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The Scandinavian Law of Torts - Impact of Insurance on Tort Law

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THE SCANDINAVIAN LAW OF TORTS

IMPACT OF INSURANCE ON TORT LAW

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LOOKING at the law of Western Europe, most of the countries belong to two main groups. The majority belong to the continental group, comprising countries whose law has been influenced strongly by Roman Law, the other group being formed by the Common Law countries. The Nordic countries do not belong to either of these groups. While each of the three Scandinavian countries, Denmark, Norway and Sweden, has its own law, together with Finland and Iceland they form a special group, the five Nordic countries. These have never received the Roman Law, and their law has had an unbroken evolution from the era of primitive law.

At the same time, the Scandinavian laws have not been uninfluenced by foreign law. As these countries are small and have been in close communication with other countries, their law has necessarily been influenced by the laws of many other countries as well as by canon law and by the doctrines of the great European schools of law. In the nineteenth century, Scandinavian scholars were mainly influenced by German doctrine. But the laws have never abandoned their independence, and particularly Denmark, which had to fight Germany in two wars in the middle of the 19th century, has been disposed to criticise German scholars. The Nordic mind is less abstract than the mind of the Germans. On the whole, the Scandinavian laws hold a middle ground between continental Civil Law and English Law. Since the eighteen-eighties, most Scandinavian scholars have made use of the method of comparative law and have investigated English law as well as continental law; lately, they have begun to study American law.

Like most continental countries, the Scandinavian countries have codes. But these codes are old: The Swedish code dates from 1734; the Danish and the Norwegian codes, which are almost alike and were given by the same king, from 1683 to 1687. These codes are not nearly so detailed and complete as the more modern codes, and their rules are generally based on the law that was in force in Scandinavia at the time.

Today, very little of the Danish code is still in force. Many of

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its provisions have been repealed by statutes. There have been recent codifications of the criminal law and of the law of procedure, and in the field of private law there are several important modern statutes. The majority of these statutes are uniform Scandinavian acts. Scandinavia has a great number of uniform acts, beginning in 1880 and continued until today. But the law torts and a great part of the law of contracts are still predominantly case law.

The subject of this article is the Scandinavian law of torts. Even in this field there are a number of statutory provisions. But most of them are concerned only with harm caused in special ways, e.g., by railroads, motor vehicles, or airplanes. The general rules of tort law in Scandinavia are based on case law. This case law still leaves room, however, for further development, and for that reason legal scholars have done extensive research work in this field. Since the beginning of this century in general, Scandinavian scholars have not contented themselves with reporting and grouping the decisions of the courts. That work they certainly do, and they are disposed to think that in general the courts are wiser than the scholars. But they also think that it is their task to collaborate with the courts in further developing the law. Through their research work, which is generally based on comparative law, they are often able to make useful suggestions to the courts. Generally speaking, they have been working in close co-operation with the courts for more than one hundred years.

The law of torts lends itself particularly well to research work of this kind. It is evident that the rules of tort law ought to be formed in accordance with the interests existing in society.

When I speak of Scandinavian Law, I have primarily Danish Law in mind.[1] Only where the law of Norway or Sweden differs considerably from Danish law, is attention drawn to that fact.

The main principle of the Scandinavian law of torts is the principle of fault. It was established by the Danish courts in the course of the eighteenth century. The Scandinavian rule is essentially identical with the rule of fault as it exists in most European countries. The notion of fault is modeled upon the Roman concept of *culpa*.[2] However, there is a difference between the structure of tort law in our law and in Roman law. In the latter, an action for damages for harm would not lie unless the facts would

1. A textbook on the Danish Law of Torts: Henry Ussing, Erstatningsret (Nyt optryk 1947) Copenhagen.

2. Statutory provisions concerning the liability in tort of children and insane persons were introduced by sections 63-64 of Lov om umyndighed (Law on Infants and Incompetents).

fit in with some one of the limited number of forms of action. Roman law was quite similar in this respect to English law, where, according to prevailing doctrine, there is not a law of tort, but only of *torts,* or where, in other words, no right of action exists unless the facts fit patterns such as that of libel, slander, trespass, assault and battery, fraud, etc. Quite different is the approach of the French, Swiss, or certain other civil codes, where it is provided in the basic sections that one has to pay damages for every harm which he has, by faulty conduct, caused to another. This provision is so broad, however, that it means very little until it is filled with concrete content by the courts. There has thus developed in France and other European countries a veritable system of case law indicating in what situations one is liable in tort and in what situations one is not. The Danish approach is similar, although there is no such general statutory provision as is contained in those codes. But it is generally said that such a broad general principle of liability for all culpable conduct underlies Danish law. But nobody would know what it means if he were not familiar with the cases.

As elsewhere, most of the cases clearly constitute certain well-marked groups, such as those dealing with bodily injury, or harm to property, or invasion of a person's reputation, or interference with business relations, etc. But the courts may award damages outside of these groups.

The present discussion is limited to the first-named group, viz. the cases of bodily injury and harm to physical property. In this subject matter, however, it is important that, like other modern laws, Scandinavian law has found itself compelled to step beyond the nineteenth century rule of fault and to recognize situations in which a person may be liable without any fault or, at least without any fault of his own.

Like American law, Danish and Norwegian law [3] admits the vicarious liability of the master for damage caused by the fault of his servant while acting in the course of his employment. This liability was introduced by the Danish courts about fifty years ago and was based on a section in the old code. Up to that time it was the general opinion that the provision of the code dealt only with breach of contract. But towards the end of the nineteenth century, the courts were disposed to hold a master liable generally and, inspired by certain legal authors, they established

3. A textbook on the Norwegian Law of Torts: J. Øvergaard, Norsk Erstatningsret (2 Utgave, 1951) Oslo.

a new and wider interpretation of that section, so that now this new rule is one of the most important parts of the Danish law of torts. In Sweden, vicarious liability of a master is admitted generally in contract, but in tort only to a limited extent. The Swedish code has no provisions similar to the Danish, and it is still a matter of dispute whether the general rule of vicarious liability should be introduced.

To a certain extent strict liability for risk is admitted in Scandinavian law. But in this respect the laws of the three countries differ.

The need of a rule of strict liability for risk has been produced by the growing industrialization and technical progress in more or less the same evolution as has occurred everywhere.

In the nineteenth century, the principle of no liability without fault gained ground in Scandinavia as in most European countries and in America. The prevailing doctrine considered the fault rule as the only just rule; only a few rules imposing liability irrespective of fault, viz. some provisions of our codes as to harm caused by animals, had been preserved. But towards the end of the century a new trend began to evolve. In Scandinavia this new current made itself felt first in Norway. Beginning in the eighteen-seventies, a number of judgments imposed strict liability for dangerous activities, e.g., in the case of an explosion of a factory of high explosives, of a fire caused by sparks emitted by a railroad engine, of the subsidence of buildings in Oslo caused by the construction of an underground railroad, or of damage to property in Oslo caused by the leak of a water main. Already at the beginning of the twentieth century, the principle of strict liability was firmly established in Norway as a supplement to fault liability.

In Sweden, the development has been slower.[4] But in the course of the last two decades, the courts have introduced strict liability for ultrahazardous activities, although it seems that the Swedish courts will not apply this strict liability to anything but clearly ultrahazardous activities.

The Danish courts are still hesitant as to strict liability for risk.[5] Some judgments of the courts of appeal have admitted strict liability, but other judgments have repudiated it, and thus far the supreme court has avoided a clear-cut decision. The problem of

4. A textbook on Swedish Law: Ilj. Karlgren, Skades tåndsläran (1943) Lund.

5. See Ugeskrift for Retsvæsen, 1947 B, page 281, 1948 B, page 121 (papers by the author and by W. E. von Eyben).

liability irrespective of fault was the object of my first book, "Skyld og Skade," published in 1914. Applying the method of comparative law, I arrived at the conclusion that Denmark ought to introduce strict liability for activities that are hazardous because they create special risks for other persons or for their property, provided such activity is not of a kind that is performed by the common man. The rules that I advocated are very much the same as those that were later set forth in Sections 519 and 520 of the Torts Restatement of the American Law Institute under the heading of "Liability for Ultra-Hazardous Activities." I felt very much encouraged when I found that eminent American lawyers had arrived at similar results.[6] While it does not prove that the proposed rules are the ideal rules, it does show that the lawyers of our countries are working along the same lines. They are guided by practical considerations, trying to form rules that are appropriate to modern social conditions.

Nowadays, all over the world, we find a growing demand for security against the risks of modern life. This tendency manifests itself in many ways, but particularly by the stupendous growth of insurance in this century. This growth is conspicuous when we look at tort cases. The damages actually paid, in the majority of cases, are paid by insurance companies. Very often the tortfeasor has taken out insurance against legal liability to third parties, and if so, the insurance company has to pay the damages for him. Or the injured person has taken out fire or other insurance, and the company will indemnify him. Sooner or later these facts had to influence the law of torts, and I think that in tort law the most important problem of the near future is that of determining whether, or rather how, tort law will be influenced by the growth of insurance.

Insurance will probably influence tort law in two opposite ways. While it may bring about a certain broadening of tort liability, it is likely at the same time to result in a shrinking of the field of liability for tort. These two aspects are now to be considered separately.

Since the last decades of the nineteenth century, insurance has been used in connection with the introduction of strict liability for risk. It was used in that way in some countries when they introduced compensation for accidents suffered by workmen in the course of their employment. According to statutes of this

6. See my paper in Festskrift till. Birger Ekeberg, 10, August 1950, Stockholm. reprinted in Ugeskrift for Retsvæsen, 1950 B, page 214.

character, compensation has to be paid even for accidents that were brought about without fault. Some countries have introduced compulsory accident insurance for workmen. But other countries have chosen a different approach. The statutes impose a strict liability on the employer, but provide that he can escape liability by taking out accident insurance in favor of his workers. Such was the rule of the first Danish statute of workmen's compensation.

These statutes are often considered as particularities based on social motives. But in the course of this century compulsory insurance has been introduced even in other fields.

In Denmark, in 1918, insurance against liability was made compulsory for owners of motor vehicles, and similar rules are in force in Norway and Sweden, and in a number of other countries. In Denmark insurance against liability is now compulsory even for harm caused by dogs and for harm caused by hunting. The greater part of this insurance is provided by private companies under the supervision of the state.

It is obvious that the compulsory insurance scheme has great advantages. Very often a tortfeasor is unable to pay damages, and the cost of litigation in tort cases is comparatively great. When the damage is covered by liability insurance, the injured person is fairly sure to obtain payment of the compensation, and at least in Scandinavia, in general he will get payment without going into court and without having to pay a lawyer's fee. These advantages are pretty clear.

But insurance may have further advantages. It tends to increase security in another way. When the insurance is compulsory, even strict liability for risk will not involve serious hardship for the tortfeasor. This is the lesson of the workmen's compensation laws. Why should we not apply the same idea in other fields? Why not apply it to compensation for accidents caused by motor vehicles?

In fact, the great number of automobile accidents calls for compulsory insurance of this kind. The first proposal to establish such insurance was advanced in the United States, the country that has the greatest number of automobiles and automobile accidents. The proposal was set forth in 1932 in a committee report to the Columbia University Council for Research in the Social Sciences. That report proposed an extension of the principles of the workmen's compensation laws to motor vehicle accidents.

Under the plan, a motor vehicle owner would be liable, without regard to fault, to pay compensation according to a fixed scale to any person suffering injuries or death caused by the operation of that motor vehicle, and the owner should be required to insure against this liability.

Two years later, without any knowledge of this plan, similar propositions were set forth by a Norwegian lawyer, Emil Stang, who was later appointed Chief Justice of the Supreme Court, and the idea was carried still further by other Scandinavian lawyers and writers, among others by myself.[7] The Scandinavian proposals differed from the Columbia plan in some respects, especially in that the insurance should cover even damage to property up to a certain amount.

I know that the Columbia plan has not led to the enactment of corresponding statutes here in the United States. But after the war Saskatchewan enacted such a statute.[8] In Scandinavia, the war has delayed the revision of our statutes. We have already compulsory insurance against liability for motor vehicles, and certainly we shall proceed along these lines. Recently, the Scandinavian governments have appointed committees to propose a draft of a new uniform act on compensation for automobile accidents, and surely these committees will propose a compulsory insurance scheme with awards of compensation irrespective of fault.

It is my opinion that similar compulsory insurance ought to be introduced in other fields. It ought to be proposed at any rate for all large factories and trades carrying on ultrahazardous activities, e.g., railroads, street cars, or factories producing explosives. On the other hand, compulsory liability insurance ought not to be applied to the ordinary activities of daily life, common to the great number of people. It is not practical to require every man or woman to take out insurance against all harm that he may inflict on the body or property of others. It is impossible to compel poor people to pay the insurance premiums, and very likely the insurance would be expensive.

Turning to the other aspect of insurance, in Scandinavia the question is under discussion whether insurance should take over the functions of tort law so as to restrict or entirely abolish liability for torts in certain fields. This is a very important problem.

7. See my paper in Ugeskrift for Retsvæsen, 1938 B, page 93.

8. The Automobile Accident Insurance Act, 1947, with yearly amendments. It is commented on by Frank P. Grad in "Recent Developments in Automobile Accident Compensation," 50 Columbia Law Review 300 (1950).

At the outset it should be recalled that damages incurred according to tort law are very often paid by insurance companies. If this is so, we might ask this question: Is it reasonable to maintain tort liability in cases where insurance covers the damage? Would it not be better to abolish tort liability under those conditions? This idea may be startling to many lawyers. It goes against tradition, and surely the courts cannot embark on these lines, as the law stands in most countries.

Nevertheless, this question has been discussed in Scandinavia for some years, and in fact, the idea has already been applied in some countries for special kinds of harm. The first instances are to be found in the workmen's compensation laws. In all countries, an employer is liable in tort in the case of intentional harm to his workman. But in some countries he will not be liable for his negligence, unless it is "gross" or "wanton". This is Norwegian law. According to Swedish law, the employer will have to pay the surplus, if damages under tort law exceeded the compensation under the workmen's compensation act. The Danish act limits the remedies of the workman in a similar way. But the insurance does not benefit the employer in the way it does in Norway and Sweden. If he is liable according to tort law, the insurance company, by paying the compensation, will generally be subrogated to the tort remedies of the injured person.

In England the Beveridge plan prompted consideration of the question. The report was in favor of limiting tort liability, so that the tortfeasor would only have to pay the potential surplus as in Sweden. An injured person should not have the same need met twice over. But a minority preferred to allow the use of tort remedies without any restriction. The Law Reform Act of 1948, settled the dispute by a compromise, allowing recovery of part of the damages according to ordinary tort law.[9] I think the report, i.e., the proposal of the majority, was sound.

The rules of the workmen's compensation acts did not lead to a discussion of the wider question of the impact of insurance on tort law. They were considered as particularities. But in fact exactly the same question arises outside the scope of those acts.

In 1901 a Danish author set forth the opinion that a tortfeasor should not be liable to pay damages, if compensation for the loss was owed by an insurance company. In 1917 a Danish attorney,

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9. See W. G. Friedmann, "Social Insurance and the Principles of Tort Liability", 63 Harv. L. Rev. 241 (1949).

N. H. Bache, again took up the idea, and his article [10] provoked further examination of the problem. In 1921, I published a paper on the subject.[11] My conclusion was this: It is not a rule of Danish law that all tort liability ceases in case of insurance covering the damage, and the enactment of his rule cannot be recommended. But it is to be recommended that a restricted application of the idea be introduced by Act of Parliament.

While I wrote my paper, committees from the three Scandinavian countries and Finland were preparing a draft of an Act on Insurance Contracts, and these committees discussed the problem. They did not agree. The Danish committee, of which N. H. Bache was a member, endorsed practically all my proposals. The committees of the other countries wished to maintain the liability of the tortfeasor to the injured person, but to restrict the remedies of the insurance companies as against the tortfeasors. In so doing they followed the model of the German and Swiss act on insurance contracts, but they went far beyond those acts.

The drafts were adopted by the legislatures of the four countries. The Danish Act on Contracts of Insurance is dated April 15th 1930,[12] and its Section 25 contains the following rules (not verbatim): The liability of a tortfeasor is not affected by the existence of life, health, and accident insurance of the usual types. As a rule, the injured person can sue the tortfeasor even after having received payment under the insurance policy.

On the other hand, however, the liability of the tortfeasor may be restricted in case of fire insurance or any other insurance of property or any insurance for indemnity. When the insurance covers the loss, the courts are authorized to exempt the tortfeasor from liability or to reduce the damages, (1) if the liability has to be based on the defendant's negligence and the negligence of the defendant was not gross or wanton, and likewise (2) they may exempt the defendant from liability if the plaintiff has invoked the general rule of *respondeat superior.*

I stress the point that liability does not cease automatically, but that the court may exempt the tortfeasor or the master. The committee considered it inadvisable to abolish all liability in cases where the loss would be made good by an insurance company. It might make people too careless. The wording of the act made it possible for the courts gradually to form more precise

10. Printed in Tidsskrift for Detsvidenskab 1917, page 269.
11. See Tidsskrift for Retsvidenskab 1921, page 19.
12. Its official title is Lov om Forsikringsaftaler, no. 129.

rules, as they were guided by experience. In fact, it happens very often that the courts make use of the rule, but they do not in every case exempt the tortfeasor from liability.

A few cases will illustrate how the courts have handled the rule. First, three cases concerning liability for negligence.

A woman was bicycling on a road. By negligently turning in front of an approaching motor car, she caused the motorist to make use of the brakes. The result was that the car turned over and was damaged. The car was insured, and the insurance company sued her. The court held that the accident was caused by her negligence, but exempted her from liability.

A tenant farmer negligently placed a hand-lantern in a barn in such a way that it caused a fire. The fire insurance company paid 9.600 kr. and sued him, but as he was not guilty of gross negligence, the court reduced the damages to 2500 kr., about one fourth of the amount paid.

A farmer drove into the courtyard of the farm of another. As the horse stepped on the wooden cover of a well, the cover broke and the horse was killed. The horse was insured. It was held that the owner of the farm had been negligent as to the condition of the cover, and that he was liable in full.[13]

As to the vicarious liability of a master, the courts seem to exempt the master from tort liability in most cases. To mention only one judgment given by our Supreme Court: An errand-boy bicycling in a narrow street negligently broke the pane of a shop window. The pane was insured. The master was exempted from liability.

Outside the two hypotheses that have been stated, full liability for tort is maintained. If the rule of liability to be applied is a rule of strict liability for risk or a rule that is more strict than the two rules mentioned above, the defendant has to pay damages without any reduction, either to the injured person or to the insurance company which has paid the compensation and by that payment has been subrogated to the remedies against the tortfeasor. The provision that tort liability is maintained here is based on the practical consideration that hazardous activities ought to bear the economic burden of the harm they inflict on third parties. Either they must pay the damages, or they must themselves take out and pay for insurance against legal liability. Under Danish law, according to this rule, full damages have to be

13. Judgment of the Supreme Court, reported in Ugeskrift for Retsvæsen 1945, page 456.

paid by shipowners, by railroads, by owners of motor vehicles, aircraft, power plants, etc. On the other hand, the defendant may be freed from liability if he has caused harm to others by negligent acts occurring in the everyday life of a common man, e.g. by walking, bicycling, or riding a horse, or by throwing a match that causes a fire. According to the Danish act, under the above conditions the tortfeasor will be exempted from liability even in case the injured person should sue him before he has received compensation from his insurance company. This is, in my opinion, a sensible rule. Otherwise there would be room for chicanery and attempts to obtain improper profits.

The acts of the other Nordic countries have not yet dared to introduce this new approach. They content themselves with a restriction of the remedies of the insurance companies against the tortfeasor.

I think the line of the Danish law is sound. Tort liability is very burdensome, and it can ruin the tortfeasor in a way that is detrimental even to the community. If the liability is maintained, the risk can only be averted by means of insurance against liability. The only essential objection that may be raised to the Danish rule seems to be that such restriction of liability may make people more careless. Certainly this is a serious problem, and it has been much discussed in Scandinavia, but it has proved impossible to agree. Experienced attorneys engaged in the management of companies providing insurance against liability disagree just as much as the law professors. If a provision of the law of torts is changed, it may sometimes be possible to observe that this influences human behavior. But in general it seems impossible to measure the influence of the law of torts on the degree of care in human behavior. The factors influencing human behavior are too complex. It is fairly clear that in some cases the threat of liability for negligence will incite people to greater care. But it is impossible to measure its influence on behavior in general and to predict the consequences of abolishing legal liability under certain conditions. As to this problem, it should be most interesting to exchange experiences. I understand that some studies have been made in the United States by the late Professor Underhill Moore of the Yale Law School;[14] it would be of interest to know what other studies have been made and whether anybody

14. See Moore and Callahan, "Law and Learning Theory: A Study in Legal Controls," 53 Yale Law Journal 136 (1943).

has devised methods to measure the admonitory effects of the law of torts.

My own examinaion of the problem and of a great number of cases has led me to believe that it is possible to set forth at least a few propositions.[15]

As regards conduct involving risk of bodily harm, the abolition of tort liability is not likely to cause increased carelessness, or at any rate not to cause an alarming increase. The penal code and police regulations provide the necessary incentive to be careful. If, on the other hand, the conduct involves only risk of harm to property, the admonitory function of tort liability is presumably greater. In my opinion, it is to be recommended that a tortfeasor acting negligently in a momentary distraction or in a situation of unforeseen danger requiring immediate unpremeditated action, should be exempt from liability on the other hand, I dare not recommend abolition of tort liability in the case of negligence in the planning of a continuing activity or in the construction of dangerous works or engines, or in the keeping in repair of a building.

If the idea of restricting liability is admitted on general principles, it seems evident that the idea ought to be given the greatest possible application. But how are we to proceed? Its sphere of application will depend on the future development of insurance, and we must consider the possibilities of further development in this field. In making some suggestions, I distinguish between harm to persons and harm to property.

For harm to persons, the Scandinavian countries have introduced far-reaching social measures providing support in case of illness, of disablement, and of accidents to workmen and other employees. Lately, Sweden has improved these measures so much that it is not utopian to expect a further improvement that will give the plain workingmen a claim to a reasonable compensation for bodily harm and death. If Sweden succeeds in attaining this goal, the Swedish professor Ivar Strahl holds that Sweden ought to abolish the greater part of tort liability for harm to persons.[16] People that are better off financially would lose the prospect of full compensation, but they would be able to take out additional insurance.

If Sweden succeeds in improving its system of insurance in that way, Mr. Strahl's ideas will certainly be the object of close

15. See Ussing, Nordisk lovgivning om Erstatningsansvar (1950) Copenhaben, page 33.
16. Förberedande utredning angaende lagstiftning pa skadeståndsrättens område (1950) Stockholm, 5 kapitlet.

scrutiny. But at present, the economic prospects of Denmark and Norway are not quite so bright. It is quite certain that for a number of years we can but expect lesser improvements of our social insurance laws. If this is so, we will not be able to abolish the tort remedies in general. But we may introduce the rule that damages for personal injury are to be reduced by the amount to be paid according to the social insurance acts. If we proceed along these lines, the problem as to damages for personal harm is nearly the same as the problem concerning harm to property.

As regards damage to property, it is hardly possible to introduce insurance against all risks. If we want to promote further extension of insurance, two means are at our disposal. The insurance may be taken out and paid by the potential future tortfeasors as liability insurance is, or it may be taken out and paid by the owners of the property, and it will thus be an insurance against harm to that property.

To proceed along the first of these two lines, it will be necessary to form a new type of insurance. The insurance ought to benefit the owners of the damaged property like insurance against liability. But at the same time the tortfeasor should escape liability if his conduct was not particularly dangerous and inadmissible. In other words, insurance against liability should be transformed into insurance against accidents inflicted by his conduct on the property of a third party.

The laws of some countries concerning compulsory insurance providing compensation to workmen exempt the employer from liability, at least partially. Why not extend this idea to other fields?

In 1938, I advocated the plan that every owner of a motor vehicle should be required to take out insurance against bodily harm, death, and harm to property caused by the operation of his motor vehicle. But the owner and the operator of the vehicle should be, in general, exempted from personal liability. For bodily harm and death, the Saskatchewan Acts have introduced provisions very much like those proposed by me.[17] The war delayed the revision of our motor vehicle act. But the Nordic committees that have been appointed lately will have to face this problem. It seems possible to advance along similar lines as regards damage caused by extrahazardous activities. But what I said before makes it relatively clear that it is impossible to com-

17. See my paper in Ukeskrift for Retsvæsen 1951 B, page 41.

pel the common man to take out insurance covering damage that he causes third parties.

If this is so, it will be necessary to examine the possibility of advancing along the other line, by means of insurance against damage to your own property, like fire insurance.

The main obstacle to an advance along this line is that the types of insurance now in use fail to cover every possible damage to property. Insurance has been extended to a great number of risks, but as to property, it covers only special risks, and they form a rather complicated pattern. It would be an important progress to establish a kind of insurance against all accidents to property, no matter in what way they occurred. I set forth this idea some twenty years ago, but it had very little success. Most of our insurance experts seem to think that insurance against accidents to property in general is impracticable. The causes of accidents are innumerable, and many accidents occur in a way that makes it difficult to prove their precise causes.

In order to alleviate the tort liability, it would suffice to introduce insurance against accidents caused by third parties. I have invited our insurance experts to examine this problem in order to find out if more comprehensive insurance against accidents to property is practicable.

To proceed along this line by means of insurance that is paid by the owners of property would be in my opinion have at least one advantage. It seems likely that it would be possible to reach the result that practically all valuable property is insured. It is impossible to compel poor people to insure their property, but they have very little property. Most people who own valuable property could probably be induced to insure it. I think they would be induced to do that, if it were enacted that generally nobody is entitled to claim damages for harm to property, if it could be insured against the risk of such harm.

Of course, it would be necessary to retain tort actions against tortfeasors acting maliciously or recklessly, but the average citizen would rarely incur liability for his negligence.

I am aware that these ideas must undergo further study and scrutiny by other experts. But they ought not to be rejected solely because they are new.

To sum up: My thesis is that for some situations tort liability ought to be maintained in order to restrain tortious conduct, but that, apart from this comparatively narrow field, it will be preferable to have compensation paid by means of insurance. If this

scheme is adopted, the main problem will be who has to take out the insurance and pay the premiums. Broadly speaking, I think that one who conducts an ultrahazardous activity ought to take out insurance against third-party risks, and that a similar rule ought to apply to motor vehicles and perhaps to animals. On the other hand, insurance against the risks of the activities of the common man must be taken out and paid by anyone who wants to insure his own property. Similar rules should be applied to bodily harm insofar as the social insurance schemes do not award adequate compensation.

Besides the automobile committees, the Scandinavian countries have appointed committees of experts to draft a uniform act concerning the tort liability of the state and the municipalities. Surely even these committees will consider the new ideas. It will not be necessary to establish insurance in this field. But under certain conditions the state and the municipalities may be made liable to the same extent as if they were insured.

If we succeed in agreeing on a uniform automobile act, our countries intend to attempt to draft a uniform Scandinavian act on torts in general. We are aware that we will not be able to form workable rules covering the whole field of the law of torts, and that we must take care not to hamper further development of the law of torts in accordance with social conditions. But we will try to devise rules as far as it is possible.[18]

Probably, the most interesting task of these committees will be to consider the impact of insurance on the law of torts, and particularly the question to what extent it will be possible to restrict tort liability for damage that is covered by insurance.

It is my hope that this question will be further examined here in the United States and in other European countries. It is so important that its solution demands co-operation of scholars from more than one country.

18. See the two reports listed in footnotes 15 and 16.