Scandinavian Legal Culture within the Insurance Law

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1 Introduction

In this article, I will try to explore the signs and symptoms of a special Scandinavian legal culture that is immanent in the area of insurance law.[1] Investigations of relationships and shifts regarding the legal orders on the surface and their corresponding level of legal culture, will of course, to some extent, be based on elements of speculation. However, it is an interesting perspective that may render findings that might otherwise remain obscured. Ideally, the approach involving legal cultural perspectives may detect trends and developments that are significant as a framework for future decisions regarding business strategies. Even more important, and more relevant to a scholarly debate, the legal cultural perspective may unveil *new relevant problems* to explore.

Many scholars have pointed to the fact that regulations that are seemingly similar on the surface may not have a corresponding similarity in the factual adjudication in the various EU-countries. The theory of levels of the law presented by Kaarlo Tuori is a useful and apt instrument for investigating such issues.[2] The regulative ambitions of the EU are primarily channelled through the texts of regulations, directives and recommendations on the "surface level". However, these texts may be interpreted in the light of various legal cultures, maybe perhaps resulting in very diverse consequences.[3] We can keep this possibility in mind as we begin an investigation of the Scandinavian legal culture that may be viewed as looming ominously behind the wording of clauses of insurance law.

If a true Scandinavian legal culture may be detected, this may be interesting in itself. However, there are also good reasons to investigate the relationship between the alleged Scandinavian legal culture and other legal cultures, and most intriguing, the emerging silhouette of what one may call the EU legal culture (see Section V below).

2 Legal Culture as a Scholarly Approach

"Legal culture" is a problematic concept because it is defined and understood in various ways. The concept sometimes refers to institutions of law within a legal order and sometimes to the mentality of a people. The idea of Pierre Legrand about mentalities of various legal orders, which also lies underneath the legal

1 An interesting investigation of the specialities and legal culture of the Scandinavian legal family is Bernitz, Ulf, *What is Scandinavian Law*?, in Scandinavian Studies in Law, Vol. 50, 2010 p, 14-29.

2 Tuori, Kaarlo, *Critical Legal Positivism*, Aldershot 2002.

3 *See* for example Tuori, Kaarlo, *EC-law: an independent legal order or a post modern Jack in the box*", in: Cameron, Iain/Simoni, Allessandro: Dealing with integration, vol. 2, Uppsala 1998.

reasoning, may be a good point of reference for the latter. [4] By *mentalité*, Legrand refers to:[5]

«the framework of intangibles within which an interpretive community operates, which has normative force for this community … and over the longue duree determine the community as a community»

Also other scholars have adopted resembling formulations regarding the mentality that is embedded within the people of a nation, see for example Genevieve Helleringer and Kai Purnhagen, who refers to «… the product of linguistic and social conventions, which together strongly influence the manner in which social problems are understood".[6]

Some interpretations of the concept of legal culture refer to both of the mentioned elements, institutions *and* mentality. [7] Other accounts of legal culture seem to try to embrace all features of a legal order, leaving a so multifaceted picture that it is hard to grasp the true content of the approach.[8] Just as there is diversity of legal cultures, there is apparently also diversity in the perception of the concept of legal culture.[9]

Therefore, one issue that has been raised is whether there at all is something to gain from scrutinizing legal elements from the perspective of legal cultures. Guido Comparato has claimed in this respect that there is a danger that important differences between legal orders are obscured, hence the approach "instead of shedding light on the deeper dynamics of the legal system(…) rather obfuscates them".[10]

Be that as it may, there are many writers trying to find patterns of interest in the legal orders from the cultural perspective. This has been attempted especially in the field of private law. In an interesting article, Dutch scholar Cees van Dam has operationalized Gert Hofstede's theory on diverse cultures, in the work *Culture´s consequences*.[11] Hofstede investigates in an interesting manner a large

4 *See* the landmark article Legrand, Pierre, *European legal systems are not converging*, International and Comparative Law Quarterly vol. 45 (1996) p. 52-82.

5 *See* Legrand, Pierre, *Fragments of Law-as-Culture*, Deventer 1999 p. 27.

6 Helleringer, Genevieve and Purnhagen, Kai, The Terms, *Relevance and Impact of a European Legal Culture*, in Helleringer, Genevieve and Purnhagen, Kai (eds.), Towards a European Legal Culture, Baden-Baden 2014.

7 *See* Koch, Sören, Skodvin, Knut and Sunde, Jørn, *Comparing Legal Cultures*, Bergen 2017.

8 *See* Mankowski, Peter, *Rechtskultur (Beitrage zum ausländischen und internationalen Privatrecht)* (2016).

9 Mankowski reveals such an insight himself: "Sarkastisch könnte man sagen, dass jede juristische Teildisziplin sich den Begriff der Rechtskultur für ihre Zwecke passend macht und ihn zugleich für ihren jeweiligen Beritt vereinnahmen will", Mankovsky, Rectkultur p. 6.

10 Comparato, Guido, *Challenging Legal Culture*, 7 European Journal of Legal Studies 5 (2014) p. 5, similar statements also at p. 7 and 10.

11 *See* Hofstede, Geert, *Culture´s Consequences (Comparing Values, Behaviours, Institutions and Organisations Across Nations)* Second edition, Thousand Oaks-London-New Dehli 2001. Van Dams interesting work is van Dam, Cees, *Who is afraid of diversity?* King´s Law Journal (2009) p. 281-308.

number of features in a large sample of countries, comparing them on a set of scales. The chosen features of each culture, for example, are based on the distance between the government; the level of decision-making and the citizen. Hofstede has also advanced various dichotomies to explain differences between cultures. Some of the dichotomies are adopted and investigated further by van Dam, with a view to the more specific legal culture of different European nations. Carefully avoiding the specific use of the term ”legal culture” himself, van Dam makes many interesting observations by employing Hofstede’s more general approach to the consequences of different cultures. By systematically analysing the different legal orders in conjunction with various dichotomies, van Dam makes observations of the true content of the legal cultures regarding tort and insurance law–related issues.

The dichotomies employed include *Masculinity vs. Femininity* and *Individualism vs. Collectivism*. The core of “femininity” is “care for or solidarity with the weak” , whereas the existence of the opposite features constitutes a masculine legal order: ”men are supposed to be assertive, tough and focused on material success”.[12] As for ”individualism”, it refers to the liberal attitudes of the self-made business man, ”every man for himself”, whereas collectivism comprises the opposite attitude where every citizen is a part of family, taking care of each other in solidarity:[13]

”Individualism stands for a society in which the ties between individuals are loose: Everyone is expected to look after him/herself and her/his immediate family only. Collectivism stands for a society in which people from birth onwards are integrated into in exchange for unquestioning loyalty.”

From this approach, van Dam found for example that France is less masculine than the UK, although not as feminine as the Netherlands.[14] The study is most interesting and it is thought-provoking when it comes to the perspectives of legal culture.

When looking at Hofstede’s investigations it is interesting to notice that the Scandinavian countries have high scores on both feminism and individualism. In Hofstede’s diagram, only Finland and Netherland hold this special position in addition to the three Scandinavian countries. [15]

Van Dam has, however, not integrated the Scandinavian legal culture (or cultures?) in this interesting picture based on operationalizing Hofstede’s ideas.[16] It may therefore be interesting to see whether it is possible to place the Scandinavian legal culture on the gender scale according to the van Dam approach.

There are of course some dangers in applying legal culture approaches to observations of law; there is always a risk of overlooking relevant causal or

12 Both descriptions borrowed from van Dam, *Who is afraid, see* p. 296 and p. 292.

13 *See* Hofstede, *Culture´s consequences* p. 255.

14 *See* van Dam, *Who is afraid* p. 296-298.

15 Hofstede, *Culture´s Consequences* p. 294.

16 Except for short remarks on the Nordic social security system, *see* van Dam, *Who is afraid* p. 296.

explanatory factors, for example historic events, or making false conclusions based on the rather eclectic perspectives.[17] Keeping these challenges in mind there are good reasons to restrict oneself to rules and standards within the realm of insurance regulations that are *distinctly value-based*. Such rules will generally reveal the true cultural attitude, of the true *mentalité* in a given legal order. In the value-based clause of a given act or regulatory scheme, the attitudes and values of the national population often find a platform also within the lawyer-made rules, within the world of legal provisions and standards. This investigation is therefore focused on certain *value-based* points within insurance law.

Hence, in the following presentation, I will look into two areas with a view to ascertaining how the Scandinavian legal culture may possibly differ from mainstream conceptions of values and regulations within tort and insurance law throughout Europe. Hence, the themes of *recourse actions* and *contributory negligence* are brought to the fore. The first subject may demonstrate some distinctly collectivist features of Scandinavian law and actually bar the recourse action in many constellations where such a solution is far from obvious. The study of the latter theme, contributory negligence, may reveal that typical feminine ideas are prevailing,

3 Recourse Actions

3.1 Introductory Remarks

The ”Nordic model” is an expression often applied to capture the special feature of the tort and insurance schemes in the Scandinavian countries.[18] The salient features are that tort and insurance are well embedded in relatively elevated and advanced welfare systems, protecting the citizen from poverty and ensuring him or her the basic living costs no matter what disasters or other vicissitudes of life may occur. An important part of this picture is of course the relatively general social security systems that are established. There are, additionally and correspondingly, a wide range of no-fault insurance schemes that apply to many of the conceivable accidents possible, and there are also solid first party insurances established for employers at work.[19]

The schemes established may in some respects amount to a way of thinking, a *mentalité* – a legal culture.[20] It is a profound principle that the victims must be compensated and that the employers and other business representatives must be prepared to bear the expenses ensuing from risks created by their activity, namely the damage to persons and goods. The governments in the Nordic

17 Van Dam, *Who is afraid* p. 282.

18 *See* for example von Eyben, Bo; *Alternative compensation systems*, in Scandinavian Studies in Law Vol. 41, *Tort Liability and Insurance* (2001) p. 193-242, on p. 193-195.

19 *See* for example the Norwegian Act relating to Industrial Injury Insurance, 16 June 1989 no. 65 (yrkesskadeforsirkingsloven, hereinafter ysfl.).

20 *See* the references in chapter II supra.

countries are often prepared to establish statutory, mandatory insurance schemes, as a means of securing the victims by the standards mentioned above.[21]

A downside of this system is that the actual tortfeasor often does not have a distinct incentive to avoid risky behaviour, and consequently the damage following from his activity. All the measures established to safeguard that the victim gets compensation once the damage occurs, is in fact detrimental to the preventive effects of the tort and insurance regime. At this point, *the idea of a recourse action* is crucial. By recourse actions, one may safeguard that undesired behaviour is sanctioned after all. Recourse actions and subrogation are useful means of reaching the object of corrective justice.[22] By subrogation, the tortfeasor´s business may also be forced to bear the costs of their activity, which of course is desirable from perspectives of law and economics.

One may perceive the subrogation and the recourse actions as important pieces in the puzzle to satisfy welfare ambitions whilst at the same time maintaining corrective justice as a basis for regulating the behaviour of actors. This is very effectively achieved by reintroducing the culpa rule as a means of avoiding risky behaviour. On this basis, one would assume that the subrogation mechanisms are systematically integrated in the system, and carried through in the aftermath of every damage compensated by the insurance companies. However, this is too simplistic and presents an inaccurate picture of what is really happening. On the contrary, due to certain attitudes that are closely linked to the Scandinavian mentality, the recourse actions are sometimes barred, and it is a well-known fact that insurance companies do not always utilize the existing legal bases of recourse. The belief in the preventive effect of recourse actions has also traditionally been weak.[23]

In the following, I will present an overview of the recourse and subrogation regime in Norwegian tort law.

3.2 Damage to Things

The system regarding damage to things is that the insurance company covering the damage is granted recourse actions wherever the damage is caused by an intentional act or an act that amounts to gross negligence. If the damage is caused by an act of negligence, the insurance company may only claim recourse in cases where damage is caused in the course of business activity or public activity that may compare to business activity.[24] This system implicitly means that the damage to a thing that is covered by insurance that is caused by a person in his private life will not and cannot be a subject of a recourse action. The damage lies

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21 *See* for example the Act relating to Industrial Injury Insurance, 16 June 1989 no. 65 (ysfl.).

22 On corrective justice, *see* for example, Coleman, Jules, *Risks and wrongs* , New York 1992 p. 361-382.

23 *See* the rather pessimistic view of Jan Hellner already in 1953, Hellner, Jan, *Försäkringsgivarens regressrätt,* Stockholm 1953 p. 213-214.

24 *See* the Norwegian Compensation for Damages Act (Skadeserstatningsloven, hereinafter skl.) 13. June 1969 no. 26 §§ 4-3 and 4-2.

with the insurance company as a consequence of the mandatory law enacted by parliament. Of course, this fact is taken into account in the actuarial process of stipulating the insurance premiums and making the necessary calculations for setting aside the means for future coverage. The choice of exonerating the private, culpable tortfeasor altogether is quite far-reaching and does not have any counterpart in, for example, English or German law. It may be perceived as a rather feministic and collectivistic symptom of the legal culture embedded in the Norwegian legal order.

Where damage is caused to things by gross negligence or intent, however, there is a legal basis for recourse actions against the tortfeasor, see skl. § 4-3 cf. § 4-2 first paragraph. The insurance companies often claim such damage, helping to maintain a preventive effect. The same system is established for damage covered by the traffic insurance, see the Norwegian act on Motor vehicle insurance § 12.[25] This way, the many incidents caused by drink-driving may render the actual tortfeasor liable. Drink-driving almost always amounts to gross negligence, practically speaking.

For the sake of comprehension, it should be mentioned that also damage to things caused in the course of professional activity can be followed up with recourse actions, see skl. § 4-3 cf. § 4-2.

3.3 Damage to Persons

As for damage to persons, the insurance companies will have to cover the damage unless it is intentionally caused, see skl § 3-7. Only if this requisite is fulfilled will there be a legal basis for a recourse action. This means that the insurance companies on the victim´s side (the first party insurance) will have to cover very much of the expenses connected to personal injuries. This in itself is a remarkable solution, since in other countries there may be recourse actions against the tortfeasor at least in cases of gross negligence.

The solution may, however, only be properly understood in light of the very generous social security system featuring the Nordic model.[26] An important feature of the Nordic model is that the social security system covers a great part of the actual loss of income suffered by the victim. As for Norwegian law, an important step in this regard was taken in 1970, when the right to recourse actions from the social security system against the tortfeasor was abandoned. Since then and onwards, the social security system shouldered the bulk of the costs incurred for personal injuries. The system was challenged by a Supreme Court case in 2003, where a municipality filed a recourse action against a traffic insurer for the costs that the public health service had to bear as a consequence

25 Lov om ansvar for skade som motorvogner gjer (bilansvarslova), 3. February 1961, hereinafter, bal.

26 *See* Askeland, Bjarte, *Basic questions of tort law from a Norwegian perspective*, in Koziol, Helmut (ed), *Basic structures of tort law from a comparative perspective*, Vienna 2015 p. 99-164 on p. 99-104.

of a severe personal injury in a traffic accident.[27] The Supreme Court found, however, that granting a recourse action would contradict the system of which the parliament with open eyes had built. Hence, a recourse action was denied.

Based on the system explained, the award actually paid by the tortfeasor, meaning for all practical purposes the liability insurers, only *supplements* the expenses covered by the social security system which in fact covers the bulk of loss and costs stemming from an injury caused by a responsible tortfeasor.The idea of supplementing the social security emerged originally in connection with the enacting of a system where the social security should cover the loss of income.[28] At present the public coverage is approximately and on an average 60 %. [29]

The word "supplement" is mentioned in the preparatory works.[30] The term and the underlying concept and principle has expanded its range of application through a string of supreme court cases.[31]. Hence, the public health service also shoulders the expenses for medical care, with no basis for a recourse action against the tortfeasor or liability insurers.

The rather simplistic figure below may illustrate the uniqueness of the Nordic model in this respect.. The columns show the initial responsibility of the tortfeasor in Norway, Germany and the UK regarding *loss of income*. (The diagram does not account for the recourse systems available for example in UK, where the National Health Service tortfeasor on certain terms may have a recourse claim against the tortfeasor.)

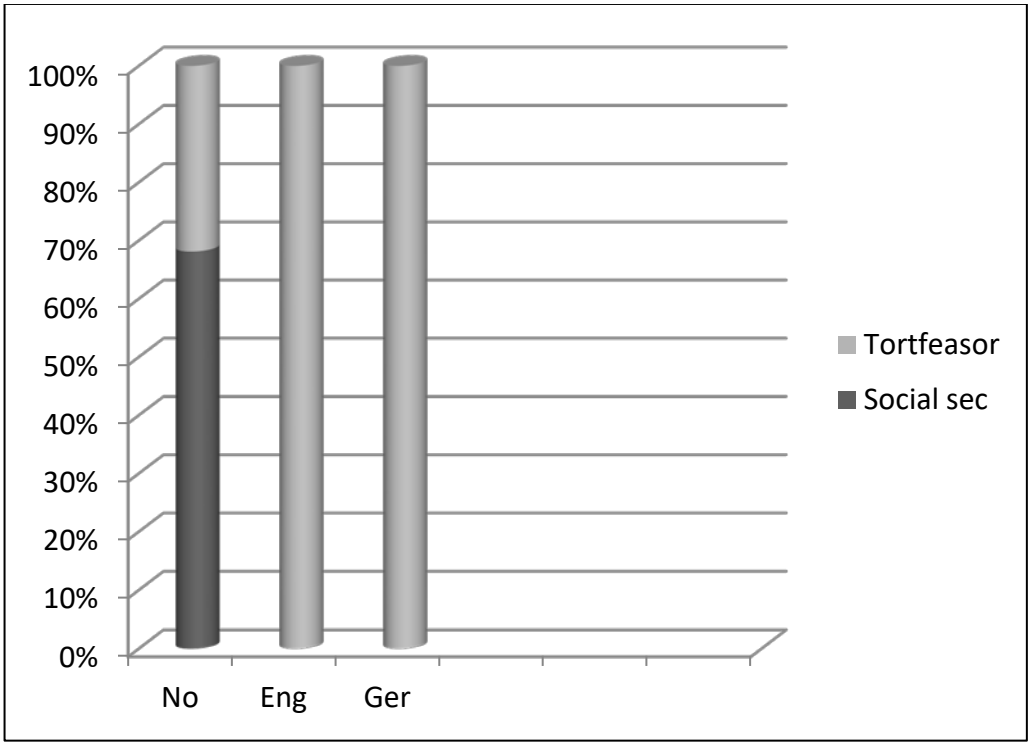
27 *See* Rt. 2001 p. 1603.

28 *See* Lov 1970. Lov om endringer i Lov om folketrygd av 19. juni 1970 nr. 67.

29 This follows from the act on social security, Folketrygdloven 1997. A survey of the system in Norway at this point may be found in Askeland, *Basic Questions* pp. 99-104. Similar schemes are established in the other Scandinavian countries.

30 *See* Recommendation of the Compensation Legislation Committee, "Innstilling fra Erstatningslovkomiteen" 1971 p. 24.

31 *See* Rt. 1993 p. 1548, Rt. 1996 p. 967, Rt. 1999 p. 1967 and Rt. 2009 p. 425.



When the social security administrative entity is barred from filing recourse actions against the tortfeasor, the result is that the society pulverizes the costs of personal injury by distributing them to all members of society, not very different from a first party insurance.[32] One may infer that the system, seen in isolation, has a collectivistic and feministic structure.

3.4 A Closer Look at Personal Injuries Covered by Occupational Liability

Another strong indication of the collectivist way of thinking is the insurance scheme regarding injuries at work. The mandatory system of workmen´s compensation in Norway prescribes that an employee has a right to first party insurance based on the Norwegian Occupational Insurance Act, ysfl. § 5.[33] The employer is obliged by the same act to have liability insurance covering damage to the employee, see ysfl.§ 3.

The provision in ysfl. § 8 first paragraph reads that the employer of the injured employee *is not responsible* for the injury. The provision § 8 second paragraph makes clear that the insurer has a right to recourse only insofar as the employer has caused the injury or illness *intentionally*.

32 The uniqueness of the system is emphasized by Helmut Koziol in his comparative observations regarding the Nordic model, *see* Koziol, *Basic Questions* p. 713, no. 8/34.

33 Yrkesskadeforsikringsloven 16 June 1989 no. 65, ysfl.

These provisions thereby establish a mandatory system of insurance coverage for the benefit of the employee, paid by his employer. The employer is obliged to insure his employee. In "return", the employer is barred from being sued by his employee for damages covered by the insurance.

However, the collective employers must pay some of the expenses through the social security system based on special models for calculation. The payment from each of the insurance companies is calculated by considering the accumulated sum of payments from the insurers of occupational injuries.[34] This means that the insurance companies in fact exercise a sort of solidary liability for the whole of the expenses stemming from risks at work.

Additionally, the point in relation to the issues discussed in this article, is that there are no links whatsoever between *the actual individual tortfeasor* causing damage (for example an employer showing gross negligence in failing to instruct a new employee handling a dangerous machine) and the coverage. Even if the employer himself, or more practically, an organ of the company has shown gross negligence, the insurance company will not have any basis for a recourse action. Hence, the system concerning occupational injuries is rather collectivistically oriented.

4 Contributory Negligence

When looking for value-based clauses within Norwegian or Scandinavian legal reasoning, it may be fruitful to investigate *contributory negligence* in motor vehicle insurance schemes as a sort of "tertium comparatione" for the purposes mentioned above.[35]

As a starting point, it may be pointed out that the Scandinavian systems allow for rather lenient regulations concerning victims of motor vehicle traffic. In Norway, a victim may only have his claim for full compensation reduced if he has shown *more than slight* culpability. Hence, there is a threshold for even mandating reduction of compensation based on contributory negligence. In Sweden and Denmark, the threshold is even higher, the victim will not have his claim reduced other than in cases where his culpability amounts to *gross negligence or intent*.[36] There is no corresponding threshold in for example English law.

Narrowing the *tertium comparationis* even more, by focusing on a specific situation of contributory negligence, one may also reveal interesting results. The chosen example here is the situation where the passenger suffers a personal

34 *See* The Norwegian Social Security Act, Folketrygdloven 28. February 1997 no. 19 § 23-8 first paragraph.

35 The term "tertium comparationis" means the object of comparison within the functional method of comparative law, *see* for example, Zweigert, Konrad and Kötz, Hein, *Introduction to comparative law*, 2nd ed. 1998 p. 21.

36 *See* Færdselsloven (Lovbekendtgørelse 1386 of 11. December 2013) § 101 second paragraph. The general attitude towards victims failing to take security precautions seems lenient under Danish law, *see* Steenstrup, Anne Sophie, *Skadelidtes medvirken*, Copenhagen 2017 p. 187-284, 198.

injury because he or she *has failed to wear a seatbelt*. This is of course an everyday situation, probably the kind about which the ordinary citizen may have an opinion. As touched upon above, that opinion is not entirely irrelevant to a judge deciding whether and to what extent there is a basis for reduction due to the negligence on the part of the victim. The value judgements of the general population come into play as a part of the judge´s reasoning based on common sense. Hence one may claim that there on this particular point of legal regulation is a clear link to the ”mentalité” embedded in the culture of the people, and presumably the same mentality is in the legal culture represented by actors within the legal profession.[37]

In Norway, there has been a notable shift towards a distinct social attitude towards the question of contributory negligence, and this social attitude has quite clearly come to the fore in cases of failing to wear a seatbelt. An important case in this respect is the Supreme Court case referred in Rt. 2005 p. 817:

A girl, 17 years and ten months of age, was seriously injured in a car accident. She was a passenger in the back seat of a car holding five persons, all of them young people. The young driver had been driving at a speed of 130 km per hour for some time and was found to have driven at a speed of 122 km per hour when he eventually drove off the road and into a rock next to the roadway. None of the young people in the car had fastened their seat belts, but luckily four of them suffered only minor injuries in the accident. However, the girl was thrown out of the car and landed by the roadside, injuring her head and lungs and breaking several bones. She became 100% disabled.

The traffic insurer admitted responsibility for the loss, but held that the award should be reduced because of the plaintiff´s negligent behaviour, i.e. failing to fasten her seat belt. The Norwegian Act on Motor Vehicle Liability (Bilansvarslova, bal.) § 7 grants the traffic insurer the benefit of a possible apportionment in cases where the plaintiff's contribution. The provision opens for a margin of discretion with regard to the question of whether the sum of compensation should be reduced, and if so, the degree of reduction. Thus, one is allowed to take into consideration the concrete circumstances of the case, inter alia the plaintiff's social and economic situation after the injury.[38]

The court found that the girl had acted negligently above the threshold of "slight blameworthiness". The court nevertheless found that there should be *no reduction* in compensation. The judges placed weight on the fact that the driver had driven recklessly and on the girl's young age and devastating situation after the injury.

As a point of reference, one may look at the corresponding situation regarding failure to wear seat belts in the UK. Here the leading case is *Froom v. Butcher (1976)*, in a case where a passenger was injured whilst not wearing seat belt; the award was reduced by 25 %. At this point, it is important to bear in mind that the compensation for personal injuries in the UK is designed so that the public

37 Cf. also Tuoris theory on how the deeper levels of the law are embedded in the attitude and mentalities of the "legal experts" within a given jurisdiction, Tuori, *Critical legal positivism* p. 161-166.

38 This follows from the preparatory works, namely Innstilling fra Motorvognasnvarskomiteen av 1951, avgitt 1957 Recommendation for the Norwegian Motor Car Liability Act, 1957.

expenses are not deducted up front, cf. the diagram supra. Hence, the reduction of 25 % is a very large sum compared to what such a degree of reduction would be in the Scandinavian countries, where deduction is made beforehand. The inference made here is consistent with van Dam´s observations regarding the individualistic and masculine approach to contributory negligence under the law of England and Wales.[39]

Another point of reference may be the ECJ case *Almeida* C-300/10:[40] A front-seat passenger in a collision and not wearing a seat belt was thrown through the front windscreen of the car and severely injured. The Portuguese civil code § 570 provided a legal basis for the national court to refuse compensation altogether because of the victim´s culpa. The ECJ found that the Motor vehicle insurance directive (now consolidated in 2009/135/EC) did not preclude the national provision that "… allows the civil liability if the insured persons to be limited or excluded".

The comparison between Norway, England and Portugal/EU applied specifically to seat belt cases may be concluded by suggesting that the Norwegian (and Scandinavian) legal culture is somewhat more "feminine" than the other European countries mentioned.

Other cases within Norwegian law have also demonstrated a lenient attitude towards the victim, based on the social impact of the devastating injury. In a 2008 case, a young man, 18 years old, who willingly and knowingly was a passenger in a car driven by a highly intoxicated driver got his claim for compensation reduced by 40 %. In addition, the Supreme Court pointed to the "social considerations" as a justification for the result.[41]

In another case, the dependents of a drunk driver who lost his life whilst driving grossly negligently, had their award reduced by 20 %. In this case as well, the Supreme Court pointed to social considerations.[42] The question of imputed contributory neglect in Norway is very socially oriented, as the main rule in fact is that the claims of the dependent "stand on their own feet".[43] The default rule that applies to fatal accidents in Norway is thus actually that the award is *not reduced.* The developed rule has expanded so that the traffic insurer covers dependents even if the deceased driver himself would not have been covered, had he or she survived grossly negligent driving.[44] This may be characterized as very generous, typically feminine – and probably also a collectivistic - solution. One may infer that the social attitude of the Norwegian

39 Van Dam, *Who is afraid* 296; mentioning that the English have no limits regarding reduction of the award due to children´s contributory negligence in traffic, whereas Germany (7 years) and France (16 years) have such limits. Norway has a general limit of 10 years of age, *see* The Norwegian Act on Compensatory Damages § 5-1 no. 1 i.f.

40 *Almeida v. Companihia de Seguros Fidelidade-Mundial SA* Case C-300/10 [2013] I CMLR 39.

41 *See* Rt. 2008 p.453.

42 *See* Rt. 2014 p.1192. The justification was similar in a parallel case in Rt. 2015, 142.

43 This is a translation of a famous statement in the preparatory works that the case law has adopted, *see* Rt. 1990 p. 829, Rt. 1997 p. 149, Rt. 2014 p. 1192 and Rt. 2015 p. 142.

44 Rt. 1997 p. 149 and Rt. 2014 p. 1192.

cases on traffic insurance is at odds with other European countries, and especially the UK. This tension may for example be illustrated by the solution in Principles of European Tort law. As for the principles of "identification" in 8: 101 (2) and (3), it is full identification and hence reduction to the same degree as the deceased parent would have had to accept had he or her survived. The wording in art. 8: 101 second paragraph thus in fact *contradicts* the prevailing view in Norway (and to a certain extent also in Sweden).[45]

The investigations so far point towards concluding that the Norwegian tort and insurance regimes are symptoms of a feminine and collectivistic legal culture.

5 Some Reflections on the Legal Culture of the European Union

In some respects, commentators have referred to the emergence of a European legal culture, however with some diverging perceptions of what may be the salient features of the phenomenon.[46] Martin Hesselink referred in his article of 2001 to a "European legal culture that is less formal, dogmatic and positivistic than national legal cultures in Europe have been".[47] In a later article of 2014 heparaphrases the caracteristics as "substance-oriented, rather pragmatic approach to private law", , wheras he holds that "... the neo-formalist approach seems to be stronger today than when I wrote the original essay".[48] Others maintain that there really is no reason to speak of a legal culture corresponding with the EU-movement.[49]. The latter statement by Comparato corresponds very well with commentators who argue that the soft law projects aiming to unite the private law regimes of Europe are only working on the surface, whereas there is divergence in the deeper layers.[50]

Leaving aside the discussions of whether a European legal culture exists at all, it may be interesting to confront the developments described above with the trends that can be detected in the same area within the law of the European Union.

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45 *See* on the corresponding problem of attributed contributory negligence, Bengtsson, Bertil and Strömbäck, Erland, *Skadeståndslagen med kommentarer*, 3 ed. Stockholm 2014 p. 400-401.

46 *See* various contributions in Helleringer, Genevieve and Purnhagen, Kai (eds.), *Towards a European Legal Culture*, Baden-Baden 2014.

47 Hesselink, Martijn, *The new European legal culture*, Deventer 2001.

48 *See* Hesselink, Martijn, *The new European legal culture – ten years on*, in Helleringer, Genevieve and Purnhagen, Kai (eds.), *Towards a European Legal Culture*, Baden-Baden 2014 p. 17-24 at p. 23.

49 This seems to be one of the points of Comparato, *see* Comparato, *Challenging legal culture*, p. 13-17.

50 Schultz, Mårten, *Analyze this! Some Swedish reflections on the Europeanization of tort law*, European Business Law Review (2004) p. 222-251 at p. 228-232.

Even though the above-mentioned Portuguese case *Almeida* suggests otherwise, one should note an interesting development within the EU-law concerning the topic discussed; traffic insurance liability. Developments through the various revisions of the motor vehicle liability insurance directives have altogether strengthened protection of the passengers. The level of protection is now embedded in the consolidated version of 2009 and it is referred to in the case law of ECJ.[51] A parallel movement may be traced in some of the cases from the ECJ, especially the "doctrine" established by the Candolin case C- 537/03.[52] The case was about a claim of an injured passenger in a car driven by a drunk driver who was denied compensation because of a provision in the Finnish insurance act implementing the Motor vehicle insurance directive. The court found that the Finnish provision violated the directive: In order to secure the effectiveness of the directive, one must not reduce the awards without very good reasons, and only if they are proportionate distinctly based on the individual merits of the case. (no. 24-31, especially 28). Hence, an abstract rule denying compensation by referring to the drunk driving was not acceptable (no.29):

"Article 2(1) of the Second Directive and Article 1 of the Third Directive preclude a national rule which allows the compensation borne by the compulsory motor vehicle insurance to be *refused or limited in a disproportionate manner* on the basis of the passenger's contribution to the injury or loss he has suffered" (my italics).

There is some confusion about whether or not this ruling also has consequences for the national tort law reductions, even though the ECJ distinctly underlined that their practice only refers to the insurance schemes in the various countries, not interfering with the still national tort law.[53] Some ECJ cases suggest that the tort law regimes are not affected, see for example the above-mentioned *Almeida*.[54] It is, however, also conceivable that the ECJ rulings may have an indirect impact on the tort law regimes in the various countries.[55]

Some commentators have perceived the Candolin judgement as an interpretation that bars any future reduction of 100 percent.[56] Another commentator, Cees van Dam, has inferred that reductions in traffic liability cases will not exceed 25-50 %.[57] An interesting point is that the rather feminine and

51 *See* for example *Vnuk v. Zavarovalnica Triglav d.d.,* 162/13 no. 52.

52 *Katja Candolin v. Pohjjola and others* C-537/05 ECR I - 5745.

53 Following the doctrine established in *Ferreira v Companhia de Seguros Mundial Confiança* Case C-348/98 no. 28.

54 *See* also *Lavrador* v. *Companihia de Seguros Fidelidade-Mundial SA* Case C- 409/9 [2012] RTR 4: No compensation to relatives where an eleven-year-old boy lost his life while cycling on the wrong side of the road.

55 *See* for example suggestions in Viggo Hagstrøm and Are Stenvik, *Erstatningsrett*, Oslo 2015 p. 288-289. This seems to be a presupposition for the elaboration of the subject in Van Dam, Cees, *European tort law*, 2nd ed. Cambridge 2013 p. 420.

56 Lunney, Mark and Oliphant, Ken and, *The Law of Tort*, Oxford 2013 p. 305.

57 Van Dam, *European tort law*, p. 420.

collectivistic turn produced by the ECJ in the Candolin case left English tort law commentators somewhat surprised and baffled. Thus, Oliphant and Lunney characterized the decision as "something of a bombshell".[58]

All in all one may trace a sort of harmonization between the Nordic model and the EU-law. It is interesting that the social values of granting a victim a good compensation are indirectly supported by the EU principle of effectiveness.[59] A rather socially oriented, collectivistic attitude may also be detected in an important document published by the European Parliament; see their recommendation on robotics, which largely recommends insurance solutions.[60] The way of thinking fits very well with profound thoughts of which the many Scandinavian mandatory insurance schemes are built upon.

6 Conclusion

The findings from the few dives into the insurance regimes of Norway and Scandinavia suggest, as might be expected, that the legal culture embedded in the legal orders mentioned above is rather feminine and collectivistically oriented. An interesting observation is that the both the EU-law on the surface and the normative attitude that may be detected underneath are to a certain extent approaching ideas that is similar to the profound thoughts of the Nordic model and hence, Scandinavian legal culture. This is not to suggest that there has been any export of the ideas of Scandinavian legal culture. Rather it is an effect of a social shift within EU in the course of development of the single market. However, one may infer, or at least speculate, that the development of stable democracies will "gravitate" towards feminine and collectivistical ideals.

58 Lunney and Oliphant , *The Law of Tort* p. 304. However, Paula Giliker less dramatically states that the English tort law "would seem to satisfy the Candolin test" , see Giliker, Paula, *The Europeanisation of English Tort Law*, Oxford 2014 p. 76.

59 The principle stated in Candolin no 28 has been followed up by a string of later cases, for example *Elaine Farrell v Alan Whitty, Minister for the Environment, Ireland, Attorney General and Motor Insurers Bureau of Ireland* Case C-356/05.

60 *See* the public consultation of 22 march 2017; "www.europarl.europa.eu/committees/en/juri/robotics.html?tab=Introduction". The many references in the document to ethic stances are also compatible with "feminine approaches".