TOWARDS STRICT LIABILITY IN TORT

BY

STIG JØRGENSEN

Professor of Law,
University of Aarhus

BEFORE it is possible to make up one's mind on the question whether the rules on tort liability are or should be stricter than follows from the general rule of liability for fault, a number of preliminary questions must be clarified.

I. OBJECT AND FUNCTION OF LIABILITY RULES[1]

The object of liability rules, as of other legal provisions, is to influence human behaviour in a certain direction so as to secure certain "rights" recognized by the community.

It is a usual basic assumption that liability rules have both preventive and reparative functions. These expressions may be understood either in a concrete or in an abstract sense. In general, liability rules cannot be shown to have any considerable concrete preventive effect, since it is impossible to distinguish this effect from that of other motives—psychological, social, religious, etc.—influencing human behaviour. However, available experience from the field of liability insurance does not seem to indicate that the concrete preventive effect is very important. Of course, the concrete reparative function is obvious in those cases where damages are actually paid. The importance of this fact is, however, somewhat diminished by the fact that a liability claim often remains merely "a scrap of paper" because the tortfeasor has no money with which to pay it, and no liability insurance. This is an important fact in our days, when risks of damage are considerable, and liability often amounts to large sums. Moreover, the concrete reparative function is immaterial from the point of view of the community at large, since the loss is merely shifted from one party to another. On the other hand, it may be assumed that liability rules

[1] Jørgensen, *Svie og Smerte,* 1960, Chap. II, with further references.

also have preventive and reparative functions in a general or abstract sense, since they contribute to maintaining notions of "correct" behaviour and to creating security through the expectation that redress may be claimed for damage due to "incorrect" behaviour. As will appear below, there is a certain interrelation between the influence on human behaviour that is exercised by liability rules and the pattern of behaviour which actually exists, and on the existence of which liability rules are to some extent based.

Liability rules and the rules of penal law have in common their preventive effect. Moreover, penal rules also have the general function of creating security through the expectation that punishable infringements will be followed by penal sanctions. The reparative effect of liability rules is also shared by the insurance system, which in addition fulfils a preventive function through such devices as safety provisions in policies, propaganda, and premium conditions.

It is obvious that the reparative function of liability rules would not be reduced by an extension of responsibility amounting to strict liability. On the contrary, it must be assumed that the reparative function grows at the same pace as the increase of liability. Nevertheless, there have been divergent opinions concerning the influence of stricter liability upon the preventive effect. On the one hand, some scholars have argued that the standard of care will improve with the development of a stricter liability, and on the other hand, that it is useless to impose a liability which goes beyond the limits of human possibilities. In the latter view, absolute liability, if it went beyond a certain limit, would reduce humanity to a neurotic and apathetic state. The last-mentioned consideration, which was particularly used in the middle of the last century in defence of a general rule on liability for fault as opposed to earlier theories based on the law of nature, is hardly in agreement with modern psychology. There are many other situations, particularly in the law of contracts, where a person assumes a risk without incurring the consequences thus indicated. On the contrary, it even seems likely to some extent that each step towards a stricter liability may carry with it the possibility of a certain increase in preventive effect, even though the importance of this development has probably been exaggerated by the advocates of strict liability, who consider that an increase in preventive effect is an essential ground for such liability.

II. LIABILITY AND INSURANCE[2]

Instead of undertaking any real inquiry into this very extensive subject, I intend simply to explore two fundamental questions: (A) What is the actual function of insurance in the law of torts? (B) How should the rules on this topic be framed in detail?

A. The Function of Insurance

Here we must make a distinction between two kinds of insurance: (1) liability insurance and (2) other insurance for injury and damage (including insurance of persons).

1. *Liability Insurance*

Liability insurance presupposes the existence of liability in tort and thus, in order to work, requires an injury for which somebody is liable. But as a general rule the existence of liability cannot be conditioned by the existence of liability insurance, since it would then be impossible to compute premium rates. It does not necessarily follow from this consideration, however, that tort liability cannot in certain limited cases be adjusted in consideration, *inter alia,* of the existence of liability insurance.[3] The tortfeasor's liability towards an insurer entitled to subrogation under sec. 25 of the Danish Insurance Contracts Act, or similar rules, may in the same way be influenced by the existence of liability insurance.[4] Nor would it be impossible, when considering the question whether strict liability should be imposed, to take into account the fact

[2] Cf. Hellner, "Tort Liability and Liability Insurance", *Scandinavian Studies in Law* 1962, pp. 129 ff.

[3] Sec. 63 of the Danish Infants and Guardians Act provides that the tort liability of children may be reduced or wholly set aside if reasons for such a decision are found either in the child's lack of intellectual development, the character of the tortious act or the possibility of redress through others, *inter alia* parents or liability insurers (cf. Selmer, *Nordisk Försäkringstidskrift* 1962, pp. 1 ff.).

[4] It is provided in sec. 25, subsec. 1, second para., of the Danish Insurance Contracts Acts that the insurer's claim against a tortfeasor may be reduced or wholly set aside if the tortfeasor is liable as a master for his servants or has not been guilty of gross negligence, provided the victim's loss is due to damage to goods covered by insurance. The Swedish Act provides merely for a setting aside of liability, not for its reduction.

that liability insurance is possible, common, or even compulsory in a given case. In that case, obviously, the companies would be able to adjust their premiums in accordance with the stricter liability. Indeed, such considerations would be very well-founded since losses would not be such hard a blow to the individual tortfeasor but would, instead, be distributed among potential tortfeasors generally, by means of the insurance premiums. In fact, it appears that a normal course of legislation is to combine strict liability with a statutory duty to maintain insurance, e.g. in the legislation on motor vehicles, air traffic, and dogs. It has often been pointed out in modern legal theory that a more extensive coverage of the tortfeasor's liability by means of insurance makes a stricter liability possible.[5]

A few writers have gone so far as to assert that the availability of liability insurance is an important legislative reason for the introduction of strict liability.[6] However, this argument, which has been put forward particularly in Norwegian legal theory in support and in explanation of the relative generosity with which Norwegian courts have regarded the possibility of maintaining strict liability, is not entirely to the point. First, in the vast majority of cases, it is possible to include in a liability insurance policy the typical liability for fault, too. Second, in contractual relations where the reasons for more severe liability are considered particularly strong, there is—at least in Danish law—only a very limited possibility of securing oneself against losses by means of liability insurance. Moreover, if there is a contractual relation between the party responsible for the damage and the party suffering a loss covered by insurance, the courts generally do not avail themselves of their discretionary power to reduce the insurer's right of subrogation under sec. 25 of the Insurance Contracts Act. Quite frequently, therefore, the result will be that in contractual and similar relations a fault which is insignificant in the circumstances will cause a considerable sum in damages to be paid by the tortfeasor alone. Although this unfortunate consequence can obviously be somewhat mitigated by extending the coverage of liability insurance, the possibility of insuring oneself cannot be asserted as a legislative ground for a stricter liability. Nevertheless, one effect of the possibility of insurance is the removal of any

[5] Hellner, *loc. cit.*; Bengtsson, *Om ansvarsförsäkring i kontraktsförhållanden*, Vol. 2, 1960, at p. 629.

[6] Andersen, *Erstatningsrett*, 1959.

need to be restrictive if other reasons support the introduction of a more severe liability.

When liability insurance was introduced in the Scandinavian countries in about 1914, it was looked upon with scepticism by some eminent lawyers. Particularly those who considered prevention to be the most important function of liability rules objected to liability insurance, which was thought to reduce the preventive effect.[7] Since then, liability insurance has developed considerably and, as pointed out above, has been made compulsory in several situations of practical importance. As far as can be discerned, the preventive effect has not suffered, a fact which also tells us something essential about the preventive function of tort liability as such—or about its lack of such a function, apart from the most obvious cases. In fact, eminent experts have recommended, in recent days, a further development of the use and usefulness of liability insurance, *inter alia* by strengthening the position of those who have suffered damage in relation to the insurance companies.[8]

2. *Other Kinds of Insurance*

Unlike liability insurance, the insurer's duty of coverage under an insurance of property or of persons does not presuppose that some person can be held responsible for damage that may occur. It is obvious that, from a theoretical point of view, insurance of this kind is better suited to meeting the demands for redress and security than is liability insurance combined with liability in tort. In actual fact, however, the position is somewhat different, for it would often be economically burdensome, and also unpractical, perhaps even impossible, to secure oneself against the same kinds of damage as are covered by liability insurance; in particular, insurance of property is normally limited to certain types and causes of damage, while other causes are often uninsurable according to the standard conditions of insurance. These facts alone are enough to make it practically impossible to replace the whole law of torts either by a general duty to keep oneself insured or by a system under which the victim of damage is to carry the loss himself if he has not insured his property. To a limited extent, such a course of action would perhaps be possible

[7] Lundstedt, *Föreläsningar över obligationsrätten,* Vol. IV: 2, *Strikt ansvar,* Vol. II: 1, 1948, p. 7.

[8] Hellner, *loc. cit.*

with regard to damage to persons,[9] since the usual types of accident insurance cover at least the domain of tort liability for personal injuries. In that event, considerations of social welfare would require the introduction of a duty of insurance which would probably have to be limited to amounts of the same order as the statutory insurance for workmen's compensation; in Danish law, this would not mean any drastic reduction, since damages for injuries to persons are already modest.[1]

The claim that an abolition of liability in tort would impair the prevention of damage would not be a decisive objection against a total or partial substitution of other devices for that liability. The concrete preventive effect is already removed through liability insurance except for the most obvious cases, and available experience from the application of sec. 25 of the Insurance Contracts Act indicates that human behaviour is not essentially modified even if liability is very largely abolished. Swedish experience seems to show that it is not necessary, from the point of view of prevention, to maintain the insurer's right of subrogation to the extent actually upheld in Denmark.[2] It is only in particularly obvious cases of grossly negligent conduct that the actor's liability is to be upheld irrespective of compensation through insurance.[3]

B. The Framing of Rules in Detail

The essential objection against the idea of introducing into the law of torts a principle of reduction of personal liability similar to the rule enunciated in sec. 25 of the Insurance Contracts Act seems to be that a further development of this principle would not make liability insurance unnecessary. If, on the other hand, one were to introduce, upon social grounds, a general system of compulsory accident insurance, that system could obviously be combined with a reduction of liability to the extent to which the

[9] Strahl, "Förberedande utredning angående lagstiftning på skadeståndsrättens område", *S.O.U.* 1950: 16. Cf. *Scandinavian Studies in Law* 1959, pp. 224 f.

[1] Jørgensen, *Erstatning for Personskade og Tab af Forsørger*, 1957; Selmer, "Limitation of Damages according to the Circumstances of the 'Average Citizen'", *Scandinavian Studies in Law* 1961, p. 133.

[2] Actually, in Denmark, the companies have brought a considerable number of actions before the courts, which sustain actions based upon subrogation to a large extent, provided there is "considerable negligence" or "professional fault"; cf. Vestberg, *Forsikringsydelse og Erstatningsansvar*, 1957.

[3] Hellner, "Om försäkringsbolagens utövande av regressrätt", *Skadeståndsrättsliga spörsmål*, Stockholm 1953.

sums paid out under it coincided with damages in tort. It would then be possible to take this system into account when calculating the premiums for liability insurance. Legal rules on liability in tort and, consequently, the need for liability insurance, would therefore still exist. Nevertheless, it is doubtful whether a liability insurance system should be stimulated by narrowing the field of application of, or wholly abolishing, the reduction rule in sec. 25 of the Insurance Contracts Act. Such a course of action would lead to unreasonably harsh effects unless a real duty to undertake liability insurance were introduced.[4] It also seems preferable on administrative grounds, as well as for reasons of insurance technique, that a loss which has once been covered by an insurer should remain where it is instead of being removed once more to a tortfeasor, since it is generally acknowledged that the right of subrogation is of no economic importance to the insurance companies and would hardly assume such importance even if a general duty to insure against liability were introduced.

The conclusion from the discussion is that the choice between different forms of insurance depends upon reasons connected with insurance technique rather than upon "legal" considerations. There would, therefore, be no objection to choosing the form of liability insurance in some cases, e.g. in the case of motorists' liability, even if that liability were then turned into a strict responsibility and the insurance consequently assumed the character of an accident insurance in favour of third parties.[5] Conversely, in other types of injuries to persons, one could choose the form of accident insurance. Within this system, it is possible to make distinctions according to the nature of the activity involved and the interests exposed to risk, and thus to choose the solution which is most practical in each individual case. In the remaining cases, one would have to maintain liability insurance on the one

[4] Jørgensen, *Juristen* 1958, p. 40 f.

[5] Cf. the inter-Scandinavian negotiations concerning modifications of motor liability; Danish report No. 179, 1957. The rules proposed in the report have been introduced in Finland and Norway (*Nordisk Försäkringstidskrift* 1961, p. 278), but not yet in Sweden and Denmark, where the insurance companies in particular have expressed apprehension about the proposed amendments. In Danish law, ever since the beginning of this century, the basis of the system has been a compulsory liability insurance combined with a liability for fault with the onus of proof upon the motorist: the owner or user of a motor vehicle has to prove that the damage is not due to faults in driving the vehicle or to faulty material. In actual practice, this rule has worked almost as a strict liability, particularly for faulty material. It is only in quite extraordinary cases that the courts have found the evidence for the defendant sufficient.

hand and the reduction rule of sec. 25 of the Insurance Contracts Act, or similar rules, on the other; apart from this, the loss should remain with the company which has paid the indemnity. Considerations involving the size and distribution of premiums do not seem to imply any political problem of real importance.

III. DEVELOPMENT OF THE RULES[6]

The modern law of torts is a creation of the era of "Enlightenment". With the shifting of power from the ruling elements of feudal days to the property-owning middle classes which was favoured by the development of the community from an agrarian economy into a system of exchange, there came into existence a liberal and individualistic ideology which taught that human rights exist *a priori*. It seems reasonable to regard "freedom of action" and "right to property" as the most essential of these rights from a practical point of view. Since legal rules had to be founded in the "rational nature" of man, it was an obvious solution to make human will a principle of justice. The theory of intention in the law of contract, the doctrine of *nemo dat quod non habet* (as opposed to divestment of title in favour of *bona fide* acquirers) in the law of property and the rule of liability for fault in the law of torts were consequences that flowed from this principle. The external action was accordingly considered an expression of an objectionable volition. The foundation of liability was not the damage as such but the evil intention, i.e. the fault. Towards the middle of the last century, it was concluded from the reasoning outlined above that a responsibility without fault, of the kind prevailing in earlier days and in earlier legal thinking on the basis of the law of nature under more primitive social conditions, was a highly objectionable principle. No suffering without guilt—Jhering's famous programme—was at the same time the epitaph of an era. The liberal *bourgeois* community gradually developed towards a society designed for production, with a concentration of men and materials and an intensification of trade, communications and transport that led to a considerable increase

[6] Hellner, in *Minnesskrift utgiven av Juridiska fakulteten i Stockholm vid dess femtioårsjubileum*, 1957, pp. 117 ff., and *Scandinavian Studies in Law* 1958, pp. 149 ff. Cf. also Rinck, *Gefährdungshaftung*, Göttingen 1959, Jørgensen, *Svie og Smerte*, Chaps. V and VI, *Juristen* 1959, pp. 133 ff.

in risks, a great diversification of possible damage, and a substantial addition to the values involved. This development has continued at an ever-increasing pace into our own days. It has created—in the community as a whole—a rapidly growing need for security. At the same time, a more widespread understanding of the continuity and interdependence of production and social life has gradually developed. In the law of contract, the principle of protecting reasonable expectations has been introduced. In the law of property, there has been an increase in the number of situations where the owner of goods is divested of his title in favour of *bona fide* assignees.

With regard to the law of torts, the reaction caused by the new forms of production and communications was to impose liability without fault. In most countries, the first rules of strict responsibility concern damage arising from the operation of railways. Similarly, towards the end of the last century, vicarious liability was introduced more or less extensively. In Denmark, this was made possible through an interpretation of the rule in the Third Book of the Code of Laws, 1689, Chap. 19, sec. 2, which had not been noticed before. The employer's liability towards his employees was also sharpened, in most countries through the introduction of compulsory accident insurance covering injuries sustained by employees in the course of their work. Strict liability for damage arising from air traffic was introduced in addition to that imposed on the railways. Although rules on a liability of this kind were not laid down with regard to motor vehicles, the liability for fault was increased by shifting the burden of proof. Later on, this method was used in respect of installations using high-tension electric currents. Some older rules of strict liability for certain kinds of damage caused by animals could already be found. A special rule on responsibility for dogs was added. In some countries the evolution went somewhat further than in others, but the overall impression is nevertheless the same for all: the initiative of the legislature in this field has come to a standstill, and it is only to a very limited extent that the courts follow the recommendations of legal writers to establish a strict liability for "ultra hazardous activities" generally—a notion defined in Denmark as an "extraordinary" act involving a "particular danger" to third parties.[7]

It may well be asked why this development has ceased. Some

[7] Ussing, *Erstatningsret*, 1st ed., Copenhagen 1937, p. 125.

writers contend that strict liability was introduced as a means of defence against new and unknown risks, that the need for such protection was reduced as the activities in question grew more numerous and rules for their safer operation were created, and that they could then be accepted in the same way as other activities in the community. In so far as this development has become more universal, the need for such a vigorous reaction in the form of increasingly strict liability has steadily diminished.[8] Others hold that in actual fact the development has not come to a stop and that, on the contrary, it has gone further and further towards a general strict liability under cover of a fictitious fault terminology which has now been stretched to breaking point.[1]

Whether the one or the other of these opinions, or possibly a third one instead, is correct is a question which cannot be answered before we have made up our minds about the meaning of the notion of fault (IV), the sense of *increased* liability and the legislative policies underlying that development (V), as well as the actual practice of courts (VI).

IV. FAULT[2]

In a time in which the rational human will was considered to be the foundation of legal rules, and to which the freedom of action and the right of property were central notions, it was natural to look upon fault as responsible conduct exceeding the limits on the freedom of action. Under the relatively simple social conditions that prevailed in former days, there was nothing unusual about the idea that the limits of the freedom of action could be drawn without excessive difficulty by means of a general principle, the so-called doctrine of the balancing of interests. The decisive question under this approach was whether the usefulness of a certain action was outweighed by the likelihood that it would produce damage. This balancing was to be undertaken by a hypothetical reasonable man or *bonus pater familias* according to "the rule of life". It is only just to add that it was in a later

[8] von Eyben, *U.f.R.* 1948 B, pp. 121 ff.

[1] Trolle, *Risiko og Skyld*, 1960.

[2] Hellner, *Sv.J.T.* 1953, pp. 609 ff.; Schmidt, *ibid.* 1954, pp. 467 ff.; Rodhe, *Obligationsrätt*, 1956, § 20; Gomard, *Erstatningsregler i og udenfor kontraktsforhold*, 1958, pp. 183 ff.

period that this "doctrine of wrongfulness"[3] was pushed to the absurd point where it was considered to contain the common condition for all legal decisions, and the principle of balancing of interests contained in it was applied indiscriminately to any concrete situation under consideration. Originally, the doctrine of wrongfulness was applied only to violations of physical integrity, and it was pointed out clearly that the balancing of interests was to be undertaken with regard to the general harmfulness or usefulness of an action. In fact, the essential idea upon which the doctrine of wrongfulness was based implied the laying down of rules for courses of action which could be chosen with the assurance that no liability would be incurred. Similarly, in a relatively uncomplicated community it was also reasonable to resort to the *bonus pater familias* of Roman law, the reasonable man in general, as a standard for this balancing. Until the middle of the last century, society was not so complicated that a reasonable man could not in general be supposed to be able to survey life as a whole in relation to the risk of damage. Moreover, as a general rule in the vast majority of cases, this risk of damage was, as already mentioned, so limited and so evenly distributed that there was no need for liability irrespective of fault.

This relatively simple notion of fault, the gist of which is a balancing of interests cast into certain forms by means of custom (the *bonus pater familias*), is individualistic in structure since it is based upon the psychological processes of the acting person —what he knew or ought to have known—with regard to those facts which rendered the action wrongful. In the following pages, I shall try to demonstrate that this system is not only antiquated from a methodological point of view but is also no longer capable of dealing with the underlying social facts.

Within other fields of private law, there has been a development related to that which characterizes the notion of fault. For example, the reason for the binding effect of contract was originally founded on the intention of the person undertaking an obligation, and later on the expectations of the receiver. Consequently, when deciding to what extent error or change of circumstances was to be given effect, logic at first required that the hypothetical

[3] The so-called "Nordic doctrine of wrongfulness" was developed at the same time, the end of the last century, by two scholars, the Norwegian Getz and the Danish professor Goos; in its principles, the doctrine is similar to the "theory of adequate causation" developed at the same time by German theorists. Cf. Jørgensen, *U.f.R.* 1953 B, p. 33.

intention of the person who issued a declaration should be decisive. Later on, the question whether an "implicit condition" was known to the receiver of the declaration was, of necessity, the decisive point. More recent writers have rightly abandoned this system bound up with the psychology of the parties, on the ground that in the vast majority of cases there is no "implied condition" in the psychological sense: when concluding a contract, there are a great number of circumstances which the parties neither can nor should take into account; indeed it is the function of supplementary rules of law to settle such problems after due consideration of the average interests of parties in general. The requirement that an "implied condition" should be known to the parties is now generally dispensed with on the ground that, normally, only typical "implied conditions" are relevant, and that the receiver of a declaration cannot claim to have been ignorant of such conditions. The result is that the determination of the effects of an obligation outside the limits of what has actually been agreed upon is no longer based upon a construction of the contract between the parties themselves but on a supplementing of the contract by means of general sources of law.[4] Similarly, the doctrine of adequate causation, which limits the liability of tortfeasors, has developed towards an objective system from the solving of a psychological problem—what the tortfeasor could foresee or count upon. The extent of responsibility in tort is now determined by general rules of law.[5] Moreover, it should be observed that a decisive condition for the use of a psychological test of adequate causation is removed if the notion of fault is modified in the direction of an objective standard—as set out below—since it has been usual to point out that the same grounds ought to determine both the incidence of liability and its extent. There are other fields where a similar development has taken place.[6]

It has been rightly objected against the *bonus pater familias* hypothesis that it is meaningless, since even people who have normal intelligence and act with normal care commit faults. If such a person is to serve as a standard this fact must be taken into account, and it would thus be impossible to claim damages in many cases.[7] Attempts have been made to rescue the hypothesis

[4] Illum, *U.f.R.* 1946 B, pp. 122 ff.

[5] Jørgensen, *Personskade,* pp. 48 ff.; *Nordisk Försäkringstidskrift* 1960, pp. 196 ff.

[6] The rules on the transfer of property and, as a whole, on the effects of contracts with regard to third parties.

[7] Lundstedt, *Strikt ansvar,* Vol. II: 1, pp. 25 ff.

by creating an ideal out of the notion, and thus operating with a fictitious person who never commits faults; but then the *bonus pater familias* has in fact been given up. Instead, it is possible to introduce a standard based upon sociological considerations and put the question: How do proper and rational people behave statistically?[8] In this way, it would be possible to save the essential principle of the *bonus pater familias* hypothesis, although not completely.

In the opinion of most writers, it is impossible to accept all customs as proper. A majority favours the idea that the courts of justice should be allowed to exercise "censorship" with regard to customs. In this field, as in others, the courts may set aside certain customs as being, for example, impermissible, undesirable, or wrongful. When doing so, however, we have given up the pure sociological detachment of the notion of fault, and have recognized a normative development.[9]

A *bonus pater familias* cannot today be supposed to be able to survey the whole of our complicated social structure. On the other hand, a person who is engaged in a special area of human activity cannot claim that, although he is equipped with a normal amount of knowledge and normal abilities, he lacks the knowledge and abilities which are needed in his special area. Thus, a nuclear physicist may not claim that he knows no more about an atomic reactor than does a tram conductor. One may try to save the *bonus pater familias* by specifying that there is one such person for each area of life; but it is doubtful whether this is enough to keep the hypothesis alive.

It may be objected, at any rate, that a reference to the normal cannot be sufficient. Indeed, it is a strange feature in itself that in the law of torts custom is still retained as the primary source of law, and that lawyers cling to what is almost a fiction: that nothing has occurred in the course of the last few generations. We still operate with the time-honoured balancing of risk and usefulness, which the individual tortfeasor is supposed to undertake as though such an evaluation of policies in the most important areas of life had not already been undertaken through legislation, administrative decrees, ordinances, orders and regulations. It is still said that those facts which are liable to make an action wrongful must be known to the actor, even though in other

[8] Rodhe, *Sv.J.T.* 1952, pp. 696 ff.; same author, *Obligationsrätt*, § 20.
[9] Hellner, *Sv.J.T.* 1953, pp. 616 ff.: Gomard, *op. cit. supra* n. 2, pp. 187 ff., Ussing, *loc. cit.*, p. 28 f.

fields of law an individual is not allowed to plead ignorance of the legal rules actually in force.

The conclusion from the reasoning above must be that both the old system of fault based on the method of balancing of interests characteristic of the doctrine of wrongfulness and the principle of the *bonus pater familias* are antiquated with regard to their theoretical foundations, and likewise that they are unable to answer the requirements of the modern community. Instead, the analysis of fault must be regarded as a special application of the general principles on the sources of law. In order to get information about the standard of behaviour embodied in the notion of fault we must consult the statute book—for example, the legislation on highway traffic, factory rules, etc., and the appended schedules, decrees, regulations and rules, etc., in particular factory regulations and other technical regulations—the decisions of courts that are of particular importance in this field of law, custom, and—if none of these sources of law can provide an answer—"the natural character of the case", where the arguments used in the doctrine of wrongfulness may have some limited value. It is particularly uncertain whether these arguments should be used in the form given them by the late Professor Ussing, according to whom an act should be called negligent when it might cause a violation of integrity of "at least some small importance",[1] while capacity to cause damage can never make an act inexcusable if that capacity is of a determined, insignificant strength. The intermediate cases must be decided by means of a balancing of usefulness against capacity to damage.[2]

V. RULES OF STRICTER LIABILITY

A. Different Types of Liability

(1) It is necessary to realize that liability rules can be aggravated in several different ways, and that the following discussion does not present a barren choice between pure liability for fault and pure strict liability. As should have appeared from the preceding discussion, even the development that has taken place since the middle of the last century implies in actual fact a considerable

[1] Ussing, *Erstatningsret*, pp. 31 ff.
[2] Cf. Hellner, *loc. cit.*, pp. 620 ff.

increase in the required standard of care, since the ever-growing complexity of the community presupposes an equally complicated pattern of behaviour in most areas of life.[3] And the evolution of the notion of fault towards greater objectivity, which is partly a result of the above-mentioned development, implies in itself an aggravation of liability through the elimination of individual psychological components.

(2) It appears from what has now been said that even within the framework of the system of fault it is possible to go quite far towards such an aggravation of liability. Both language and psychology, however, set limits beyond which this route ceases to be practicable. On the other hand, there are several different transitional solutions on the way towards pure strict liability. In the first place, mention should be made of the *liability of masters* for their servants, which is based, in principle, on responsibility for fault since one person is made responsible for another person's fault.

This extension of liability, employed by the Danish courts since the end of the last century, met a strong need for due regard to be paid to modern conditions of transport and production. A further step in the transition towards pure strict liability is to create a *liability of the entrepreneur for acts of independent contractors* (in the broadest sense of the term), for it is a firmly rooted tradition that the vicarious liability of masters is limited to those persons who are, in one way or another, attached to the organization of the master.[4]

(3) A third method for aggravating liability is to shift the burden of proof, so that the tortfeasor has to prove that he has acted excusably. In modern Scandinavian terminology, this kind of liability is usually called "presumption liability". The best known example of this kind of responsibility is to be found in sec. 65 of the Danish Highway Act.

The considerations, set out below, that legal writers have put forward as policy foundations for an aggravation of liability, and that have widely been pleaded in support of pure strict liability, do not often take us further than one of the above-mentioned

[3] von Eyben, *U.f.R.* 1948 B, p. 121.

[4] Gomard, *Juristen* 1960, pp. 537 ff.; apart from this, the prevailing rule on liability for other people's fault in Danish and Norwegian law is similar to that of Anglo-American law (Third Book, Chap. 19, sec. 2, in the Code of Laws of the Kingdom of Denmark, 1689; Third Book, Chap. 21, sec. 2, in the Code of Laws of Norway), while masters' liability in Sweden and Finland is limited to torts committed by employees in a responsible position.

transitional forms of aggravated liability. Moreover, as will appear from the following pages, it is rather doubtful whether it is, on the whole, possible to lay down a general rule of strict liability. The various practical considerations do not provide reasons for anything else, or anything more far-reaching, than a recognition of an aggravated liability in clearly delimited typical situations, an aggravation which varies among the different groups of cases.

B. Types of Policy Foundations

1. *Principal Trends of Development*

The various policy arguments fall into two main groups, the *responsibility type* and the *security type*. The former, which may be said to be based on the idea that in a modern community liability rules should be aggravated in order to achieve greater general safety, are primarily grounded on the idea that accidents will be prevented through the fostering of responsible conduct. The latter arguments, sometimes polemically referred to as "social" or "welfare-minded", place the heaviest stress on redress or reparation, and have as their principal object the creation of greater security through the extension of the victim's right of recovery. Lundstedt[5] and Strahl,[6] respectively, may be mentioned as the most important representatives of these two principal types. It is common to both authors, however, that they underline the common features in the functions of liability rules. This fact is of great importance, for it means that the ground has been cleared for a solution of the problem of liability based exclusively on policy considerations. It would then be possible, on the one hand, to operate with smooth transitions between the two extremes of the scale of liability, and, on the other hand, to introduce various forms of insurance in support of the underlying policy considerations.

2. *Principal Types of Reasons*

Broadly speaking, the various arguments put forward in legal discussion in favour of a stricter liability may perhaps be gathered

[5] Cf. p. 31 note 7.

[6] Strahl, "Förberedande utredning angående lagstiftning på skadeståndsrättens område", *S.O.U.* 1950: 16. It is more difficult to place Ussing under the proper heading; originally, he adopted Lundstedt's ideas to a great extent; in later years he seems to have been influenced by Strahl.

under three principal headings, although it must be recognized that the various arguments are found in differing versions and these in turn exist in varying combinations. Where the terms "considerations of justice" and "rational arguments" are used in what follows, they do not express any normative evaluation on the writer's part. A third group could be called "pragmatic reasoning".

a. *The "Justice" Type*

Under this heading may be gathered several types which have an internal similarity, although this, of course, implies a substantial simplification of facts. Writers of this school of thought have gone back to the maxim of Roman law *"cujus commodum ejus periculum"* and made that principle serve as "ground" (explanation, justification) for an aggravation of liability. This course of reasoning has particularly been used in support of the recognition of the master's liability for the fault of his servants, and in relation to his employees,[7] but it has also been used as a reason for an aggravation of responsibility for "dangerous activities" in general. In a more recent and more "rational" variation this idea has been developed so as to imply that certain activities have to carry their own damage for reasons of political economy. This consideration is intimately connected with the interest-balancing method of the doctrine of wrongfulness. The underlying idea is that where an activity is "lawful" only because its usefulness outweighs the probability of its producing harm, compensation should be paid for all damage caused by the activity, which can prove its social usefulness—i.e. its lawfulness—only to the extent that it can pay damages as part of permanent costs of operation. Thus, considerations of enterprise economics have been introduced into the debate. The weakness of these two groups of arguments is that they presuppose the recognition of the general "doctrine of wrongfulness" and that, when the convincing strength of that course of reasoning is not accepted, they do not provide an answer to the question why some activities should carry their own damage and others be exempted from that burden; nor can they adduce any firmer or more practicable criteria for the drawing of the limit than "extraordinary actions", "peculiar danger" etc., formulas which do not give any practical guidance.[8] A third weakness is

[7] Instead of introducing stricter rules of liability in relation to employees, a compulsory accident insurance was created on the German model.

[8] Jørgensen, *Juristen* 1959, pp. 194 ff.

that these arguments cannot "explain" all cases of aggravated liability. If there is to be any sense in the considerations, it is difficult to see why a dog owner should have to carry the whole liability. It must also be obvious that arguments drawn from the fields of general or enterprise economics cannot lay a foundation for the stricter liability of railways, tramways and other undertakings based upon public privileges and grants of public money. Finally, that part of the reasoning which is taken from enterprise economics is particularly unrealistic. In the first place, liability for damage and injuries generally does not have any importance for the economy of the business. Secondly, even if it did, it is not always certain, particularly in the export industries, that an enterprise could take this liability into account when setting its prices, but this does not mean that the community lacks an interest in this export. Finally, attempts have been made to replace this course of reasoning by the consideration that these enterprises, particularly the bigger ones, can cover their liability by taking out liability insurance—a possibility which is held to be of special importance for enterprises which cause damage as "consequences of the operation that experience shows to be unavoidable".[9] However, this consideration has scarcely any independent value, since anyone can cover his liability by means of liability insurance by which losses are distributed. What the argument really supports is the introduction of a general duty of maintaining liability insurance which, as pointed out above, could probably be introduced at a very moderate premium.

Another variation of the "justice" argument is the "equilibrium consideration". In a relatively undeveloped community, the citizens are equal with regard both to assets and to risks of damage. It is therefore possible to start with a rather flexible fault rule, which expresses a reasonable distribution of risk under these circumstances. In a more complicated community, there is a greater concentration of capital, and, as a particular consequence of this fact, a greater concentration of risks on a smaller number of heads. A reasonable way of counterbalancing this "overweight" would therefore be to impose a stricter liability on such "high-capital" activities. As an instrument of legal policy, however, this reasoning is not very useful: it is too vague and indeterminate. It is a different matter that it expresses a psychological reality. The "distribution of risk theories" should probably also be grouped

[9] Andersen, *T.f.R.* 1941, pp. 299 ff. and *Erstatningsrett*, pp. 231 ff.; in this connection, Andersen speaks about the point of view of "pulverization".

under this heading.[1] It is particularly the Danish Professor von Eyben who has put forward the hypothesis that the citizens of the community originally react with suspicion and uncertainty to new kinds of activities containing entirely unknown elements of risk which it is impossible to foresee: therefore, there will be a tendency to introduce stricter liability rules. Later on, a special and richly varied pattern of behaviour is developed in connection with the new type of activity and it is thereupon accepted on an equal footing with other activities, provided that it is performed in accordance with special rules of acting. It is beyond doubt that thoughts of this kind were of some importance when motor cars were introduced at the beginning of this century, and that thoughts bearing similar implications may be found today in connection with the exploitation of atomic power. On the whole, considerations of this kind are relevant only when entirely new forms of activity are introduced, and their power to convince is limited in time.

b. *Rational Considerations*

It is above all Lundstedt who has rejected the first-mentioned group of considerations and drawn attention instead to the preventive functions of liability rules.[2] The essential task of the liability for fault is of a preventive character, and if liability is aggravated then, in Lundstedt's view, an even higher standard of care must be observed in order to avoid liability in tort. It is probable that, to some extent, considerations of prevention may be at the bottom of the claim for stricter liability. As pointed out above,[3] however, it is problematic how far it is possible to go in this direction and to what extent one must take into account the existence of various forms of insurance, in particular liability insurance. Apart from this, the possible preventive effect of an aggravation of liability rules is uncertain, and moreover, the prevention principle gives no safe guidance to the more detailed delimitation between the cases in which there must be a wish to introduce stricter responsibility rules and the rest.

Considerations of organization and legal technique are akin to the idea of a general prevention. Courts of justice are not in possession of the expert knowledge needed for making judgments

[1] Cf. in particular Trolle, *Risiko og Skyld*, 1960.
[2] Lundstedt, *Strikt ansvar*, Vol. II: 1, pp. 187 ff.
[3] Sec. II above.

about the operation of a complex and specialized enterprise. Therefore, there is a risk that many inexcusable actions in the modern system of production and transport will take place without consequent liability. In addition to this, there is the risk that unqualified labour and inadequate material might be used;[4] and there are the usual problems of proof. It is obvious that such arguments have considerable weight, and that they are supported by the "justice and equilibrium considerations" set out under (a) above. However, these arguments need not require more than the creation of liability for the fault of employees and possibly, to some extent, for the fault of independent contractors, or, it may be, the introduction of a presumption of liability.

In connection with the arguments mentioned in the preceding paragraph, we could also point to similar variations asserting that enterprises must be made safe against all foreseeable dangers, since these can be anticipated and can thus be met through insurance. We shall not study these rather vague considerations in greater detail; often they are put forward only as secondary and supplementary reasons, frequently in connection with the above-mentioned "considerations of justice".

c. *Pragmatic Methods*

In recent legal writing—particularly in Sweden—there has been a tendency to use more pragmatic methods. The possibility of laying down a general rule and of selecting a single consideration as decisive is rejected. Writers of this school of thought recognize, on the one hand, the possibility, and even the desirability, of a stricter liability but emphasize, on the other hand, that such an aggravation of liability can be effected in many different ways in the various groups of cases.[5] It is also emphatically stressed that liability rules must be framed with due regard to the insurance system and to insurance law, and that considerations of insurance technique rather than the usual "legal" point of view must be allowed a decisive influence on the tenor of rules in this field. In particular, Hellner and Bengtsson point out that it is possible to introduce stricter rules of liability as it becomes correspondingly possible and normal, or even compulsory, to take out liability insurance against specified risks. On this topic, I would refer the reader to what has been said under II above.

[4] Ussing, *op. cit.*, p. 119.

[5] Grönfors, *Om trafikskadeansvar utanför kontraktsförhållanden*, Stockholm 1952, pp. 124 ff., 151 ff.

VI. THE PRACTICE OF COURTS

The essential idea of the Danish writer Trolle is that the rule of liability for fault is antiquated.[6] It no longer corresponds to the realities of life and is no longer acknowledged by the courts, even if the contrary impression may be conveyed by their decisions. If the opinions of courts nevertheless discuss fault and negligence, this is not to be taken seriously; it is merely a question of a fiction intended to veil the real fact, which is that liability is imposed upon a weighing of risks rather than an analysis of fault. Trolle does not invoke an investigation of legal concepts or considerations of legal policy in support of his results. Instead, he refers to early Danish law, and inquires into the practice of courts in later years, within various areas of life which one may possibly imagine as being in especially urgent need of a stricter liability.[7] Without any more detailed discussion of Trolle's book—which is an excellent contribution to the law of torts, in particular with regard to the doctrine of the individual actions in tort—we intend to raise very briefly some objections of principle to the basic theses of the work. In this connection, however, we shall give a detailed analysis only of the judicial decisions discussed by Trolle.

A. The Material

Even if Trolle has brought to light very considerable material from the courts, nevertheless that material only touches upon special areas of life and particularly those in which it may be expected that peculiar considerations are of importance. It is necessary to be very cautious when drawing any conclusions regarding real life in general from that view of life which is found in the reports. Merely by working with this material, one has made a very important selection. Generally speaking, it seems justifiable to say that litigation in general concerns special and doubtful conflicts, while those situations the results of which are in accordance with normal patterns of behaviour and evaluations either do not give rise to conflicts or at any rate usually end in reconciliation. Of the decisions of courts, only a few will be dealt with by the

[6] Trolle, *op. cit.*, pp. 22 ff., 378 ff.

[7] Trolle's delimitation corresponds essentially to the rules of French law on liability for the fault of employees, animals, movables and real property (secs. 1384–1386 in the *Code civil*).

courts of higher instance, and of these only a very modest number will be reported. Therefore, if we want to make statements concerning patterns of behaviour and evaluations in life in general, it is necessary to observe great caution if the printed material from the courts is to be the basis of such statements.

So far, however, we have only pointed out that the material used by Trolle is too specialized to serve as the foundation of definite conclusions about the importance of the fault rule in life in general, but we have not determined whether Trolle's hypothesis about the disappearance of the fault rule is correct as a description of the particular fields of life with which he deals.

B. The Criterion of Fault

Trolle's line of reasoning is mainly as follows. Although the courts speak in terms of fault, they think in terms of risk; thus, even though judges, practically without exception, declare that fault is an indispensable condition for liability, their opinion is in actual fact quite different. Obviously, such a line of reasoning inspires misgivings in itself; but, in addition, it confronts the sceptic with an impossible task, i.e. to prove that the courts mean what they say. This seems invidious, not least in view of the fact that Trolle himself is a judge of high reputation, and I shall therefore refrain from the attempt.[8]

Nevertheless, the hypothesis is not necessarily correct. The reason why Trolle may have got the impression that the opinions, and more particularly the actual decisions, of courts are not in accordance with the fault rule may be that he largely bases his analysis upon the classical fault arguments.[9] If, on the other hand, fault is understood more objectively, the way in which courts cling to the fault terminology—in spite of the attempts of several generations to undermine it—seems less incomprehensible. I shall not dwell any further on this problem in this connection, but refer the reader instead to the remarks under IV above and under D below.

C. Several Methods of Aggravation

I have already pointed out, under V A above, that liability in tort may be aggravated in more than one way without any necessity to

[8] Trolle is a Justice of the Danish Supreme Court.
[9] Trolle, *op. cit.*, pp. 24 f.

introduce strict liability. In this connection I shall only briefly rehearse these different possibilities:

(1) The required standard of care may be raised in particular fields of life.

(2) Liability for the fault of others, particularly liability of the entrepreneur for independent contractors, may be imposed.

(3) The burden of proof may be lightened for the plaintiff or even shifted to the defendant.

D. Stricter Liability in the Practice of Courts

Three essential statements are the natural outcome of an analysis of the decisions of courts; in this respect, the material put forward by Trolle changes nothing:

(1) There is no decision of the Danish Supreme Court in which strict liability in tort has been explicitly established.

(2) There is no decision of the Danish Supreme Court which excludes the possibility of strict liability in special cases.

(3) There is a series of decisions in which liability is aggravated, as set out under C above.

a. *Strict Liability: Points (1) and (2)*

1. *Law of Adjoining Properties*

In what follows, I shall not consider the special liability for nuisance to adjoining properties. In some cases it is based upon particular grounds, as where the owner of adjoining land is entitled to damages for essential inconveniences of a permanent character.[1] Conversely, it is doubtful how the Danish courts have considered the closely related problem of damage to adjoining property in connection with excavations. There is no decisive precedent in support of a pure strict liability,[2] and the latest Supreme Court judgment is based upon liability for fault with a certain aggravation.[3] The same is true of similar decisions concerning parts of buildings or snow and ice which cause damage by falling down.[4]

[1] Illum, *Tingsret*, Vol. 1, 1952, p. 292; Trolle, *op. cit.*, Chap. II.

[2] Illum, *Tingsret*, Vol. 1, 1952, p. 290; same author together with Ussing in *U.f.R.* 1950 B, pp. 202, 257; Trolle, *op. cit.*, pp. 38 ff.

[3] 1958 U.f.R. 300; cf. below B.

[4] Cf. 1938 U.f.R. 453 (Sup. Ct.) (cornice); 1953 U.f.R. 663 (Sup. Ct.) (chimney); 1958 U.f.R. 1103 (Sup. Ct.) (snow); Trolle, *op. cit.*, pp. 38 ff.

2. *Other Cases*

(a) The Courts of Appeal have occasionally utilized pure strict liability, for which the nearest support is Ussing's general rule of "dangerous activities". In those cases which have been appealed, the Supreme Court has modified the *ratio decidendi* and relied on liability for fault. On some occasions the Court of Appeal has confirmed the reasoning of the court below. These judgments are immediately connected with the liability of public bodies. The case 1948 U.f.R. 253 concerned a policeman who had been ordered to stop all vehicles on a highway and who fired a bren-gun volley against a car which did not stop at his order. The Crown was held liable in consideration of the "dangerous and extraordinary" character of the action, but apart from this, the decision was based upon the principle of freedom from liability for acts committed under necessity. If this decision is considered together with later judgments, it seems even more doubtful whether the alleged *ratio* can be accepted; in fact, it also seems reasonable to characterize the policeman's conduct as indefensible. The other decision is a judgment from the Copenhagen Maritime and Commercial Court, 1948 U.f.R. 755, and concerns a state-owned ice-breaker which, in the course of opening a passage for a ferry boat, had pressed ice floes against other ships, which as a result sustained damage. The court held the Crown liable, since it must be reasonable that the Crown, when causing acts to be performed in its own interest which were attended with special danger to others, should pay compensation for damage caused thereby. It is difficult to say what importance is to be attached to these judgments. In the first place it must be pointed out that both were rendered against the Crown;[5] secondly, they have not been submitted to the Supreme Court which, as stated above, has reversed other judgments founded upon a similar *ratio*.

(b) In several cases, the Courts of Appeal have imposed liability in decisions using neutral language; but it is not possible to find support for any specific opinion in these rather heterogeneous cases.

(c) It is a cause for reflection that the Danish courts have not imposed strict liability in those cases where such responsibility is

[5] Cf. the *Commission Report on Liability for the Crown and for Municipalities,* No. 214, 1959, pp. 61 ff. and pp. 10 f.; also in the decision 1911 U.f.R. 788 (Sup. Ct.), the Crown was held liable without fault, but the case concerned permanent nuisances to adjoining properties.

recognized by both Norwegian and Swedish courts,[6] viz. blasting and military exercises.[7]

(d) On those occasions where there is statutory support for strict liability, there has been a tendency to consider the legislation as exhaustive, even if there has been considerable similarity of causes. In Danish law, there is a statutory rule on strict liability for damage caused by railways through fire due to sparks and through collisions. These statutory rules, which are not explicitly extended to special local railways for the transport of, for example, sugar beet and marl, have not been held analogically applicable to damage caused by such railways although they are operated by large industrial enterprises.[8]

(e) On the other hand, there is a long series of decisions dealing with deficiencies in material which are seemingly incompatible even with a highly objective construction of the notion of fault. Some Supreme Court judgments reported in the *Ugeskrift for Retsvæsen* go quite far in this direction. In 1946 U.f.R. 276, liability was imposed for a fracture in the axle of a merry-go-round. Although the owner exercised ordinary care, an expert could have discovered the defect. Even more far-reaching is 1942 U.f.R. 355, where the owner of a motor car was made responsible for a broken hub although it was impossible for a non-expert to discover the defect, and although it was also not certain that an expert would have seen it. In 1957 U.f.R. 109, liability was imposed for a defect in a swing; the only finding, which was held sufficient, was that the back rail did not fulfil the standard required for it not to break. In some decisions the emphasis is put upon faults of construction, while in others liability is enforced for faulty material in cars, lifts, entertainment establishments, buildings, etc., without specific details of the reasons. However, the action has not been sustained in other similar cases. It is difficult to make up one's mind about these decisions. In some of them, liability is based upon fault; in others it is possible to refer

[6] Kristen Andersen, *Erstatningsrett*, Chap. X.; Lejman in *Festskrift til H. Ussing*, 1951, pp. 300 ff.

[7] *Commission Report on Liability for the Crown and for Municipalities*, pp. 9 f. and 61 f.

[8] On the other hand, it is characteristic that the courts have extended an aggravated liability quite far, when the enforcement of such a liability has some support in a statutory provision, for example in connection with entering or descending from railway coaches, falling on platforms, etc., and in traffic accidents under the Highways Act (*Report on Motorists' Liability*, p. 8). By such methods, the courts seem to avoid many difficult problems of delimitation.

to a presumption of fault. The latter solution has statutory support with regard to liability for motor vehicles, but a similar construction is also resorted to in other cases. In some of these, it is possible to refer to the liability for fault committed by others (cf. below under b). In a few of the cases now mentioned, the only thing that may be pointed out is the finding of defects in the materials. Thus, we come close to the rules of French law concerning deficiencies in movables or real property. In technical construction, these are rules establishing presumtions; but in recent days they have been applied almost entirely as rules of strict liability.[9] However, it appears from the comment attached to the merry-go-round decision that the court put some weight upon the fact that it was a dangerous installation which was put at the disposal of the public professionally and for remuneration. Upon these grounds, a high standard of strength in the materials should be required. In other similar cases concerning entertainment, etc., no liability has been imposed without fault, but the required standard of care has been raised (cf. below under b). It may also seem natural to read the decisions discussed above in this light if we consider that the majority of the Supreme Court, in a more recent decision, has explicitly rejected the plea that a hospital or its suppliers should be responsible for a deficiency in the functioning of an anaesthesia apparatus in the hospital.[1]

(f) In a couple of recent Supreme Court decisions, a minority of Justices have sought to impose a strict liability. In the case 1956 U.f.R. 215, liability was pleaded against a reform school on the ground that a couple of boys who had escaped from the school had set fire to a summer house. Four Justices found that the boys had not been properly guarded and held the school liable under the fault rule; four Justices were in favour of dismissing the action since there was no ground for liability in general tort rules and no other foundation for liability could be found. One Justice did not want to impose liability under the fault rule, but found the school liable because its board of directors must understand that the inhabitants of the surrounding countryside ran risks of this kind. The claim was not, as a matter of fact, sustained; the four Justices who held an action to lie under the fault rule considered that the claim was carried by the insurer who had been subrogated to the claim of the owner, and

[9] Lundstedt, *Föreläsningar över obligationsrätten*, Vol. IV: 2: 1, pp. 80 ff., Trolle, *op. cit.*, pp. 139 ff.

[1] 1960 U.f.R. 576.

made use of sec. 25 in the Insurance Contracts Act to exempt the reform school from the obligation to pay damages. In the above-mentioned decision (reported in 1960 U.f.R. 576), four out of nine Justices held a hospital liable for a deficiency in the functioning of an anaesthesia apparatus although there was no evidence of negligence. This judgment, however, may be explained as based upon a presumption of liability (cf. above concerning the fault in the material and below under b).

b. *Other Forms of Aggravated Liability: Point (3)*

If the foregoing survey contains a correct description of the attitude of courts to the idea of introducing and applying, by means of judicial precedents, a general rule of strict liability for "dangerous" and "extraordinary" activities, the result nevertheless is that, after occasional attempts made in earlier decisions by the Courts of Appeal, there has been, particularly in the last few years, some unwillingness to carry out the programme. On the other hand, the aggravation of liability which has undoubtedly taken place seems to have been effected along three different lines, all tending towards a more precise and objective construction of the fault rule, while retaining its principal ingredient, that of liability for a deviation from "correct" behaviour when behaviour could have been different. These three methods, which correspond to the possibilities mentioned *supra* (C), have been: (1) an aggravation of the required standard of care in certain situations; (2) the introduction of liability for the fault of independent third parties, and (3) more severe rules of proof, possibly by shifting the burden of proof.

1. *Aggravation of the Required Standard of Care*

To illustrate this general tendency within certain areas of the life of the community, we may refer, in a general way, to Mr. Justice Trolle's book *Risiko og Skyld,* which has already been mentioned above. We may also refer to a Supreme Court decision in 1955 U.f.R. 992. The action concerned an explosion in a plant where oxygen and acetylene gas were manufactured. One workman was injured. It would seem reasonable to assume, *a priori,* that if any activity could fulfil the requirements of being "dangerous" and "extraordinary", this must be it. In fact, the plaintiff's claim was

based upon the exceptionally dangerous character of the enterprise, and it was shown that explosions had taken place earlier in the welded gas tubes used in the factory. The Court of Appeal dismissed the action on the ground that no evidence had been produced about the small number of earlier explosions that could make it appear probable that the explosion in question was due to a fault in the fabrication of the tube. For this reason it could not be held that there had been such danger as was in itself sufficient to create liability. Since, moreover, it was found that there was nothing which could justify the assumption that it would have been possible to discover such a fault by a general examination, and since a small unevenness in the surface of the floor was found not to have contributed to the damage, no negligence was found. The Supreme Court held that the explosion was due to a fault in connection with the fabrication of the tube and to the defective state of the floor. Consequently, the defendants were held liable to pay damages, "since particular care must be required of them in view of the dangerous character of the activity . . .". In another case, which would probably have given rise to strict liability in Norwegian courts, the Supreme Court again emphasized that it had paid "regard to the particular care which, the Court finds, should be observed under the conditions prevailing in this case". The action concerned snow and ice which had fallen from a roof and injured a person who was passing in the street.[2] In an action concerning a lift used in the construction of a house, it was equally stressed that the responsible party had not observed the requisite "particular caution".[3] In a decision concerning infection of subsoil water, the Supreme Court pronounced that the defendant had not displayed "particular caution and care".[4]

It would be possible to mention more examples of the method used particularly in recent Supreme Court decisions. We have, however, pointed out the most typical ones. In the first- and last-mentioned cases, the plaintiff's claim was founded upon strict liability. If, in the first decision, it was of any material importance that the victim was not a "third party", this was not mentioned in the judgment.

[2] 1958 U.f.R. 1103.
[3] 1955 U.f.R. 472.
[4] 1958 U.f.R. 365.

2. *Liability for the Fault of Independent Third Parties*

In many cases, the courts have imposed liability for the fault of others even if there has been no relation between the defendant and the tortfeasor such that the case would be covered by the rule in the Third Book, Chap. 19, sec. 2, of the Danish Code of Laws. The limits of this enactment are certainly rather indefinite, but some cases are clearly outside its scope. The actions which have been decided by the courts all concern branches of activity in which legal writers have claimed that the courts have been inclined to establish strict liability. If their reading of the cases is correct, the problem of liability for the fault of third parties obviously loses its importance as an independent element.[5] If, on the other hand, no strict liability is assumed, the aggravation now referred to is obviously of the greatest importance. It has been possible to discern the aforesaid tendency in the following groups of cases.

(a) The tendency has been most obvious in the so-called excavation cases, with regard to which legal writers have, moreover, found a strong inclination to enforce strict liability (cf. above, under V). In the Supreme Court decision, 1958 U.f.R. 300, it is not clear upon what ground liability was imposed; at any rate, great importance is attached to the fault committed by the independent contractor. In 1942 U.f.R. 304, another Supreme Court judgment, it is assumed that the Crown is responsible for other damage caused by persons who perform for the Crown work for which they have submitted offers on a competitive basis.

(b) The tendency is also obvious with regard to the state of roads and other public utilities.[6] In these cases, the liability is closely similar to that which is based upon defective material (cf. above).

(c) It is also possible to discern the tendency with regard to entertainment enterprises. In 1950 U.f.R. 225, a person who had arranged a display of fireworks was held liable for a fault committed by the pyrotechnist.

(d) While there has been no tendency to make builders liable for faults committed by the workers in construction projects,[7] there has been an inclination to impose liability for permanent

[5] Ussing, *Erstatningsret*, p. 99 compared with p. 133 f.; cf. also Frost, *T.f.R.* 1944, p. 15, and Trolle, *op. cit.*, pp. 48 ff.; *Report on Liability for the Crown and for Municipalities*, p. 39.

[6] Frost, *T.f.R.* 1945, p. 15.

[7] Trolle, *op. cit.*, pp. 38 ff.

faults in buildings which are due to third parties. Inasmuch as the present owner of real property is made responsible for faults in the construction, or for faults committed during the ownership of his predecessors, the rules on liability for permanent faults in buildings are obviously not far from strict liability in the proper sense.[8] It must, however, be pointed out that here, as in the case of deficiencies in material, evidence must be produced of a fault which could have been avoided.[9]

3. *More Severe Rules of Proof*

A third method for aggravating liability without formally abandoning the fault rule is to shift the burden of proof, as has been the case in sec. 65 of the Danish Highway Act and in sec. 6 of the Act on Installations Using High Tension Electric Currents. It appears from the report of the commission which drafted the Highway Code (p. 15) that in actual practice a responsibility of this kind functions like a strict liability, since there is little chance of disproving fault. Courts are particularly likely to resort to more severe rules of proof in those cases in which they feel that they do not possess the requisite expert knowledge to penetrate into a "hidden fault" and where a fault may have been committed by a third party (cf. under 2).

Cases concerning deficient material and faulty functioning, etc., may be ranged with the first group of cases. With this is, however, to be compared the above-mentioned case of the anaesthesia apparatus, 1960 U.f.R. 576, in which four Justices emphasized the difficulty of proving faulty functioning. Comparable grounds may have been used in the case of the swing, 1957 U.f.R. 109, also referred to above. A similar view explains the liability for anonymous faults, for example, in 1959 U.f.R. 841 (Sup. Ct.), in which a manufacturer was held liable for an injury suffered by a workman who had fallen from a platform, even though the cause of the accident was not clear; it was considered to be obvious that, having regard to the construction of the platform and the character of the work, the slightest irregularity or faltering in the workman's movements could have caused him to fall.

A decision concerning fireworks complements what has been said above with regard to liability for the faults of third parties. In one case, the Supreme Court sustained an action in tort because it had not been proved that the fireworks had been properly

[8] Trolle, *op. cit.*, pp. 71 ff.
[9] Cf. sec. 1386 of the *Code civil.*

handled, 1923 U.f.R. 551 H. The same statement is true about the tendency, pointed out by Justice Trolle, to shift the burden of proof in cases concerning constructional faults.[1]

VII. CONCLUSION

A. The outcome of the foregoing discussion seems to be that in the decisions of courts there does not appear to be any tendency to adopt a general principle of liability for "dangerous" activities, or to impose strict liability in certain limited groups of cases. Conversely, there is a general tendency to exact a more severe responsibility in certain fields of activity by the imposition of a higher standard of care, by introducing liability for the fault of independent third parties, and by shifting the burden of proof.

B. It is difficult to find an answer to the question *why* Danish courts do not make use of the possibility to establish strict liability, at any rate to the same extent as the Swedish courts, even though they seem to consider themselves entitled to do so in principle.[2] This restrictive attitude, which seems strange in a country which had so strong an advocate of strict liability as Ussing, cannot, in my view, be explained away merely through an assumption that the courts do not mean what they say. If an outline of an explanation is to be attempted, a number of different factors may be pointed out:

(1) The courts may have felt the lack of a more precise criterion that could be used for delimitation purposes without being exposed to the risk of vagueness; in other words, the matter has been considered a problem for the legislature.[3] The lack of consistency in the judicial decisions concerning excavation cases also argues strongly in favour of a legislative initiative as in Norway. In fact, there is no doubt that such an initiative is emerging in the case of nuclear energy.[4]

(2) It has been possible to manage with a more precise and more severe fault rule. Particularly with regard to new areas of activity in the community—created by technical development—to which an

[1] Trolle, *op. cit.*, p. 73.

[2] Cf., for example, the acetylene tube case, 1955 U.f.R. 992.

[3] Cf. Hellner, *Norsk Forsikringsjuridisk Forenings Publikasjon,* No. 41, at p. 23.

[4] Cf. Gomard, "Legal Problems of Compensation involved in the Use of Nuclear Energy", *Scandinavian Studies in Law* 1960, pp. 61 ff.

attitude of suspicion was the original reaction, there have been created, in the course of time, new and more refined patterns of behaviour which may be difficult for non-experts to become familiar with but which are obvious realities for those who live in their midst.[5]

(3) Finally, the violent discussion about the report of the Commission appointed to prepare a bill on motorists' liability shows that today considerable resistance will be aroused by an attempt to abandon the fault rule even though the amendment would, in fact, be one of language and of principles rather than a change of practical importance. The rule of fault is so firmly rooted in the human mind that people would not accept a general liability without "fault"—at any rate in the highway traffic area—even though this would not imply any heavier burden, and would in addition have the advantage of a certain simplification.

C. If liability rules are to be modified in the direction of greater severity or greater leniency, this should be done with due regard to the *possibilities and functioning of the insurance system.*

(1) It could be argued that the existence of widespread liability insurance which was designed, more than it now is, to create security for the victims of torts would increase the possibility of aggravating the liability rules. If there is a desire to introduce strict liability within certain fields of activity, it would be reasonable to continue the already established practice of combining the system with a duty to insure in those cases in which the enterprise cannot act as its own insurer (e.g. the Crown).

(2) An extension of liability insurance would not make it impossible, in some fields, to manage with a system of insurance for goods, or with accident insurance. Thus it would not be impossible to realize, in the future, the idea of a general system of accident insurance for persons. In my view, it is necessary seriously to consider how claims based on the insurer's right of subrogation can be avoided by such systems, and also to consider a limitation of the right of subrogation in connection with compulsory accident insurance as in the other Scandinavian countries.[6] It is recognized that the subrogation claims have no economic importance for the party entitled to them, and particularly where the tortfeasor has no liability insurance his liability towards the insurer may have

[5] von Eyben, *U.f.R.* 1948 B, p. 128; Alexanderson, *Tidskrift utgiven av Juridiska föreningen i Finland* 1944, p. 104.

[6] In Denmark, unlike Norway and Sweden, the insurer has a right of subrogation against the tortfeasor; cf. sec. 4 of the Accident Insurance Act.

unreasonably harsh effects. Possibly, the right of subrogation could be retained in cases of deliberate torts and cases of particularly gross negligence, but on the other hand it does not seem very efficacious to make subrogation claims serve in the interest of prevention. Other measures to that end should be attempted.

(3) It also seems necessary to reconsider the effectiveness of the far-reaching Danish application of sec. 25 of the Insurance Contracts Act. As we have already mentioned, the right of subrogation has no economic importance for the insurers, and its preventive function is not to the point.

D. *Final Remarks.* The problems of liability should be reconsidered from another point of view, viz. that principles of insurance technique rather than "legal" reasons should provide guidance for the framing of rules.

For the time being, however, it would be most in harmony with public opinion to retain the fault rule in the precise and objective form set out above. In everyday relations, life has not been so profoundly modified that it would be possible to find support in recent developments for an aggravation of liability. On the contrary, in certain private relations there has been a tendency towards a more lenient liability.[7] Thus, an important sector will still be reserved for a general liability for fault. Apart from these everyday relations, the above-mentioned precise fault principle will go a long way. In categories of activity attended by greater risks, it will be possible to go even further with a more severe standard of care, an extension of liability for the fault of third parties, and an aggravation of rules of proof. Of course, it is always possible to discuss how far one can go in this direction without abandoning even an extended fault rule. The essential remaining element is the notion of "fault": fault in construction, in functioning, in material, fault by third parties, anonymous and probable faults. This terminology presupposes that the individual has had an opportunity to act otherwise, i.e. that he would have been able to avoid the damage. In this sense the notion of fault is subjective: it rests upon the idea that a free individual is responsible for his acts.[8]

[7] The courts have shown a tendency to limit the liability for injuries occurring in ordinary social life to cases of negligence; cf. Trolle, *op. cit.*, p. 223, Bengtsson, *Skadestånd vid lek, sport och sällskapsliv,* Stockholm 1962, and Agell, *Samtycke och risktagande,* Stockholm 1962.

[8] Schmidt, *Sv.J.T.* 1954, at p. 469.