implications. To some extent, duty to provide information in this respect should follow from applicable legislation.⁴⁶⁴ Moreover, for reasons of competition, effective design and provision of information should be in the best interests of the insurer. Most probably, in addition to this, various consumer organisations, such as, for example, the Consumer Insurance Bureau, as well as the mass media should be able to effectively contribute to the required information flow.

11.6 A Closer look at the Suggested Content and Application of the Causal Requirements

Even in the case of terms being formulated and interpreted according to the lines advocated in this work, the scope of the majority of property insurance policies would most probably be limited by the requirement of adequate causality. It is therefore important to discuss in more detail the content and application of the adequacy doctrine in the context of insurance (section 11.6.1). In addition to this, in some cases there may also appear the requirement of direct causality; its content and application are therefore treated in section 11.6.2. In some special insurance policies the sole requirement of factual causality may also be found. Its content and application are discussed in section 11.6.3.

⁴⁶¹ See section 11.3.2.3.

⁴⁶² See, Ekstedt (1996) p. 100.

⁴⁶³ Refer in this connection to section 11.3.2.3.

⁴⁶⁴ As regards Sweden, see §§ 5 and 6 KFL (concerning these provisions, refer to Nilsson & Strömbäck (1984) p. 49 ff). Similar requirements of information have been set forth in 2:2 and 2:3 of the proposal to NYFAL (Ds 1993:39), where it has been stipulated that the duty of information should embrace more numerous types of insurance than those presently covered by KFL (see especially chapter 1 § 1 and chapter 2 § 1 of the proposal). In Norway the information in question should be covered by § 2-1 NFAL (see Selmer (1990) p. 41 ff). In Denmark the circumstances are more complex. A good survey of the situation is provided in Det Danske Selskab for Forsikringsret (1997).

11.6.1 Adequate Causality

11.6.1.1 Content

The doctrine of adequacy in insurance law appears to be relatively uniform. The doctrine's application entails a requirement of likelihood or similar.⁴⁶⁵ This appears to be well justified, since the likelihood requirement (or similar) complements the insurance situation better than other adequacy criteria, especially as the insurer needs to be able to calculate a premium corresponding to the assumed risks already at the conclusion of a contract.⁴⁶⁶

11.6.1.2 Determination of Adequacy

Application of the doctrine of adequacy in insurance law has been the object of attention in a limited degree only.⁴⁶⁷ Consequently, the doctrine is unpredictable, in that it is sometimes uncertain whether or not particular damage can be considered to fall within the adequacy framework of insurance law, which causes disputes and increases transaction costs. In order to minimise the doctrine's unpredictability in the greatest possible degree the following section discusses a number of questions commonly appearing when determining adequacy in insurance law. In this context two kinds of relationships appear to be of particular importance. It is partly the fact that the insurer's obligation to compensate rests wholly on the contractual basis; and partly, that it is absolutely necessary for the insurer to be able to calculate in advance premiums corresponding to the assumed risks, and that, as pointed out in section 11.2, when this is impossible, the insurer will tend to protect himself by charging premiums which are higher than those that can be considered as justifiable under the existing estimates.⁴⁶⁸

In a similar way to the one presented in section 11.3.2.3 it could be stated in connection with the last-mentioned relationship that the question concerning the adequacy doctrine's application affects the economy of the insurance in a limited degree only. This is why it would not be fair to let the insurer's capability to assess risks govern the application of adequacy. Against this argument one could submit the view that even if each single issue concerning the interpretation of the insurance policy (to which application of the adequacy doctrine may be considered to belong) can be quite unimportant for the economy of the insurance,

⁴⁶⁵ As regards other terms describing adequacy that can be considered as synonymous with the presently mentioned ones, refer to section 2.2.2.2.

⁴⁶⁶ The requirement that the loss be related to or flow from the dangerous features of the act leads in some measure to a kind of goal-oriented coverage argument which clashes in the context of insurance with the limitations on the scope of insurance protection that focuses on the interest insured (see section 4.3). When determining adequacy in insurance law it is preferable to formulate a requirement of probability increase, or possibly a requirement stipulating that the loss shall not constitute too remote a consequence of the covered event. These formulations do not seem, however, to be as suitable with regard to the insurance situation as the aforementioned requirement of likelihood.

⁴⁶⁷ See section 9.4.2.

⁴⁶⁸ See Radetzki & Radetzki (1997) p. 3 ff. Cf. Skogh (1996) p. 6.

when all such issues are considered together, they will acquire great importance. This is why in a discussion of the adequacy doctrine's application each factor influencing the economy of the insurance should be considered as important.

11.6.1.2.1 Relevant Evaluator

In the light of the foregoing the primary purpose of the doctrine of adequacy seems to be to prevent the insurer from being liable for damage that he was unable to foresee. Determination of adequacy should therefore apply to the question of whether the insurer has actually foreseen, or should have foreseen, the type of damage in question. It should thus be an objective process, with an evaluator in the form of a hypothetical insurer.

The level of competence of the hypothetical evaluator is, naturally, of great importance for the result of the determination. Since risk assessment constitutes a vital part of the insurance company's activities, in addition to the knowledge possessed at the relevant point in time⁴⁶⁹ by the insurer in the case in question, the evaluator should be equipped with relatively extensive knowledge and therefore the ability to foresee the consequences of the covered event.

11.6.1.2.2 Relevant Point in Time

As mentioned earlier, the insurer's liability is wholly based on contractual grounds. The insurance contract in question is based, in turn, on the free will of the parties to the contract at the time of the contract's conclusion. In these circumstances it appears reasonable that the insurer's liability should be limited to losses that were foreseeable at the time of the contract's conclusion, and which could therefore have been taken into consideration when calculating the premium. The relevant point in time for determining adequacy should thus be the time at which the insurance contract in question was concluded.

11.6.1.2.3 Description of the Course of Events

The subject matter of adequacy determination consists of the course of events, beginning with the covered event and leading to the losses indicated in the insurance policy. It is, of course, impossible to give a general statement as to how precisely this course events ought to be described. A reasonable starting point seems to be, however, that only the most central components of the course of events, which can be expected to have been considered by the insurer when setting the premium, should be taken into consideration. Details should thus be omitted.

11.6.1.2.4 The Level of the Adequacy Requirement

It has been shown that the adequacy requirement formulated in the present context entails a requirement of likelihood or the like. It has also been shown that the doctrine of adequacy is not applied very stringently. In support of the latter the following arguments have been used in the literature: (a) that the statistics underlying the insurers' calculations of premiums include also relatively odd or peculiar chains of events; (b) that strict application of the adequacy doctrine

⁴⁶⁹ Regarding this issue see the following section.

causes uncertainty regarding the scope of the insurance cover; (c) that the idea behind insurance business activities is compensation for loss, and that strict application of the adequacy doctrine is in stark contrast with this idea; (d) that the costs which a particularly low level of adequacy requirement would entail are so small that they can easily be borne by the insurance companies; (e) and that insurers who so wish can protect themselves in the insurance policy against the consequences of a liberal requirement of adequacy.⁴⁷⁰

One reason against liberal application of the adequacy doctrine is that the primary purpose of the doctrine in the context of insurance is to ensure that the insurer will be able to calculate in advance insurance premiums corresponding to the assumed risks. This possibility is lost when the adequacy requirement is too liberal. Despite the latter argument there are good reasons in insurance law, however, for a less stringent requirement of adequacy. As mentioned before, risk assessment constitutes a vital part of the insurance companies' activities. One should therefore be able to place high demands on their ability to foresee the covered event's consequences. It is therefore reasonable to consider all damage that appeared to a given insurer as a possible consequence of the covered event to constitute an adequate consequence thereof.⁴⁷¹

The primary basis for this relatively liberal requirement of adequacy is constituted in the generally good possibilities of the insurer to foresee the consequences of the covered event. Since these possibilities should be independent of the circumstances surrounding each individual case, there is no reason to let the level of the adequacy requirement be influenced by them. The required degree of adequacy should therefore be made independent of such factors as the nature of the insured property, the status of the insured or a similar relation.⁴⁷²

11.6.1.2.5 Conclusions

To summarise the result of the above, in the present context *loss can be regarded as adequate if that loss could be perceived by a hypothetical insurer as a possible consequence of the covered event at the time of contract conclusion. When determining adequacy, the more central components of the course of events shall be considered.*

11.6.1.3 Comments

Even though the guiding principles presented here elucidate the content and application of the adequacy doctrine to a certain degree, the result of adequacy determination may sometimes be difficult to foresee. It has thus been impossible to fully overcome the doctrine's unpredictability. This can hardly be done in any

⁴⁷⁰ See section 8.3.3.3 including the references.

⁴⁷¹ One could claim, of course, that almost any consequence of the covered event might be considered as a *possible* consequence thereof (cf. Ramberg (1995b) p. 646 f regarding interpretation of Art. 74 CISG). The expression used above should not be interpreted in this way, however. Its objective is only to give expression to the fact that the requirement of likelihood should not be particularly high in the present context.

⁴⁷² Cf. section 9.4.2.

case. The doctrine of adequacy entails evaluation of the causal relation between the covered event and loss. Only loss which is regarded as likely is compensable. What is necessary to fulfil this condition can hardly be determined in general terms without becoming overly vague. As in tort law,⁴⁷³ it can therefore be too much to regard the adequacy doctrine as a *rule* according to which the policy holder's right to compensation is restricted *in a certain way*. The doctrine is not accurate enough for this. It is rather a way of reasoning about the limits of liability.

It is true that the principle of adequacy proposed for insurance law shows certain similarities to, partly, the principle applied in the contractual law of damages and, partly, to Art. 74 of CISG.⁴⁷⁴ This is not surprising. Insurance consists in the fact that for certain premium an insurer carries certain risks, where the premium has been adjusted to the scope of risk in question. In a similar way a seller requests remuneration for the legal responsibility that he carries under the applicable contractual rules of the law of damages with regard to defective goods. Even here the amount of the remuneration will naturally depend on the risk. The fact that principles applying to the scope of liability are similar seems to be motivated in this context.

In certain respects there is, however, a substantial difference between the adequacy principle proposed here, on the one hand, and the above-mentioned contractual principles on the other. The difference is that the requisite level of the adequacy requirements in the contractual law of damages seems to be higher than what can be considered suitable in insurance law. This is not surprising, however, either. As mentioned before, one should be able to set high requirements on the insurer's ability to foresee possible consequences of the event covered by the insurance. To require that a party to a contract shall be able to foresee the possible consequences of a contract breach in a similar degree appears hardly reasonable. The fact that the adequacy requirement in insurance law is more liberal than the equivalent requirement in the contractual law of damages can be considered justifiable in these circumstances.

11.6.2 Direct Causality

The requirement of direct causality means that the covered event must have caused damage without the intervention of any supervening events.⁴⁷⁵ When determining whether some damage constitutes a direct or an indirect consequence of the covered event, the precision with which the course of events in question is analysed is of central importance. Assume that an insurance policy covers direct consequences of fire, where fire caused heat, which caused in turn damage to a close-by stock of perishable products. The question is whether the heat shall be considered as assignable to the concept of fire, in which case the damage will constitute a direct and therefore a compensable consequence of the fire, or whether the heat shall be separated from the concept of fire, in which

⁴⁷³ Regarding this, refer to sections 2.2.2.5 and 2.3.1.3.

⁴⁷⁴ Regarding this, refer to sections 2.3.1 and 2.3.2.

⁴⁷⁵ Regarding the content of the concept of direct causality, refer to section 4.2.3.2.

case the damage will be considered as indirect and therefore non-compensable. The decisive factor for this assessment will be the content of the concept of fire appearing in the policy, which will be determined in the first hand by common language usage.⁴⁷⁶

Since the way we use language undergoes constant changes over time, the point in time at which the assessment is made may sometimes be important. As in a discussion about the relevant point in time for adequacy determination,⁴⁷⁷ it should be mentioned in the present context that the insurer's obligation to pay is based on a contract, which is based in turn on the free will of the parties at the time of the conclusion of the contract. It appears therefore reasonable in the present context to allow general linguistic usage at the time of contract conclusion to be the decisive factor of the interpretation.

In summary it can thus be said that as in relation to the covered event direct damage is *that damage which, according to the ordinary language usage at the time of the conclusion of the contract, constitutes damage caused directly by the covered event, i.e. without the intervention of any supervening events.*

It is beyond doubt that drawing a border line between direct and indirect damage according to the proposed definition may entail great difficulties. On the other hand, this kind of problems should appear in a relatively limited number of cases, namely in the settlement of claims concerning proximate damage in relation to the covered event. It is clear that other types of damage cannot be regarded as direct under the proposed definition. Hence, the current problem seems to be relatively rare when compared with the difficulties appearing when drawing borders between adequate and inadequate damage, which should arise in a much wider range of damage types.

11.6.3 Factual Causality

Insurance against the covered event's factual loss can be expressed in a somewhat simplified manner as that covering all loss for which the covered event was a necessary or a sufficient condition.⁴⁷⁸ This means that an insurance policy against the covered event's factual consequences entails very extensive, not to say unlimited, insurance coverage. In practice, this liability is restricted, however, due to the burden of proof which lies with the policy holder in this case. The starting point in civil disputes is that the party who has the burden of proof regarding a certain situation or state of things must *prove* that this situation exists.⁴⁷⁹ With regard to remote damage it can be very difficult, not to say impossible, for a policy holder to *prove* that the covered event is the cause of the damage.⁴⁸⁰ For an insurance case (i.e. the circumstances when insurance compensation is paid) to apply a slightly modified proof requirement is employed, however. When the insured is a consumer, it is enough that an overall assessment

⁴⁷⁶ See section 3.3.1.1.

⁴⁷⁷ See section 11.6.1.2.2.

⁴⁷⁸ Concerning the meaning of the concept of factual causality, refer to section 4.2.3.1.

⁴⁷⁹ See NJA 1993 p. 764 (p. 775).

⁴⁸⁰ See Rodhe (1956) § 28 at footnote 10.

indicates that it appears as *more admissible* that the insurance case has occurred than that it has not. In other cases it is required that an overall assessment indicates that it is *clearly more probable* that the insurance case has occurred than that it has not.⁴⁸¹ The purpose of this relaxation of proof requirements has obviously been to increase the scope of the insurer's liability in the present context. When thinking of the insurer's absolute necessity to calculate a premium equivalent to the assumed risk already at the time of the conclusion of the contract, this relaxation of proof requirements could become the object of criticism. Despite this, it must be considered as justifiable to at least some extent, since without such relaxation the seemingly enormous scope of insurance protection would be somewhat illusory.

Also term requirements of factual causality may thus give rise to difficult problems of drawing border lines. Similarly to problems concerning the distinction between direct and indirect damage these problems should seldom occur, however. As regards frequently arising consequences of the covered event the causal connection should be obvious. The problems of drawing border lines in the context of factual causality should thus arise mainly in rare cases of very remote kinds of loss.

11.6.4 Summarising Example

Assume that a wooden building has been destroyed by fire. The damage consists in the fact that the wood has been transformed into ashes. The fact that this damage constitutes a *factual consequence* of the fire is obvious. It is also obvious that it constitutes an *adequate consequence* of the fire. The damage to the wood may also be considered to constitute a *direct consequence* of the fire, since it has been caused by it without any supervening events.

Yet another damage consists in the fact that a warehouse containing textile fabrics located in the neighbourhood of the building destroyed by the fire has been damaged as a result of smoke development during the fire. Also this damage constitutes both *factual* and *adequate consequence* of the fire. The answer to the question as to whether it also constitutes a *direct consequence* is more uncertain. The question is whether according to the general language usage applicable at the time of conclusion of the contract the damage can be considered to have been caused directly by the fire, i.e. without any intervening events.

An object rescued from the fire is damaged by damp due to rain. The damage constitutes a *factual consequence* of the fire. With all probability it can be also considered to constitute an *adequate consequence*. It does not constitute, however, any *direct consequence* of the fire. Its direct cause is rain.

Due to the rain other objects rescued from the fire are placed in a car parked outside the building destroyed by the fire. The car is hit by a passing buss, with

⁴⁸¹ See Bengtsson (1992a) p. 46. Cf. Lindell (1992) As regards case law the reader may refer to NJA 1984 p. 501 and NJA 1986 p. 3 (consumer insurance), as well as NJA 1992 p. 113 (company insurance – small companies). As regards Danish and Norwegian law, see, Lyngsø (1994) p. 184 and Selmer (1982) p. 316. A more all-sided discussion of the question concerning burden of proof and proof requirements in the current context can be found in Bolding (1952).

the resulting damage of the property placed in the car. Doubtless, even this damage constitutes a *factual consequence* of the fire. It is, however, much more difficult to answer the question as to whether the damage constitutes an *adequate consequence* of the fire. The question here is whether the damage appeared as a possible consequence of a fire to a hypothetical insurer at the time of contract conclusion. When considering this question, only the more central components of the course of events shall be taken into consideration. The fact that the damage cannot be considered to constitute a *direct consequence* of the fire is evident, on the other hand.

During the work to save the property from the fire the owner of the building is injured. He goes to the nearest hospital to get first aid. On the way from the hospital he falls down the stairs and damages his shirt. Without the fire his shirt would not have been damaged. Doubtless, even this damage constitutes a *factual consequence* of the fire, but it does not constitute either an *adequate* or a *direct* consequence thereof.

The damaged shirt is replaced by purchasing a new one. When the new shirt is washed for the first time it discolours and damages the remaining laundry. This damage would not have either occurred without the fire, and it therefore constitutes a *factual consequence* thereof. However, it can be difficult to prove this connection, not least if the counter-party should claim that some other piece of clothing must have caused the damage. Whether or not the damage will be regarded as a factual consequence of the fire will depend to a large extent on the prevailing proof requirements. Various means of relaxation of proof requirements will be applied here in order to increase the policy holder's possibility of recovery. Once again it is obvious that the damage constitutes neither an *adequate* nor a *direct consequence* of the fire.

These examples illustrate the meaning of the concepts of factual, adequate and direct causality. In addition, they demonstrate the difficulties that may accompany the practical application of causal requirements based on these concepts. Even though the guiding principles used in the different assessments above make practical application somewhat easier, there still remains a lot of uncertainty. Hence, even when the proposed formulation and interpretation of terms is followed, the application of the liability-activating causation terms constitutes a difficult problem, detrimental to the insurers, the policy holders, and society as a whole. To conclude, there may be a reason to remind the reader that, as pointed out in section 4.3, the question of the interpretation of the liability-activating causation terms becomes operative solely in the case when compensation from the insurance is not excluded due to some other limitation on the insurer's liability. Among such limitations which may bring relief to the causal requirements when trying to delimit the insurer's liability can be found terms concerning the interests or the type of damage covered by the insurance. In order to avoid, as far as possible, this troublesome complex of causation problems the insurer's liability should be delimited primarily and to the greatest possible degree with the aid of such, to the causal requirements alternative, methods.

Abbreviations

AC	Appeal Cases (England)
AGB-Gesetz	Gezetz sur Regelung der Rechts der Allgemeinen Geschäftsbedingungen. Vom 9 Dezember 1976, BGBl IS 3317 (Germany)
AIDA	Association Internationale du Droit des Assurances
AK	Ankenævnet for forsikring (insurance board, Denmark)
ARN	Allmänna reklamationsnämnden (the National Board for Consumer Complaints, Sweden)
AVLK	Lag om avtalsvillkor i konsumentförhållanden (1994:1512) (the Consumer Contracts Act, Sweden)
AvtL	Lag om avtal och andra rättshandlingar på förmögenhetsrättens område (1915:218) (the Contracts Act, Sweden)
CB	Common Bench Reports (England)
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980
DavtL	Aftalelov. Lovbekendtgørelse nr. 600 of 8 Sept. 1986 (the Contracts Act, Denmark)
DFAL	Lovbekendtgørelse no.726 of 24 October 1986 om forsikringsaftaler (the Insurance Contracts Act, Denmark)
Ds	Departementsserien (the Official Reports Series published by the Ministries, Sweden)
EEC	European Economic Community
Exch	Exchequer Reports (England)
F2d	Federal Reporter, Second Series (USA)
FAL	Lag om försäkringsavtal (1927:77) (the Insurance Contracts Act, Sweden)
FED	Forsikrings- og Erstatningsretlig Domssamling (Law Reports, Denmark)
FFAL (1933)	Lag om försäkringsavtal (132/1933) (the Insurance Contracts Act, Finland) (repealed)
FML	Lag om försäkringsmäklare (1989:508) (the Insurance Brokers Act, Sweden)
FRL	Försäkringsrörelselag (1982:713) (the Insurance Business Act, Sweden)
FSN	Forsikringsskadenemnda (insurance board, Norway)
FT	Försäkringstidningen (insurance journal, Sweden)
HD	Högsta domstolen (the Supreme Court, Sweden)
J	Juristen (legal journal, Denmark)
JFT	Tidskrift utgiven av Juridiska Föreningen i Finland (legal journal, Finland)
JT	Juridisk tidskrift vid Stockholms universitet (legal journal, Sweden)
JV	Jussens Venner (legal journal, Norway)
KFL	Konsumentförsäkringslag (1980:38) (the Consumer Insurance Act, Sweden)

Lloyd's Rep	Lloyd's Law Reports (England)
LoR	Lov og Rett (legal journal, Norway)
LU	Lagutskottets betänkande (Report of the Standing Committee on Laws, Sweden)
MIA	Marine Insurance Act 1906 (6 Edw 7 c 41, England)
NAvtL	Lov 31 mai 1918 no.4 om avslutning av avtaler, om fuldmagt og om ugyldige viljeserklæringer (the Contracts Act, Norway)
ND	Nordiske Domme i Sjøfartsanliggender (Scandinavian law reports)
NFAL	Lov om forsikringsavtaler av 16 juni 1989 no. 69 (the Insurance Contracts Act, Norway)
NFAL (1930)	Lov om forsikringsavtaler av 6 juni 1930 no. 20 (the Insurance Contracts Act, Norway) (repealed)
NFT	Nordisk försäkringstidskrift (insurance journal, Scandinavia)
NJ	Skriftserien Ny Juridik (legal journal, Sweden)
NJA	Nytt juridiskt arkiv (avdelning I) (law reports, Sweden)
NOU	Norges offentlige utredninger (the Norwegian Government Official Reports)
NYFAL	Ny försäkringsavtalslag (Ds 1993:39, Sweden)
ot prp nr	Odelstingets proposisjon (bill, Norway)
prop	Proposition (bill, Sweden)
QB	Queen's Bench Reports (England)
QBD	Queen's Bench Division Reports (England)
Rt	Norsk Retstidende (law reports, Norway)
SkFL	Skadeförsäkringslag (SOU 1989:88, Sweden)
SkVN	Skadeförsäkringens villkorsnämnd (insurance board, Sweden)
SOU	Statens offentliga utredningar (the Swedish Government Official Reports)
SvJT	Svensk juristtidning (legal journal, Sweden)
TfR	Tidsskrift for Rettsvitenskap (legal journal, Scandinavia)
U	Ugeskrift for Retsvæsen. Afdelning A. Dansk Domssamling (law reports, Denmark)
UfR	Ugeskrift for Retsvæsen. Afdelning B. Juridiske afhandlinger Meddelelser mm (legal journal, Denmark)
VVG	Gesetz über den Vericherungsvertrag. Vom 30 Mai 1908, RGBI S 263 (Germany)

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