TORT LIABILITY AND LIABILITY INSURANCE

BY

JAN HELLNER

Professor of Insurance Law,
University of Stockholm

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In the ever-increasing discussion on the law of torts, some penetrating analyses and far-reaching proposals have come from those who recommend the abolishment of tort liability in favour of insurance. A. A. Ehrenzweig and Fleming James in the U.S.A., H. Möller and K. Sieg in Germany, Astrup Hoel and Ivar Strahl in Scandinavia may be mentioned among the leaders of this fight for a reform of the law of torts.[1]

Together with tort liability, the insurance which covers it has come in for attack from the same quarters. This attitude has received a succinct formulation in the title of one of the earliest proposals for reform of this kind, "The Vanquishing of Liability Insurance" *(Die Überwindung der Haftpflichtversicherung)*, by H. Möller (1934).[2] More particularly, the main change advocated by Möller, as well as by other authors just mentioned, can be briefly summarized as the substitution of accident insurance of persons and property for the now prevailing combination of liability in tort and liability insurance.

Although there is thus an apparent unity in the main purpose, an examination reveals considerable differences not only in the

[1] A. A. Ehrenzweig, "Assurance Oblige—A Comparative Study", *Law and Contemporary Problems* 15, 1950, pp. 445 ff., *Negligence Without Fault*, Berkeley & Los Angeles 1951, *"Full Aid" Insurance for the Traffic Victim*, Berkeley & Los Angeles 1954; F. V. Harper & F. James, *The Law of Torts*, Boston & Toronto 1956, Vol. 2, pp. 759 ff.; H. Möller, "Die Überwindung der Haftpflichtversicherung", *Juristische Wochenschrift* 1934, pp. 1076 ff.; K. Sieg, *Ausstrahlungen der Haftpflichtversicherung*, Hamburg 1952, "Haftungsersetzung durch Versicherungsschutz", *Zeitschrift für das gesamte Handelsrecht und Konkursrecht* 113, 1950, pp. 95 ff.; G. Astrup Hoel, *Risiko og ansvar*, Oslo 1929, "Grunntrekk av en erstatningsrettslig reform", *Norsk Retstidende* 1930, pp. 69 ff.; I. Strahl, *Förberedande utredning angående lagstiftning på skadeståndsrättens område*, SOU 1950: 16, "Tort Liability and Insurance", *Scandinavian Studies in Law* 1959, pp. 199 ff. For a French discussion of the same problems in a more conservative vein see R. Savatier, *Les métamorphoses économiques et sociales du droit civil d'aujourd'hui*, T. 1, 2e éd. Paris 1952, pp. 246 ff., *Du droit civil au droit public*, 2e éd. Paris 1950, 2e partie. A comparative survey is found in W. Friedmann, "Principles of Tort Liability and the Growth of Insurance", *Internationales Versicherungsrecht, Festschrift für Albert Ehrenzweig*, Karlsruhe 1955, pp. 25 ff.; cf. the same author's *Law in a Changing Society*, London 1959, pp. 126 ff.

[2] *Op. cit. supra*, note 1.

scope and character of the reforms proposed but also in the underlying ideas. This alone seems a sufficient reason for looking into the various proposals and comparing them. Further, to anybody who has learnt to regard liability insurance as a useful tool for compensating those who suffer losses, it seems obvious that such insurance should not be condemned out of hand without first scrutinizing the objections raised and considering the possibilities of meeting them within the framework of liability insurance. This leads to an investigation of the specific charges against liability insurance and the possibilities of removing them by reform.

As will be seen from the following study, the problems arising are closely connected with the specific conditions of particular countries, especially as regards private and social insurance. For this reason it seems justifiable to concentrate on one special sphere, which in the present case will be Scandinavian, particularly Swedish law. Another reason for concentrating on Scandinavian law is that there exists a considerable Scandinavian discussion, which has aroused some interest in other countries as well. I shall start with a short survey of this discussion, and later I shall consider the various practical questions.

2. At least as far as Scandinavia is concerned, the merit of being the first to investigate seriously the possibility of substituting insurance for tort liability belongs to the Norwegian writer Astrup Hoel, whose book *Risiko og ansvar* (Risk and Responsibility) appeared in 1929.[3] His argument contains a predominantly theoretical portion, concerned with the distribution of risks, and another, more practical portion, concerned with the technical differences between liability insurance and insurance on goods in favour of a third party. The book begins with an elementary account of the notions of causation and probability. On this basis Astrup Hoel discusses the possibilities of making losses foreseeable and of distributing the costs of losses with the aid of insurance. The main idea seems to be that the very possibility of foreseeing a loss as the result of a certain activity contains a ground for imposing the burden of such a loss on the person who undertakes the activity. This idea agrees largely with what has been said by others, in the earlier Scandinavian literature on tort liability notably by F. Stang.[4] On the level of legal technique, Astrup Hoel compares the protection

[3] *Op. cit. supra*, note 1.

[4] F. Stang, *Erstatningsansvar*, Oslo 1927, pp. 48 ff.

afforded by liability insurance to the person suffering a loss and the protection afforded when, for example, a bailee insures the goods belonging to the bailor. This comparison—which is based on the rules of the Scandinavian Insurance Contracts Acts—leads to the conclusion that insurance on property is better adapted to the needs of the person suffering the loss.[5]

Astrup Hoel's most radical plans of reform appear in a separate essay, published in 1930, where he sketches a system for compensating losses both to person and to property by one general scheme of insurance.[6] This system tends to obliterate the difference between insurance liability and accident insurance on person and property, since losses are to be compensated without the burden falling on either the person suffering the damage or the one causing the damage, except in special circumstances.

In later discussion, ideas of social policy play an important role. The rules concerning tort liability and insurance have been considered part of the general system of social security for those who suffer damage. An influence from the Beveridge plan can be observed in Scandinavia. This influence is perceptible already in a paper of 1943 by the Norwegian Johs. Andenæs.[7] The predominance of social considerations leads to the main importance being attached to injuries to persons. Andenæs cannot be said to regard liability insurance with disfavour; he simply considers it relatively unimportant for achieving the objects which he has in view.

In the writings of Ivar Strahl in this field, ideas of various kinds are combined. Strahl devotes considerable attention to the questions when strict liability should be imposed and whether such liability should be combined with compulsory insurance in favour of those who suffer damage. On this topic, his discussion takes up ideas from more traditional treatments of the law of torts, although the conclusions are largely his own. Strahl's opinion is that strict liability should be imposed only in a limited number of cases but should generally be combined with compulsory insurance in favour of those suffering damage.[8] More important from the present point of view is Strahl's comparison between compulsory liability insurance and compulsory accident insurance as means of providing persons suffering physical injuries with com-

[5] G. A. Hoel, *Risiko og ansvar,* pp. 179 ff.

[6] *Op. cit. supra,* note 1.

[7] *Fortid og fremtid i erstatningsretten* (Norsk forsikringsjuridisk forenings publikasjoner, Nr. 15), 1943.

[8] See *Scandinavian Studies in Law* 1959, pp. 214 ff.

pensation.[9] Strahl points out, in a very convincing way, that the original assumptions on which the present rules on motor traffic liability are based no longer exist. These rules presuppose that the car owner himself pays the compensation to those who suffer damage from the use of the car. When the issue is thus between the car owner and the person suffering injury, it is understandable that the former can escape liability if, as is the case according to the present Swedish law, he can prove that neither he nor the driver was negligent. But where there exists a compulsory insurance which covers the car owner's liability, such as has long been in force in Sweden, the real issue is whether the victim of a motor accident should be allowed compensation from a fund to which all motorists have contributed by their premiums for the compulsory insurance. In these circumstances it is incongruous that the right of compensation should depend on the conduct of the driver in the individual case.[1]

Considerations of social policy appear in Strahl's proposals for the distribution of indemnities from the motor traffic (i.e. third party) insurance. According to Strahl the money should be distributed among those suffering damage in the way most advantageous to them, and for this purpose it is better that each injured person should get a reasonable compensation than that some victims should get full indemnity and others nothing at all. Strahl goes a step further. He suggests that we should not compel car owners to maintain injured persons at a high standard of living but rather leave those with large incomes to protect themselves by insurance. The conclusion is that the compulsory motor liability insurance should be transformed into a personal accident insurance, of the same type as the industrial accidents insurance, giving limited amounts of compensation for all injuries due to motor traffic.[2] Even in other cases where compulsory insurance might be introduced for personal injuries, Strahl considers accident insurance preferable to liability insurance.[3]

Finally, Strahl envisages as an ultimate goal the setting up of a general accident insurance replacing tort liability and giving limited amounts of compensation to all persons suffering personal injuries. To this insurance car owners, employers and potential tortfeasors as well as those likely to suffer damage would have to

[9] *Op. cit.*, pp. 218 ff.
[1] *Op. cit.*, pp. 219 f.
[2] *Op. cit.*, pp. 222 f.
[3] *Op. cit.*, pp. 223 f.

contribute. He admits that such a scheme may seem rather Utopian but considers that in practice the Swedish system is not very far from the goal, since there are already systems of compulsory insurance that cover the two fields in which most serious injuries occur—motor accidents and industrial accidents.[4]

With the views of Strahl one can compare those of Ussing.[5] Their main ideas are largely the same, but Ussing is rather more cautious. Among other things he stresses that the economic conditions in Denmark and Norway are not so favourable as those in Sweden for the introduction of a far-reaching social insurance of the kind suggested by Strahl.[6]

This short survey of the Scandinavian proposals for reforming tort liability will serve to indicate some differences between Scandinavia and the U.S.A. as regards the background for a possible reform. In the American discussion motor traffic insurance seems to occupy an even more important place than in the Scandinavian proposals. The reason for this difference lies in the present state of motor traffic insurance; in the U.S.A. this is such as to furnish the advocates of reform with various practical arguments for a radical change, a prominent feature of which is the removal of the present necessity for the victim to prove negligence of the motorist.[7] In the Scandinavian countries, on the other hand, the victim need not prove any negligence on the part of the motorist, although only Norway and (recently) Finland have gone so far as to provide him with a right of indemnity that is wholly independent of the motorist's negligence.[8] In Denmark and Sweden the owner of a car can escape liability by proving that the damage was due neither to negligence of the driver nor to a defect in the

[4] *Op. cit.*, pp. 224 f.

[5] H. Ussing, "The Scandinavian Law of Torts—Impact of Insurance on Tort Law", *American Journal of Comparative Law* 1, 1952, pp. 359 ff.

[6] *Op. cit.*, p. 370.

[7] See, in addition to works by A. A. Ehrenzweig and F. V. Harper & F. James cited *supra*, p. 131 note 1, e.g. L. Green, *Traffic Victims: Tort Law and Insurance*, Evanston Ill. 1958, S. F. Hofstadter, "Alternative Proposal to the Compensation Plan", *Cornell Law Quarterly* 42, 1956, pp. 59 ff., F. James, "Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge", *Columbia Law Review* 59, 1959, pp. 408 ff. For further references, see *Automobile Liability Insurance and the State*, A Bibliography of the Material in the Law Library, California State Library, February 1961 (mimeographed).

[8] The present Finnish and Norwegian legislation in this field is based on reports by committees cooperating with Danish and Swedish committees (cf. *infra*, p. 138). The Finnish Traffic Insurance Act was adopted on June 26, 1959. The Norwegian Motor Traffic Liability Act was passed on February 3, 1961.

car. It is, however, rare for the car owner to succeed with proof of this kind, and introducing strict liability, without the possibility of exoneration on the side of the car owner, would therefore be a comparatively unimportant change. Motor traffic insurance is compulsory in all four countries. The costs of litigation are probably proportionately lower than in the U.S.A., although in Sweden at least they are considered to be far too high.

Before proceeding to the practical problems, attention should be drawn to the proposals by H. Möller which—as already mentioned—were first put forward in 1934.[9] Möller analyses the protection of the person suffering damage according to the German rules concerning liability insurance, and he finds various defects in this protection, especially in relation to the creditors of the insured. These defects can partly be avoided by the device of an accident insurance taken out by the potential tortfeasor in favour of the person potentially suffering damage. Such an insurance can be insurance on property, as when the proprietor of storage premises takes out insurance in favour of his clients on the goods stored. It can also be insurance for personal accidents, as when a car owner takes out insurance in favour of the passengers and the driver of the car. But these arrangements have also certain disadvantages, especially when viewed from the point of view of the tortfeasor who is also the insured. If the loss should exceed the insurance sum, the obligation to pay damages remains a burden on the tortfeasor. Generally the insurance on goods only covers special risks, such as fire and theft, and the tortfeasor is not protected against liability for other damage. Finally, the insurance mostly includes damage which is in no way due to the person taking out insurance, and from this point of view the insurance will probably be fairly expensive for him.

As a proof that it is possible to avoid these disadvantages as well, Möller mentions the German Freight Forwarders' Regulations of 1932. According to these the forwarding agent is wholly relieved of all liability by insuring the goods in favour of the owner. Finally, Möller briefly mentions the possibility of transforming motor traffic insurance into an insurance of a similar kind.

Möller's ideas have been further developed by K. Sieg, who also takes as his starting point the Freight Forwarders' Regulations but tries to generalize the results more than Möller does.[1]

[9] H. Möller, *op. cit. supra*, p. 131, note 1.

[1] K. Sieg, *Zeitschrift für Handelsrecht* 113, 1950, pp. 95 ff. (cf. *supra*, p. 131, note 1).

3. If we survey these different suggestions for reform it may seem rather curious that a common proposal—substituting accident insurance for liability insurance—should be advanced with the support of such various arguments. Liability insurance is generally considered by the reformers to have served its time and to be due for replacement by more efficient and suitable means for compensating the persons suffering damage. But the reasons offered for such a reform vary from broad arguments of social policy to rather special considerations of legal technique, from theoretical ideas of the economically most suitable distribution of risks to practical aims of removing special defects in the present law, and from the desirability of harmonizing the rules of indemnity with general principles of the law of torts to that of fitting such indemnity into a system of social welfare.

The differences in the practical reforms proposed are also important. A common feature is no doubt that the right to compensation should not depend on the negligence of a tortfeasor, but in other respects the proposed rules vary considerably. The treatment of contributory negligence, for instance, is subject to various opinions. In the U.S.A., where the principle of apportionment of damages in case of contributory negligence has by no means gained universal recognition, the introduction of such apportionment has been considered a suitable reform.[2] There are, however, both in the United States and elsewhere, writers who are not content with anything less than the abolition even of apportionment, except for cases of gross contributory negligence on the part of the victim.[3] The standardization of the sums due to persons suffering personal injuries is another debated issue. Ehrenzweig goes so far as to propose uniform indemnities for all victims of motor traffic.[4] Strahl only wants to limit indemnities by introducing a maximum.[5] Leon Green considers that a satisfactory scheme must provide full indemnities according to the principles of the law of torts (with the exception that no compensation for pain and suffering should be allowed).[6]

The conclusion seems natural that there is only a loose connection between the call to abolish liability insurance and the practical reforms. One might even suggest that each separate reform

[2] See Hofstadter, *Cornell Law Quarterly* 42, 1956, pp. 63 ff.

[3] See Ehrenzweig, *"Full Aid" Insurance for the Traffic Victim*, pp. 33 f., Strahl, *Scandinavian Studies in Law* 1959, pp. 221 ff. Cf. *infra*, p. 138.

[4] *Op. cit.*, pp. 36 ff.

[5] See *infra*, p. 138.

[6] *Traffic Victims*, pp. 87 ff.

could be carried out within the sphere of the law of torts, combined with liability insurance, and also that tort liability and liability insurance could be abolished on paper without introducing any practical reform, at least in countries that already have systems of compulsory insurance.

Some evidence for this last suggestion can be found in the proposals for reforming motor traffic insurance that appeared in Scandinavia in 1957. The Swedish report was prepared by a committee under the chairmanship of Professor Strahl.[7] The committee proposed the substitution of an insurance on property and persons for the compulsory liability insurance that is now in force. A main feature of the draft for new legislation was that the person suffering injury should in general be entitled to indemnity even if it could be proved that the driver had not been negligent. This, however, is no more than could be achieved by a reform of the present Motor Accidents Act. For cases of collision between cars, the draft statute even proposed a mitigation of the present liability of the motorist by limiting the right of indemnity of the owner, driver and passenger of each car from the traffic insurance of the other car to cases of proved negligence on the latter side. As for contributory negligence, the majority of the committee wanted to keep the present rules of apportionment, whereas Strahl and another member of the committee proposed that indemnities for personal injuries should be apportioned only when the victim had acted intentionally or with gross negligence.[8] The indemnities were in general to be decided according to the rules of the law of torts, with a limitation for damage to property.[9] Strahl suggested, however, that damages for personal injuries should not be computed on loss of income exceeding 20,000 Sw. kr. a year (a sum roughly corresponding to £1,400).[10] But altogether the proposed reform concerned rather minor details and would not change the present law in any radical way. The proposals have not yet resulted in any reform in Sweden.[1]

4. The problem posed here is, in its most general form, how we can avoid tort liability and liability insurance. In investigating

[7] *Trafikförsäkring*, SOU 1957: 36.
[8] *Op. cit.*, pp. 121 f., 130 f. Cf. *supra*, p. 137.
[9] Cf. *infra*, p. 148.
[10] *Op. cit.*, p. 127.
[1] The same is the case in Denmark. As for Finland and Norway, cf. *supra*, p. 135, note 8.

this problem, we should take into account not only methods which shift the burden of the losses to those who cause them but also methods which let the burden stay where it falls, and I shall first deal with these latter.

The simplest way of avoiding tort claims is to leave those threatened by losses to protect themselves by insurance or in some similar way, as best they can. If they omit to procure protection, they must bear their losses themselves, even though the losses have been caused by the negligence or perhaps the hazardous activity of others.[2]

It does not seem, however, that this method will lead very far. It is no use arguing this question on the basis of what one thinks insurance should be; one has to accept the fact that private insurance is at present confined to certain types and is likely to remain so. The possibilities of acquiring protection of property by insurance are limited, since the insurance generally covers only special risks, such as fire, burglary, damage from bursting water-pipes, etc. But even apart from these limitations, the very possibility that a person threatened by a loss can protect himself by insurance should not, in my opinion, count very high. For what does it mean that the person suffering damage must bear the loss himself when he lacks insurance, even if the damage was caused by a third party? It means that in weighing the interests of the parties that suffer losses against those of the tortfeasors, the latter are to be favoured. The omission to procure insurance on the part of the person suffering a loss is considered more important than the negligence on the side of the tortfeasor. Omission to insure one's property becomes the supreme negligence, the supreme tort. Certainly there are some cases where such a view can be justified, e.g. damage by fire. It will often seem more serious to omit to insure one's own property than to cause a fire to another's property by a moment's negligence. But even in the case where the owner has insured his property, but for an insufficient sum, it may seem doubtful whether his negligence should be counted as more serious than that of the tortfeasor, with the result that he is debarred from suing the tortfeasor for damages. And if we consider other fields where insurance is not so widespread, our doubts rapidly increase.

There are other objections against forcing those that may suffer losses to protect themselves in order to let a possible tortfeasor

[2] This view has been put forward by the Norwegian writer Kristen Andersen, see e.g. *T. f. R.* 1948, p. 114 and *ibid.* 1955, pp. 373 f.

escape liability. The insurance that is available often covers many more cases of damage than the tort liability concerns. For practical reasons an obligation to insure—for this is what the rule would amount to—goes much further than the interests of the tortfeasor demand. This can be demonstrated by an example. It is often said that the indemnities for personal injuries from traffic insurance and other insurance taken out by a tortfeasor should be limited, because those who stand in danger of losing high incomes should protect themselves by personal accident insurance.[3] But in Sweden at least there is no accident insurance available that covers only accidents from motor traffic, and full insurance coverage might be expensive. It is possible to be specific on this point. A Swede who in view of the risk of being injured in a motor accident considered himself obliged to take out insurance might find that the most favourable form offered by insurers would be a sickness insurance where payments start one month after the outbreak of the sickness and where the premiums are deductible for income-tax purposes, in which case the benefits are subject to tax. Suppose that he is 45 years old and that he wants to insure an income of 72,000 Sw. kronor (roughly equivalent to £4,800) a year up to the age of 65. Such an insurance would in Sweden cost about 3,000 kronor a year, or—since the premium is deductible for tax purposes—about 1,200 kronor (about £80) net a year. This is a considerable burden to lay on a person in order to relieve motorists of liability.

The arguments that those who have high incomes should protect themselves by accident insurance fails altogether in regard to persons who, because of age or bad health, cannot procure such insurance.

These reasons support the view that there are considerable practical objections to the method of abolishing tort liability by placing the burden on those who suffer the losses, irrespective of whether they are in fact protected by insurance or not.

Much more can be done, and is in fact done in the Scandinavian countries, by abolishing or modifying tort liability when the person suffering damage is actually protected by insurance. Although only Denmark has gone so far as expressly to deprive him of the right of damages in some such cases, the same result is in practice reached in the other Scandinavian countries by deducting the insurance indemnity from the damages and limiting the insurer's

[3] Cf., e.g. *supra*, p. 138.

right of subrogation.[4] Further protection of the tortfeasors results from the fact that often the insurance companies do not exercise the rights of subrogation to which they are entitled. As far as Sweden is concerned, damage to property that is covered by the owner's insurance will hardly ever have to be compensated by a tortfeasor personally, although in some cases subrogation is exercised against a liability insurer of the tortfeasor or against the state as a self-insurer.[5]

The situation is less favourable with regard to personal injuries, since the victim is entitled to damages for loss of income in addition to the insurance indemnity. The insurance therefore does not mitigate the tortfeasor's liability, unless a person who has suffered an injury happens to be less eager to pursue his claim for damages against a tortfeasor when his loss of income has already been compensated from his own accident insurance. The possibility does not seem altogether excluded that personal accident insurance could be employed to a wider extent for mitigating the tortfeasor's liability, by an arrangement similar to that now employed in insurance on property. But this problem is rather complicated, and it is not possible to investigate it here.[6]

The overriding consideration, however, must be that, even if the right of damages is strictly curtailed whenever a loss is covered by insurance, this will not have a decisive influence on tort liability. It is no doubt possible and even likely that insurance on property and personal accident insurance will continue to spread and cover an increasing portion of losses, but there will still remain an important group of losses that cannot very well be covered by insurance on the part of the person on whom the loss primarily falls.

5. We must now consider those methods by which a loss is covered by insurance on the part of the person who causes such

[4] Cf. the present author's *Försäkringsgivarens regressrätt (The Insurer's Right of Subrogation)*, Uppsala universitets årsskrift 1953: 3, Uppsala 1953 (English summary pp. 257 ff.) and Strahl, *Scandinavian Studies in Law* 1959, pp. 207 ff.

[5] As far as Sweden is concerned, subrogation is common in marine and other transport insurance. In motor insurance a right of subrogation often arises from a collision insurance towards a motor traffic insurance, but in practice knock-for-knock agreements (or their equivalents) prevent the exercise of most such rights.

[6] A proposal for a rather limited reform in this direction appears in *Försäkringsgivares regressrätt*, SOU 1958: 44, pp. 49 ff. So far this proposal has not led to any legislation.

a loss. The proposals for reform mentioned earlier are mainly concerned with these possibilities. It must be noted, however, that in spite of the manner in which these proposals are advanced they are in practice often confined to rather limited groups of damage. There is a common tendency to consider industrial accidents as the field where sound principles have already emerged, and motor accidents as the field where reform is most urgently needed. I believe that one of the most necessary prerequisites for clarifying the issue is to realize the distinctive features of these two fields.

With few exceptions, it seems to be accepted in all industrialized countries that injuries due to industrial accidents should be covered by a special liability of the employers for workmen's compensation or, preferably, by a compulsory insurance paid for by the employers.[7] The employee's right of compensation is then independent of any negligence on the part of the employer. Such compensation may be considered as a necessary counterweight to the occupational hazards of modern industry, as part of the wages of the employees, or even as a social benefit extended to the class of the population that is most likely to suffer need in case of serious accidents. Whatever reasons may be given for the establishment of this compensation, one must acknowledge that the conditions for creating a scheme of compulsory insurance with standardized benefits are unusually favourable in this case. The persons in whose favour the insurance operates are a definite group comprising the employees of those who pay the premiums. The damage to be covered consists in personal injuries and does not include damage to property. The limits of the insurance can be drawn fairly clearly (although there are always borderline cases that are open to discussion or doubt, such as injuries suffered by an employee on his way to or from work). The loss of income of the injured person corresponds to the wages due to him by the employer. The upper limit of the loss of income that can fall within the insurance is mostly indicated by the general standard of wages for manual labour.

Much more doubt attaches to the question whether the employer should also be liable in tort for industrial accidents, and much less uniformity is found in the corresponding rules. In many

[7] See, e.g., S. A. Riesenfeld & R. C. Maxwell, *Modern Social Legislation*, Brooklyn 1950, pp. 127 ff., P. Durand, *La politique contemporaine de sécurité sociale*, Paris 1953. Concerning an exception see "The Federal Employers' Liability Act", *Law and Contemporary Problems* 18, 1953, pp. 107 ff.

countries the employer's liability is abolished altogether for accidents that befall his employees (with the exception only of intention and especially serious negligence).[8] As is well known, Great Britain has adopted a system according to which the employer is liable in tort, although half of the benefits received from the industrial injuries insurance scheme is deducted from the indemnity in tort. Since the insurance gives only limited benefits, the employer's liability is economically important.[9]

In Scandinavia, three different systems are found. Norway has gone farthest in the abolition of the employer's liability, since the person who is entitled to an indemnity from the industrial accidents insurance scheme *(ulykkestrygden)* is deprived of right of suing in tort not only his own employer but also every other employer who pays contributions to this insurance.[1] The only important exception is that an employee who is injured by motor traffic may claim the indemnity due to him under the Motor Traffic Liability Act.[2] This is explained by the fact that the difference between the two systems of compulsory insurance is considerable and that the employees are not satisfied with what they receive from the less advantageous one. In Sweden the employer is liable in tort against an employee who has been injured through the negligence of the employer or of an employee in a superior position, but the benefits received from the general health insurance or industrial injuries insurance schemes are deducted from the damages.[3] The insurer is subrogated to the claim against the employer only if the latter has acted intentionally or with gross negligence or if the injury is due to an accident covered by motor traffic insurance.[4] In Denmark, the employee is entitled to damages

[8] This principle is prescribed in Germany by Reichsversicherungsordnung, sec. 898, and in France by the Loi du 30 octobre 1946, sec. 68.

[9] Cf. D. J. Payne, "Compensation for Industrial Injuries", *Current Legal Problems* 10, 1957, pp. 85 ff.

[1] Cf. K. S. Selmer, "Limitation of Damages According to the Circumstances of the 'Average Citizen'", *Scandinavian Studies in Law* 1961, pp. 131 ff., at p. 144.

[2] Cf. B. S. Lassen, C. Smith & I. A. Vislie, *Erstatning og trygd,* Oslo 1953, pp. 274 ff. The same result may be reached in Germany according to a statute of December 7, 1943, which makes the employer liable for injuries which a workman suffers *im allgemeinen Verkehr.* See Lauterbach, *Unfallversicherung,* Stuttgart 1954–56, pp. 281 f.

[3] Cf. Strahl, *Scandinavian Studies in Law* 1959, p. 206.

[4] As for a proposal of reform cf. *infra,* p. 147. The Finnish system is substantially the same as the Swedish one, although the insurer is subrogated to all claims in tort of the injured workman towards a third party. See N. E. Ingman, "Synpunkter på arbetsgivarens skadeståndsansvar vid olycksfall i arbete", *Nordisk försäkringstidskrift* 1961, pp. 203 ff.

whenever the employer or any of his employees has been negligent. The benefits received from social insurance are deducted, but the social insurer is always subrogated to the claim against the employer.[5] The difference between the Danish and Swedish systems is, however, greater than appears from the bare rules of liability. In Sweden the general health insurance and industrial injuries insurance schemes together give benefits which relatively speaking are higher than those obtainable in, e.g., Great Britain, but nevertheless damages for loss of income may often exceed the amount due from social insurance, and especially for well-paid workers the advantage of being entitled to damages in tort is often considerable. In Denmark, damages are sometimes smaller than the capitalized value of the insurance benefits, and the only advantage of claiming damages may then consist in the fact that by this remedy the injured person can receive a lump sum, while insurance benefits would consist in an annuity. In both countries, compensation for pain and suffering is confined to tort liability and is not part of the benefits payable under the industrial injuries insurance scheme.

In view of these differences in the legal rules and also in the relative importance of insurance benefits and tort liability, it seems rather rash to state sweepingly that the most satisfactory system is to concentrate all resources on the industrial injuries insurance scheme and abolish the employer's tort liability altogether. Evidently such a solution could be considered expedient if the standard of industrial injuries insurance benefits was high enough to provide not only relief for those in need but also satisfactory compensation for all losses suffered by an employee as the result of an industrial accident. Tort liability could then be abolished without anybody being the worse. It does not seem impossible to aim at such a standard, although the burden on the employers might be heavy if they alone had to pay the premiums. But as long as this goal is not attained, one must consider whether the person suffering injury through the negligence of the employer should not have the same right of full indemnity as outsiders have, although this would mean having two systems of compensation—industrial injuries insurance (possibly combined with general health insurance) and tort liability—instead of only one system.

Some of the arguments advanced in favour of having one single system do not seem to be able to bear a close scrutiny. It is some-

[5] Ulykkesforsikringsloven, sec. 4, as amended May 8, 1959.

times said that with such a system the employee, even if he does not get full indemnity when the employer is negligent, gets an equivalent in the fact that he receives correspondingly higher benefits when the employer is not negligent. From the employer's angle the same view can be expressed by saying that, as an equivalent for paying limited compensations even when he is not negligent, he escapes liability for negligence.[6] But against this view it can be objected that the benefits due from the industrial injuries insurance are not calculated on this basis. It also seems doubtful whether one can make any rational estimate of the comparative advantages of having a full right of indemnity in certain circumstances and only a limited right of indemnity in other circumstances, on the one hand, and of having the right to receive a somewhat higher compensation—which still does not cover the whole loss—on all occasions, on the other hand. This must be a subjective choice, and there does not seem to be any valid argument against those who voluntarily choose the first alternative. The choice is particularly important for well-paid workers, whose incomes lie close to or above the upper limit of income taken into account for industrial injuries insurance. In practice this limit has a tendency to lag behind because of the constant increase in industrial wages that is due to improving standards of living and to inflation. In cases where tort indemnity is given, such indemnity corresponds to the standard of wages at the time when the damage occurs, and it therefore follows the increase in wages more closely than social insurance generally does.

As a reason in favour of having one system of compensation instead of two it can be argued that the costs of administration will be lower with the former alternative, since the employer then need not have a liability insurance to cover him against claims from the employees. But this advantage is diminished if the employer must all the same have a liability insurance to cover his liability in other directions. More important is no doubt the fact that the costs for settlement of losses are greater when an injured employee may not only receive compensation from the industrial injuries insurance but also sue his employer in tort. On the other hand, it is often said—and often denied—that the employer's liability encourages precautions and emphasizes the need for a high standard of care.

[6] See, e.g., for German law 170 RGZ 159, at p. 160. Cf. Lauterbach, *op. cit.*, p. 282 a.

It does not, however, seem likely that the slight preponderance that might be found in the rational arguments for one system or the other will be allowed to prevail. Opinions based on the historical development seem to carry greater weight. In some countries the employer's liability in tort was abolished more or less completely when workmen's compensation was first introduced, and in these countries it seems to be generally accepted that the employer shall remain free from tort liability, even if workmen's compensation has been transformed into compulsory industrial injuries insurance. Only if the insurance benefits are considerably lower than the tort indemnities will the demand for an alternative remedy be strong. In other countries the employer's liability was retained, although much diminished in importance, when workmen's compensation was introduced, and in these countries there seems to be a settled opinion that the employer should remain liable. Although personally I am in favour of abolishing the employer's liability in tort for industrial accidents, I consider the wishes of the employees and the employers more important than any outsider's arguments.

6. As for injuries due to motor traffic, the situation resembles that of industrial accidents in some respects but in other ways it is different. A compulsory insurance scheme is fairly easy to administer, since the control of the maintenance of insurance can be linked to the existing registration of cars. The damage to be covered by the insurance can also be fairly clearly defined as that due to motor traffic. On the other hand, the losses comprise both injuries to persons and damage to property. The loss of income of those suffering personal injuries ranges within much wider limits than in the case of industrial accidents.

The right of compensation for personal injuries due to motor traffic must be seen in its connection with the rules concerning damage to property. If the conditions for right of indemnity are different, the advantage to be gained by simplifying the rules concerning personal injuries are diminished, since in collision cases there is generally some damage to the cars as well and there must be an investigation into the liability for this damage. It will also seem more difficult to justify standardized compensations for loss of income, with upper limits for the income that is to be taken into account, when damage to property is compensated fully. If one car collides with another and the owner of the first car gets

the whole damage to his vehicle indemnified from the traffic insurance of the other car, a passenger in the first car may well ask why his loss of income should not also be compensated fully.

More important are, however, the general objections to the standardization of compensation to the victims of motor traffic. Such limited compensations only solve part of the problem raised by personal injuries due to motor accidents.[7] Here, as in other similar questions, the benefits provided by social insurance must be considered as the background for the special rules concerning motor traffic losses. In Sweden the health insurance scheme and the pension insurance scheme (which also—and principally—provides old age pensions) supply the basic aid to people temporarily or permanently disabled by motor accidents, as well as to anybody else who is injured or falls ill. These are predominantly compulsory schemes, financed by contributions from those entitled to compensations, from the employers and from the state. The compulsory insurance can be supplemented by voluntary insurance, administered by the same authorities. At present there is subrogation from the general health insurance to the traffic insurance when the victim is entitled to damages in tort from the motorist, but in accordance with a recent proposal this subrogation is to be abolished.[8] The burden of the compensations will then no longer fall on the motorists.

When the basic needs of the victims of motor traffic are thus met by social insurance, the role of motor traffic liability insurance cannot be to supply the same kind of aid. Motor traffic insurance is concerned with the excess loss of income, with pain and suffering and with damage to property. The reason for instituting a special, compulsory insurance in favour of those who suffer losses from motor traffic must then be that even the additional losses are considered important enough to justify special protection. If one thus accepts as a starting point that the aim of motor traffic insurance is not to supply basic aid to the victims but to carry through a policy concerning the distribution of losses, any severe curtailment of the indemnities would seem meaningless. It would also in all probability meet with strong opposition. In a country where traditionally the great majority of those suffering losses by motor traffic get their whole losses indemnified,

[7] Cf. Green, *Traffic Victims*, 1958.

[8] *Lag om allmän försäkring, m. m. Förslag utarbetade inom socialdepartementet*, SOU 1961: 39, pp. 126 ff.

any reform which would give them less than a substantial indemnity would seem a retrograde step.[9]

These arguments lead to the conclusion that the right of indemnity for personal injuries should depend on the same circumstances as the right to damages for loss of property. It is not possible to discuss the details here, but the main purpose should be to compensate adequately those who suffer losses, particularly in cases of personal injuries. Damages should be given irrespective of any negligence of the motorist, and contributory negligence should not, as far as personal injuries are concerned, lead to any apportionment of the damages. The indemnities should be assessed according to the law of torts. Such rules may seem to lay a heavy burden on the motorists, but they satisfy the primary objects in this field: placing the losses due to motor traffic on the motorists, covering the whole losses by one single insurance—with the exception of that part of the losses which is covered by social insurance—and simplifying the prerequisites for a right of indemnity.

What has now been said does not dispose of the view that compulsory insurance should not be used for maintaining a high standard of living for those who lose high incomes through motor accidents. But this problem is not peculiar to motor traffic insurance, and it has been dealt with earlier (*supra,* p. 140). In the same way, the idea that the loss of especially valuable property should not be compensated is not peculiar to motor traffic insurance. It may be mentioned here, however, that in this field the evolution in Sweden has gone past the ideas contained in the draft for a new statute from 1957 (mentioned *supra,* p. 138). In this draft it was proposed that the insurer should have unlimited liability for personal injuries but that a maximum of 50,000 Sw. kronor should be retained for damage to property. The liability of the tortfeasor for an excess loss of property was to be restricted to cases where he had acted intentionally or recklessly.[1] Some time after the presentation of the report, the insurance companies voluntarily abandoned the earlier limits not only for personal injuries but also for damage to property, retaining only a maximum for reinsurance purposes; and the traffic insurance therefore covers all losses for which the motorist is responsible.

7. Industrial accidents and motor traffic accidents are the two most important fields where special arrangements are justified in

[9] As for the position in Great Britain, cf. D. J. Payne, "Compensating the Accident Victim", *Current Legal Problems* 13, 1960, pp. 85 ff.

[1] *Trafikförsäkring,* SOU 1957: 3, pp. 50 f., 92.

order to ensure that those who suffer losses are compensated. The risk is especially high, the accidents to be covered can be fairly well defined, and the control of a compulsory insurance can be administered without special difficulties. Other such fields are accidents due to air traffic and atomic risks. There is no need for elaborating here the special features of these accidents and of the circumstances in which they arise, nor for discussing in what other fields similar features arise. But the cases now referred to must be considered exceptional, even if they comprise the most important types of accidents, and there will always remain a considerable number of situations where compulsory insurance cannot be resorted to, if only because the costs of administering a compulsory insurance would be so heavy that they must be avoided.

In what follows I shall confine myself to the accidents that are not subject to special arrangements and therefore are left to voluntary insurance on the part of the person causing an accident. This means that I shall also disregard the possibility that a single, immense insurance institution covers losses of all kinds and collects contributions from all who can cause or suffer loss. This possibility does not seem to lie within the scope of what can be envisaged at present. The accidents with which we are thus left are important enough to merit a special discussion.

There are two main types of voluntary insurance available by which damage is covered by someone other than the person who suffers the loss. These are insurance of property in favour of a third party—especially insurance in favour of whom it may concern—and liability insurance. To those may be added a third type, voluntary personal accident insurance in favour of a third party, but as this type is not common in Sweden I shall not discuss it here.

8. As has appeared earlier, Astrup Hoel and Möller, in spite of their different starting points, seem to agree that property insurance in favour of third parties should be substituted for tort liability and liability insurance. If a person may cause damage to others he should insure in their favour, and in return he should be relieved of his liability in tort. Ehrenzweig seems to favour the same method, although he has not developed his views in detail for any other losses than those caused by motor traffic.[2]

The opportunities for using this method are, however, also limited. Apart from compulsory insurance, for which its applica-

[2] Cf. *Negligence without Fault*, p. 64.

tion has been discussed earlier, it is chiefly restricted to contractua relations. By contract the parties can agree that one of them shal procure an insurance in favour of the other but shall have n(further liability. The example from which Möller and Sieg start the Freight Forwarders' Regulations of 1932, belongs to the con tractual sphere, and the same is true of the other examples men tioned by, e.g., Ehrenzweig.[3]

In extra-contractual relations it is hardly possible to rely on this kind of insurance in favour of others.[4] It seems unlikely that any private person would voluntarily take out insurance in favour of each and every person to whom he could cause damage. It seems even less probable that an enterprise, with its greater capacity for causing damage, would procure such insurance in favour of others. Anyhow, the insurance would not relieve the party who takes it out from liability for excess losses.

It has been suggested that liability insurance can be combined with a special voluntary insurance for a limited sum in favour of those suffering losses in such a way that the victim may choose between relying on the tort liability and availing himself of the special insurance of the tortfeasor. If the victim chooses to avail himself of the special insurance, he must waive his claim in tort.[5] The success of such a scheme seems to depend largely on the character of the liability in tort. If the tort liability gives good protection to the victims, their advantage in relying on the special insurance will be small, and the role of this insurance will be insignificant. If on the other hand the tort liability gives in-adequate protection, the victims have good reason to rely on the special insurance, but at the same time the cost of the insurance will be considerable and it can be surmised that there will be little incentive for the tortfeasors to procure it.

9. It therefore seems inevitable that there will always remain some tort liability against which the potential tortfeasor will have reason to insure himself by liability insurance. Although the tort-feasor primarily acts for his own advantage, the real protection accrues to those who suffer damage. Tort liability can therefore be regarded as a means of inducing those who may cause losses to others to procure insurance in their favour by compelling them to pay for the losses themselves if they fail to procure such

[3] See *"Full Aid" Insurance for the Traffic Victim*, pp. 25 ff.
[4] Cf. Sieg, *Zeitschrift für Handelsrecht* 113, 1950, pp. 102, 104 f.
[5] See Ehrenzweig, *"Full Aid" Insurance*, pp. 39 f.

insurance.[6] Compared with compulsory insurance in favour of third parties, tort liability has the advantage of being easily and smoothly manoeuvrable. It does not require any control by governmental agencies but is based on the psychological pressure that is exercised by the rules of the law of tort. This pressure is generally cumulative. A potential tortfeasor does not insure against each single form of liability that he may incur but against all liability of any kind that may fall on him. The insurance will cover all sorts of damage for which the courts will hold him liable. If liability is increased in a certain field, this will strengthen the pressure on those concerned to obtain liability insurance.

It is therefore misleading to state that tort liability can only remove a loss from the person suffering damage to a tortfeasor. Tort liability acts as an incentive to procure liability insurance, which is a means of distributing losses.

If liability insurance is regarded in this manner, an important question is how to develop it in such a way that it will afford the best possible protection for those suffering damage. Special attention should be given to the points brought forward by the critics whose views have been mentioned earlier.

10. Certain limitations in the protection of the party suffering damage result from the rules regarding insurance or from the insurance conditions. The limitations are mainly due to the interests of the insurers, and to a minor extent to more general interests in preventing damage, discouraging fraud, etc. The insurers may take the view that some proposals for improving the protection of those suffering damage cannot be accepted because they would involve too great a risk of abuse of the insurance. Objections of this kind must of course be carefully examined, but it should be kept in mind that the utilizing of liability insurance for the protection of a party that has suffered a loss, even if this protection should go further than is necessary for safeguarding any interests of the tortfeasor, must not be considered an abuse of the insurance but a desirable development.

It appears then that some limitations that have been considered as matters of course where liability insurance is concerned do not occur in other types of insurance, especially insurance on property in favour of whom it may concern. In traffic insurance the protection of the person suffering loss is often better than in voluntary

[6] Cf. Astrup Hoel, *Risiko og ansvar*, p. 192.

liability insurance for reasons that do not depend on the compulsory character of the insurance. As will appear later, in countries where motor traffic insurance has long been voluntary—notably France—there have been improvements which illustrate what can be achieved without resorting to compulsory insurance.

In what follows I shall compare voluntary liability insurance with other types of insurance as regards certain specific points.

(1) In voluntary liability insurance the person suffering damage must bring his suit against the tortfeasor, whereas in insurance for whom it may concern he can bring his suit against the insurer himself.[7] In motor traffic insurance the insurer is, according to Swedish law, directly liable, but it is more usual for suit to be brought against the motorist personally. The insurers seem to prefer the suit to be brought against a tortfeasor, even if everybody knows that there must be an insurer in the background, since the insurer then need not appear as a party in the lawsuit. The whole point seems, as far as Sweden is concerned, to be very unimportant. In theory it might happen that an insurer claims that a judgment against a tortfeasor is not *res judicata* against him, although he has in fact directed the defence of the tortfeasor himself, but this is not a likely contingency in Scandinavian legal systems. The present procedure functions smoothly.

In some countries only the person taking out liability insurance is considered to be the creditor of the insurer for the insurance indemnity. He can collect and spend the money himself, with the possible result that the person who has suffered the loss never receives any part of it.[8] It also occurs that the creditors of the tortfeasor distrain on his claim against the insurer, which also has the effect that the person suffering a loss does not receive the indemnity which the insurer pays. But on both these points the Scandinavian Insurance Contracts Acts have provided adequate protection for those who suffer losses (although the methods vary between the Scandinavian countries), and there does not seem to be any need for a reform here.[9] In other countries the same result is achieved by the aid of the *action directe*.[1] This removes one of the objections that has been raised against liability insurance.

(2) The person suffering damage can fail to recover an in-

[7] Cf., e.g., Ehrenzweig, *Law and Contemporary Problems* 15, 1950, pp. 435 ff., Green, *Traffic Victims*, p. 78.

[8] See, e.g., *Travaux de l'Association Henri Capitant*, T. 9, 1957, pp. 169 ff.

[9] Cf. J. Hellner, *Försäkringsrätt*, Stockholm 1959, pp. 393 ff.

[1] Cf. M. Picard & A. Besson, *Les assurances terrestres*, Paris 1950, pp. 551 ff.

demnity from the liability insurer for various reasons that depend on the person who has taken out the insurance. That person may have violated some duty imposed on him by the insurance contract. He may for instance be guilty of misrepresentation or of concealment when taking out the insurance, he may have attempted to defraud the insurer at the settlement of the loss, or he may have failed to comply with the customary clause in the insurance contract according to which the insurer is entitled to conduct the defence of the tortfeasor in a lawsuit brought by the person suffering a loss.

For other types of insurance Scandinavian law often gives the party suffering the loss a more favourable position, although there are certain gaps in his protection.[2] Misrepresentation and concealment on the part of the person taking out an insurance for whom it may concern debar even an innocent third party from recovering the insurance indemnity, but in compulsory motor traffic insurance such misrepresentation or concealment does not affect the right of the person suffering a loss. Misrepresentations and frauds against the insurer during the investigation of a damage do not affect the rights of an innocent third party either in insurance for whom it may concern or in motor traffic insurance. Obligations concerning the conduct of lawsuits have no place in insurance for whom it may concern. In motor traffic insurance a duty of informing the insurer of the lawsuit is incumbent on the person suffering the loss, and if he fulfils this duty he cannot lose any right against the insurer.[3] The fact that the party suffering the loss has a more favourable position in those other types of insurance indicates that the rules regarding voluntary liability insurance are harsher than necessary against the person suffering the damage.

Further, a comparison with French law is of some interest. Since 1932, French courts have taken the position that in liability insurance the insurer is not permitted to exercise against a person suffering damage so-called *déchéances postérieures à la réalisation du dommage*.[4] The general idea is that, after the occurrence of damage, the person who has taken out the liability insurance is out of the picture and the person suffering the loss has an independent right. If the former omits to report the damage to his insurer, or if he is guilty of fraud, or if he violates the obligation to

[2] See Hellner, *op. cit.*, pp. 291 ff.
[3] See Hellner, *op. cit.*, pp. 347 f.
[4] See Picard & Besson, *op. cit.*, pp. 556 ff.

let the insurer conduct the defence in the lawsuit, this behaviour does not influence the right of the person suffering the damage.

If this system functions in France, it should not be impossible to introduce it in other countries as well. What happens after the damage has occurred should not influence the right of a person suffering damage. It should be added, however, that although the rule concerning *déchéances postérieures* has been considered important in France it seems rather unlikely that its introduction would rank as a remarkable reform in Scandinavia. It is even possible that to some extent this rule agrees with the present practice of the insurance companies. The matter has not to my knowledge been discussed before in Scandinavia, and still less has the practice of the insurers been investigated.

It is more doubtful whether misrepresentations and concealments in concluding a liability insurance contract should be unopposable against the person suffering damage. The issue depends largely on what rights are given to the insurer for such a case. It does not seem likely that either insurers or insured would approve of a term in a voluntary insurance contract, according to which the insurer was entitled to pay out the insurance indemnity in full but was subrogated to the claim of the person suffering damage against the insured. Although such subrogation claims occur in compulsory motor traffic insurance, they would surely be regarded in a different light if they were to be introduced in voluntary insurance. Another form of sanction against the person guilty of misrepresentation would be to make him pay an additional premium as a fine. But although a precedent for such an arrangement can be found in the draft of the Motor Traffic Insurance Act,[5] it would not give the insurers sufficient compensation for the extra risk incurred by them, and it seems doubtful whether it would work here.

(3) The tortfeasor's liability insurance in general gives no protection to the person suffering damage if the tortfeasor has acted intentionally or under the influence of alcohol. There are also exceptions in the liability insurance contracts that concern certain kinds of recklessness.[6] This is a further point where the position of the person suffering the loss is more favourable under the rules of insurance for whom it may concern and compulsory motor traffic insurance, since in both cases the insurer is liable although he

[5] See *Trafikförsäkring*, SOU 1957: 36, pp. 115 f.
[6] Cf. Hellner, *op. cit.*, pp. 389 f.

is subrogated to the claim against the person who acted intentionally or with gross negligence.

In this connection it may be noted that in French voluntary motor liability insurance the insurer was debarred after 1938 from invoking *déchéances antérieures au dommage* against the victim of a motor accident, according to the conditions of concession for this branch of insurance.[7] A similar principle now applies to the compulsory motor traffic insurance in France, although the system is rather complicated technically.[8]

It does not seem likely, however, that the person suffering the loss can be allowed to claim indemnity from a voluntary liability insurance even if the tortfeasor acted intentionally or drunkenly, or violated special safety regulations. The objections to subrogation are perhaps not so strong in this case as in the one mentioned in (2). But the need for prevention against intentional acts is much greater, and a subrogation claim would probably not be a sufficient deterrent. This applies specially to damage to property. If the insurer were liable against a person who had suffered damage to property by the intentional act of the insured, the latter could provide his friends with indemnities by wilfully destroying their property. The risk is perhaps smaller in regard to personal injuries, as probably few people would submit to assault and battery in order to collect an indemnity from the tortfeasor's liability insurer and the punishments on the offenders for such crimes are heavy. But the body of punctilious insured might argue that they should not be made to contribute to an insurance that partly goes to indemnities to those who are assaulted by other insured. This argument is not entirely conclusive, since prudent motorists, for example, must contribute to the indemnities for damage caused by reckless motorists. But nevertheless it does not seem feasible to protect the victims without protecting at the same time those guilty of deliberate acts of violence.

(4) Another circumstance that may prevent the person suffering damage from collecting an indemnity is that the coverage of the liability insurance may be suspended because the insured has not paid his premium. On this point, too, it would appear to be difficult to bring about a change. The experience from fire insurance in favour of mortgagees of insured property and from compulsory

[7] See Picard & Besson, *op. cit.*, pp. 555 f.

[8] See Besson, *Revue générale des assurances terrestres* 1960, pp. 5 ff., L. Sicot & J. Bienvenu, *L'assurance automobile obligatoire*, Paris 1959, pp. 54 ff., 105.

motor liability insurance demonstrates the difficulty of making any exceptions to the general rule.

This survey leads to the conclusion that there is little possibility of improving the protection of those suffering damage by reforming the insurance conditions. The few reforms that seem feasible would not have any great practical importance, although they would remove some of the present incongruities.

11. There are much better possibilities of improvement by increasing the sums of liability insurance. At present, tort liability and liability insurance aim to cover the whole loss of the person who suffers damage, but a limitation results from the maxima common in liability insurance. On the other hand, an insurance in favour of whom it may concern, like other insurance of property, only covers the value of the insured property.

It has been shown earlier that some of the authors who want to substitute insurance on property and personal accident insurance for liability insurance, intend by this to limit the indemnities.[9] This proposal was dealt with above when discussing whether a person suffering damage should be left to cover this damage himself by insurance or in some similar way. In my opinion it is much better to raise the maxima of liability insurance so that the insurance can cover all the losses of those who suffer damage. The cost of such a reform does not seem likely to be prohibitive, since the expensive part of a liability insurance is the coverage at the bottom, not that at the top. As already indicated, the maxima of motor traffic liability insurance have recently been raised in Sweden in order that all conceivable damage shall be covered, and the maxima of private liability insurance have also been raised considerably. It would not prove difficult to raise them even more, leaving only those maxima that are necessary for reinsurance purposes. Such a reform seems called for in the interests both of those suffering damage and of those liable for damage. One single insurance would then cover all losses for which a tortfeasor is liable, except those which are already covered on the side of the person suffering damage and for which subrogation is supposed to be limited. Such a reform is, however, certainly not a step in the direction of substituting personal accident insurance and property insurance for liability insurance. Another matter is that it is strongly desirable that exaggerated damages shall not be awarded either for damage to property or for damage to persons.

[9] Cf. *supra*, p. 137.

12. The weakness of liability insurance regarded as an insurance in favour of those who suffer losses is, however, due chiefly to circumstances connected with the rules of liability in tort. The person suffering damage cannot receive out of the liability insurance more than the tortfeasor is obliged to pay. Some of the limitations that are well justified in the relation between a tortfeasor personally and a person suffering damage are, as Strahl pointed out, irrational in the relation between an insurer and a person suffering damage. A reform in this respect might bring about an improvement in the protection of the party suffering damage.

A priori there does not seem to be any objection to the idea that a person suffering damage has a better right against a liability insurer than he would have had against the tortfeasor himself, supposing that the latter had no liability insurance. Under Scandinavian law we are accustomed to the fact that—at least in practice—the person suffering damage has in important respects no right of indemnity from the tortfeasor when his loss is covered by insurance.[1] Much less attention has been given to the reverse possibility of letting the person suffering damage have a better right when the tortfeasor has a liability insurance.

In Sweden the only cases where the existence of a liability insurance ameliorates the right of indemnity concern liability of infants and insane persons, and liability for fatal injuries. In both cases the courts are free to take the economic situation of the defendant into account, but in so far as the loss is covered by liability insurance no mitigation is allowed on account of this economic situation.[2] These two cases are, however, of minor importance. The view has also been ventilated that the courts may sometimes be disposed to impose liability on a defendant if they know that he is protected by liability insurance,[3] but it is hardly possible to substantiate such a suggestion.

It does not seem desirable that as a general rule the courts should impose liability according to their discretion, even if the ordinary prerequisites for liability are not present, when the defendant has a liability insurance that would cover such liability. This method would introduce arbitrariness to an extent hitherto unknown and would weaken the foundations for premium assess-

[1] Cf. *supra*, pp. 140 f.

[2] See B. Bengtsson, "Om ansvarsförsäkringens betydelse i skadeståndsmål", *Sv.J.T.* 1961, pp. 627 ff. with further references. Cf. concerning Norway K. S. Selmer, *Nordisk försäkringstidskrift* 1960, pp. 10 ff.

[3] See particularly Bengtsson, *op. cit.*, pp. 637 ff.

ments in liability insurance. It would also encourage a game of hide-and-seek in lawsuits regarding tort liability.

Another aspect of the matter seems more rewarding. There are clear signs that it is in the interest of those who take out liability insurance that, in some cases at least, the insurance should provide protection even if they are not themselves liable under the law of tort. There exists a sense of moral responsibility for damage caused to others that goes further than legal liability, and liability insurance is regarded by the insured as a means of enabling them to comply with this moral responsibility. In Sweden we find an example in the provisions concerning the liability of infants in the conditions for private liability insurance. According to the law of torts, damages from an infant must be assessed with regard to the state of mind of the infant, the nature of the act, and other circumstances. This rule generally results in an apportionment of the damages, sometimes an exemption from liability. As just mentioned, no mitigation for the defendant's economic circumstances is allowed to the extent that his liability is covered by liability insurance, but the other circumstances can be invoked by the insurer as well as by the tortfeasor himself. The insured have, however, reacted against such limitations of the insurer's obligations, and there have been successive changes in the insurance conditions, with the practical result that, as far as minor indemnities are concerned, the insurers now cannot avail themselves of the special defences granted to infants.[4]

A similar example concerns vicarious liability. Sweden has at present no general rule of *respondeat superior*, and an employer is in principle only liable for the negligent acts of those employees that supervise others. It has, however, become so common that the employers voluntarily insure the liability of those employees for whom they are not themselves responsible, that by a recent innovation such coverage is now part of the standard conditions for liability insurance for enterprises.[5]

A third example occurs in motor insurance, where the compulsory liability insurance, which does not cover injuries to the driver, is combined with a voluntary accident insurance for a fixed sum in favour of the driver, a so-called "driver's seat insurance".[6] Although this insurance may be considered as primarily protecting

[4] Cf. Bengtsson, *op. cit.*, pp. 633 f.
[5] Cf. Hellner, *op. cit.*, pp. 365 f.
[6] Cf. *op. cit.*, pp. 344, 487.

the person taking out the insurance himself, since he is often the driver, it operates to the advantage of other drivers as well.

There are certainly strong reasons for taking this tendency into account, especially as it can be said to agree with the general interests of the community. But this time, too, it seems profitable to compare the results of the law of torts with those of the law of insurance, especially in insurance for whom it may concern.

13. We then find that when the person suffering damage has contributed to his loss by his own negligence, the damages due to him under the law of torts are as a rule apportioned.[7] He will therefore receive only a fraction of what he would otherwise receive. On the other hand, if an insured contributes to his own loss, his right to insurance compensation is not impaired unless he acted intentionally or with gross negligence or if he negligently acted against a special safety provision laid down in the insurance contract.[8]

One may ask whether sufficient reasons can be found for retaining the apportionment of the damages whenever there is any negligence of the person suffering the damage. To such a question the answer must be that there certainly are strong reasons, in particular that the costs of the insurance would undoubtedly increase if apportionment was abandoned for ordinary negligence.[9] When the proposals for a reform of motor traffic insurance were published in Sweden in 1957, a strong body of opinion in favour of retaining the present rules of apportionment asserted itself.[1] It is possible that the reaction would be the same to a suggestion that in voluntary liability insurance the insurer's obligation should in general not be affected by contributory negligence on the part of the person suffering damage. But in my opinion such a reform should be seriously considered. If the insured are faced with the question whether or not they wish that persons to whom they negligently cause damage shall have full indemnity from the

[7] Cf. K. Grönfors, "Apportionment of Damages in the Swedish Law of Torts", *Scandinavian Studies in Law* 1957, pp. 93 ff.

[8] Insurance Contracts Act of 1927, secs. 18–20, 51.

[9] When preparing the 1957 draft for a new Traffic Insurance Act (cf. *supra* p. 138), the committee put to a group of experts the question how much the costs of traffic insurance would increase if apportionment for contributory negligence was abandoned for personal injuries. The answer was that the increase could be estimated at 7.5 per cent at the lowest. See *Trafikförsäkring*, SOU 1957: 36, p. 159.

[1] The draft statute was submitted to various authorities and organizations for opinions, according to the general practice in Swedish legislative procedure.

liability insurance, even if these persons have contributed to the loss by negligence, it seems to me quite likely that many people would be willing to pay the small additional premium that would be necessary. From the community's point of view such a reform would no doubt be advantageous.

A similar problem refers to those losses which have been caused without negligence. Strahl points out that to the average man it often seems peculiar that liability insurance does not give any protection when the damage has been caused without negligence.[2] The importance of the view of the common man is perhaps not very great, as mistakes of this kind are generally not considered an argument for the extension of insurance. All the same, the view mentioned merits attention as an expression of what may be desirable for the insured.

There are, however, objections of different kinds to such an extension of liability insurance. Problems of legal technique are bound to arise. If liability insurance covers even such damage as the insured causes without negligence, there will be difficulties in fixing what losses are to be covered. Negligence as a condition for liability has *inter alia* the function of delimiting in a fairly clear-cut manner those losses for which a person is to be liable. The simple prerequisite that the insured shall have caused the damage will probably create a vaguer and more nebulous limit of liability. In countries where there is a special rule of liability for damage due to motor traffic, a well-known problem is to ascertain the extent of this liability. If an insurance were to cover all damage that the person insured causes, without regard to negligence and without regard to any connection with a special activity such as motor traffic, the difficulties would probably increase.

Another problem concerns the prevention against negligence, an aspect that has until now been avoided here as far as possible, for the simple reason that I do not believe that the reforms discussed would have any substantial influence on the standard of care. In the matter of letting the right of indemnity depend on negligence or on causation, one cannot wholly avoid this issue. There may be a better incentive to exercise care if the right of indemnity is limited to cases of negligence. This may seem paradoxical, but can be demonstrated by a simple example. An honest person tries if possible to avoid causing another a loss that will not be compensated by insurance. If no indemnity will be given

[2] See, e.g., *Scandinavian Studies in Law* 1959, pp. 218 f.

in cases where there is no negligence, he must try to be as careful as possible. If he knows that the person suffering a loss will always receive an insurance indemnity, regardless of the circumstances, he may feel sure that his insurance will protect that person, and he may therefore not take the same care. The argument is purely hypothetical, and it is brought forward with no further contention than that the possibility should not be disregarded. The matter should be deliberated if a change is seriously considered.

The conclusion is that for practical reasons, if not for others, it is probable that losses for which the insured is not liable in tort can be covered by an extension of the liability insurance only in special cases, such as the ones which have already been mentioned. Whether the improvement in the protection is worth the trouble of making provisions for these special situations is another matter on which it is hard to pronounce an opinion. But some guidance might be found by an investigation of the cases in which the insurers are disposed to make payments *ex gratia*. Where such a tendency is found to exist, it would certainly be a great advantage if it could be transformed into a legal obligation of the insurers. The *ex gratia* payments are apt to favour partly those whom the insurer is particularly desirous to please and partly those who are particularly troublesome. It is an important requirement of insurance that all the insured should as far as possible be treated in the same way.

14. There remains yet another method of making the combination of tort liability and liability insurance an efficient means of protection, and this is also the simplest one: to develop tort liability with the deliberate intention that it shall be covered by liability insurance. The efficiency depends on the possibility of making liability insurance widespread. In Sweden the prospects of this are nowadays good, thanks largely to the present predominance of comprehensive policies. Since such policies generally contain an element of liability insurance, the chances are strong that anyone who owns any property that he wishes to insure against damage will also procure a liability insurance that will protect others when he causes them damage by his negligence or under other circumstances which make him liable.

The method has the drawback, like all other such methods, that the loss will fall heavily on the person who is held liable in tort if in fact he is not protected by insurance. But in contrast to the cases where the loss falls on the innocent victim when he has not

insured, the losses will here fall on a person who at the same time has not insured and has caused the loss by his negligence or under some other circumstances which are considered sufficient as a basis for liability. As a special safeguard against unfair results, the courts could be allowed to mitigate liability that is not covered by insurance.

Altogether, the case for tort liability and liability insurance seems rather hopeful, provided that they are not regarded as the only means of distributing losses that one person causes to another. It is no doubt possible to exaggerate the importance of tort liability, and as has already been said it is possible that the most important kinds of damage should be compensated by other means. But it is a matter of some interest that within the sphere where it remains liability insurance plays its role as well as possible. An aim of the preceding study has been to prove that, while each individual reform now discussed may not work wonders by itself, yet together these reforms might result in a considerable improvement.