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MALPRACTICE IN SCANDINAVIA

VIBE ULFBECK*, METTE HARTLEV** & MÅRTEN SCHULTZ***

INTRODUCTION

There are different welfare state models, and the Nordic model has certain characteristics not prevalent in other models.¹ First of all, the Nordic model is a universal model where entitlements to social services are based on residency or citizenship and not on employment relation or need. There is a comprehensive social benefit scheme and social services are normally free or subsidized at the point of delivery. Furthermore, there is strong public involvement in the social and economic area to promote equality of the highest standard (and not just equality with regards to basic needs). Thus, the Nordic welfare model is very influenced by an egalitarian ideology.

The Nordic model in relation to tort law (with emphasis on personal injury law) must be understood in this context.

On a general level, Scandinavian tort law is a law of delict. The analysis revolves around the basic concepts of culpa, causation, adequacy, and damage. The culpa rule—the basic principle that holds that liability presumes negligence—provides the standard for personal responsibility. The culpa rule is a dogma in the Scandinavian legal systems: it lies at the core of tort analysis. In reality, however, many injuries will never be tried under the general rules of fault liability. The shift from the general culpa rule to different insurance solutions is in fact considered a foundational develop-

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1. Jon Magnussen, Karsten Vrangbæk, Richard B. Saltman Jon Magnussen & Pål E. Martinussen, *Introduction: The Nordic Model of Health Care*, in *NORDIC HEALTH CARE SYSTEMS: RECENT REFORMS AND CURRENT POLICY CHALLENGES* 3, 3–20 (Jon Magnussen, Karsten Vrangbæk & Richard B. Saltman eds., 2009).

ment of the Scandinavian welfare states in general. It is probably not an exaggeration to say that the introduction of overreaching compensation mechanisms was a core constituent in the construction of the Nordic welfare states. This development often goes under the name of the Nordic model.²

In relation to compensation for injuries, the Nordic model can be characterized in different ways. From a policy point of view, the most fundamental and almost banal idea is that *personal injury should always be compensated*. To achieve this goal, it has generally been agreed that the cost of personal injury compensation is in general best carried by collective entities. The legal system has provided rules that promote the idea that costs resulting from personal injuries are borne by collective entities.

A more detailed picture of the Nordic model in this respect will reveal a complex interplay between social insurance and other kinds of collective compensation schemes as well as personal insurance, and—to a lesser extent—tort law. The Nordic model is not the same as the New Zealand approach to personal injuries; the idea was never that the taxpayer should cover all costs of personal injuries. In fact one of the basic ideas was that the costs instead should be covered by insurance paid for by the party responsible for activities that were thought to be particularly risky (and thus not paid (directly) by the taxpayer).³

In a narrow sense the Nordic model is sometimes used as a collective term for four important compensation schemes: (1) traffic accidents, (2) patient injuries, (3) pharmaceutical injuries, and (4) work-related injuries.⁴ These different insurance systems are crucial to an understanding of malpractice and medical liability in Swedish law since they all entail that fault liability is pushed aside in their respective areas. In a more extensive sense one can see the Nordic model as encompassing not only these comprehen-

2. For some general accounts of the Swedish or Nordic approach to tort law, see Jan Hellner, *Compensation for Personal Injury: The Swedish Alternative*, 34 AM. J. COMP. L. 613 (1986) [hereinafter Hellner, *The Swedish Alternative*]; Jan Hellner, *Compensation for Personal Injuries in Sweden: A Reconsidered View*, 41 SCANDINAVIAN STUD. LAW 249 (2001) [hereinafter Hellner, *A Reconsidered View*]; Carl Oldertz, *Security Insurance, Patient Insurance, and Pharmaceutical Insurance in Sweden*, 34 AM. J. COMP. L. 635 (1986). See Guido Calabresi, *Policy Goals of the "Swedish Alternative,"* 34 AM. J. COMP. L. 657 (1986) for reflections on the Swedish alternative from a policy point of view.

3. Of course, indirectly the system is tax funded. Thus, when public hospitals must pay for insurance, the expenditures of the hospitals rise. These expenditures must be paid by the state, which ultimately means the taxpayer.

4. See Hellner, *A Reconsidered View*, *supra* note 2, at 269–70. See Bill W. Dufwa, *Development of International Tort Law Till The Beginning of the 1990s From a Scandinavian Point of View*, 41 SCANDINAVIAN STUD. LAW 87 (2001) for a more overarching account of Swedish tort law from an international perspective.

sive compensation schemes but also as a providing a general outlook on the relationship between personal injury compensation and insurance.

I. THE OVERALL SCHEME FOR PREVENTING AND REDRESSING MEDICAL ERRORS AND ADVERSE EVENTS

A. Regulatory Methods in the Nordic Health Care Systems

The Nordic approach to compensation for medical malpractice must be understood in the broader context of the Nordic health care systems in terms of organization, regulation, professional duties, and financing.

The organization of health care services varies slightly among the Nordic countries. Different organizational levels may be operating (e.g., state, regions, and municipalities), and some fluctuation between centralization and decentralization may be observed.⁵ In general, financing of the health care services is the public's responsibility, and most services are covered by a tax-paid health service scheme (a so-called Beveridge model). However, private service providers are also, to an increasing extent, operating in the Nordic countries: in some situations people would rather pay for treatment at private hospitals than make use of the available public health care schemes.⁶ The strong involvement of public financing also affects the no-fault compensation scheme as compensation ultimately comes from the taxpayers. This may have an impact on the level of compensation.

In general, health care professionals are subject to legal regulation stipulating rights and duties, and most groups of health care professionals are covered by a licensing system operated by the public health care authorities (and not by the professions themselves). This provides the authorities with the power to survey and control the professional performance of health care professionals and also to issue sanctions in cases of malpractice. In serious cases the professional's license may be withdrawn. Together with complaint mechanisms, this serves the purpose of preventing medical malpractice. Patients are entitled to complain both with regard to violations of patients' rights (e.g., right to information) and in cases of medical malpractice. The complaint procedures are organized differently in each of the

5. Pål E. Martinussen & Jon Magnussen, *Health Care Reform: The Nordic Experience*, in *NORDIC HEALTH CARE SYSTEMS: RECENT REFORMS AND CURRENT POLICY CHALLENGES*, *supra* note 1, at 21–52.

6. This is, for example, the case in Denmark. Mette Hartlev, *Forwards or Backwards? New Directions in Danish Patients' Rights Legislation*, 18 *EUR. J. HEALTH L.* 365, 367–69 (2011).

Nordic countries.⁷ Recently, there has been an increasing interest in improving patient safety, for example, through obligations to report adverse events. This promotes a “learning approach” to adverse events with the purpose of preventing risks and faults in the future. As may be clear from this brief description of the broader context, there are various mechanisms in the Nordic health care systems that serve the purpose of preventing medical malpractice. Consequently, the compensation system must be viewed in connection with these other mechanisms.

B. Compensation Systems

A noteworthy feature of the Scandinavian system’s approach to malpractice is the Nordic countries’ various patient insurance systems.

Sweden was the first Nordic country to develop a patient insurance system⁸. Here, the first patient insurance scheme was introduced in 1975. Afterwards, the development in Sweden spread. Thus, a patient insurance act was adopted in Finland in 1984, in Norway in 1988, and in Denmark in 1992.⁹ All of these acts were inspired by the Swedish scheme, although they were not entirely identical. The current Patient Injuries Acts will be referred to as the Swedish PIA¹⁰, the Finish PIA¹¹, the Norwegian PIA¹², and the Danish KEL¹³.

When it comes to the details of the way the systems are organized, the Swedish system can serve as an illustration. Liability insurance in Sweden is mandatory and regulated in the Patient Insurance Act. Patient insurance is supplied by a company called Landstingens Ömsesidiga Försäkringsbolag (LÖF).¹⁴ All county council districts (*landsting*), which are the chief suppliers of health care in Sweden, have taken up insurance

7. Ulrika Winbland & Ånen Ringard, *Meeting Rising Public Expectations: The Changing Roles of Patients and Citizens*, in NORDIC HEALTH CARE SYSTEMS: RECENT REFORMS AND CURRENT POLICY CHALLENGES, *supra* note 1, at 126–50.

8. Edvard Nilsson, Ulf K. Nordenson, Carl Oldetz & Erland Strömbäck, *Personskaderättens utveckling – ersättning på grund av individuell skadeståndsrätt eller kollektiv försäkring*, in PATIENT – OCH LÄKEMEDEL FÖRSÄKRINGEN VID ETT VÄGSKÅL. VÄNBOK TILL CARL E STURKELL, 19–21 (1996).

9. See Bo von Eyben, *Alternative Compensation Systems*, 41 SCANDINAVIAN STUD. LAW 193, 201–02 (2001) for a description of this development.

10. PATIENTSKADELAG (Svensk författningssamling [SFS] 1996:799) (Swed.).

11. Potilasvahinkolaki [Patient Injury Act] No. 585, July 25, 1986 (Fin.).

12. Lov om erstatning ved pasientskader mv. (Pasientskadeloven) [Patient Injury Act] No. 53, June 15, 2001 (Nor.).

13. Lov om klage- og erstatningsadgang inden for sundhedsvæsenet [Law on the Right to Complain and Receive Compensation within the Health Service] No. 706, June 25, 2010 (Den.).

14. See PATIENTFÖRSÄKRINGEN LÖF, <http://www.patientforsakring.se/> (last visited Oct. 20, 2011).

with the LÖF.¹⁵ Private health care providers also fall under the insurance scheme as regulated by their contracts with the county council districts.

Malpractice is sometimes seen as an area of the law where the Scandinavian systems have been especially successful in avoiding the perceived absurdities in other jurisdictions.¹⁶ Scandinavian lawyers will generally talk about malpractice law in the U.S., or rather the stories about malpractice law in the U.S., with a tone of horror in their voices. One of the most common arguments in favour of the Nordic model in this area is that it successfully avoids the (supposedly) perverse effects of malpractice law in the U.S. A side effect is that malpractice law in Scandinavia is sometimes obscure.

C. Liability Systems

Tort law is a legal discipline that has gone from being perceived as a part of criminal law to a “pure” civil law subject in Scandinavian law. There are still remnants of the idea that tort law is connected to criminal law, noticeable for instance in the fact that the rules on defences in the Criminal Code are thought to apply also in tort law, without it even being mentioned in any tort law legislation. Also, tort law has gone from the situation where there were very few statutory rules that directly (i.e., without being considered as applied by analogy) dealt with tort liability. This changed in the nineteenth century. The most important legislative input in the development of the current understanding of fault liability is undoubtedly the introduction of statutes of tort liability.

In Sweden, the Tort Liability Act came into force in 1972.¹⁷ This act was the first overarching legislation on tort liability in Swedish law. Previously, the main source of tort principles in legislation was the sixth chapter of the Penal Act, a predecessor of today’s Criminal Code.¹⁸ The Tort Liability Act was never intended to be a full codification of tort law. Many basic criteria for liability were left out of the statute. For instance, the general requirement of causation is not mentioned at all in the act. Still, it is clear from the preparatory works that causation was still to be considered a

15. *Id.*

16. For a comparative study between Swedish and U.S. law, see LOTTA WESTERHÄLL, AN INTRODUCTION TO MEDICAL MALPRACTICE LAW IN THE UNITED STATES AND SWEDEN—THE RIGHTS OF PATIENTS (1992).

17. SKADESTÄNDSLÄG (Svensk författningssamling [SFS] 1972:207) (Swed.).

18. STRAFFLAGEN (Svensk författningssamling [SFS] 1864:11); BROTTSBALKEN (Svensk författningssamling [SFS] 1962:700) (Swed.).

requirement of liability.¹⁹ Many other basic liability requirements, as well as other tort principles, were also left uncodified.²⁰

D. The Relationship Between the Systems

Theoretically, there are several ways in which a patient who has suffered injury may claim compensation. He can be compensated in the form of damages under the rules of tort law, he can claim compensation under the patient insurance scheme and, in addition, he can sometimes claim compensation under his own private insurance. However, most often, the cases will be dealt with under the insurance schemes.

Nevertheless, all of the Scandinavian legal systems except for one (the Danish system) allow for the ordinary tort law rules to be applied as an alternative to the compensation systems. Thus, even if the patient has the right to obtain compensation under the special insurance scheme, he normally still has the choice to instead claim compensation under tort rules if he so prefers. In Swedish law, the patient insurance then works as liability insurance.

The possibility of using tort law instead of the alternative compensation scheme is seldom used. Very few medical malpractice cases are thus dealt with directly under the rules of tort law. If a case went to court the plaintiff would bear the burden of proving the circumstances on which she bases her claim. This means that the burden of proof for loss, causation, and fault falls on the plaintiff. The patient's position is substantially better within the patient insurance scheme.

The few malpractice cases that do go to court, therefore, most often concern injuries that the patient insurance does not cover.²¹

In Danish law, the system is a little different. Here, application of the ordinary tort law rules is precluded if the patient has the right to obtain compensation under KEL.²² The idea behind the system is to channel liability to the patient insurance. However, this rule does not apply in the case of product liability. In these cases, the right to claim damages under tort

19. Proposition [Prop.] 1972:5 Kungl. Maj:ts proposition med förslag till skadeståndslag m. m. [government bill] (Swed.) at 21.

20. Similar developments were seen in the other Nordic countries. In Denmark the first Tort Liability Act came into force in 1984. Bekendtgørelse af lov om erstatningsansvar [Act on Liability] No. 885, Sept. 20, 2005 § 28 (Den.). In Norway, the Tort Liability Act dates back to 1969. Lov om skadeserstatning (Skadeserstatningsloven) [Damages Act] No. 26, June 13, 1969 (Nor.).

21. See *infra* pt. II.A.3.b.

22. See Lov om klage- og erstatningsadgang inden for sundhedsvæsenet [Law on the Right to Complain and Receive Compensation within the Health Service] No. 24, Jan. 21, 2009 § 26 (Den.).

law as an alternative to the patient insurance is upheld.²³ The reason for this is that the Danish product liability rules are based on an E.U. directive that requires that the injured party can sue the producer.

II. THE DETAILS OF THE APPLICABLE LIABILITY AND COMPENSATION SYSTEMS

A. Patient Injury Compensation Systems

1. Introduction

Since the patient insurance systems for all practical purposes are the key to understanding Scandinavian malpractice law, the following will focus on these compensation systems and not on ordinary tort law. Although all of the Scandinavian patient injury systems are based on the same basic idea, there are still differences between the compensation systems when it comes to the details. The following is an attempt to give a fuller description of the central, common rules in the insurance schemes and to point out some differences.

2. Basis for Compensation

a. The Experienced Specialist Standard

The experienced specialist standard is a common feature of the Nordic medical malpractice compensation systems.²⁴ According to this rule, compensation shall be paid for an injury if it may be assumed that an experienced specialist in the field in question under the given circumstances would have acted differently during examination, treatment, or the like, thereby avoiding the injury.²⁵

The term “experienced specialist” means that the evaluation must be based on an *optimus vir* standard.²⁶ This refers to the best doctor in the particular field as opposed to any good and reasonable doctor. Thus, the classic fault rule is not in play. In contrast, the overall question is if the

23. *See id.* § 28.

24. The rule is found in the following: for Denmark, *see id.* § 20 para. 1(1); for Finland, see Potilasvahinkolaki [Patient Injury Act] No. 585, July 25, 1986 § 2 para. 1(1) (Fin.); for Sweden, see 6(1) § PATIENTSKADELAG (SFS 1996:799) (Swed.). In contrast, the experienced specialist standard is not found in the Norwegian PIA; instead, there is strict liability for injuries caused by treatment. *See* STEN FOYN, ANNE MARGRETHE LUND & OLA VIKEN, PASIENTERS RETTSSTILLING 190 (1990).

25. *See* Skadeståndslag (Svensk författningssamling [SFS] 1972:207) (Swed.).

26. BØJE POMMER, PATIENTSKADEERSTATNING 72 (2011); Bo VON EYBEN & HELLE ISAGER, LÆREBOG I ERSTATNINGSRET 396 (2011).

patient has received the treatment, which according to medical science and experience, would have been the best for him.

If the experienced specialist would have acted differently and thereby avoided the injury, the patient is entitled to compensation. The evaluation, in other words, is objective and implies a hypothetical course of events. Under this hypothetical course of events, the actual doctor is “replaced” with the best doctor.

It should be noted, however, that the rule does not imply that the patient has an absolute right to receive the optimal treatment. Under Danish law, this follows from KEL section 20, paragraph 1, clause 1, which specifies, “. . .in the given circumstances.”²⁷ Thus, the resources and facilities that were available in the specific situation must be taken into consideration. Lack of resources, which may lead to a lack of personnel or a lack of the newest technical equipment, may be a valid excuse and imply that there is no right of compensation according to the specialist rule.

However, if the experienced specialist in a given situation could have sent the patient to a more experienced specialized hospital and refused to treat the patient himself because of a lack of resources, the patient may be entitled to compensation. It is a requirement that the referral could have avoided the injury. If a transfer would not have been an option (e.g., if urgent measures had to be taken to save the patient’s life), the experienced specialist could not have avoided the injury by a transfer, and the patient would not be entitled to receive damages.²⁸

b. The Failure of Apparatus

Another common feature is the “failure of apparatus” rule.²⁹ This rule deals with injuries due to the malfunction or failure of technical apparatus, instruments, or other equipment used for or in connection with examination, treatment, or the like. The rule establishes strict liability.

If the injury results from malfunction of equipment falling under the rule, the patient is entitled to compensation. The reason why the equipment

27. Law on the Right to Complain and Receive Compensation within the Health Service No. 24, Jan. 21, 2009 § 20 para. 1(1) (Den.). See Lov om erstatning ved pasientskader mv. (Pasientskadeloven) [Patient Injury Act] No. 53, June 15, 2001 § 2 para. 2 (Nor.), for Norwegian law.

28. KRISTINA SPROVE ASKJÆR, NIELS HJORTNÆS & PETER JAKOBSEN, ERSTATNING INDEN FOR SUNDHEDSVÆSNET 85 (2008); BØJE POMMER, PATIENTSKADEERSTATNING 82 (2011); BO VON EYBEN & HELLE ISAGER, LÆREBOG I ERSTATNINGSRET 397 (2011).

29. The rule is found in the following: Law on the Right to Complain and Receive Compensation within the Health Service No. 24, Jan. 21, 2009 § 20 para. 1(2) (Den.); Potilasvahinkolaki [Patient Injury Act] No. 585, July 25, 1986 § 2 para. 1(2) (Fin.); 6(2) § PATIENTSKADELAG (SFS 1996:799) (Swed.); Pasientskadeloven [Patient Injury Act] No. 53, June 15, 2001 § 2 para. 2(b) (Nor.).

did not function is of no importance. In this respect, the rule goes further than the product liability rules. Thus, the rule does not require that the equipment is defective within the meaning of the Product Liability Act, and there is no “state of the art” defence available. The main purpose of the rule is to ensure that it is no concern to the patient what kind of technical failure has occurred.

However, if the malfunction or failure of the technical equipment is in fact within the scope of the Product Liability Act, the patient has the choice to claim damages under this Act instead of invoking the special patient insurance schemes.³⁰ As a starting point, the level of compensation will be the same under the two sets of rules.

It should be noted that the failure of apparatus rule covers *any* equipment that is being used during the examination or treatment. It is of no importance how complicated or simple it may be.

c. The Alternative Treatment Rule

Both Danish and Swedish law recognize the “alternative treatment rule.”³¹ According to this rule, compensation shall be paid if, on the basis of a subsequent evaluation, the injury might have been avoided using another available treatment technique or treatment method that would have been just as successful in treating the patient’s illness from a medical point of view.

The rule is relevant in situations where the doctor had an alternative between the treatment he used and another available treatment, which would have been just as effective, that would have been a better choice for the patient. Again, the theme is not what the individual doctor should have done but what from an objective point of view would have been the better choice. Thus, the alternative treatment rule is not a fault-based rule.

This most clearly becomes apparent when looking at the exact wording of the rule. The keywords of the alternative treatment rule are “. . . subsequent evaluation.”³² This means that when evaluating whether the injury could have been avoided, not only is information available at the time of the treatment taken into consideration, but also information that

30. In Danish law, this follows explicitly from Law on the Right to Complain and Receive Compensation within the Health Service No. 24, Jan. 21, 2009 § 28 (Den.). See UfR 2001.2338H, 2344 (2001) (Den.). The case concerned a kidney transplant carried out at a public hospital.

31. See Law on the Right to Complain and Receive Compensation within the Health Service No. 24, Jan. 21, 2009 § 20 para. 1(3) (Den.); 6(1) § PATIENTSKADELAG (SFS 1996:799) (Swed.). Similar rules are not found in the Finnish PIA or the Norwegian PIA; however, under the Norwegian PIA this should be seen in the light of the strict liability rule. See discussion, *supra* pt. II.A.2.b.

32. 6(1) § PATIENTSKADELAG (SFS 1996:799) (Swed.).

becomes available after the treatment or examination has taken place.³³ In this sense, the evaluation of what was unavoidable is determined using hindsight.

Nevertheless, the alternative method or technique must have been a current option that was actually available when the patient was treated or examined. The doctor must have had a real choice when treating the patient. This alternative or choice does not have to be a skill that the doctor masters himself. If an alternative method exists somewhere else in the health service system, the doctor must refer the patient.³⁴

d. The Reasonableness Rule

The Nordic compensation systems also—to varying degrees—apply a reasonableness rule. In the Danish and Finnish systems, this reasonableness rule is of a general nature. It provides that compensation must be paid if injury occurs as the result of examination, including diagnostic procedures or treatment in the form of infections or other complications that are more extensive than the patient should reasonably have to bear.³⁵ The following aspects must be taken into account: the severity of the injury, the patient's illness and general state of health, the rareness of the injury, and the general possibility of taking the risk of its occurrence into consideration.

Also under the Norwegian PIA a general reasonableness rule is acknowledged.³⁶ Under Swedish law, a similar rule applies, but only in relation to infections.³⁷

Under Danish law, this rule is meant to encompass the injury situations that are not within the scope of KEL section 20, paragraph 1, clauses 1–3. The Danish KEL section 1, paragraph 1, clause 4 applies in the situation where damages cannot be claimed by using clauses 1–3, and where not awarding the patient damages would be even more inappropriate under a reasonableness test.³⁸

The rule rests on the basic assumption that some injuries must be accepted by the patient. In order to be compensable, the injury must be dis-

33. KRISTINA SPROVE ASKJÆR, NIELS HJORTNÆS & PETER JAKOBSEN, ERSTATNING INDEN FOR SUNDHEDSVÆSNET 95 (2008).

34. See UfR 2007.477H (2007) (Den.), for an illustration of the application of the rule. The court rejected liability for not having carried out surgery prior to a brain haemorrhage.

35. See Law on the Right to Complain and Receive Compensation within the Health Service No. 24, Jan. 21, 2009 § 20 para. 1(4) (Den.); Potilasvahinkolaki [Patient Injury Act] No. 585, July 25, 1986 § 2 para. 1(7) (Fin.).

36. See Pasientskadeloven [Patient Injury Act] No. 53, June 15, 2001 § 2 para. 3 (Nor.).

37. 6(4) § PATIENTSKADELAG (SFS 1996:799) (Swed.). See *infra* Part II.A.2.g.

38. Law on the Right to Complain and Receive Compensation within the Health Service No. 24, Jan. 21, 2009 § 20 (Den.).

proportionate compared to the underlying disease and the consequences that could normally be expected of it. This means that the more serious the initial disease, the more substantial complications must be accepted.³⁹

e. "Accidents"

In Sweden, certain injuries caused by accidents may be compensated under the PIA, for instance, when a patient suffers an injury caused through a fire at a hospital.⁴⁰ An equivalent rule is found in Finnish law.⁴¹ In contrast, Danish and Norwegian compensation systems only compensate such accidents if there would have been a basis for liability under ordinary tort law rules.⁴²

f. Wrong Diagnosis

In the Swedish PIA there is a special rule on injuries caused by an incorrect or delayed diagnosis. Such injuries are compensable under the patient injury scheme.⁴³ Compensation for wrongful diagnosis is awarded only if it may be assumed that an experienced specialist in the field in question under the given circumstances would have acted differently. A similar rule applies under Danish law.⁴⁴

g. Infection

In Swedish law, as well as in Finnish law, there is a special rule dealing with compensation for infections. Thus, if an injury results from an infection which originates from an examination, treatment or similar action, the patient has a right to be compensated, unless the patient is required to endure the injury in view of the predictability of the infection, the degree of severity of the injury sustained, the nature or difficulty of the illness or impairment that was being treated and the patient's overall health.⁴⁵

39. See UfR 2001.2505H, 2509 (2001) (Den.), for an illustration of the application of the rule. The case concerned damage to intestine caused by radiation treatment.

40. See 6(5) § PATIENTSKADELAG (SFS 1996:799) (Swed.).

41. See Potilasvahinkolaki [Patient Injury Act] No. 585, July 25, 1986 § 2 para. 1(5) (Fin.).

42. See Law on the Right to Complain and Receive Compensation within the Health Service No. 24, Jan. 21, 2009 § 21 para. 2 (Den.); Pasientskadeloven [Patient Injury Act] No. 53, June 15, 2001 § 2 para. 1(e) (Nor.).

43. See 6(3) § PATIENTSKADELAG (SFS 1996:799) (Swed.).

44. See Law on the Right to Complain and Receive Compensation within the Health Service No. 24, Jan. 21, 2009 § 21 para. 1 (Den.).

45. See Potilasvahinkolaki [Patient Injury Act] Act No. 585 of July 25, 1986 § 2 para. 1(3) (Fin.); 6(4) § PATIENTSKADELAG (SFS 1996:799) (Swed.); cf. 6(2) § PATIENTSKADELAG (SFS 1996:799) (Swed.).

3. Causation

a. The Concept of Causation in Scandinavian Law

Causation is a general requirement for liability, and it is also a prerequisite for compensation from patient insurance. It is generally assumed that the requirement of causation is to be understood uniformly—it has the same meaning in tort law as well as patient insurance law. However, the question of how Scandinavian law deals with uncertain causation in medical malpractice cases is difficult to answer for several reasons. The concept of causation in Scandinavian law is more vague than in many other legal systems. Scandinavia does not have the firm basis in a *conditio sine qua non* view of causation that most other Western countries share, and instead the Scandinavian tort law systems operate with a more open, pragmatic approach to the causal requirement.⁴⁶ For example, courts are open to finding ways around the difficult problems of uncertain causation through flexible variations of the concept of causation. Before some specific problems associated with causation in cases of malpractice are addressed, a few general remarks should be made on the how the concept of causation is perceived in the Scandinavian legal systems.

The causal inquiry in Scandinavian law is generally perceived of as a two-tier process. The first step is the *factual-causation inquiry*: did the intentional or negligent act of the defendant actually cause the damages or injuries of the plaintiff? The second step is the *adequate-causation inquiry*: was the act or event in question an adequate cause of the damages or the injuries of the plaintiff?⁴⁷ In English legal terminology this is usually referred to as the proximate-cause inquiry, or placed under headings such as “remoteness” or “foreseeability.” In other words, it deals with excluding from the scope of liability acts or events that, even though in fact causally connected with the conduct, are considered too unforeseeable or remote. In the Scandinavian countries, these demarcation problems primarily fall under the heading of “adequacy,” or the adequacy test.⁴⁸

46. See generally MÅRTEN SCHULTZ, *KAUSALITET* (2007).

47. Whether causation is a link between events, facts, or some other entities has been a matter of debate. See, e.g., Tony Honoré, *Necessary and Sufficient Conditions*, in *THE PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 367, 367 (David G. Owen ed., 1995). See also J.L. MACKIE, *THE CEMENT OF THE UNIVERSE* 248 (L. Jonathan Cohen ed., 1974); D.H. MELLOR, *THE FACTS OF CAUSATION* 119–20 (1995); Donald Davidson, *Causal Relations*, in *ESSAYS ON ACTIONS AND EVENTS* 149, 149 (1980); D.H. Mellor, *The Singularly Affecting Facts of Causation*, in *METAPHYSICS AND MORALITY: ESSAYS IN HONOUR OF J.J.C. SMART* (1987), reprinted in *MATTERS OF METAPHYSICS* 201, 201 (1991).

48. See HÅKAN ANDERSSON, *SKYDDSÅNDAMÅL OCH ADEKVANS* 29–36 (1993) for a thorough investigation. See also MÅRTEN SCHULTZ, *ADEKVANSLÄRAN* (2010).

The requirement of causation can often pose special problems in malpractice cases. From the Scandinavian perspective, the problem of establishing causation in a particular case sometimes converges with the problem of capturing what the requirement actually entails. There seem to be some differences between the Scandinavian systems when it comes to the concept of causation.

In the Scandinavian systems the requirement of causal connection does not follow from any provisions of the different statutes, but is generally said to belong to the unwritten general and fundamental tort law principles. The absence of statutory support is perhaps not surprising since the Scandinavian legislators never intended to codify tort liability law in its entirety: none of the Scandinavian countries have a civil codification. For an understanding of the content of general tort law principles, Scandinavian lawyers will generally fall back on other legal sources, such as the preparatory works of the legislation and decisions by the Supreme Court.

The preparatory works do not give any clear guidance on the issue of causation in any of the Scandinavian countries. The only Supreme Court in Scandinavia that has taken a more or less clear stand on the issue of the concept of causation is the Supreme Court in Norway. The Norwegian court has thus stated that the causal requirement is generally to be understood in accordance with the *conditio sine qua non* theory, which entails that the assessment of causation is carried out through a but-for test.⁴⁹

In the absence of clear guidance from the courts the main source for understanding the concept of causation is legal literature. The leading works indicate that the Scandinavian systems seem to uphold something like a but-for test as a first step but it is less clear than in many other jurisdictions. As for Denmark, the *conditio sine qua non* approach seems to be considered the starting point for the causal analysis. The leading textbook by Bo von Eyben and Helle Isager thus holds that the first question in an investigation of causation is the but-for test.⁵⁰ Within the Swedish discussion, one cannot find any dominant, favored approach for dealing with actual causation the way the so-called *sine qua non* test (but-for test) has been used in many other jurisdictions.⁵¹ It has previously been argued that

49. In Rt. 1992, § 64 the Norwegian Supreme Court thus states (in translation): "The requirement of causation between an act or an omission is generally fulfilled when the damage would have occurred if the act or omission is thought away. The act or omission is then a necessary condition for the damage."

50. BO VON EYBEN & HELLE ISAGER, *LÆREBOG I ERSTATNINGSRET* 286 (2011).

51. For comparative accounts on the application of the so-called *sine qua non* theory in other jurisdictions, see Tony Honoré, *Causation and Remoteness of Damage*, in 6 *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW* 7 (A. Tunc ed., 1983); 2 CHRISTIAN VON BAR, *THE COMMON EUROPEAN LAW OF TORTS* 433–98 (2000).

the *conditio sine qua non* approach captures the concept of causation also in Swedish law. Today the picture is more complex. Recent Swedish publications have argued for alternative approaches to causation, especially for some sort of NESS test.⁵² Norwegian authors have put forward other models of causation; especially noteworthy in this regard is Nils Nygaard's so-called risk realisation theory.⁵³ According to some scholars, Nygaard's theory resembles John Mackie's INUS-approach to causation (which resembles with the NESS test).⁵⁴

It should be clearly stated that the Scandinavian stance on the issue of cause-in-fact is ambiguous and difficult to interpret. It seems clear that the but-for test does not have the dominant position that it has in many other countries.⁵⁵ However, a couple of points can be made with some certainty. The twofold causal inquiry is generally taken for granted.⁵⁶ Also, the apparatus of necessary and sufficient conditions is seen as a tool that in some way could be used when carrying out the first factual inquiry. There are some that still argue that this inquiry is to be, or should be, more or less, carried out in accordance with the but-for test, but other writers are more cautious and do not take a firm position on any specific method.⁵⁷

The general impression is that it is difficult to clearly state how the core view on causation in Scandinavian law actually is to be understood. An illustrative example of this skepticism towards causal theory is the late professor Jan Hellner's review of Hart and Honoré's seminal *Causation in the Law*. The review criticized Hart and Honoré's argument that the approach to analyze causation from a common sense perspective could even lead to *begriffsjursprudenz*, a legal system-building pursuit so detested in

52. See SCHULTZ, *supra* note 46. The notion of NESS has been introduced by Richard W. Wright, building on the account in Hart & Honoré's seminal *Causation in the Law*, as well as on ideas by the philosopher John Mackie. See H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 112 (2d ed. 1985). For Richard W. Wright's analysis, see Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1788 (1985); Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1019 (1988); Richard W. Wright, *Once More Into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1101-03 (2001).

53. NILS NYGAARD, *SKADE OG ANSVAR* 326 (5th ed. 2000).

54. See BJARTE ASKELAND, *ERSTATNINGSRETTLIG IDENTIFIKASJON* 85 (2002).

55. Concerning the comparative claim that the but-for test is dominant in many other jurisdictions, see VON BAR, *supra* note 51, at 437. See also Jaap Spier & Olav A. Haazen, *Comparative Conclusions on Causation*, in UNIFICATION OF TORT LAW: CAUSATION 127, 127 (Jaap Spier ed., 2000) ("All jurisdictions recognise causation as a requirement of tortious liability and all legal systems consider a *conditio sine qua non* as such as a first test.").

56. That is, a dichotomy between the cause-in-fact inquiry and the legal process of evaluation is taken for granted. See SCHULTZ, *supra* note 46, at ch. 8.

57. Cf. Jan Hellner, *Causality and Causation in Law*, 40 SCANDINAVIAN STUD. LAW. 111, 132 (2000) ("Most writers do not seem to take any clear position on this point, or may be that they frame the problems in other terminology.").

Scandinavia.⁵⁸ Within the Scandinavian legal systems, the conceptual analysis associated with causation in other jurisdictions has been considered misguided, especially in light of the well known flaws of the traditionally favored *conditio sine qua non* theory. It is therefore very unusual that the terminology of necessary and sufficient conditions is even mentioned in judgments and other legal texts. The attitude seems to be changing, especially among scholars, but the “pragmatic” approach to causation still holds strong in the courts.

b. The Problems of Causation in Malpractice Law

In general, it may be assumed that malpractice law, as well as patient injury law, takes the analysis of the basic concepts of tort law for granted. The concept of causation in a malpractice case, and also when it comes to compensation under the rules of patient insurance, is thus the same concept as that employed in the general law of torts. A more interesting issue is whether special doctrines or principles can be allowed to influence the analysis of causation in malpractice law as a complement to the traditional apparatus.

Malpractice cases have challenged traditional legal analysis in many jurisdictions. These challenges have produced new legal doctrines, such as the doctrine of loss of chance and probabilistic causation. The Scandinavian legal systems have not really had a discussion on these issues. From a comparative perspective this might be seen as strange, perhaps even underdeveloped.⁵⁹ An explanation can be found in the previous account. Few malpractice cases are tried under the rules of tort law and claims under the patient insurance scheme seldom reach the courts.

It seems that the development of tools such as the doctrine of loss of chance, proportional liability, or probabilistic causation is at least partly a product of the difficulties of providing reasonable results within the traditional conceptual apparatus, for instance in some malpractice cases. The Scandinavian legal systems take a more open, pragmatic approach to basic concepts such as causation, but also of the different concepts of damages

58. Jan Hellner is one of the leading Scandinavian tort scholars in legal history. For his review of Hart & Honoré's *Causation in the Law*, see Jan Hellner, Book Review, in SVENSK JURISTTIDNING 525, 525–26 (Birger Ekeberg et al. eds., 1960). See also ANDERSSON, *supra* note 48, at 306 n.74; BILL W. DUFWA, FLERA SKADESTÄNDSSKYLDIGA [JOINT AND SEVERAL TORTS] 935 n.44 (1993); ALEKSANDER PECZENIK, CAUSES AND DAMAGES 379–380 (1979); ULF PERSSON, SKADESTÄNDS—OCH FÖRSÄKRINGSRÄTTSLIGA STUDIER 114–117 (1962). For a less critical view towards the common sense approach, see Folke Schmidt, *Orsaksproblemet under debatt*, in SVENSK JURISTTIDNING 209, 209 (Birger Ekeberg et al. eds., 1954); Mårten Schultz, *Further Ruminations on Cause-In-Fact*, 41 SCANDINAVIAN STUD. L. 478, 479–80 n.61 (2001).

59. See discussion, *supra* pt. I.E.

(e.g., physical injury), so that situations that have provoked courts to develop the loss of chance doctrine in other jurisdictions could be handled through a flexible interpretation of the standard concepts.

c. Relaxation of Evidence

It is a common approach in Scandinavian law to seek solutions to problems of causation within the law of evidence. To put it somewhat provocatively, courts, and to some extent also scholars, sometimes seem to think that the problems of capturing the essence of the causal requirement can be solved by relaxing the burden of proof. This holds also for malpractice cases.

In Denmark, the difference between the general rules of private tort law and KEL is that the requirement for evidence is relaxed for causal connection between the examination or treatment and the injury. According to KEL, it is sufficient if on a balance of probabilities there is causation. KEL section 20 states that “[c]ompensation shall be paid if, on the preponderance of the evidence, the injury was caused. . .”⁶⁰ Thus, the right to compensation is not dependent on proof of causation to the level of certainty that the Danish courts would normally require. In fact, probability of 51 percent is enough.⁶¹

A similar rule exists in Sweden. In section 6 of the PIA it is stated that for the purpose of patient insurance compensation it is sufficient if the patient, on the preponderance of the evidence, establishes causation.⁶²

Also, the Norwegian PIA contains a special rule dealing with evidentiary matters in relation to causation. Thus, section 3 in the Norwegian PIA states that if the cause of an injury of a patient cannot be brought to light, and it is likely that the injury is caused by an external influence during the treatment, it is normally to be assumed that the injury was caused by a failure in the supply of the health care service.⁶³

60. Lov om klage- og erstatningsadgang inden for sundhedsvæsenet [Law on the Right to Complain and Receive Compensation within the Health Service] No. 24, Jan. 21, 2009 § 20 para. 1 (Den.).

61. *See, e.g.* UfR 2006.1717H, 1719 (2006) (Den.); The court did find sufficient proof of causation. UfR 2006.1114H, 1114 (2006) (Den.); Damage to shoulder and arm which occurred shortly after surgery was not considered caused by the surgery. UfR 2002.1690H/2, 1693 (2002) (Den.) The requirement of causation was regarded fulfilled..

62. 6 § PATIENTSKADELAG (SFS 1996:799) (Swed.).

63. Lov om erstatning ved pasientskader mv. (Pasientskadeloven) [Patient Injury Act] No. 52, June 15, 2001 § 3 (Nor.).

d. Assessment of Damages

In all of the Scandinavian systems, it is the starting point that compensation of a patient injury is calculated in accordance with the general principles of damage in the law of torts.⁶⁴ This means that a patient who receives compensation under the patient injury scheme will get the same compensation that a court would have awarded if the case had been tried under the rules of tort law. In general, the level of compensation for personal injuries in the Scandinavian countries is lower than the level of compensation known in other countries.⁶⁵ In addition, in all of the Scandinavian legal systems, the amount payable in a case of a patient injury is limited, so that minor injuries are not compensable.⁶⁶

III. AVAILABLE EMPIRICAL DATA

The Danish Patients Insurance Association, the Finnish Patient Insurance Centre, the Norwegian System of Compensation to Patients, and the Swedish Patient Insurance Scheme have excellent and updated statistical information on their websites to which we refer for those who are looking for more detailed empirical data.⁶⁷ In general, the number of claims regarding medical malpractice has increased during the last years in most Nordic countries and so has the annual compensation awarded by the no-fault compensation schemes.

For example, in Denmark the number of claims rose from 5,519 in 2008 to 7,489 in 2010.⁶⁸ This increase may partly be explained by in-

64. See Law on the Right to Complain and Receive Compensation within the Health Service No. 24, Jan. 21, 2009 § 24 para. 1 (Den.); Potilasvahinkolaki [Patient Injury Act] No. 585, July 25, 1986 § 3 (Fin.); Pasientskadeloven [Patient Injury Act] No. 53, June 15, 2001 § 4 (Nor.); 8 § PATIENTSKADELAG (SFS 1996:799) (Swed.).

65. See von Eyben, *supra* note 9, at 194 (stressing that comparisons are made difficult by the fact that there are large differences between the social security systems and that way these systems are coordinated with ordinary tort law).

66. In Swedish law, a “fee” is deducted from the compensation, which under the Patient Injury Act is 5 percent of the base amount defined by law (approx. 2600 SEK in 2011, or roughly 300 Euro). See 9 § PATIENTSKADELAG (SFS 1996:799) (Swed.). In Danish law, compensation cannot be obtained for losses below 10,000 DDK (or roughly 1300 Euro). See Law on the Right to Complain and Receive Compensation within the Health Service No. 24, Jan. 21, 2009 § 24 para. 2 (Den.). In Finnish law, the rule states that there is no compensation for minor injuries. See Potilasvahinkolaki [Patient Injury Act] No. 585, July 25, 1986 § 3 (Fin.). In Norwegian law, there is no compensation for losses of less than 5000 NKR. See Pasientskadeloven [Patient Injury Act] No. 53, June 15, 2001 § 4 para. 1 (Nor.).

67. For Denmark, see PATIENTFORSIKRINGEN, www.patientforsikringen.dk (last visited Oct. 3, 2011). For Finland, see POTILASVAKUUTUSKESKUS, www.potilasvakuutuskeskus.fi (last visited Oct. 3, 2011). For Norway, see NORSK PASIENTSKADEERSTATNING, www.npe.no (last visited Oct. 3, 2011). For Sweden, see PATIENTFÖRSÄKRINGEN LÖF, <http://patientforsakring.se> (last visited Sept. 18, 2011).

68. *Årsberetning for 2010*, PATIENTFORSIKRINGEN, 3 (Jun. 12, 2011), <http://www.patientforsikringen.dk/da/Udgivelser-og-tal/Statistik/Hospitalstal.aspx> (follow “2008–2010 (pdf)” hyperlink).

creased activity in the health care services. The success rate varies slightly from year to year but is normally around 35.3 to 35.7 percent.⁶⁹ In total, the compensation awarded by the Danish Patient Insurance Association has increased from 437.6 million DKR in 2008 to 660.5 million DKR (approximately 88 million Euro) in 2010.⁷⁰ The average compensation has been 183.560 DKR from 2008–2010.⁷¹

Turning to Norway, the number of claims has increased gradually to 4,352 claims in 2010, of which 32.3 percent were successful.⁷² The total annual compensation awarded by the Norwegian System of Compensation to Patients has been constantly increasing and amounted to 818.4 million NKR in 2010 (approximately 100.2 million Euro).⁷³ Consequently, the average compensation is significantly higher in Norway than in Denmark.

Also, Sweden has seen a rise in the number of claims from 9,000 in 2005 to an estimated number of 12,000 in 2011.⁷⁴ Forty-four percent of the claims made from 2005 to 2010 were successful.⁷⁵

Compared to the other Nordic countries, the Finnish Patient Insurance Centre has not experienced the same increase in claims—to the contrary, there has been a decline in claims in 2009 and 2010 compared to previous years. However, with 7,295 claims in 2010, the numbers are significantly higher than in Denmark and Norway, and the success rate is about the same (around 30 percent).⁷⁶ The total amount of annual indemnities has increased during the last years, but not so dramatically as in Norway and Denmark. In 2010, the Finnish Patient Insurance Centre paid 32.6 million Euro in compensation.⁷⁷

69. *Årsberetning for 2010*, *supra* note 68, at 5.

70. *Årsberetning 2010*, PATIENTFORSIKRINGEN, 16–17, <http://www.patientforsikringen.dk/da/Udgivelser-og-tal/Aarsberetninger.aspx> (follow “pdf” hyperlink) (last visited Oct. 3, 2011).

71. *Årsberetning for 2010*, *supra* note 68, at 17.

72. *Antall mottatte saker per år*, NORSK PASIENTSKADEERSTATNING (Feb. 2, 2011), www.npe.no (follow “Statistikk” hyperlink; then follow “Antall mottatte saker per år” hyperlink).

73. *Utbetalinger per år*, NORSK PASIENTSKADEERSTATNING (Feb. 2, 2011), www.npe.no (follow “Statistikk” hyperlink; then follow “Utbetalinger per år” hyperlink).

74. Phone call with Patientförsäkringen LÖF (March 21, 2011). See <http://www.patientforsakring.se/Arlig-statistik.html>, for full statistics.

75. *Skadeanmälningar till Patientförsäkringen LÖF*, PATIENTFÖRSÄKRINGEN LÖF, http://patientforsakring.se/resurser/dokument/arlig_statistik/Rapportmall_Stockholm.pdf (last visited Oct. 3, 2011).

76. PATIENT INSURANCE CLAIMS REPORTED 2006–2010 and PATIENT INSURANCE CLAIMS DECIDED 2006–2010, *available at* http://www.potilasvakuutuskeskus.fi/www/page/pvk_www_2795 (last visited Nov. 2, 2011).

77. PATIENT INSURANCE CLAIMS DECIDED 2006–2010, *supra* note 76.

CONCLUSION

It is the general impression that the patient injury compensation systems in the Nordic countries have worked well. The overall purpose with the compensation systems was to make it easier for patients to obtain compensation. In this respect, the compensations systems have definitely been a success.⁷⁸ Another goal was to introduce a model that would be more economical than trying cases in court. In this respect, the systems have perhaps been less successful. Thus, the administrative costs of running the systems have proved to be rather high.⁷⁹

One concern sometimes articulated is that by turning patient injuries into an insurance issue rather than a liability issue, the focus is exclusively on compensation of the injured party. The preventive effect which liability rules are normally also assumed to possess is non-existent under an insurance system. On the other hand, by placing the insurance obligation and the insurance expenditures on the entity that would otherwise have been the target of tort law claims this concern is to some extent countered. It could also be argued that it can sometimes have symbolic value for the injured party to have it recognized by a court that there is liability based on fault for an injury. However, it should be remembered that the other side of the coin would be the possibility no recognition of the claim at all, since very often it would not be possible to prove fault.

Finally, seen from a broader European perspective, there could of course be concern that the Nordic insurance-based system will come under pressure in light of the harmonization attempts in the E.U.⁸⁰ For instance attempts to harmonize the levels of compensation for personal injury could disturb the balance of the insurance-based system. Also, other harmonization attempts could pose a challenge to the Nordic model.

78. KRISTINA SPROVE ASKJÆR, NIELS HJORTNÆS & PETER JAKOBSEN, ERSTATNING INDEN FOR SUNDHEDSVÆSNET 44 (2008).

79. *Id.* at 43.

80. *See* von Eyben, *supra* note 9, at 195.

