CONTRACTUAL LIABILITY AND LIABILITY INSURANCE

A COMPARATIVE STUDY

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INTRODUCTION

In Sweden, as in other countries, there is a close connection between the increase in the use of liability insurance and the trend towards strict liability in the law of tort. The access to insurance as a means of distributing the losses is an important argument for both legislators and courts whenever there is a need for a liability rule more rigorous than the principle of fault liability.

It is often taken for granted that insurance is available for most kinds of liability, including liability independent of negligence. However, several important risks are excluded from the coverage of the ordinary policies. There is a widespread opinion that only liability in tort (in Continental law: delictual liability) is a natural object of insurance, and that liability in contractual relations or, at all events, liability based upon contract presents particular practical and theoretical difficulties for insurers. The main reason for this view is that the responsibility then assumed by the insurer does not arise immediately by law but only because of an agreement between the insured and the plaintiff. The view has been extended even to claims involving damage to property or persons. Such risks as the seller's liability towards the buyer for dangerous defects in the goods sold, or the depositary's liability for damage to the goods in his charge, or the entrepreneur's liability for damage caused to the building that he has undertaken to repair, should in principle be omitted from the coverage. In most countries the policies exclude some sort of contractual liability; moreover, they almost always contain special exceptions about certain types of damage which generally occur in contractual relations, such as damage to property in the care, custody or control of the insured and damage arising out of the sale or supply of goods.

In earlier Scandinavian doctrine, it has sometimes been argued that there is a correspondence between the particular rules about liability in contract and such common policy exceptions.[1] The

[1] See, e.g., Dahl, *Ansvarsforsikring,* Oslo 1929, pp. 41 ff., Skibsted, *Dansk Ansvarsforsikring,* Copenhagen 1930, pp. 15 ff.

committees that drafted the present Swedish and Danish Insuranc Acts have also presumed such a connection to exist.[2] In some of th few Scandinavian decisions upon the subject, the courts hav reasoned in a similar way.[3]

It is natural that legal scholars as well as the courts shoul approve of a principle according to which the scope of the insuranc should be decided by this essential borderline in the law of com pensation for damage. The interpretation of insurance policies is often a difficult matter, especially for lawyers outside insurance circles, and they will find it helpful to apply the same reasoning in this task as in deciding the nature of a claim for damages. Therefore they use, at least as their starting point, a presumption that liability in contract is not covered by the insurance. However, the significance of such a principle is still very vague; further, it has recently been doubted whether this is the right way of solving the problems involved.[4] The advantages of the presumption may be outweighed by the fact that it will sometimes conflict both with the interests of the insurers and with those of the insured parties.

The aim of this study, which is based upon a treatise in Swedish published in 1960,[5] is to examine the import and value of the principle of a connection between the liability rules and the insurance coverage. The essential questions are to what extent we can establish such a connection and whether there exists some characteristic trait of contractual liability as compared with liability in tort which might be a sufficient reason for limiting the coverage. The investigation is restricted to liability for physical damage (damage to property or person).

The chief source of information as to the insurance aspects of this problem is the actual practice of the insurers. As the wording of the policies and the common interpretation of the clauses may be influenced by experiences peculiar to the insurers of each

[2] See SOU 1925: 21, p. 188, *Udkast til Lov om Forsikringsaftaler,* Copenhagen 1925, p. 131.

[3] See, e.g., *Feldthusen* v. *Arbejdsgivernes Ulykkesforsikring,* 1941 U. f. R. 724, and *Dissing* v. *Mejeriernes og Landbrugets Ulykkesforsikring,* 1941 U. f. R. 761 (Supreme Court of Denmark), cf. *Margarinfabriken Kärnan* v. *Forsikringsaktieselskabet Nordeuropa,* 1947 N. J. A. 400 (Supreme Court of Sweden).

[4] See Hult, "Svensk rättspraxis. Försäkringsrätt 1947–1953", *Sv. J. T.* 1954, pp. 650 ff., and Hellner, *Försäkringsrätt,* Stockholm 1959, p. 378.

[5] Bengtsson, *Om ansvarsförsäkring i kontraktsförhållanden,* I. *Den skadeståndsrättsliga bakgrunden,* II. *Försäkringsskyddet,* Stockholm 1960 (xvi + 678 pp). reviewed by Hellner, *Sv. J. T.* 1960, pp. 605 ff., and by Jörgensen, *U. f. R.* 1960, B pp. 195 ff.

country or by some special trait in its national law, it is necessary to examine the solution of the problems on a national basis. To this end, the author will survey the liability rules and, against that background, the coverage of the insurance in Germany, Switzerland, France, England, the U.S.A., and in the Scandinavian countries with the exception of Finland.

THE LIABILITY RULES

There are several types of liability that might be applied between contracting parties: (a) liability for negligence (fault liability); (b) vicarious liability (for negligent acts of employees or independent contractors in the service of the defendant); (c) liability for presumed negligence; and (d) strict liability, independent of any negligence on the part of the defendant or those considered as his agents. In Swedish law, liability of type (b) is often considered a characteristic form of liability in contract. Types (c) and (d) are sometimes regarded in this way, too, though in some instances they also occur in non-contractual relations. However, such extensions of the main principle of fault liability are much more frequent in certain foreign legal systems. Further, it is emphasized, especially in Continental law, that liability of type (a) also can be based upon the breach of a *contractual* duty to take reasonable care in certain respects. A common trait of contractual liability in the various systems of law is that, in the absence of contract between the parties, the defendant would not have been liable for damage caused in the same way.

On the other hand, at times the tort rules afford considerable advantages to the injured party, for example as regards the measure of damages, the right to damages for pain and suffering, the absence of such rules concerning limitation of actions as are confined to claims in contract, etc. It is generally accepted that a breach of contract can, at least in some cases, be considered to be at the same time a tort, the injured party thus being entitled to claim alternatively in contract or tort. This ought to be kept in mind when investigating the relations between the two bases of liability.

In order to understand the functions of the contractual rules, it is important to take note of the leading policies behind the two types of liability. As to the law of *tort,* it is well known that modern industrialization and the traffic associated with it have given rise to a rigorous attitude towards such activities as involve

danger to other persons (or to their property). The principle of fault liability, however, will often leave the injured parties without compensation, and this is not consistent with the increasing desire for security among the public. For such reasons there is a tendency to extend the dominion of liability of types (b), (c) and (d); or, at least, a stricter duty of care may be imposed upon those conducting dangerous activities. It is asserted that the risks which are the outflow of a special activity should be borne by the entrepreneur, as he can protect himself from the loss by raising the price of his products or services so as to cover his costs for damages or for liability insurance. The general attitude of the legislators and the courts seems to be that the injured parties should be compensated as far as possible, provided that the liability imposed would not involve serious economic disadvantages to such entrepreneurs as organize their business or other activities in a rational way.[6] However, the formal requisites of liability in tort can seldom be altered as quickly as social policy seems to demand; in most cases the courts still rely upon some kind of negligence when imposing liability on the tortfeasor or his employer.

As for the policies behind the rules of *contractual* liability, they seem to be based upon two differing sets of ideas. In legal theory, it was long argued that the main function of the liability rules was to oblige the parties to a contract to perform their promises, and that the consequences of any breach of a contract were decided by the parties on such a basis. Though it is recognized today that it is in part a fiction to explain the sanctions in this manner, liability in contract is often considered to be something that is bargained for even in the absence of an express promise. This leads to the principle that the price and other conditions of the contract should be considered when distributing the risk of damage between the parties. Even strict liability will often appear as reasonable in view of the content of the contract as a whole.[7] On the other hand, an important consequence of the same view is that the parties should only bear such burdens as they can reckon with beforehand; thus, the rules of extended liability should in general

[6] On the reasons for an extended liability in tort from the point of view of social policy, cf. in Scandinavian doctrine, e.g., Ussing, *Erstatningsret,* 2nd ed. Copenhagen 1947, pp. 118 ff., Grönfors, *Om trafikskadeansvar utanför kontraktsförhållanden,* Stockholm 1952, pp. 77 ff., Karlgren, *Skadeståndsrätt,* 2nd ed. Stockholm 1958, pp. 11 f., 107 ff.

[7] See, e.g., Ussing, *Dansk Obligationsret, Almindelig Del,* 2nd ed. Copenhagen 1942, pp. 127 f., Arnholm, "Noen bemerkninger om erstatningsansvar i kontraktsforhold", *T. f. R.* 1941, pp. 496 ff.

not be applied to quite unexpected risks, and damages in contract should be confined to those losses that can be foreseen at the time when the contract was formed.[8] In the same way, the rules about limitation of actions in certain types of contract have been recognized as being partly a means of counterbalancing a rigorous liability.[9]

However, the idea that the bargain upon which the contract is based should be kept in mind has lately been questioned as to the essential point, i.e. whether a party has any practical possibility of compensating the risk of incurring liability by demanding a higher price.[1] In many cases of physical damage in contractual relations, other factors are clearly predominant. Lawyers have gradually realized that the purpose of the contractual liability is not merely to enforce the performance. It has been contended that the close contact between the contracting parties, which increases the risk of damage, creates a duty on each of them to be active in order to prevent damage to the other. The interest of the injured party in getting full compensation is often thought to be a weightier argument than the necessity of keeping an equilibrium between the duties of the parties.[2] Such lines of thought, too, will incline the courts to exact a particular duty of care or, at times, to impose a strict liability towards the injured party.

Thus, the concept of contractual liability evidently does not imply the same thing in all connections. Generally, a contract seems to affect the responsibility of the parties in two different ways. The mutual promises as well as the written and oral statements preceeding them can be interpreted as warranties concerning the quality of the performance or as engagements creating particular duties towards the other party. The idea of a bargain apparently confers decisive importance on facts of this type. On the other hand, the contract alters the external relationship between the parties, and by this process the liability is influenced. In accordance with the distinction here emphasized, it is submitted

[8] On Scandinavian law see, e.g., Rodhe, *Obligationsrätt,* Stockholm 1956, p. 306, Gomard, *Forholdet mellem erstatningsregler i og udenfor kontraktsforhold,* Copenhagen 1958, pp. 353 ff. Cf. also the French Civil Code sec. 1150 as well as the rule in *Hadley* v. *Baxendale,* 1854 9 Ex. 341.

[9] Cf. Hult, *Juridisk debatt,* Uppsala 1952, p. 219.

[1] See, e.g., Gomard, *op. cit.,* pp. 305 ff., Augdahl, *Den norske obligasjonsretts almindelige del,* 2nd ed. Oslo 1958, p. 264.

[2] Cf. Ussing, *op. cit.,* p. 25 f., Stoll, *Die Lehre von den Leistungsstörungen,* Tübingen 1936, pp. 25 ff.

that for the aims of this study a fruitful distinction can be made between such liability as is based upon the terms of the contract (*typical* liability in contract) and such as depends only upon the external circumstances surrounding the making and performance of the contract, combined with the mere existence of the contractual relationship. The terms of the contract should then be taken to include not only express warranties or conditions—for instance the price—but also statements made by the parties when such statements influence the liability. In both cases, the manifest intention of the parties of the particular contract seems to have contributed decisively to the issue. This is the case if, for example, a depositary is held liable for damage to goods received in bail essentially because he has bargained for a high reward, or he has explicitly or implicitly warranted the qualities of the place of storage, or he has given some special promise as to the protection of the goods which exceeds the ordinary duties of such depositaries.

Naturally, there is no distinct line between the two types of liability. When there would be no responsibility unless a certain type of contract exists between the parties (as, in the example above, a contract of deposit was supposed to imply a stricter liability than would exist in, for example, a contract of hire), the manifest intentions of the parties have, in a sense, influenced the issue. Nevertheless, it is submitted that the standardized liability rules characteristic of a special kind of contract do not clearly differ from the tort rules, unless it can be established that the terms of the contract in question have had some effect upon the decision.[3] As will appear from what follows, the distinction is important not only in the law of compensation for damages in general but also in the law of insurance.

THE BASIS OF LIABILITY IN CONTINENTAL AND ANGLO-AMERICAN LAW

These general notions of the functions of contractual liability should be verified by a closer study of the principles of law in the countries mentioned above. The analysis of the basis of liability in different situations can be carried out in several ways. If the

[3] This view partly agrees with that of the Anglo-American lawyers at least concerning bailment, see below; in Continental law, the line between contract and tort is drawn quite differently.

responsibility depends upon an express warranty or an express promise made by the defendant, there will be little doubt as to the kind of responsibility imposed upon him; obviously, it is typical liability in contract. When an injured contracting party is allowed or refused an alternative claim in tort, we may be able to distinguish between tort and contract. However, Scandinavian decisions relevant to this point are rare; further, the opinions of legal writers sometimes differ widely upon this subject, and it is seldom discussed in detail in Sweden, Norway and Denmark, where the demarcation is less clear than in other Continental countries or in Anglo-American law. In order to get a more exact idea of the basis of liability which pays regard also to the distinction just emphasized, it seems necessary to examine not only the decisions upon alternative claims but also the *ratio decidendi* in other liability cases reported. Obviously, no conclusions can be founded on isolated decisions; but when a large body of material is available, as has been the case above all in the investigation of Scandinavian law, we may be justified in expressing an opinion on the general attitude of the courts to the problems discussed. In what follows, only a brief account can be given of the results of the analysis which the author has made in his Swedish treatise.

The essential features of *German* law in this respect are that the contractual rules afford several advantages to the injured party as regards the conditions of liability, while the law of tort is more generous in other respects. Thus, according to the rules of the *Bürgerliches Gesetzbuch,* vicarious liability that cannot be defeated by the defendant's proof that he has not been negligent presupposes a contractual relationship;[4] the negligence of the person causing the damage is often presumed;[5] and there are some instances of strict liability in common types of contract, such as the seller's liability for damage caused by goods sold.[6] On the other hand, compensation for pain and suffering can be claimed only in tort.[7] In some cases, the tort rules concerning limitations of actions are also more liberal to the plaintiff than the corresponding rules applicable to contractual relations.[8]

Apparently as a part of social policy, the courts have favoured the injured party by extending, in some situations, the scope of

[4] Sec. 278, cf. sec. 831.
[5] Cf. BGB sec. 282.
[6] Cf. BGB sec. 463.
[7] Cf. BGB sec. 847.
[8] Cf., e. g., sec. 852 on the one hand, secs. 477, 558, 606, 638, and HGB secs. 414, 423, 439, 612 on the other.

the law of contract and, in other situations, that of the law of tort. Thus, vicarious liability is also imposed in certain semi-contractual relations, as for instance when a customer in a shop has been injured by the negligence of the shopkeeper's employee while inspecting the goods.[9] It is natural that in cases of these kinds, the courts generally allege only the existence of the contract as the basis of the decision, without discussing its terms. This seems also to hold true in other situations where an extended liability is imposed upon the defendant. However, when a seller is held responsible independently of negligence for damage caused by his goods, we find a clear example of typical liability in contract, the responsibility occurring where the conduct of the seller in the particular transaction might be interpreted as a warranty of the quality.[1] In most situations, the injured party is entitled to claim damages alternatively in tort, especially when compensation for personal injury is involved. In case of damage to property, an action in tort is often permitted only if the damage was caused by a positive act; however, liability for omissions by certain professional bailees (e.g. common carriers) is considered to be of a delictual nature, provided that the bailee has neglected a duty to take care of the object that is imposed upon all bailees of his type independently of the terms of the particular contract.[2]

In the law of *Switzerland,* too, the existence of contractual relations between the plaintiff and the defendant is often a condition of the latter's liability for presumed negligence or vicarious liability;[3] but even in tort there are some rigorous rules about the master's liability for the acts of his servants and about the occupier's liability for dangerous premises, and these rules establish a very strong presumption of the defendant's responsibility.[4] In view of this, it is not surprising that the Swiss courts do not extend the concept of contractual relations so far as in Germany, the tort rules generally being sufficient for adequate relief.[5]

Further, we should notice a statutory rule prescribing that the measure of the responsibility depends upon the nature of the contract and is mitigated when the contract does not aim at any

[9] Cf. 78 R. G. Z. 239.

[1] Cf., e.g., Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch,* 11th ed. Berlin 1954–, § 459: 60 a, Larenz, *Lehrbuch des Schuldrechts,* Vol. 2, München and Berlin 1956, pp. 36 f., 47.

[2] Cf. 9 R. G. Z. 301.

[3] Cf. OR secs. 97 and 101.

[4] See OR secs. 55 and 58.

[5] Cf. *Kursaal Bern A-G.* v. *Kappeler,* 70 II B. G. E. 215, 218.

advantages for the defendant.[6] This principle is also applicable in other cases of obvious disproportion between the values of what was performed and of the payment;[7] but there are very few clear instances of this in the decisions concerning physical damage. For the rest, it seems rather uncommon for the provisions of the contract to be alleged as a basis for extended liability or liability based on (contractual) negligence. As far as alternative claims are concerned, the attitude is much the same as in Germany (though it is doubtful whether liability in tort for damage to property can be based on a claim that mere omission constitutes negligence).[8]

French law presents particular features without parallels in the German or Swiss legal systems. It should be noticed that the rules of liability in tort (*Code Civil,* secs. 1382–1386) are rather severe: the master is responsible for the acts of his servants in tort also, and an extended liability is imposed upon the owner (user) of a thing that causes damage.[9] Thus, the victim has often little need to invoke the contractual rules when some damage merely incidental to a contract has occurred. The contractual rules, however, prescribe a rigorous liability for presumed negligence, too (sec. 1147). Moreover, the contractual rules afford an important advantage to the plaintiff in case of personal injury, as there are not the same limitations as in the law of tort. In the latter case, a claim for damages based upon the criminal act of negligently causing bodily harm expires at the same time as the action in criminal law.[1] As for the access to alternative claims in other cases, the salient regulations of the *Code Civil* have, by their wording and context, given a certain liberty to the courts to permit such claims or to apply only contract rules according to the demands of social policy.

The result is a rather complicated system of principles. Mostly, the plaintiff has no right to claim damages in tort against a contracting party.[2] Further, the severe rule of sec. 1147 is used in certain types of contract (e.g. contracts of carriage of persons),[3]

[6] See OR sec. 99.

[7] See, e.g., Oser & Schönenberger, *Das Obligationenrecht,* 2nd ed. Zürich 1929, p. 547 and 63 II B. G. E. 240.

[8] Cf., e.g., Oftinger, *Schweizerisches Haftpflichtrecht,* I, 2nd ed. Zürich 1958, pp. 433 ff.

[9] *Code Civil,* sec. 1384.

[1] *Code d'instruction criminel,* secs. 637, 638, 640, cf. *Code Civil,* sec. 2262.

[2] Cf., e.g., Mazeaud, H., Mazeaud, L., and Tunc, A., *Traité théorique et pratique de la responsabilité civile,* Vol. 1, 5th ed. Paris 1957, sec. 190.

[3] Cf., e.g., Mazeaud & Tunc, *op. cit.,* secs. 154, 155.

whereas in others the injured party must prove negligence on th part of the defendant. The difference between these two kinds o liability does not depend upon the details of the contract; th courts only seem to take into account the type of contractua relations between the parties.

In *English* and *American* law, the claim in contract present an advantage to the plaintiff on a few occasions only. At times strict liability can be based on (implied) warranty, as for exampl in case an injured party sues a seller for damage caused by good sold to him.[4] In the U.S.A., the courts are inclined to impose suc liability (disregarding its contractual basis) upon manufacturer even when third parties claim damages.[5] There are also certain instances of a contractual duty to take care, the doctrine of "The Moorcock", leading to an extended responsibility in comparison with the tort rules.[6] However, this doctrine does not seem to have great significance in cases of physical damage,[7] as the duty is essentially the same in tort as in contractual relations.[8] Except in the case of seller's responsibility, the terms of the contract are seldom alleged as a basis for extending the liability.[9]

The tort rules, again, are often almost as rigorous as the contractual ones. The master is liable for his servants' acts in tort, too, and the action for negligence is often rendered easier by the rule *res ipsa loquitur,* which in several cases has the same effect as imposing a presumption of negligence.

In many situations, the plaintiff is allowed to claim alternatively in tort even when he cannot allege a positive act on the part of the defendant but merely a failure to protect the property of the plaintiff; thus, a bailee neglecting his duty of care can generally

[4] Cf., e.g., *Grant* v. *Australian Knitting Mills,* 1936 A.C. 85. Cf. also the occupier's liability towards contracting parties in English law before 1958; see *Francis* v. *Cockrell,* 1870 5 Q.B. 501, and *Maclenan* v. *Segar,* 1871 2 K.B. 325.

[5] See, e.g., Prosser, *Handbook on the law of torts,* 2nd ed. St. Paul 1955, pp. 506 ff.

[6] 1889 14 P.D. 64.

[7] Cf. Cheshire and Fifoot, *The law of contract,* 4th ed. London 1956, pp. 140 ff.

[8] Cf., e.g., Wilmer, J., in *The Cadwood III,* 1951 p. 270. It is submitted that in *The Moorcock,* the duty to take reasonable care was almost identical with the duty in tort of occupiers towards invitees, although formally the rules concerning the latter situation could not be applied. According to the dicta in the case, the implied warranty of the defendant was not based upon the terms of the contract, only the existence of a reward being alleged; essentially, the external circumstances (particularly the risk of damage) seem to have decided the issue.

[9] This is true above all of the English decisions; as to American law, the author has had no opportunity of making any thorough examination of this aspect.

be sued also in tort,[1] which may be explained partly by the fact that bailment is a peculiar kind of relationship with a history of its own. Only in case of a breach of an express stipulation does the action lie exclusively in contract.[2]

So far, there are some common traits in the Continental and Anglo-American legal systems. The technique used in Germany, Switzerland and France of embodying the civil law in a code of its own obliges the courts to keep the contractual liability strictly apart from liability in tort. The traditional attitudes of the judges in England and the U.S.A. work in the same direction. However, when the tort rules are invoked between parties to the same contract, the drawing of the line everywhere involves certain technical complications. When there is a contract between the defendant and the plaintiff, it may be difficult to distinguish a workable concept of negligence in non-contractual relations. How, for instance, should we decide the extent of a duty in tort between a seller and a buyer, considering that goods are hardly ever delivered to another person without some kind of agreement existing between them? It is necessary to apply a rule of liability for negligence which (although it is part of the system of torts) is adapted to the contractual relationship.

The intention of the parties is often referred to as a reason for refusing alternative claims in tort, especially when the essential contractual duties of the defendant have been neglected. This idea has decided the French attitude to the problem, tort claims being often denied except when the damage has quite a loose connection with the contractual relation. In other legal systems, a positive damaging act can usually serve as a basis for liability in tort towards a contracting party also, though at times the action is exclusively in contract when damage occurs to property hired (lent) or property worked upon. As regards liability for omissions, damage to persons generally gives rise to tortious liability, and sometimes even damage to property is a basis for such liability, as when a bailee has failed to perform some professional duty imposed without regard to the particulars of the contract. There is a marked tendency to extend the application of the tort rules, apparently in order to give the injured persons adequate compensation for their losses.

[1] Cf., e.g., *Turner* v. *Stallibrass,* 1898 I Q.B. 56, Prosser, *Selected topics on the law of torts,* Ann Arbor 1954, pp. 402 ff., 414.

[2] Cf. *Sachs* v. *Henderson,* 1902 I K.B. 612, *Jarvis* v. *Moy, Davis, Vanderwell & Co.,* 1936 I K.B. 399, and Prosser, *op. cit.,* pp. 393 f.

On the other hand, when it is necessary to do so for reasons of social policy, the courts are disposed to enlarge the range of liability characteristic of contractual relations (strict liability and liability for presumed negligence; in some countries, vicarious liability). Sometimes, this will happen even in situations which may be described as semi-contractual (e.g. occupiers' liability towards invitees). The scope of these rules, however, varies in different countries according to the remedies afforded to the defendant by the law of tort. Thus, the line between contract and tort will depend upon considerations which have very little to do with the character of these two branches of the law.

As to various types of contractual liability, the responsibility for breach of contractual duties of care seldom seems to exist without a parallel tortious fault liability. The tendency just mentioned to adapt the concept of delictual negligence to contractual relations has contributed to diminish the contrast between the two types of liability. Even in French law, it is difficult to discern the difference. Further, the inclination of the courts to apply over a wide field the rules of extended liability has the consequence that these often lose their typically contractual traits. Thus, in most cases of physical damage, responsibility based upon contract seems to be closely related to the type of liability in tort which is imposed between two contracting parties.

THE BASIS OF LIABILITY IN SCANDINAVIAN LAW

Swedish, Norwegian and Danish law present a marked difference from the legal systems hitherto treated. Here, no deference to a general codification of the civil law compels the courts to keep tort and contract strictly apart; nor have the courts for other reasons considered themselves obliged to emphasize the distinction to such a degree as in England and the U.S.A. It is significant that in Scandinavia lawyers use a rather vague terminology, employing the expression of "liability in contractual relations" sometimes as synonymous with typical contractual liability, sometimes as denoting every liability towards the other party. In most cases, both liability in tort and liability in contract are based upon negligence. Swedish law diverges from that of the other two Scandinavian countries in some respects, the most important being that Sweden alone refuses to apply the general rule that the master is responsible in tort for the negligence of his servants (though he

is responsible for the negligence of supervisory employees, including foremen), whereas his vicarious liability in most contractual relations extends to the acts of all his servants.[3]

An analysis of the *ratio decidendi* of the Scandinavian courts confirms the general impressions from the survey of Continental and Anglo-American law. As a rule, liability based upon contract does not seem to depend upon the actual content of the contract (in the absence of express warranties); the price agreed and the representations of the parties apparently do not matter very much in comparison with the external circumstances, especially the risk of causing damage. This holds true of the duty of care required in most situations (even in cases of bailment) and also of the vicarious liability in Swedish law. In the latter respect, the concept of contractual relations has been extended in much the same way as in Germany. An example provides a case where the owner of a woodyard was held responsible when a customer visiting the yard was injured because of negligence on the part of one of the employees.[4] The courts seem to hold the plaintiff responsible so long as there is a contract between the parties and the damaging act is not too remotely connected with the performance of the contract.[5] As far as physical damage is concerned, liability for presumed negligence is generally imposed upon bailees independently of the terms of the contract, gratuitous carriage and gratuitous deposit excepted.

However, when goods sold have caused damage to other property, the details of the agreement are often alleged by the Scandinavian courts; thus, for instance, an incorrect representation made by the seller is often referred to either as negligence or as a warranty.[6] But even without any reference to the terms of the contract there are several instances of strict liability being imposed, especially in Danish and Norwegian law.

As for the possibility of alternative claims, the Swedish courts have given various solutions of the problem. With regard to legal rules about limitation of damages and limitation of actions in certain contracts—particularly concerning carriage of goods—there

[3] However, an employer is only responsible towards his employees for the negligence of his foremen and other employees in supervisory positions.

[4] *Ohlsson* v. *Jansson,* 1925 N. J. A. 119.

[5] When the damage is caused by an independent contractor, the courts apparently accentuate this demand for a closer connection with the performance of the contract. Cf. e.g. *Andersson* v. *Heidner,* 1940 N. J. A. 550.

[6] It is a moot question how far the strict liability prescribed by the Scandinavian Sales of Goods Acts is applicable to damage by dangerous chattels.

is an inclination to refuse to allow the plaintiff to rely upon tort rules except where the damage is caused by criminal conduct on the part of the defendant.[7] As for damages for pain and suffering, which are awarded in tort cases even if the liability is strict, these have been denied to the plaintiff in a few decisions which clearly concerned claims based on a contract, e.g. when a landlord had neglected to order a tenant to stop a noisy activity causing nervous disease to another tenant,[8] or when strict liability for personal injuries has been imposed upon the seller of food on the basis of implied warranty.[9] On the other hand, in several cases the courts have adjudged such compensation where vicarious liability has been based upon a contractual relationship.[1] On the whole, the principles laid down by the Swedish courts are rather vague.

Nor does Danish or Norwegian law establish any exact borderline between tort and contract. Alternative claims have practical importance only in a very few situations; in one of them, concerning the limitation of actions in Norwegian law, the important line with regard to physical damage seems to go between liability for negligence and strict liability.[2]

Thus, in Scandinavian law there is no sharp line of demarcation between liability in tort and contractual liability. Though there has been some discussion on the distinction in particular cases (as for instance regarding vicarious liability in Sweden), the actual difference as to the character of the liability generally seems to be rather small unless the liability is based on the terms of the contract, in the sense defined before.[3] Scandinavian courts seldom keep contractual and tortious negligence apart, the essential borderline as to alternative claims being drawn otherwise; and the particular contractual rules of liability often lack typically contractual traits here as well as in non-Scandinavian law.

The conclusion from this survey is that, express warranties and other express promises apart, the typical liability in contract seems

[7] See, e.g., *Försäkringsaktiebolaget Hansa* v. *The Board of Management of the State Railways,* 1951 N. J. A. 656 (transport by railway). As to carriage of goods by sea see, e.g., Schmidt and others, *Huvudlinjer i svensk frakträtt,* Stockholm 1955, p. 85, cf. *Huhtasaaari* v. *the Crown,* 1946 N. J. A. 573 (contract of hire).

[8] See *Karlsson* v. *Horney,* 1934 N. J. A. 190.

[9] See *Pehrsson* v. *Carlsson,* 1945 N. J. A. 676.

[1] See, e.g., *The City of Västerås* v. *Holm,* 1931 N. J. A. 246, and *Elektriska installationsaktiebolaget Uppsala* v. *Wahlgren,* 1943 N. J. A. 188.

[2] Cf., e.g., Holmboe, *Foreldelse av fordringer,* Oslo 1946, pp. 45 f.

[3] As regards vicarious liability, a similar view has been held by Lundstedt, *Grundlinjer i skadeståndsrätten, 2. Strikt ansvar,* Vol. 2: 1, pp. 538 ff.

to be mainly restricted to cases of products liability.[4] It should be noticed that responsibility for damage to property in bailment and to property worked upon seldom presents any typically contractual traits, though in these cases the damage is often caused by the defendant's neglect of some duty essential to the contract. In the absence of express provisions, the courts seem to base the liability upon the breach of duties implied in every type of contract. The details of these duties depend essentially on the risk of causing damage to the property and on the capacity in which the defendant has acted. It has also been shown that the differences between the two types of liability are used as technical means of realizing ends that apparently have much in common with those of the law of tort. There is no necessity on the ground of logic or for any similar reason that the damaging act should be on one occasion qualified as a tort, on the other as a breach of contract; from the point of view of the courts, the question seems above all to be which set of rules provides the easiest way of achieving some recognized aim of social policy. This applies to the conditions of liability as well as to the access of an alternative claim in tort.

These conclusions will also have a bearing upon the problem whether there is a natural connection between the coverage of liability insurance and the rules of liability. If contractual liability seldom presents any inherent quality that makes it fundamentally different from liability in tort, it is difficult to see why this distinction should determine the scope of the insurance.

GENERAL REMARKS UPON THE COVERAGE OF THE INSURANCE

Next, these views on the background of the insurance will be confronted with the actual coverage according to the wording and the general accepted interpretation of the policies.[5]

[4] However, the landlord's responsibility for damage to the tenant's property because of defects in the premises may also in some cases be an instance of typical liability in contract, though the decisions are not quite clear in this respect.

[5] In this case also, we can only give a brief summary of the comparative investigations made. In most countries, comparatively few decisions on the interpretation of the common liability insurance policies are reported. Except in Germany, the doctrine seldom discusses the construction of the exclusions in detail. The following information upon the insurance practice in this respect is to a great extent based upon an enquiry among the biggest insurance companies in Switzerland, France, England, Denmark and Norway (and also among some insurers in the U.S.A.) about the common construction

There is no doubt that the risk of incurring liability towards a contracting party for damage to him or his property is a matter of great practical importance, and that there is considerable need for coverage by liability insurance. Nevertheless, several general objections against insuring such liability are raised in insurance circles as well as by legal writers. Often, the arguments aim above all at liability based on the breach of duties essential to the contract. The same ideas recur in the discussion of almost every country here mentioned.

At times, it has been contended for various reasons that it is incompatible with the true nature of the insurance to cover liability for breach of the duty to perform the contract, this not being liability for damage in the sense of the insurance.[6] Further, the fact that persons are allowed to cover their liability by insurance has often been supposed to encourage carelessness and defective workmanship, especially when the insured has taken charge of the property of the other party or is working at such property. It has been claimed that the protection by insurance would foster irresponsibility and detract from the deterrent effect of the liability rules.[7] From a moral point of view, too, it has been considered improper to defend the insured against the consequences of his breach of contract.[8] Further, the liabilities towards contracting parties have been regarded as "trade risks" which the

of the policies in certain specified situations. The enquiry was answered in Switzerland by 8 insurers out of 9, in France by 9 insurers out of 12 (and by one association of insurers), in England by 12 insurers out of 24, in the U.S.A. by the National Bureau of Casualty Underwriters, 2 companies, and one association, in Denmark by 13 insurers out of 18, and in Norway by 9 insurers out of 15. The companies omitting to answer are generally smaller than the others, several of them pleading insufficient experience. Cf. also articles in *Journal of the Chartered Insurance Institute* (England) and *Insurance Law Journal* (the U.S.A.). The German view upon these questions has been treated in a detailed way in the literature; see, e.g., Oberbach, *Allgemeine Versicherungs-Bedingungen für Haftpflicht-Versicherung. §§ 1–4: Der Versicherungsschutz,* Berlin 1938, Wussow, *Allgemeine Versicherungs-Bedingungen für Haftpflichtversicherung,* 2nd ed. Frankfurt am Main 1957, and articles in *Neumanns Zeitschrift für Versicherungswesen, Zeitschrift für die gesamte Versicherungswissenschaft,* and *Versicherungsrecht.* See also numerous decisions reported in the journals mentioned. As regards Sweden, the investigation is based mainly on the unprinted opinions of "Skadeförsäkringens villkorsnämnd", a committee to which most Swedish insurers refer questions of this kind. Cf. also Hellner, *op. cit.,* pp. 380 ff.

[6] See, e.g., Oberbach, *op. cit.,* pp. 91 ff.

[7] See, e.g., Trolle, "I hvilket Omfang dækker Ansvarsforsikring for Skade indenfor Kontraktsforhold", *U. f. R.* 1943, B pp. 100 f.

[8] Cf., e.g., Hartung, *Die allgemeine Haftpflichtversicherung,* Berlin 1957, pp. 79 f.

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[8] Cf., e.g., Hartung, *Die allgemeine Haftpflichtversicherung,* Berlin 1957, pp. 79 f.

insured ought to cover in other ways, above all by raising the prices of their products or services.[9] From several technical points of view, the various contractual risks are said to be difficult to insure. Thus, the danger of causing damage to other contracting parties and the possibility of incurring liability towards such persons give rise to special rating problems because the contract is supposed to influence both the physical risk and the legal relations in an incalculable way.[1] Besides, certain types of claims in contract are very hard to deal with, as it is difficult to ascertain the course of events and to determine the amount of damages.[2] Most of these objections will be discussed later in this paper.

It has been mentioned before that as a rule the policies contain a general clause on the liability covered and in addition some special exclusions concerning certain damages particularly frequent in contractual relations. In what follows, we shall deal mainly with these two kinds of clauses, although there are other exceptions which can at times be applied to contractual liability.

THE GENERAL CLAUSE

As to the general clause on the liability, the wording of the policies directly expresses the idea that the insurance shall not cover certain types of contractual liability. The technique differs from country to country. Thus, the clauses used in France refer explicitly to the borderline between contract and tort drawn by the *Code Civil,* declaring that the object of the insurance is the responsibility based upon secs. 1382–1386 (or 1382–1384). In England and the U.S.A., many policies expressly exclude contractual liability, though some English insurers use other clauses instead, e.g. that the policy does not cover "liability assumed by agreement". Similar wordings occur in the Norwegian policies, and the Danish insurers sometimes except "liability based on contract", sometimes "liability for omission to perform a contract".

There is a certain contrast between these exceptions and the corresponding clauses in German, Swiss and Swedish policies. In Germany and often in Switzerland, the insurers declare that they cover the liability based upon statute ("gesetzliche Haftung"). A particular clause excludes every liability in so far as it exceeds

[9] Cf., e.g., Wussow, *op. cit.,* pp. 199, 206 f., 254, and Hellner, *op. cit.,* p. 379.
[1] Cf., e.g., Skibsted, *op. cit.,* pp. 15, 48 f., Dahl, *op. cit.,* p. 40, Trolle, *op. cit.,* pp. 99 f., 104 f.
[2] Cf., e.g., Oberbach, *op. cit.,* pp. 226 f., Hellner, *op. cit.,* p. 380.

the statutory liability because of contract or promise. In addition, losses deriving from claims on the performance of a contract and the surrogate of the performance are explicitly excluded.

As for Sweden, the insurers used to declare that they covered only liability in tort, but since 1934 the only exception of this kind in Swedish insurance practice has been of very limited scope, as it merely refers to liability based on particular promises concerning compensation for damage.

In the doctrine, attention has been paid to the question what these exceptions may imply. It has already been mentioned that they have been regarded as evidence of a general connection between the liability rules and the coverage of the insurance. As far as Scandinavian literature is concerned, this attitude seems to be greatly influenced by the opinions expressed by some distinguished German authors in the first decades of the century.[3]

However, a common trait is that all the exclusions referred to are actually interpreted in a very restrictive way. Only in France do they have a considerable importance in the actual practice of the insurers. It has been shown above that in most contractual relations, alternative claims on a delictual basis are not permitted by the French courts. Thus, the exception about contractual liability can be used for excluding most damage that is not merely incidental to the contract. On the other hand, the provisions of the policy are often constructed generously, especially where claims of injured persons are concerned; some insurers cover by the ordinary policies even contractual liability depending only on sec. 1147 of the *Code Civil* (see above).

As for other countries, liability based on particular agreements imposing a duty to pay damages independently of negligence is usually regarded as excepted; but otherwise the general clauses seem to have little impact on this matter compared with the special exclusions concerning particular types of damage. Nowhere are they regarded as the basis for a presumption that contractual claims are left out. Thus, in Germany a formerly predominant opinion that liability insurance only covers liability in tort has been altogether abandoned, such restriction being particularly inconvenient to the insured in case of vicarious liability. The *Reichsgericht* even held that an insurance policy may cover such typical liability in contract as the seller's strict responsibility on the basis

[3] Cf., e.g., Manes, *Die Haftpflichtversicherung,* Leipzig 1902, p. 85, Moldenhauer, *Das Versicherungswesen. II. Die einzelnen Versicherungszweige,* Berlin and Leipzig 1912, p. 43.

of express warranty as to the quality of the goods;[4] however, this decision has been criticized by legal writers.[5] In the Swiss law of insurance, a similar development can be observed. In England, most insurers seem to apply the exclusions mentioned above only in case of strict liability based upon an express warranty. The same seems to hold true of the U.S.A.

In Denmark, exceptions of this kind are nowadays generally relied upon only in cases where the contract imposes strict liability upon the defendant, although the practice of the insurers varies to some extent.[6] The corresponding Norwegian clauses are often interpreted in an even less rigorous manner.

In Sweden, the insurers originally contended that the insurance policy only covered liability in tort. However, most of them gradually changed their minds, above all because of the consequences of this restriction as to the coverage of vicarious liability, which as shown before is very often based upon contract. In 1951, the Supreme Court had to decide whether in the case before the Court insurance covered the liability of an insured contractor whose employee, by negligent work upon an oil pipeline, had caused the customer considerable losses of oil. The insurer referred to a clause that excluded "claims based upon contract or promise which go beyond the general rules concerning liability for damage". The Court held that there is no presumption that liability based on a contract should be excluded from the coverage, and that the clause in question did not except the risk with sufficient clarity.[7]

Today, the Swedish insurers very seldom invoke the exception about liability based on the particular contracts, this provision being regarded as referring mainly to agreements about penalties for breach of contract.

It can hardly be argued that these observations indicate any general connection between the concepts of tort and contract on

[4] See 160 R. G. Z. 148.

[5] Cf., e.g., Wussow, *op. cit.*, pp. 77 f.

[6] Some companies still use a type of clause limiting the coverage to liability in tort. However, the Supreme Court of Denmark disappointed the insurers by interpreting this clause so as to permit coverage even when property in the control of the insured was damaged, alleging that the injured party had an alternative claim in tort and that, consequently, the liability fell within the scope of the policy. See *Feldthusen* v. *Arbejdsgivernes Ulykkesforsikring*, 1941 U. f. R. 761, cf. *Dissing* v. *Mejeriernes og Landbrugets Ulykkesforsikring*, 1941 U. f. R. 724. These decisions caused most companies to revise the wording of their policies.

[7] *Forsikringsaktieselskabet Nordeuropa* v. *Aktiebolaget Carlsson & Myrberg*, 1951 N. J. A. 765.

the one hand and the scope of the insurance on the other. Nevertheless, the language of the clauses and their interpretation can be associated with certain traits characteristic of the different legal systems. It is apparently inconvenient to decide the coverage of a policy by reference to the difference between tort and contract in such countries as Germany, Switzerland and Sweden, where vicarious liability generally presupposes a contractual relationship. As it has been an important object of the liability insurance to protect the insured against this kind of contractual liability, the insurers had to abandon clauses implying that all kinds of tort claims should be excluded. Actually, the public liability insurance schemes of both Germany and Sweden nowadays cover the liability of the employees together with that of their employer without any additional premium.[8] In other countries, the notions of tort and contract are better adapted for use in the insurance policies. This is true particularly of France, where the attitude of the courts to alternative claims leads to the exclusion of liability for neglecting duties essential to the contract in question; some insurers even manage to do without special clauses aiming at damage in contractual relations. In England and the U.S.A., the exceptions concerning contractual liability supplement the special exclusions in an appropriate manner, excepting only risks that the insurers generally consider unfit for coverage. In a similar way, the rules of the law of contract in Denmark and Norway seldom differ from the tort rules except in the case of special agreements; the wording of the clauses will not limit the coverage to such a degree as seriously to affect the interests of the insured.

The general tendency is that no other responsibility than typical liability in contract in the sense defined above (i.e. liability based upon the terms of the contract) is excluded independently of the kind of damage. However, the German, Swiss and Swedish policies, at least, permit such liability to be covered in some cases, unless special exception clauses can be applied.[9] Further, even strict liability assumed by particular agreement is included by special policies of liability insurance for a certain activity (e.g. the protection & indemnity insurance intended for shipowners), provided that the agreement is of a kind common in the trade. Such risks can be endorsed by the insurer of an ordinary policy when he can inform himself of the contents of the agreement in question.

[8] However, the liability towards fellow employees is excluded.

[9] This is the case in Sweden, as far as products liability is concerned; see below.

THE SPECIAL CLAUSES

The foregoing survey needs to be supplemented by an analysis of the range of the special clauses used for the purpose of excluding liability for certain types of damage in contractual relations. The most important exclusions are those concerning (A) *property in the charge or control of the insured* and (B) *property on which the insured is or has been working*. Such clauses occur in most policies in the countries mentioned. However, many personal liability policies, for instance those of Germany, Sweden and Norway, dispense with exclusions of type (B), and so apparently do most American insurers.[1] In Sweden, personal liability insurance and farmers' liability insurance today cover damage occurring to most kinds of movable property[2] in the charge or control of the insured during the first week after the beginning of the control; some kinds of damage to the rented flat of the insured are also included. In several special types of liability insurance—above all protection & indemnity insurance but also, for instance, insurance for wharves, garages and repairers—coverage is afforded for damage to property in the charge of the insured and even property on which the insured is working, though in the latter case typical instances of defective workmanship are often left out.

There are above all three situations where opinions diverge as to the scope of the insurance. (1) The application of exceptions of type (A) is often difficult when the owner (or somebody acting on his behalf) is present at the time when the damage occurs, especially if the insured has controlled the property damaged only for a short while. (2) It is also doubtful, when the property concerned is under the control of the insured but the contract with the owner has another object than taking care of the property (or there is no contract at all between the parties). (3) Further, the interpretation of both exception (A) and exception (B) varies to a great extent when the insured in the course of his work damages some property that is not the object of the work itself but is closely connected with it: if, for example, while repairing the ceiling of a room, he causes damage to the walls or to some furniture in the room.

The details of the interpretation will not be analysed in this

[1] As mentioned before, some French insurers do not use any exceptions of these kinds.

[2] The only exceptions are motor vehicles, motor boats, sailing boats, and aircraft.

context, as they are partly peripheral to the problems here discussed.[3] However, it should be pointed out that all the three situations mentioned above can be covered according to the practice of insurers in some of the countries mentioned. It is of interest to notice how the construction of the clauses of the policies also seems to be connected with the characteristics of the liability rules in the different countries, and how the borderline is drawn between tort and contract. It is doubtful whether the contractual duty towards the other party includes taking care of the object damaged. Analysing the nature of such duties will be particularly important in the legal systems where the breach of contractual obligations is a condition for vicarious liability, as in the law of Germany, Switzerland and Sweden. It is a remarkable coincidence that, especially in these countries, there is a marked tendency to let the range of the exceptions in question coincide with the contractual duties of the insured, although the insurers are not quite consistent in this respect. In England, the U.S.A., Denmark and Norway, the corresponding exception clauses are generally interpreted in a more restrictive way.

In several of the countries mentioned, the policies also contain exceptions concerning *damage caused by goods sold and supplied.* There are above all two products risks that many insurers want to exclude: (A) liability based upon the terms of the contract (which is sometimes excepted by the general clause of contractual

[3] The following general remarks should be made concerning the details of the coverage. In *Germany,* the exceptions used before 1949 generally excluded damage in all three cases (1–3). After that year, however, most risks at least of type (1) and (2) are included, and damage of type (3), especially to buildings, is also covered to a great extent. In *Switzerland,* there seems to be some doubt about the coverage in situation (1), at least by personal liability insurance, as well as in (2) and (3); in the latter cases, many insurers seem to interpret the exceptions rather liberally. As for *France,* it is difficult to form a definite opinion about the attitude of the insurers on the basis of the enquiry. In *England,* the practice of the insurers varies when damage of type (1) and (2) has occurred; in situation (3), however, the exclusions seem to be construed in a very generous way. In the *U.S.A.,* there are several decisions by the courts as to the application of the exceptions in question. Nowadays, most damages of types (1) and (2) seem to be excluded, but in case (3) the liability is often covered. Most *Danish* insurers are inclined to except damage in case (1) and (2); a general exclusion explicitly aiming at (3) seems to be interpreted not too strictly except in instances of defective workmanship. In *Norway,* opinions differ as to (1) and (2), but there is often coverage in situation (3), particularly when movables are damaged. As regards *Sweden,* damage of type (1) seems to be covered in many cases, not taking in account the extensions just mentioned of the personal liability insurance. As for (2) and (3), insurers are less generous, the common exclusions being construed rather rigorously towards the insured in public liability insurance.

liability), and (B) the consequences of defective workmanship and inefficient methods of manufacture. In the former case, the clause makes a supplement to the general exceptions concerning liability based upon contract. Risk (B) usually concerns liability in tort. However, in some countries there seems to be coverage for most of these risks even by the ordinary policies. This is true of Germany, Switzerland, the U.S.A. and, in the practice of several insurers, of Norway.[4] In France and England, they are often altogether excluded from the ordinary insurance but may be covered by special provision or by a separate products liability insurance.[5] In English products liability insurance, risk (A) is sometimes regarded as excepted by varying clauses;[6] several insurers exclude risk (B) also.[7] In Denmark, most insurers are reluctant to cover damage by goods supplied except when it is caused by delivering wrong goods by mistake. As regards Sweden, a common exception concerning damage caused by warranties about the fitness of the goods for special purposes is interpreted in a way which is rather rigorous towards the insured, though damages by mistakes on delivery and by casual mistakes during the manufacturing process are covered. Thus, the most practical instances of typical contractual liability are excluded from the Swedish insurance policies.

In some countries other exclusions particularly aiming at contractual relations are used, for instance a common clause about damage occurring to goods sold or supplied after the delivery.

CONCLUSIONS

As mentioned in the introductory remarks, it is often taken for granted that there is some kind of natural bond between the liability rules and the scope of the liability insurance which should establish at least a presumption that liability in contract is not

[4] In Germany, Norway and often in Switzerland, the risk is excepted only when the insured has known of the defect in the goods.

[5] As for France, this follows from the general clause that the insurance only covers liability in tort.

[6] Some insurers that declare that they only cover damage caused by *defects* in products sold or supplied seem to interpret this clause so as to exclude damage caused by the seller's incorrect warranty of the fitness of the goods for some specific purpose. There are also other clauses aiming at similar risks, e.g. exclusions concerning damage caused by the failure of the goods to conform to specification.

[7] Several insurers exclude damage caused by faulty or defective design.

covered. Has our comparison of the situation in different countries given support to this idea?

As tort and contract do not mean the same thing in the legal systems mentioned, there is no common principle to be founded on such a distinction. Certainly, in a particular country the reference to the liability rules can be a technical expedient to indicate the approximate object of the insurance, as for instance in France and Denmark. As demonstrated above, the well-known borderline between tort and contract may be used as a way of simplifying the interpretation of the clauses, too, although the advantages of this method vary according to the structure of the legal systems in question. But neither the courts nor the insurers have consistently relied upon the line between the two types of responsibility.

It is true that certain points of agreement exist between the objections against coverage and the motives for applying particular rules between contracting parties. The danger of causing damage to the other party increases with the closer contact brought about by the contract and entails certain difficulties in the rating of the risk; this circumstance is also supposed to give particular weight to the argument that the preventive effect of the liability rules would be diminished by the coverage. The same external relationship between the parties has been shown to influence the rules of contractual liability. Further, when the insurers suggest that the party liable should protect himself by demanding a higher compensation from his customers instead of insuring the risk, he launches an argument which has bearing upon calculable losses only; we have pointed out before that there is a certain tendency to restrict the contractual liability to the same risk.

Such parallels may have influenced the attitude of some insurers to the contractual risk, but they are only superficial. The scope of the arguments referred to is not restricted to coverage of contractual liability; they can also be alleged, for instance, against insuring the liability of dangerous activities which most insurers are prepared to cover. The real reasons for excluding the risk have nothing to do with the basis of liability.

The only argument against coverage that seems to be alleged exclusively regarding liability in contractual relations refers to what has been defined above as *typical* liability in contract. It is evident that many insurers consider it too difficult to calculate the terms of the contracts concluded by the insured. Yet even this type of liability is at times insured not only when based upon standardized agreements, the contents of which the insurer can

anticipate, but also in some other cases, for instance products liability in some countries.[8]

The result is that there seems to be little behind the idea of a natural connection between the rules of liability and the coverage of the insurance. Neither the doctrine contending that such a general principle exists nor the clauses apparently aiming at this effect can claim accordance with practice in any of the countries here mentioned. The purposes and functions of the different exceptions vary too much to be condensed in one single formula. The insurers must also make allowance for other considerations than those compatible with the distinction between contract and tort, such as, above all, the technical problems connected with the rating of the risks and with the adjustment claims. In the decisions of the courts, there has also been a inclination to disregard this borderline when interpreting the policies.

It remains to discuss the reasons for excluding at least some kinds of liability in contractual relations, the weight of these arguments being important not only for the insurers but also for the construction of the policies by the courts.

As mentioned before, the insuring of the liability for breach of contract has sometimes been regarded as incompatible with the nature of the liability insurance. Nevertheless, no particular trait has been found that should justify such a general objection. The idea of the peculiar character of contractual liability seems to have some connection with the earlier view of the parties acting as their own legislators in contractual relations. It has been shown that as far as physical damage is concerned, these theories seem to be valid to a limited extent only.

On the whole, there seems to be no reason for attaching any decisive importance to the difference between liability based upon contract and liability in tort where the coverage of the insurance is concerned. It is true that in most countries the law of contract involves a more rigorous responsibility and, as a direct consequence, an increased risk for the insurer. But as to the general influence of the liability rules upon the premium in ordinary liability insurance little seems to be known for certain. Investigations concerning motor vehicle insurance in Sweden suggest that even radical changes in the liability rules have a rather moderate effect upon the premium, compared with the changes in the risk

[8] On the attitudes to this risk in Germany, Switzerland, the U.S.A. and Norway, see above.

of physical damage.[9] The propensity of the courts to pay regard to the existence of a liability insurance[1] or, at least, to the defendant's possibility of insuring himself, is likely to diminish the difference between extended liability and responsibility for negligence. Further, it should be noted that only the risks connected with some particular business or profession of the insured (or, at times, with his ownership of premises or with his activity as a private person) fall within the range of the ordinary policies. Thus, only certain types of contracts are likely to be of any practical importance, and the insurer will generally be able to foresee the kind of liability characteristic of these contracts. There are many instances even of strict liability being included, provided that the insurer knows beforehand that such rules of liability will be applied within the scope of the policy.

Here, however, the concept of typical liability in contract seems to be of considerable interest. By changing the terms of the individual agreement, the insured can increase the risk in a way that is hardly calculable in advance without particular provision being made in the policy. Besides, the insured can be the more tempted to assume an extended liability since at times he may be able in return to raise the prices of his products or services or, at all events, to increase the sales. Such a conduct would very often conflict with the principle of *uberrima fides* which applies to all kinds of insurances and can be regarded as part of the Swedish law, too. For these reasons, it appears to be well-grounded to exclude typical liability in contract by the wording of the policies, and it is submitted that the policies in cases of doubt should generally be interpreted to this effect.

There are some other general considerations, mentioned before, that usually influence the construction of the policies, as for instance the argument that the exclusions in question should be interpreted in such a manner as to except damage resulting from defective workmanship and lack of professional skill. The liability is considered necessary as a deterrent to such negligence and, consequently, the party liable ought to bear the economic loss himself.

On the other hand, certain objections can be raised against such a principle. Although there is a tendency to exclude professional negligence from the coverage, we have met with numerous instances

[9] See SOU 1938: 27, pp. 113 ff., and 1957: 36, pp. 148 ff.

[1] Cf. Bengtsson, "Ansvarsförsäkringens betydelse i skadeståndsmål", *Sv. J. T.* 1961, pp. 627 ff.

of the opposite attitude. Thus, in several countries, the insurers cover the consequences of defective workmanship in the manufacturing of goods, or in the work upon property closely connected with the property damaged; some types of insurance even aim directly at protecting the insured against these risks, as for instance the special insurances covering damage to property in the charge of the insured and property worked upon.

Further, we know very little of the influence of the insurance in this respect. Even if the *existence* of an exclusion concerning some kinds of damage by professional negligence may be justified by the idea of the admonitory effect of the liability, it must be supposed that the *interpretation* of the exclusions and the *exact borderline* between risks covered and risks excluded rather seldom affect the conduct of the insured or their employees. Besides, the insured are likely to be particularly careful not to cause damage to contractual parties in order to retain the goodwill among the customers. It also seems to be an intricate matter to draw the line between defective workmanship and other types of negligence; the principle in question would increase the difficulties in dealing with contractual claims.

The conclusion is that liability for professional negligence should not be excluded for the sole reason that the policy gives some support for such an interpretation, although arguments to this effect may be valid in specific cases, as when the insured has obviously neglected common measures of precaution because of his insurance.

The weight of the argument that the insurance should exclude "trade risks" can be doubted, too. It aims at such risks as can be regarded as regular expenses in the activity of the insured. However, even when some kind of damage is fairly common, the insured usually needs coverage unless the average compensations which he has paid are small in comparison with the size of the business. Besides, the principle in question is too vague to be of any use except in special situations, and it would lead to the unhappy consequence that the exclusions are interpreted differently in similar cases, depending on the size of the business of the insured.

The remaining arguments against insuring liability in contractual relations seem to be of a purely technical nature. The difficulties of rating the risk of causing damage in contractual relations and investigating the circumstances prevailing at the time of the damage may in some cases (for instance as concerns damage to property in bailment or property worked upon) be a

motive for excepting these damages. However, arguments of this type are generally unfamiliar to the insured parties, and the courts have difficulties in judging their relative importance. It may be contended that, as a rule, they should not influence the construction of the policies unless the technical reasons for excluding the risk are clearly visible to the insured. Some Swedish decisions seem to support this view.[2]

It should also be pointed out that, according to the survey presented above, liability for most types of physical damage is insurable in at least some of the countries mentioned, notwithstanding the contractual relationship. The only exceptions are some kinds of typical liability in contract and—as regards public liability insurance—responsibility for certain damage to property used or worked upon or to goods supplied. These results should also be of some interest to the courts, as they might provide a justification for imposing a more rigorous liability in contractual relations. Even if the insurers of the particular country refuse to cover a risk at present, they would probably be more willing to insure it if an extension of the liability were to increase the need for insurance.

[2] See *Forsikringsaktieselskabet Nordeuropa* v. *Aktiebolaget Carlsson & Myrberg,* 1951 N. J. A. 765, cf. *Margarinfabriken Kärnan* v. *Forsikringsaktieselskabet Nordeuropa,* 1947 N. J. A. 400. On this question see also Bengtsson, *Om tolkning av ansvarsförsäkringsvillkor,* Stockholm 1960, pp. 25 ff., cf. Hellner, *op. cit.,* p. 70.