THE FORESEEABILITY TEST IN RELATION TO NEGLIGENCE, STRICT LIABILITY, REMOTENESS OF DAMAGE, AND INSURANCE LAW

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I. INTRODUCTION

The chief problem involved in this article has long caused national courts much trouble. It has also harassed all those legal textbook writers who have tried to advance theories capable of "clarifying" the problem and to indicate ways of solving it.

A comparative legal study seems to show, however, that some very similar trends of development are gradually emerging in the different legal systems. In what follows, an attempt will be made to analyse the problems theoretically and to confront them with Danish and other Scandinavian court practice and theories advanced in legal literature. Like Anglo-American law, Scandinavian law on the problem here involved is based entirely on court decisions.

By way of introduction, it may be useful to refer to two recent British cases, namely *Hughes* v. *Lord Advocate* (1963) 2 W.L.R. 779 H. L. and *Doughty* v. *Turner Manufacturing Co., Ltd.* (1964) 2 W.L.R. 240, both of which[1] throw much new light on the problem of foreseeability in relation to liability for negligence and to remoteness of damage in English law, where opinions, as will be seen, have been greatly divided since the decision in the famous case *Re Polemis and Furness, Withy & Co., Ltd.* (1921) 3 K.B. 560.

In the *Hughes* case some Post Office workmen had opened a manhole in a public street in Edinburgh, in order to do some repairs on telephone cables underneath. A shelter tent was erected over the manhole, and a red warning lamp, which had a large paraffin container, was placed outside the tent. At 5 p.m. the workmen left the site unattended during their tea break. The appellant, a boy of eight, and his companion aged ten picked up the lamp, entered the shelter, and descended into the manhole holding the lamp. As they came out of the manhole the appellant tripped, and the lamp fell into the manhole. The paraffin escaped

[1] The decisions have been the subject of comments in *The Law Quarterly Review*, vol. 80 (1964), pp. 1 ff. and pp. 145 ff., and *The Modern Law Review*, vol. 27 (1964), pp. 344 ff. (by Gerald Dworkin).

from the container and, owing to the confined space, the vapour which arose exploded, seriously injuring the appellant.

The First Division of the Court of Session, by a majority, held that the respondents were not liable, as they could not reasonably have foreseen that by leaving the lamp unguarded an explosion of this nature would be caused.

The House of Lords allowed the appeal. It began by holding that the appellant could not be regarded as a trespasser, as he was entitled to be in the street, and the tent was an allurement to inquisitive children. As Lord Jenkins said (pp. 783 f.), "the statutory position of the Post Office ... did not include a sufficiently exclusive interest in any part of the roadway to support a claim in trespass". The problem therefore was (a) whether there had been negligence in leaving the paraffin lamp unguarded, and (b) whether, if there was negligence, the particular injury suffered by the plaintiff was a foreseeable consequence of the negligence.

In regard to negligence, the House of Lords had no difficulty in accepting the conclusion at which the Court of Session had arrived; it was negligent to leave a paraffin lamp of this nature in a public street where children would be tempted to play with it, since the lamp might tip over and burn them. It was reasonably foreseeable that such an accident might happen to children.

It was the second question, concerning the injury caused to the appellant by the explosion, which raised the difficult problem. It is obvious that no one, when leaving the lamp unguarded, would have foreseen these particular circumstances. It was on this ground that the majority of the Court of Session held that the respondents were not liable. The Lord President (Lord Clyde) said (1961 S.C. 310, 828): "It appears to be undeniable that the cause of the present accident was the explosion. If there had been none, the pursuer [i.e. appellant] would not have fallen into the hole and so sustained his injuries. For his case, both on record and in his evidence, is that, before it, he was on the roadway, and it was the explosion which caused him to fall into the manhole and get burned. If that explosion was not a foreseeable eventuality, the pursuer's whole case fails." It was here that the House of Lords differed from the Court of Session because it held that, provided the consequence, i.e. the burns suffered by the appellant, was foreseeable, it did not matter that the means, i.e. the explosion, by which the burns were inflicted was unforeseeable.

Lord Morris of Borth-y-Gest said (p. 787): "A risk that he might

in some way burn himself by playing with a lamp was translated into reality ... Though his severe burns came about in a way that seems surprising, this only serves to illustrate that boys can bring about a consequence which could be expected but yet can bring it about in a most unusual manner and with unexpectedly severe results. ... The circumstance that an explosion as such would not have been contemplated does not alter the fact that it could reasonably have been foreseen that a boy who played in and about the canvas shelter and played with the things that were thereabouts might get hurt and might in some way burn himself. That is just what happened."

Lord Guest said (p. 792): "All these steps in the chain of causation seem to have been accepted by all the judges in the courts below as foreseeable. But because the explosion was the agent which caused the burning and was unforeseeable, therefore the accident, according to them, was not reasonably foreseeable. In my opinion, this reasoning is fallacious. An explosion is only one way in which burning can be caused. Burning can also be caused by the contact between liquid paraffin and a naked flame. In the one case paraffin vapour and in the other case liquid paraffin is ignited by fire. I cannot see that these are two different types of accident. They are both burning accidents and in both cases the injuries would be burning injuries. Upon this view the explosion was an immaterial event in the chain of causation."

Lord Pearce said (p. 793): "The defenders are therefore liable for all the foreseeable consequences of their neglect. When an accident is of a different type and kind from anything that a defender could have foreseen he is not liable for it (see *The Overseas Tankship, Ltd.* v. *Morts Dock and Engineering Co., Ltd.* (*The Wagon Mound*) (1961) A.C. 388). But to demand too great precision in the test of foreseeability would be unfair to the pursuer since the facets of misadventure are innumerable."

The importance of this case is presumably that it has made it quite clear that the direct-consequence test of liability, which the supporters of the *Polemis* doctrine have so strongly supported, has now been rejected, and a somewhat stylized foreseeability test in regard to the problems of negligence and remoteness of damage has been substituted. This test has been further elucidated in the Doughty case.

In the *Doughty* case the plaintiff, who was employed in a factory, was standing near a cauldron in which there was a powder heated to 800 degrees centigrade and so transformed into a liquid,

molten mass. A loose cover made of asbestos and cement, used from time to time to conserve the heat, rested by the side of the cauldron. A workman inadvertently knocked against the cover, which slid into the bath and disappeared beneath the molten powder. At the moment nobody regarded this as dangerous, but suddenly the cauldron erupted, and some of the drops of molten powder caused personal injuries to the plaintiff. Experiments conducted thereafter showed that the cause of the eruption had been the chemical change which the intense heat had created in the cover. The trial judge found that no one could at that time have foreseen this result, but he held that the defendants' workman had been negligent in upsetting the cover into the bath, as every possible precaution should have been taken to see that nothing was dropped into the bath which could possibly produce an explosion.

The Court of Appeal held that the factory was liable. Lord Pearce began his judgment by stating that *Re Polemis* should no longer be regarded as good law. It had been established in *The Wagon Mound* that the essential factor in determining liability for the consequence of a tortious act of negligence is whether the damage is of such a kind as the reasonable man should have foreseen. Thus all the learning concerning direct consequences, *novus actus interveniens,* creation of risk, etc., could now be swept into a dust heap. In the present case it was not foreseeable that the cover might cause an explosion if it fell into the cauldron. Lord Pearce also said that there would have been no negligence on the part of the defendants if they had intentionally placed it in the cauldron. Therefore the "fact that they inadvertently knocked it into the bath cannot of itself convert into negligence that which they were entitled to do deliberately".

Counsel for the plaintiff, while not seeking to support *Re Polemis,* had argued that his client was covered by the principle established in the *Hughes* case. In the present case the defendants had dropped the cover into the cauldron. They were negligent because they could have foreseen that the cover might in some way or other cause molten drops to fly out and burn persons near the cauldron. "Therefore the actual accident was merely a variant of foreseeable accidents by splashing" (p. 244). Lord Pearce rejected this argument on the ground that "it would be quite unrealistic to describe this accident as a variant of the perils from splashing".

Harman L. J. concurred. He distinguished the *Hughes* case as follows: "So it is said here that a splash causing burns was fore-

seeable and that this explosion was really only a magnified splash which also caused burns and that, therefore, we ought to follow *Hughes* v. *Lord Advocate* [*supra*] and hold the defendants liable. I cannot accept this. In my opinion the damage here was of an entirely different kind from the foreseeable splash" (p. 246).

Diplock L. J., in concurring, said: "The actual damage sustained by the plaintiff was damage of the same kind, that is by burning, as could be foreseen as likely to result from knocking the cover into the liquid or allowing it to slip in . . ." (p. 248). It was contended, therefore, for the plaintiff that this was sufficient to impose a duty on the defendants to avoid knocking the cover into the liquid, and that the damage suffered by him flowed from their breach of this duty. But the defendants' duty of care was to avoid knocking the cover into the liquid in such a way as to cause a splash which would injure the plaintiff. They could not reasonably have foreseen that dropping the cover would produce an explosion, since the evidence showed that at that time nobody realized that it might be dangerous to immerse an asbestos cement cover in the liquid.

II. A GENERAL THEORY OF "FORESEEABILITY"

Some readers may wish to ask: Is there a common feature in liability based on negligence and that based on strict liability? I think it would be fair to answer that the common feature is that the damage must have been caused by an act of the defendant involving a certain amount of danger.

In other words, the determining factor in allowing a claim for damages is whether the risk of causing damage (like that which occurred) involved in the act or enterprise is considered to exceed what is regarded as a permissible risk of the given situation or the given enterprise. Thus, whether there is a question of ordinary negligence liability or of strict liability, e.g. for animals or dangerous enterprise, the decision of the liability for damages is based on a criterion of dangerousness that takes account of the "potential damage probable as a consequence of the act" (designated as *damage potential*) of the act or enterprise (e.g. a herd, factory, etc.).

The question of the meaning implied in the concept "damage

potential" may give rise to certain difficulties. Normally, the damage potential is determined as the product of the probability of the occurrence of the damage, or of damage in consequence of the act, and the extent of the possible damage. Symbolically (mathematically), the probability of damage may be denoted by a value between 0 and 1. These figures represent the two extremes, 0 indicating that the act implies no risk of the occurrence of the particular damage (thus, the damage cannot occur at all as a consequence of the act) and 1 indicating the absolute risk, i.e. the cases where, in the light of experience, the damage is a necessary (inevitable) consequence (effect) of the act (the cause). The intermediate stages, which are indicated by means of fractions, thus cover cases where the damage is a more or less probable consequence of the act, according to statistics or a presumption based on general experience. The "0"-cases, of course, are of no interest, since it is a condition of the whole problem in the law of damages that damage shall have occurred. Once the probability of damage occurring has been established, however, the act must also be evaluated for its possibility of causing a greater or less extent of damage. If the probability of damage inherent in an act (A) is put at $\frac{1}{n}$ and the value of the possible damage at D, the damage potential of A may be expressed as $\frac{1}{n} \times D = \frac{D}{n}$.

The calculation of the damage potential must, strictly speaking, be made through experimental statistics by generalizing about the basic qualities of the act, taking into account whether damage can be expected to occur when a large number of such acts have been carried out and also what proportion of the acts will cause damage. In other words, a dangerous act is one which by its nature, that is to say when the act is generalized, favours the occurrence of damage. By way of example, suppose a builder drops an iron pipe down from a height into a crowded street. If one had a precise picture of the traffic situation, the position and speed of the individual vehicles and pedestrians, the weight of the iron pipe, its velocity, and the direction of its fall, etc., it would theoretically be feasible to calculate whether or not the iron pipe would cause damage (e.g., hit a vehicle or a pedestrian), and one would have no use for any calculation of the probability of damage, for the probability would be either 0 or 1. However, in actual practice it is impossible to determine absolutely whether damage will or will not be caused. The question whether or not

the iron pipe will hit somebody or something is thus "purely accidental" in the individual situation. If, however, one knows the traffic density, the actual position of the vehicles, etc., it is possible to calculate (with greater or less accuracy) the probability of the occurrence of damage. The situation is comparable to what occurs in dice-throwing, where it is impossible to say in advance whether any one throw will give a six, and it can only be said that the probability is one-sixth. In actual practice, of course, it will only exceptionally be possible to calculate the probability of damage with anything like precision. Moreover, if we consider the other factor of the figure of the damage potential, the extent of the possible damage must be considered, and it is obvious that in practice this factor will normally be subject to a still greater amount of uncertainty. In the example stated, one can only guess at the magnitude of damage that may occur. If, on the other hand, the iron pipe had fallen onto a glass roof whose replacement cost was known, the damage potential could be calculated exactly, provided the occurrence of the damage was considered inevitable. Such a situation of damage, however, is a rare phenomenon. As a rule, one must rely on a practical estimate of the degree of probability as well as the extent of the possible damage.

The potential of an act to cause damage in the above-stated sense may, rather more pointedly, be termed the "foreseeable danger". This has, furthermore, the advantage of stressing that the evaluation of the damage potential must normally be made in the light of such circumstances as could be observed by a normally endowed person who was in the same situation as the tortfeasor at the time the act was carried out. Seeing that the concept is still liable to give rise to misunderstanding, it may be appropriate to examine it in greater detail.

First, it should be stressed that the concept should not be taken to imply any condition that the damage should always have been actually foreseeable in the sense that the actual damage which occurs should have been regarded in advance as a likely consequence of the dangerous qualities of the act, or should be considered as something which the tortfeasor realized or ought to have realized, and thus as a psychological condition (of the same structure as the *mala fide* concept). True, this will be the case in many situations involving damage, but it will by no means occur in all. In the example given of the iron pipe, the person causing the damage will not be able to figure out in advance how much damage, if any, will occur. The falling iron pipe may frighten a

horse and cause the driver to lose control of the animal, with resultant damage to a parked motor car. No one is likely to consider such a development actually foreseeable; all the same, however, it is fairly obvious that liability for damages should be imposed.

The determining point must be whether the tortfeasor was able to realize that the act involved a not quite negligible risk of the occurrence of damage; to a certain extent, therefore, we have to operate with what might be termed "abstract" foreseeability.

In Danish legal theory Niels Lassen[2] called attention, towards the end of the past century, to the problem of foreseeability, on which he commented in the following way (in *T.f.R.* 1889, pp. 56 ff.): "It is obvious that, as a rule, the person acting is capable of having but an approximate idea of the damage that will be a consequence of his act. ... If it be a fact, however, that virtually any tortious act implies a risk of losses of an uncertain extent, and if it can further be required of any responsible person that he must be aware of this, then it is fully justifiable to make him liable for any consequences that are so related to the unlawful act as to make it necessary to consider the act, on the evidence of experience, as having involved a risk of such consequences."

Accordingly, it will be seen that it is quite possible to maintain a psychological criterion of foreseeability in the test of negligence, provided it is required that the tortfeasor should have realized or ought to have realized that the act implied a certain, not altogether negligible, risk of the occurrence of some damage as its possible consequence. It is immaterial whether the actual results could have been anticipated; it is enough to have been able to anticipate the existence of danger.

The psychological criterion of foreseeability, on the other hand, can by no means always be maintained in the test of "adequate causation" (the traditional Scandinavian—and German—expression for the requirement that damage, in order to be compensated, must not be too remote). For here it would mean an unreasonable restriction of the liability if the damage was always required to be actually psychologically foreseeable. The one requirement to be insisted upon is that the damage shall be a manifestation of the dangerous qualities of the act. This difference between the test of negligence and that of "adequate causation", which will be

[2] Later Justice and President of the Danish Supreme Court (b. 1848, d. 1923).

discussed in greater detail in what follows, may also account for the different outcome of the two British judgments referred to in the Introduction. Whereas the *Hughes* case was concerned both with the question of negligence and with the question of whether the damage was adequately caused, the *Doughty* case was solely concerned with the question of negligence.

These reflections, however, imply a temptation to go to the other extreme and carry the liability too far. Practically any human act implies elements of danger that can be recognized, are "foreseeable", by summoning up a sufficient amount of imagination. If I stop an acquaintance in the street to ask him how he is, I may delay him just long enough to cause him to be hit by a falling tile which would otherwise have missed him. The thought of such developments comes into the heads of most of us once in a while. Indeed, they do happen. No one would doubt, however, that such cases must be regarded as fortuitous damage and, accordingly, entail no liability for damages.

It may be somewhat difficult, on the other hand, to realize the grounds for imposing liability. Here, one may find support in the doctrine of the classical theory of "adequate causation" regarding "generally increased probability".[3] That doctrine may probably be applied to the concept of negligence in the following way: any act which *in concreto* has caused damage must of necessity have implied a certain risk of the occurrence of such damage. On the other hand, a large variety of acts, though having in fact caused damage, cannot, on an *a priori* conception, be said to have increased the risk or the probability of the occurrence of that damage. In considering our tile example, it may be argued that there will always be a certain danger of being hit by a falling tile, when passing near a house; but the fact that I have delayed a person walking in the street cannot *a priori* be said to have increased the probability of such an accident. It is the fact that the damage does occur that causes the probability of its occurrence and, on an *a posteriori* conception, changes it into 1 (absolute certainty). None the less, of course, it must be maintained that the act did not in advance increase the risk of damage. It is equally conceivable that the delay could have resulted in the damage

[3] In Scandinavian legal literature the theory was in all essentials advanced already by the great Danish jurist A. S. Ørsted (1778–1860) but was first clearly formulated theoretically by the German physiologist J. von Kries in 1888 (see H. L. A. Hart and A. M. Honoré, *Causation in the Law*, London 1959, pp. 411 ff., and A. Vinding Kruse in *T.f.R.* 1951, pp. 231 ff.).

being *avoided*. A different situation exists, however, if I am a houseowner and allow my roof to fall into disrepair. In that case, my conduct is likely to increase the probability of damage and, to employ the terminology of the doctrine of "adequate causation", my conduct (in this case, an omission) can be said to have involved a generally (that is, recognizable at the time of the act) increased probability of the occurrence of damage of the nature concerned. The discussion above provides a fairly clear-cut delimitation of fortuitous (casual) damage, though of course cases may arise which are doubtful and on the borderline.

On the other hand, it will not do to impose liability every time a generally increased probability of the occurrence of damage exists. An employer, by sending one of his staff on a trip by air, increases the probability of the man's being killed in an air crash, but if this actually happened no one would dream of holding the employer liable for the employee's death. If the negligence rule is to be at all reasonable, the person causing damage should be held liable for damages only where the foreseeable danger is of a certain, not wholly negligible, order. Its order of magnitude must depend on common sense or a practical estimation, and it must also vary according to the special circumstances of the individual situation; likewise, various elements are capable of affecting the estimation, such as the possibilities of reducing the danger by taking safety measures, the question whether it is a suddenly arising situation of danger or a permanent condition, etc.

As stated above, the doctrine of the generally increased probability was originally established with a view to the test of "adequate causation", and the determination of casual damage as described above is normally, indeed, the extreme limit of damage that may be included under that of "adequate causation". That limitation may also be expressed by saying that only damage that is related to the dangerous qualities of the act is adequate. If, say, a person causes damage to a ship which involves her being delayed, with the result that she meets with a hurricane, the tortfeasor is not liable for the damage caused by the hurricane, since the damage is not related to the dangerous qualities of his act. From an *a priori* conception, the act cannot be said to have increased the probability of the damage arising from the hurricane. Indeed, as in the case of the tile example, the delay might have resulted in the ship's actually escaping the hurricane. The theory of "adequate causation" may also contribute to a theory of strict liability. In considering, for example, whether there should be strict liability

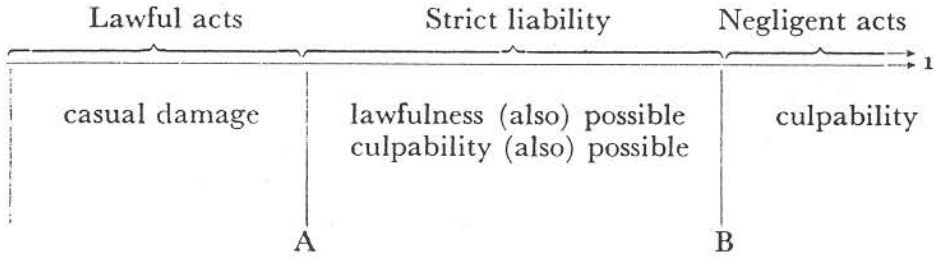
for damage caused by airplanes to outside persons or things, one must try to calculate the "general" capacity to cause damage that attaches to aviation at its present technical stage of development. Thus, in principle, one should not include such damage as is due to negligent conduct of some kind or other, such as lack of care in the manufacture of the plane, its layout, maintenance and manning, faults of navigation, errors on the part of aircraft controllers, etc., but only such damage as could not have been avoided by showing due diligence and care in regard to the operation and maintenance of equipment. Such damage may be called fortuitous, it is true, but only in a certain sense. In other words, the end in view should be to find the statistical risk of inevitable accidents in air traffic, that is, whether the specific air activity has increased the probability of the occurrence of damage.

Such damage may be called "foreseeable" already at the commencement of the air activity, it being obvious that such damage may occur. As the possibilities of collecting statistical material improve, however, the foreseeability will become increasingly exact.

Now, supposing that this accident rate, the general probability of causing damage, proves to be alarmingly high, one must begin to consider whether aviation should not be banned altogether, even where all possible precautionary measures have been taken. If one decides that the accident rate is too high, the logical conclusion must be that aerial activity should be declared unlawful and be forbidden, while the damage occurring should be compensated on the ground of negligence. In practice, it is more likely that certain methods of flying will be forbidden, e.g. by making regulations as to the flying altitude over inhabited areas, or a complete prohibition of flying over densely built-up areas, etc.

If, on the other hand, it is found that, while the accident rate may give rise to apprehension, there will nevertheless be reluctance to declare the particular aerial activity unlawful, one may choose the middle course of rendering the undertaking liable to make good all damage caused by the dangerous aspects of aviation, such as crashes, fires, explosions, noise, etc. From this it will be seen that, provided one considers the question only in the light of the general probability of the activity's causing damage, there is no actual "gap" between liability under the negligence rule and that under strict liability; rather, there is a gradual transition, it being possible, within rather wide limits, to choose between declaring the category of action (1) lawful without liability to pay

damages, (2) lawful but with strict liability for damages, or (3) positively unlawful. This may be illustrated by the following diagram:



[1] Increasing capacity to cause damage.

As indicated, A and B are not fixed limits but depend on public policy.

In the light of the foregoing discussion, it should now be possible to draw a fairly clear-cut line of division between negligence liability and strict liability. Both types of liability are primarily based on considerations of the damage potential, anticipated with greater or less probability, of an act. From a practical point of view, however, negligence liability is based solely on the specific damage potential, whereas considerations of strict liability take account additionally or exclusively of the general damage potential. The determining point in the view of negligence is, then, whether it can be said that the tortfeasor had any possibility of avoiding the causing of damage by acting with greater care than he did, whereas, in principle, this is not possible in the case of damage being solely based on a strict liability rule. It may therefore be said, if with some simplification, that the area of the negligence rule is the foreseeable and avertible damage, whereas strict liability also—or only—covers the inevitable but still foreseeable damage.

This characterization of negligence liability as a liability for avoidable or avertible causation of damage has the added advantage of fitting in fairly well with the current conception; at any rate, it is a criterion that laymen can understand, and it also seems as if it is the element to which a very large number of judgments on negligence liability attach decisive importance.

A typical case is recorded in 1957 U.f.R. 903. Some cows broke through an electrified fence, causing damage to a passing motor vehicle. The fence was presumed to have been in a proper condition; seeing, however, that the pen bordered on a much-frequented highway and that the cows had broken out of the pen on several

previous occasions, it was held that their owner ought to have taken further measures. Having omitted to do so, he was held liable for damages.

This must not be taken to mean, however, that there always is or should be liability under the negligence rule merely because of the existence of a foreseeable danger that might have been averted. In short, it can be said that the danger involved must be of such an order as to make a prudent and reasonable man (*bonus pater familias*) take account of it and take measures against it.

III. SCANDINAVIAN DOCTRINE OF "ADEQUATE CAUSATION"

According to Scandinavian legal doctrine, a wrongdoer is responsible only for the "adequate losses" caused by his wrongful act.[4] When we examine the literature on the law of damages, we find that this condition is usually explained by saying that the damage must have been a "foreseeable consequence" of the act; this is intended to mean that, at the time he carried out the negligent act, the tortfeasor realized or ought to have realized that the damage was a possible consequence of the act.

This psychological criterion of actual foreseeability, which in the Danish literature both Julius Lassen and Ussing relied on, is hardly distinguishable from that applied in the test of negligence, that is to say in relation to the very question whether a given act shall be regarded as negligent. The perusal of many judgments relating to damages gives the same impression. I shall confine myself to giving a few examples picked at random.

1956 U.f.R. 215 contained the following facts. Two boys had

[4] Of Scandinavian literature on the problem of adequate causation of recent years, mention may be made of Henry Ussing, *Erstatningsret*, pp. 148 ff.; Fr. Vinding Kruse, *Retslaeren* I, pp. 378 ff.; Kr. Sindballe, *U.f.R.* 1948, pp. 253 ff.; Stephan Hurwitz, *Den danske kriminalret, Almindelig del*, pp. 232 ff.; A. Vinding Kruse, *T.f.R.* 1951, pp. 321 ff., *Juristen* 1963, pp. 125 ff., *Erstatningsretten* I, § 11; Julius Lassen, *Obligationsretten, Almindelig Del*, pp. 244 f., 252 f.; Stig Jørgensen, *Erstatning for personskade og tab af forsørger*, pp. 98 ff.; Dagfinn Dahl, *Festskrift til Jon Skeie*, 1941, pp. 73 ff.; Kristen Andersen, *Erstatningsrett*, 1959, pp. 25 ff., *T.f.R.* 1941, pp. 299 ff.; Johs. Andenaes, *Alminnelig strafferett*, pp. 108 ff.; Hjalmar Karlgren, *Skadeståndsrätt*, 2nd ed., pp. 37 ff.; Kurt Grönfors, *Om trafikskadeansvar*, pp. 48 ff.; Ulf Persson, *Skada och värde*, pp. 62 ff., *Skadestånds- och försäkringsrättsliga studier*, pp. 100 ff.; Knut Rodhe, *Obligationsrätt*, pp. 297 ff.; Hans Saxén, *Adekvans och skada*.

been committed to an approved school for difficult children. The commitment of one of the boys was due to the fact that, previously, he had on several occasions committed arson. One day the boys disappeared from the school for four hours following a reprimand for smoking. They bought cigarettes and matches, and celebrated their regained freedom by setting fire to a farmhouse. Having regard to the fact that it was aware of the pyromaniacal tendencies of one of the boys, the approved school was held liable for damages for having failed to exercise adequate supervision, seeing that, as was stated in the reasoning of the opinion, it must be considered "very likely" that the boys would commit arson if they escaped. In such a case, there is no difference between the test of negligence and that of "adequate causation". It is the same criterion of actual foreseeability that is applied. Even in judgments given in favour of the defendant we often find a complete coincidence of the test of negligence and that of "adequate causation".

By way of example, mention may be made also of 1956 V.L.T. 266. A. had left his bicycle in the paddock of F., a farmer. One of F.'s cows ate the dress-guard of the bicycle, with the result that it died. F. claimed compensation from A., but his contention was not upheld, it being stated that A. could not have foreseen that his leaving of the bicycle in the paddock would have such a consequence.

It is not rare, however, to meet with judgments which apparently are based on the assumption that the criteria of foreseeability of the test of negligence and that of "adequate causation" are not identical. As an example, mention may be made of 1943 U.f.R. 641. Mrs. A. had been hit by a horse-drawn carriage, suffering fracture of three metatarsal bones. Normally, such an injury should heal rapidly; in this instance, however, a very rare complication developed, involving a long term of difficult treatment and repeated stays in hospital. The person causing the injury pleaded that he was liable to pay damages only in respect of the first, that is the "normal" hospital stay, in view of the fact that the complication was a remote and unforeseeable consequence. His contention, however, was not upheld.

These and similar judgments have, indeed, caused Stig Jørgensen (*loc. cit.*) to assume that the courts make more rigorous demands on the "foreseeability" as regards the development up to the time of the real damage, and largely relax the demands in regard to the consequential effects of the real damage. The former

damage should be actually foreseeable, while consequential damage need not be. There are, however, quite a number of decisions which are hardly reconcilable with such a construction of court practice. By way of example, mention may be made of 1933 U.f.R. 639. A tram driver tried to pass a horse-drawn carriage by a narrow margin. This caused the horse to shy, and as a result the rear wheel hub of the carriage came in contact with the rear gear-case of the tram, thus propelling the carriage forward. The horse then took fright and bolted. An elderly lady, X., tried to save another elderly lady from being run over; however, they were both knocked down. X. acquired a neurosis accompanied by dizziness and was hospitalized for three weeks, after which she spent four weeks in a convalescent home. Four months after the accident she had a fall in her home because of the dizziness and broke her arm. The tramway company was held liable for the broken arm, as well as the other injuries.

Another example is provided by 1933 U.f.R. 232. Through a piece of careless driving a lorry-driver nearly ran into a lady, who had to jump aside to save her life. As a result of the shock caused by this she fell down in the street a few minutes later, sustaining a concussion. Notwithstanding this unusual causative development, the driver was held liable for damages.

To say that such causing of damage should be something which the persons concerned could or ought to foresee as possible consequences of their negligent acts would be purely fictitious, both as regards the primary damage and the consequential damage. And this seems to do entirely away with the psychological criterion of foreseeability of both the test of negligence and that of "adequate causation". Or, as the Norwegian jurist Arnholm puts it: "The advantage of the doctrine of 'adequate causation' is that the concept of adequacy has no content."

It is not quite so bad as that, but, to overcome the difficulties, it must first of all be recognized that even if the criterion of foreseeability of both negligence and "adequate causation" is often, in actual fact, completely psychological, of the usual legal type, "recognized or ought to have recognized that the concrete damage might be a possible consequence of the act", nevertheless this is not an indispensable requirement. In my opinion, however, the mistake is that an inference has been made, from the frequency of such cases, that all cases must be alike. There is no denying that the psychological criterion of actual foreseeability has to be abandoned to a rather large extent if a realistic and not

an imaginary description of court practice is to be given. The question then is, what should replace it. Here, it would be tempting to ask whether a mere examination of court practice would not provide the answer. However, it is not so simple as that. For the difficulty of finding the principles underlying court practice is that, particularly in the doubtful borderline cases, the courts apply the concept of "foreseeability" without basing it on any psychological fact in the ordinary sense, and without indicating any other principle. It has, indeed, become the fashion to say that the courts operate with fictions of negligence. With much more justice it could be said, I think, that the courts operate with fictions of foreseeability.

Therefore, the first thing should be to try to find out whether general considerations in regard to the law of damages cannot provide a hint as to how far the liability for damages should go under the negligence rule.

IV. THE FOUNDATION OF THE THEORY OF "ADEQUATE CAUSATION" (POLICY ARGUMENTS)

A. Both Julius Lassen and Ussing explain the criterion of foreseeability in the doctrine of "adequate causation" by reference to prevention (unlawful acts). The reasoning, however, has a peculiarly negative form, which in itself seems somewhat suspicious.

The view is simply that a wider liability will have little preventive effect, the decisions of the person acting not being affected by possibilities which are not taken into account at all.

In this connection, it should first be asked whether it would have any great preventive effect to extend the liability so far as would be a reasonable consequence of a psychological criterion of foreseeability. In all probability, the answer must be no. The preventive effect of the negligence rule is now generally recognized as being of modest significance; in any case, the exclusion of the somewhat less foreseeable damage from the area of liability for negligence would hardly affect prevention. But that is exactly what court practice does not do. On the contrary, practice extends the liability beyond what is psychologically foreseeable. So, the attitude of court practice cannot be explained by reference to prevention. And we are therefore forced to draw the conclusion

either that court practice is on the wrong track, or that prevention is not the principal consideration, at least when given its present formulation. I shall later touch upon a view that in some measure makes amends to the principle of prevention in this context.

B. Ussing, however, had other arguments, too. Thus he stated that the criterion of foreseeability had the technical advantage of doing away with many difficult examinations relating to the causative condition. "For the nearer one gets to the unforeseeable, the more difficult will it be to estimate the causal connection."

I think the correctness of this view is very doubtful. Difficulties in finding out whether there exists the necessary causal connection between the act and the damage are generally due to quite other matters than those relevant to the question of foreseeability. In the majority of doubtful cases of "adequate causation" there is no doubt whatever of the causal connection, and vice versa. And, again, it may be said that, at most, the view points towards the psychological criterion of foreseeability, and not towards the wider liability imposed by the courts.

C. Ussing also thought that the narrow limit of "adequate causation" had the further advantage of appealing to the sense of justice. However, one should beware of relying too much on that uncertain element. Besides, the content of the sense of justice is likely to differ greatly, according as one is on the side of the tortfeasor or on that of the injured person.

D. If the regard to be paid to prevention does not altogether serve our purpose, we have always the principle of reparation to fall back on. Several authors, indeed, have done so. In fact, on the face of it, one would think that regard to reparation would indicate the widest possible extension of the liability. The more regrettable is it, therefore, that this regard cannot really justify anything whatever. In actual fact, it only implies that X's loss may be shifted to Y in that the latter has to pay damages to X, but this cannot motivate or explain why and in what circumstances Y should pay damages to the injured person X. In short, regard to reparation therefore means no more than that it is pleasant for the injured person to obtain compensation.

The gist of regard to reparation is merely that it indicates an expedient manner in which to protect rights against certain types of damage, but this does not tell us in what cases it is to be applied.

E. As far as I can see, the attitude of court practice must be explained by reference to quite different considerations. As the

most important of these I shall mention, on the one hand, considerations of risk (which, by the way, may in some measure satisfy the regard to prevention) and, on the other, the technical desideratum of having more or less clear-cut rules governing extension of the liability.

First, it should be stressed that, if the limitation of "adequate causation" is to rely solely on a psychological criterion of foreseeability, the line of liability will be indistinct, not to say confused. To my mind, however, the most important objection is that the criterion will result in many decisions being made quite arbitrarily. For it is often a matter of mere chance whether a negligent act results in some actually forseeable damage or in the opposite, unforeseeable damage. But it does not appear reasonable that the negligent person causing the damage shall escape payment of damages because of such a chance. It must be up to him also to bear the risk of such damage as he could not foresee with certainty, simply because he has brought about a dangerous situation involving danger both of foreseeable damage and of more unexpected damage. To revert to the judgment concerning the bolting horse, it may be said that the causative development up to the time of the broken arm was so peculiar as probably to prevent anybody from calling it foreseeable. On the other hand, the old lady might very well have broken her arm in the actual collision with the horse, and in that case anyone would, I suppose, find the damage foreseeable. But why make any distinction between the two cases?

These considerations are also relevant to the criterion of foreseeability in the test of negligence. For by that criterion alone, a requirement of actual, psychological foreseeability would weaken the responsibility. In a large variety of cases one can or ought to realize merely that one has brought about a situation involving danger, but without any possibility of anticipating how the damage, if any, will come about. If, say, one inadvertently drops a heavy object from a height into a crowded street, it is obvious that damage may occur. And very often such damage may be characterized as likely or foreseeable, e.g. if a person is hit. It is quite possible, however, for damage to come about in a quite unexpected and, therefore, unforeseeable way. But why should the person causing the damage escape for that reason?[5]

[5] This reasoning may be the true explanation of the *Hughes* case (*supra*).

V. THE CRITERION OF "ADEQUATE CAUSATION" BASED ON THE DANGEROUS QUALITIES OF THE ACT

I have previously advocated a criterion which would place the chief emphasis on the question whether the damage can reasonably be said to have been caused by the dangerous qualities of the negligent act. Or, in other words: Has the act, on a general view, increased the risk of the damage which has occurred? If so, the damage is adequately caused. If not, the damage must be regarded as a fortuitous—casual—consequence not giving rise to liability for damages.

That view, however, has been criticized by Stig Jørgensen, who furthermore is of the opinion that it is not in accordance with Danish court practice. All the same, I still consider the criterion to be the most appropriate point of departure in the doctrine of "adequate causation", for several reasons.

First, it is a far more clear-cut criterion than the traditional criterion of foreseeability. For what can be foreseen as possible consequences of the negligent act?

To take the classical example of the ship that is lost in a storm because her departure was delayed owing to negligently caused damage, it is, I think, not quite out of the question that the damage could be anticipated as a possibility. Ships do get lost now and then. The point is, however, whether on a general view the act has increased the risk of the occurrence of the damage, and such is not the case if it only causes a delay. For the delay might equally well have caused the ship to escape the storm.

As a rule, it will not be difficult to decide in each particular case when the dangerous qualities of the act have been of decisive importance in the occurrence of the damage. This will normally not be the case, if the damage is brought about by outside causes which operate upon the damaged object only as a result of its having been placed by the negligent act in a certain location, where it would not have been if the act had not been carried out; or if the damage occurred because, as a result of the act, the object had arrived at its place of destination at a different time (sooner or later) from the scheduled one. Of course, a change of place or situation may be a factor generally increasing the probability of the occurrence of damage, as was pointed out already by von Kries. This, however, will be a rare exception. Besides, one should not take account of any slight increases in danger but

should allow for a certain margin. This is due to the fact that negligence will not be imputed at all in the case of acts whose capacity to cause danger only slightly exceeds that of the usual acts of daily life. If, say, a personal injury requires that the injured person be immediately taken to hospital in an ordinary car, it may plausibly be said that the risk of being injured in a road accident during the emergency transport has become slightly increased in relation to transportation in an ambulance which has priority over other traffic. This should be disregarded, however, so that the person causing the original damage and the necessity for emergency transport is not held liable for any further damage occurring in a collision during the journey to the hospital.

To my mind, such a limitation on "adequate causation" fits in best with the above-mentioned considerations of risk. The tortfeasor should bear the risk only for that damage in respect of which his negligent act has in advance increased the risk. And I cannot see that most court practice is at variance with this criterion; it seems to me that, on the contrary, it is largely in keeping with the doctrine stated above.

As already mentioned, the courts do not normally take account of the question whether the real damage has come about in a quite unexpected way, provided the damage is the result of the dangerous qualities of the act.

In addition to the judgments referred to above, I wish to give some other examples that provide a good illustration of the problem.

If, say, by running into a pole one breaks electric power cables, causing a short-circuit of the main distributing system, etc., the consequential damage, if any, may be peculiar and unforeseeable. In 1938 U.f.R. 159, for example, some radio valves burst in the neighbourhood where such an incident had occurred. The person causing the original damage was held liable. In 1959 U.f.R. 708, an interruption of the power supply resulted in the death of some chickens in an incubator. The court gave judgment in favour of the defendant, holding that the damage was so indirect and remote an effect as to exempt the tortfeasor from liability for damages. In 1962 U.f.R. 190, all the eggs in an incubator were destroyed as a result of an interruption of current; the court, however, did not consider the damage unforeseeable. The damage to the main distributing system in that case, it is true, was not caused by a collision with a pole but by a machine in connection with an excavation, where the risk of damage to the main distri-

buting system had in fact been concretely foreseeable. It might therefore, with respect to that decision, be rather more justifiable to talk of the foreseeability as a psychological fact, and this is likely to have determined the result. As will be understood, I see no reason to arrive at different decisions because of so slight a difference.

About these cases it must be said that, surprising though it was, the damage was nevertheless a result of the dangerous qualities of the acts. In order to throw more light on the question, I will comment on two more decisions.

The first is found in 1941 U.f.R. 586. In this case a farmer, F., had sent for a smith, S., to carry out a repair at his farm. When at sunset S. came cycling along F.'s private approach road, he ran into some barbed wire that had been stretched across the road to bar the way to cattle, while they were driven out from the farm. S. got a scratch on one of his hands, but paid no heed to it; blood poisoning developed, resulting in disability and another injury. In addition to the scratch, F. was held liable for the consequences of the blood poisoning, which were found not to exceed what might have been expected as a result of the very dangerous omission by the defendant, i.e. not to remove the wire before calling on S.

The judgment of 1946 U.f.R. 145 resembles the judgment just reported, except that in this case the damage was not caused by the dangerous qualities of the act. The driver, A., of a one-horse cart had gone in front of the vehicle with the reins in his hands to remove a wire which a farmer had stretched across the road and forgotten to take away. The horse came into contact with an electrified fence and bolted because of the shock, causing the vehicle and an engine placed on it to be damaged. Seeing that the contact of the horse with the electrified fence was found not to have any foreseeable connection with the fault committed by the farmer, he was held not to be liable to compensate the damage. The act of the farmer was obviously unlawful, involving as it did very great danger to traffic, but the damage occurring *in concreto* was not related to that danger. The misadventure might equally well have come about even if the driver had stopped for some other reason.

As already mentioned, court practice does indeed as a rule consider the damage adequately caused, even if it assumes larger proportions than are "normally" anticipated because of rare complications, or because of particular individual circumstances affecting the person sustaining the damage. The attitude of the

courts is probably based on the fact that the greater damage could equally well have come about in the "normal way". It is a matter of chance that it comes about in an "unforeseeable way". This thinking again exemplifies the risk view.

Thus, it has several times been assumed by the law courts that the tortfeasor is liable for injuries which are due to a special predisposition in the injured person, but does develop only through the actual causing of damage and entail serious complications of some kind or other. A classical case is where a person is already blind in one eye, so that injury to the other eye involves a very severe disability.

Sometimes, however, the liability in such cases will be mitigated by virtue of the rules governing contributory negligence on the part of the injured person. This will be so where the person has not himself shown the increased attention and caution that must be required of people with physical handicaps, in particular where there is a risk that even small injuries will have unexpectedly severe consequences.

In many cases, some of the harmful consequences do not develop until a long time after the commission of the tortious act. It is generally assumed, however, that the injured person may also as a rule claim damages in respect of these later consequences, even if he has made no reservation on that score at the time of adjustment of damages, indeed, even where he has given a "receipt in full".

A typical example is provided by 1950 U.f.R. 996. A., who in 1943 had sustained an injury to his right cerebral hemisphere through being run over by a motor car driven by B., agreed in full with the motor third-party insurance company of B. for compensation, *inter alia,* for disability. No reservation was made for future claims. Since a traumatic neurosis, possibly already existing at the time of the accident, proved to be more severe and prolonged than could be foreseen at the making of the settlement and took a course other than could be anticipated, A. was awarded further compensation. It invites reflection that the reason adduced for the claim was that the injury was unforeseeable, though this was chiefly used to aim a blow at the compromise from the point of view of assumption of the risk of future developments.

On the other hand, it must be recognized that it may seem unfair to the tortfeasor if for a long, indeterminate period he may be exposed to new claims for damages of unknown extent. The tortfeasor must be said to have a natural right to a final settlement of his liability, if possible. This view has more particularly

been put forward by Kr. Sindballe (*loc. cit.*). Sindballe, however, shows no actual way of dealing with the clash between the conflicting interests of the injured person and those of the tortfeasor. So far as can be judged, he is, if anything, inclined to decide the case in favour of the person causing the damage. It is just possible that the conflict might be solved in such a way that, in the assessment of compensation for the disability, the courts would take account of the increased risk to the injured person implied by the disability.

An interesting judgment which touches upon the problem is recorded in 1961 U.f.R. 1041. In 1952 A. was injured in a road accident for which B. was liable and, by a judgment of October 7, 1954, A. was awarded a disablement benefit of 8,000 kroner. He then asked that B. be ordered to pay additional compensation because on April 19, 1954, he, A., had a fall from his bicycle, resulting in an affection of his shoulder which entailed increased disability. A. based the claim on the fact that, in the accident in 1952, he had contracted a post-traumatic epilepsy, and that the fall from the bicycle was due to a fainting fit. According to the content of the judgment of 1954, however, it was assumed that that judgment had taken account of the disadvantages to A. of his being restricted in his mode of life because of fainting fits and of the possibility of his sustaining new injuries during such fits; in any case, A. was precluded from obtaining further compensation under the existing circumstances in which he had ridden a bicycle, notwithstanding the fact that he had previously had fainting fits when cycling. B. was therefore held not to be liable.

Accordingly, it may be established that court practice does not require the damage to have been actually-psychologically foreseeable. It is sufficient that the damage shall have been caused by the dangerous qualities of the act; these dangerous qualities, however, must have been perceptible to the tortfeasor. One thing is true, however, that perceiving dangerous qualities of conduct is quite a different thing from anticipating a particular damage. Many kinds of damage are not foreseeable—in other words, they are atypical—but this is not decisive in practice. Reading the decisions in the light of these considerations, I think it must be recognized that most judgments finding for the defendant on the ground that "the damage was unforeseeable" mean in actual fact either that the danger was imperceptible or at least that the perceptible danger was so far negligible as to justify the person causing the damage to disregard it.

VI. THE LIMITATION OF "ADEQUATE CAUSATION" AS MITIGATION OF LIABILITY

One might choose to maintain the psychological criterion of foreseeability in the doctrine of "adequate causation" in such a way as to exempt the tortfeasor from compensating for damage, even where it is a result of the dangerous qualities of the act, if the damage is characterized as quite exceptional or atypical. Probably it is particularly in such cases that the public sense of justice does not regard the liability as being quite reasonable. Nor is it rare to find the suggestion of similar rules in legal literature. Such a rule of exception already involves equally great difficulties of delimitation as to the traditional criterion of foreseeability. And it is not in keeping with the considerations of risk stated above, or with the main tendency of Danish court practice.

So far as I can see, another view may be put forward, which, I think, is perceptible, if a little dimly, behind these attempts at delimitation. What I have in mind is the sense of justice in regard to balance between fault and liability. For many reasons, that principle may be applied only very imperfectly in the general law of damages. On the other hand, I think there could be no objection to introducing a sort of safety valve in the law of damages so as to mitigate the liability for damages if it is found to be unreasonably onerous, having regard to the fault and other circumstances. Such a safety valve will indeed be proposed in the new inter-Scandinavian Draft Act on the master's liability for the act of his servant.

It is worth noting, however, that this idea may already be met in some measure by means of the test of "adequate causation" if the test be so framed as to enable the courts to mitigate the liability, when the damage that has occurred is so excessive that the liability for damages bears no reasonable proportion to the fault. In such mitigation it will be more appropriate to apply the concept of "foreseeability". Here, it may to some extent be a guide to the courts, and it will not be unrelated to psychological facts.

Such mitigation of liability, however, does not find much support in court practice.

VII. MUST THE LOSS BE ADEQUATE?

In most cases, the same real damage will entail the same financial loss, irrespective of who is affected by the damage.

If the damage consists of the destruction of a car, the financial loss is the same whether the vehicle belongs to one person or to several, and whether the owner is rich or poor.

In quite a number of cases, however, it is possible that the same real damage may involve widely different financial losses, depending on who is affected by the damage and how it comes about, and normally also depending on circumstances which are imperceptible to the person causing the damage at the time of the act. If the real damage consists in the amputation of the injured person's left little finger, the financial loss will largely depend on his occupation (artisan, employee, great violinist, etc.). There may thus be several cases where the resulting damage is actually foreseeable, but where a substantial part of the financial damage or loss is not, or only to a "less" extent.

Opinions have been divided in the literature as to how to deal with the question of "adequate causation" in connection with the financial loss; traditionally, however, it is inculcated that the loss must also be adequate, which means that the loss must not be unforeseeable to the person causing the damage at the time he acted.

By and large, the question is parallel to that of unexpected real damage, and the same considerations of risk that have been argued in the foregoing concerning the foreseeability of real damage must apply to the present question also. The consequence must be that, in principle, the tortfeasor must be liable for the financial consequences of the damage caused by the perceptible dangerous qualities of the act, irrespective of whether, because of individual circumstances affecting the injured person, the amount of the loss is much larger than "normally" or of whether the loss has come about in a quite peculiar way.

I think Danish court practice must be said to be in keeping with these views, as for example in 1922 U.f.R. 1027. In that case, a Swedish painter, P., during a visit to a Copenhagen house fell down a steep basement staircase in the dark, thereby severely injuring his right upper arm. The owner of the house was held

liable for damages, it being found highly unwarrantable, having regard to the way in which the staircase was placed just inside the main entrance, that no safety measures had been taken through special lighting or otherwise; on the other hand, the court found that P. himself had shown negligence, and the damages were therefore reduced. Nevertheless, the compensation for loss of earnings and somewhat reduced earning capacity was fixed at 20,000 Danish kroner, a considerable sum in 1922. In 1941 U.f.R. 166, a forestry student who was injured in a road accident was awarded damages amounting to 600 Danish kroner from the persons liable for the accident, because there was a "natural relation" (not foreseeable) between the disease arising from the accident and the low marks he obtained in a subsequent examination and there were reasons for expecting that these marks would be prejudicial to his career. If, on the other hand, the loss is due to the fact that, in consequence of a collision, a pedestrian is unable to accept an advantageous offer in due time (perhaps he was on his way to the offeror with the acceptance in his pocket), he cannot claim compensation for that loss, since, I submit, it cannot even be maintained that the real damage (the non-delivery of the acceptance) has any connection with the dangerous qualities of the act (reckless motoring is not a factor generally increasing the probability of late acceptance of an offer). However, as regards the question of the amount of the loss also, it may be justifiable to mitigate the liability, if the loss is very excessive in proportion to the fault. On the other hand, I have found no clear examples of this view in Danish court practice. Normally, the reduction of damages is based on contributory negligence or acceptance of increased risk.

As an example of the application of the view in contracts, mention may be made of a judgment pronounced by the Danish Supreme Court and reported in 1951 U.f.R. 248. During the navigation of S.'s motor boat from Vejle to Faxe the engine failed and, after examination by a firm, F., at Kalundborg, the crankshaft was declared to be broken. The boat proceeded under sail, but after S. had bought a new engine it appeared that the shaft was not broken. F. was held liable for his negligence in carrying out the examination, etc.; the loss sustained by S. in connection with the renewal of the engine being found to be unforeseeable, S. was awarded damages for loss of time only. (The judges disagreed.) F.'s bill for the examination was 25 kroner. The loss amounted to some 15,000 kroner. The damages were fixed at 1,000 kroner.

VIII. "ADEQUATE CAUSATION" AND INSURANCE

Insurance is in a certain sense the opposite of "adequate causation" or foreseeability. It is precisely the unforeseeable, the fortuitous event one insures against; in principle one does not insure against what is foreseeable.

If this can nevertheless be done, it is due, however, to the possibilities of statistically calculating the risk of fortuitous damage, or at least of basing the calculation of premium on insurance accounts where a large number of risks have been accepted.

None the less, views of "adequate causation" have been of no small importance in insurance law.

A. Significance of the Test of "Adequate Causation" in Third-party Liability Insurance

In principle, the test of "adequate causation" must penetrate. By way of example, mention may be made of 1951 U.f.R. 999. The 5 1/2-year-old Erik and the 7-year-old Arne had thrown stones into a basin in which a grocer put eggs for preservation and had stirred the basin with a stick. This caused some eggs to break, and later it appeared that others were spoiled as a result of contamination by the liquid preservative. In view of the fact that, having regard to their age, the boys must have realized that their course of action would damage the eggs, they were found liable for damages. Irrespective of the question whether the damage was covered by a third-party liability insurance taken out for the boys, the damages were reduced, having regard in particular to the fact that the wider consequences of the act had hardly been fully foreseeable by the boys. (The judges disagreed.) The loss amounted to some 7,000 Danish kroner. The amount of damages was fixed at 3,500 kroner. As will be seen, the judgment is among the rare ones which are based on a criterion of psychological foreseeability, possibly because the boys were minors.

B. What Cases of Damage are Covered by the Insurance?

The doctrine of "adequate causation" has also been applied to cases of damage which are covered by insurance.[6] In dealing with

[6] See, in this connection, Drachmann Bentzon and Knud Christensen, *Kommentar til forsikringsaftaleloven*, p. 364; Niels Tybjerg, *Om søassurandørens*

the question, a distinction must be made, so far as I can see, between two problems: (1) the course of events up to the damage insured, and (2) the sequelae of the insured damage.

(1) *The course of events up to the insured damage*

Here, the foreseeability of the damage will normally be quite irrelevant. For it is precisely against the unforeseeable or casual damage that one insures. In however peculiar, atypical or unexpected a manner the damage to a thing insured against fire comes about, the insurance must cover the loss. The foreseeability of the damage, on the other hand, may be relevant rather to the questions of contributory negligence from the insured party, increased risk, or precautionary measures.

A problem arises, however, in the construction of sec. 79 of the Scandinavian Insurance Contracts Act: "the damage caused by fire to the thing even if it does not catch fire". How is one to consider the following case under this rule? A fire in the neighbourhood results in a few hours' interruption of current. In consequence thereof some fire-insured chickens in an electric incubator die. According to the explanatory statement accompanying the Scandinavian Insurance Contracts Act, the question of indemnity shall be decided from a consideration of whether the "causal relation between the damage and the fire is adequate, i.e., capable of previous calculation".

That criterion, however, is hardly well-advised, for then the chickens also might have to be compensated for, but this was hardly the intention of the legislators. Undoubtedly, the insurance is designed to cover only such damage as may typically occur near the place of fire as a result of the conflagration. Thus, the explanatory statement mentions "fire-fighting measures". It should also be noted that many policies say that "indirect losses are not compensated", and that it has actually been found necessary in sec. 83 of the Scandinavian Insurance Contracts Act to incorporate an explicit provision on theft from the place of fire and on damage during attempted rescue, which after all should clearly be covered by the provisions of sec. 79 if the latter is construed by

ansvar, pp. 80 ff.; Th. Grundt, *Norsk forsikringsrett*, pp. 87 ff.; Folke Schmidt, *Faran och försäkringsfallet*, pp. 205 ff.; Ulf Persson, *l.c.*, pp. 49 ff.; Jan Hellner, *Försäkringsrätt*, pp. 94 ff.

means of the criterion of "adequate causation". The question, however, must of course be subject to an evaluation of reasonableness by the courts.

(2) *The sequelae of the insured damage*

The sequelae of the insured damage notably constitute the question which has given rise to an animated discussion of the applicability of the view of "adequate causation".

A large part of the problem, however, is generally removed because of the stipulations of the policies in regard to the insured interest, excepted risks and excepted losses (e.g., that the insurance does not cover loss of profits). Nevertheless the problem may arise. Some examples may be given. An unobserved theft of an engine part from a motor-car results in the car being severely damaged in subsequent normal driving. Does the insurance against theft cover this? Water damage causes decay of the floor joists with the result that a chandelier falls down and is destroyed. Does the insurance against water damage cover this? According to the traditional criterion of foreseeability, in both cases the question must be regarded as very doubtful. Folke Schmidt, indeed, rejects the current criterion of "adequate causation", maintaining that the determining point must be whether the damage comes within the typical need of security to be considered by the insurance. And in his opinion importance should then be given to the way in which the ordinary policy holder will reasonably look upon it. Hellner, on the other hand, gives importance to the question whether the damage is in "the direction of the risk"; in general, however, the line must be fixed on the basis of an estimation, and not too narrowly.

The question is indeed a difficult one. I am inclined to lean to the classical criterion of "adequate causation": If the risk of the damage occurred has been generally increased by the insurance event, it should be covered; whereas it must be of secondary importance whether the damage came about in an atypical way. I should therefore let the insurance cover the damage in the cases referred to. Nor is payment of atypical damage very onerous to the companies, owing to its rare occurrence (which is what makes these cases atypical). The limitation in regard to the insured interest is likely to be sufficient to protect the companies against unreasonable claims.

C. Doctrine of "Adequate Causation" and Competing Causes of Damage

The foregoing discussion has several times touched upon the question whether outside causes influencing the course of events may have contributed so substantially to the damage that it cannot be considered adequately caused in relation to the tortfeasor, or an insurer. There may be a question, on the one hand, of an interaction of causes in the same chain of causation and, on the other, of independently operating causes, that is of several independent causes, each of them being instrumental in the occurrence of the damage.

The problem now is, which of these contributing causes are to be singled out as the ones for which liability will be imposed? In the law of damages, it may, *inter alia,* be relevant to the question whether several persons are liable for the damage. In insurance law it is relevant to the question whether the insurance shall cover the loss.

Several theories have been advanced on the subject.

(1) In recent years, interest has centred on the so-called "*main cause doctrine*",[7] which is the Scandinavian equivalent of the *causa proxima* doctrine.

The "main cause" doctrine has in particular been developed in insurance law with a view to delimiting the scope of the causes of damage excepted in certain policies, e.g. "damage occurring as a direct or indirect consequence of earthquake, war, civil unrest, etc.". Here, the excepted risk may be conceived of as having played a role of greater or less importance in the occurrence of the damage, inviting its being characterized either as a "determining", or a "contributory", or only a "secondary" factor in the occurrence of the damage.

[7] As to the *main cause doctrine,* reference may be made in particular to Sindballe, *Dansk forsikringsret* II, pp. 10 ff.; Ussing, *Enkelte kontrakter,* pp. 229, 315 ff.; N. H. Bache, *N.F.T.* 1940, p. 147; Adam Jacobi, *U.f.R.* 1941, pp. 17 ff.; G. L. Christrup, *Juristen* 1941, pp. 168 ff.; Bentzon and Christensen, *Kommentar* II, pp. 363, 614 ff.; N. Tybjerg, *Om søassurandørens ansvar*; F. Schjelderup, *Krigsforsikringer for norske skibe* II, pp. 42 ff.; Øvergaard, *T.f.R.* 1938, pp. 171 ff.; *N.F.T.* 1938, p. 474; Astrup Hoel, *ibid.,* pp. 149 ff.; T. Grundt, *T.f.R.* 1941, pp. 539 ff.; Johs. Andenaes, *T.f.R.* 1941, pp. 241 ff.; Folke Schmidt, *Faran och försäkringsfallet,* pp. 224 ff.; Carsten Smith, *Solidaritet og regress i erstatningsretten,* pp. 33 ff.; Jan Hellner, *Försäkringsrätt,* pp. 98 ff.; and Sjur Braekhus, "Norsk sjöforsikringsplan 1964", *Norwegian Shipping News,* 1964. Of these authors, notably *Øvergaard, Grundt* and *Folke Schmidt* have criticized the application of the doctrine in insurance law.

An example of this last case is the following. A war breaks out in the Far East. A. remains at home for ten minutes more than usual in order to hear a special news transmission on the radio. On the way to his work A. is seriously injured by a falling tile. Can A.'s accident insurance company refuse to pay with reference to the war clause? If the *conditio sine qua non* doctrine of causation is applied to that problem of construction, the answer would be "yes", which would be obviously unreasonable. In order to arrive at acceptable results recourse has therefore been had to the "main cause" doctrine referred to above, according to which the determining fact shall be which cause appears to be the chief or predominating factor in the chain of causation or among several, independently operating causes (competition of causes). Where the excepted risk is covered by a special insurance, e.g. a war risk insurance, it must be one or the other insurance which compensates the damage.

(2) In contradistinction to the "main cause" doctrine is the so-called *"distribution doctrine"*, according to which the liability shall be distributed among the individual causes according to the share they are supposed to have had in the damage.

In Danish insurance law, the "main cause" doctrine has normally been preferred in theory and practice alike, whereas Norwegian war risk insurance applies the *"distribution doctrine"*, subject to a concession to the "main cause" doctrine.

Nevertheless Norwegian jurists in particular, and among them especially Schjelderup, Astrup Hoel and Kristen Andersen, have advocated the transfer of the "main cause" doctrine to the problem of "adequate causation" in the law of damages. In the law of damages, the "main cause" principle should aim at finding the chief or predominant causative factor and attaching the liability to that factor if there is any justification for liability at all. From this it will be seen that the principle may apply both to the interacting and to the independent chains of causation, and here the result may be that judgment is given in favour of the defendant if the liable cause is not the "main cause" or, where the damage is caused by several persons, that only one is held liable, a procedure at variance with the joint and several liability generally accepted in Scandinavian law. There is no denying that this *may* be the right solution in certain cases of damage caused by several persons; normally, however, the traditional solution that imposes joint and several liability seems to be the most appropriate one. And if one of the persons concerned is to be singled out as a special

scapegoat, this should rather be done with due regard to the degree of fault. Also, there may be cases where a *pro rata* liability would be the most obvious solution, and that way should not be barred.

Apart from this, however, other serious objections may be made against the "main cause" doctrine, and more particularly to its application within the field of insurance law.

First, it will in a variety of cases provide no certain answer. Thus, it will often be quite accidental which of the contributory causes is singled out as the "main cause". Even in the example referred to above, it may seem arbitrary to single out the tile as the "main cause", in contradistinction to the outbreak of war. One gets the impression that the doctrine provides only an apparent explanation, and that quite different elements are legally relevant in the decision, these, however, being sometimes more difficult to recognize. To stick to the example: What is war damage ("consequences of war")? Here, one might try to change the question into: Why does accident insurance except war damage? It does so simply because an accident insurance is not financially capable of bearing the incalculable consequences of a war. And the same thing is true of the greater part of other damage excepted, such as civil war, earthquake, atomic damage, etc. They are exceptional disasters, and the premiums of accident insurance are calculated on the basis of normal conditions. If the construction is based on this view, it must undoubtedly be recognized that the view of "adequate causation" is appropriate, and it will probably be possible to decide the cases of doubt with a fair amount of certainty. Where the risk of a certain type of accident has been substantially increased as a result of the state of war, it will be natural to except that type, but not if, by a mere chance, war has caused damage that might equally well have come about in a normal way.

As an example, mention may be made of Opinion No. 597 of the Insurers' Society (1945 U.f.R. 209). In that case a person, A., who was insured against accidents, decided to turn off the main gas tap because of an air-raid warning. In doing so he fell off a stool and was injured. The insurance company wanted to class the accident under the war clause, but its contention was not upheld. I think it must be recognized that the "main cause" doctrine can make no sound contribution whatever to the decision of that case.

The same is true of the decision in 1950 U.f.R. 371. The case concerned the explosion, caused by collision with a mine, of the coastal vessel "København" in June 1948 in the Aalborg bay.

Among others, Mr. Graae, a permanent secretary of state, was killed and his executors claimed payment on a life assurance policy. The company invoked the war risk clause of the policy, and its contention was upheld by the Court of Appeal. The majority of the judges of the Supreme Court, however, varied the judgment, finding that the clause "accidents due to war" did not with a sufficient degree of certainty cover the loss, which had occurred some three years after cessation of hostilities in "a shipping route opened for ordinary conveyance of passengers with the approval of the international minesweeper organizations".

Whether one agrees or disagrees with the judgment, however, one must at least agree that it cannot be based on the "main cause" doctrine. It is quite possible that the judges of the Supreme Court considered that, as time went on, the danger from mines had become so small that the contingencies to which the war risk clause has special reference no longer existed.[8] If, however, there had been war risk insurance, too, there is hardly any doubt that the case would have been regarded as war damage.

The most weighty argument in favour of preferring the "main cause" doctrine to the distribution doctrine is, I gather, a presumption to the effect that the latter doctrine would more frequently give rise to doubt and, in turn, to litigation. The argument does not seem convincing to me. The cases where the "*distribution doctrine*" gives rise to doubt are likely to be the same as those where the "main cause" theory will do so.

In the event of coincidence of two types of insurance, such as war risk insurance and maritime insurance, the question is of but minor importance to the insured persons, and it is therefore without any great hesitation that the Supreme Court, *inter alia* in 1943 U.f.R. 779, has left the question to mutual agreement between the companies.

If, on the other hand, the question is that of construing an exception clause, it is indeed a matter of everything or nothing for the insured. Here I find it neither very reasonable nor very consistent with public policy to apply the "main cause" doctrine uncritically.[9] If anything, the clauses should be con-

[8] See also C. J. Arnholm, *T.f.R.* 1950, p. 208.

[9] Here, mention may be made also of a judgment (1943 U.f.R. 1052), which implies a tendency towards the acknowledgment of the distribution doctrine. The case related to the following matter. F., who had taken out an accident insurance by which, *inter alia*, he insured himself against disability where "the direct consequence of an accident is a substantial and incurable physical injury", injured his hip in an accident. The accident would have

strued from insurance considerations, and here views of "adequate causation" are likely to be applicable.

In connection with the judgment relating to the explosion of a mine, I have already touched upon the "disaster clauses", raising the question whether one should not be guided by considerations as to the extent of the general war risk in the particular case. A similar reasoning might be applied in the construction of the other exception clauses, such as the sickness clause in private accident insurance. If, say, the insured person suffers from an illness involving frequent fits of dizziness, a fall in consequence of dizziness should not entitle him to compensation. But what about a case where the fall of the insured is due to dizziness following a recent bout of influenza? Would it not here be natural to say that the risk of accidents having to do with the common petty illnesses of daily life is so small in proportion to the other risks of accident as to make it reasonable to include them among those covered by the insurance? Obviously, that view cannot solve all problems in regard to the delimitation of the concept of accident. Nor is that intended, however. On the other hand, I consider it a better instrument for settling some of the problems which writers have tried to solve by means of the "main cause" theory or the "distribution doctrine".

entailed only temporary injury if F. had not suffered from rheumatism of the hips, which in the course of a few years would have disabled him; owing to the accident, however, the rheumatism now entailed immediate disability. He was awarded half damages.