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## Policy Goals of the "Swedish Alternative"

In the following remarks, I shall try to outline: (a) where the Swedish approach fits in a theoretical scheme of accident law, and (b) some things that can be said in favor and against that fit. Because it is my own, and because I find it difficult to think about accident law differently, I shall use a variant of the outline of accident law goals which I originally presented many years ago in *The Costs of Accidents*.<sup>1</sup> I shall quickly describe these, and then see how, and how well or on what bases, the Swedish approach attempts to meet these goals. The goals of accident law in this schema are the following five:

(1) A deterrence or safety goal—the object of which is to reduce the sum of accident costs and safety costs, or, in other words, to achieve the optimum level of safety. This goal assumes that some accidents, some injuries, some harms are not under existing technology worth avoiding. It also does not necessarily measure costs in a strictly economic way, and indeed, when I apply that goal, I certainly do not so measure them. (So a particularly painful or offensive injury may be worth avoiding even though the safety costs are significant, while another injury which has the same *economic* consequences to the injured party may not be worth avoiding because it entails lower "moral" or "non-economic" costs.)

(2) A spreading or compensation goal. The object of this goal is to see to it that no individual or company is so crushed by having to bear accident costs (or for that matter safety—that is, accident avoidance—costs) as to result in significant additional harm to himself or the society. It is also to see to it that safety and accident costs do not alter the economic status of injurer or victim dramatically—for such dramatic changes in wealth themselves are costly.

(3) A moral-distributional goal. The object of this goal is to put the burden of accident costs and of safety costs (accident avoidance costs) on those who by reason of their behavior, or their relationship to the injurer or victim, ought (other things being equal) to bear them. This goal not only raises fault issues, but also raises issues of the desirability of individual responsibility between a given

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1. Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (1970).

injurer and a given victim regardless of fault, and issues of vicarious responsibility for the acts of others.

(4) A general distributional goal. The object of this goal is to put the burden of accident costs and of safety costs on those who are most suited to bear them either by reason of wealth or status in that society. In a sense this goal takes cognizance of the fact that any system of accident law can be viewed as a tax system and its desirability must be gauged also by its fairness when so viewed. Do those categories of people who are relatively wealthy bear their share of safety or accident costs? Are those activities (like land owning in 19th century England) which the general tax system favors similarly favored? Are those activities which, on account of status or relative capacity to pay, are financially disfavored in that society similarly burdened by that society's accident law? These are the questions this goal raises.

(5) (And finally), an efficiency goal. The object of this goal is to achieve the mixture of other goals desired by a given society in as inexpensive a fashion as possible. That is, of course, the only valid meaning of efficiency. Too many discussions of accident law sound as though efficiency were a goal in itself, without asking what it is that is being accomplished efficiently. They make as little sense as would a discussion which praised the efficiency of a society in its production of bananas, and which ignored the fact that the members of that society despised bananas and had no effective way of selling, elsewhere, the bananas produced.

One more word before turning to the Swedish approach in relation to each of these goals, and that word is, of course, Justice. Justice, or fairness, remains what *the* goal of accident law must be. The goals I have outlined are *parts* of what in any given legal system goes into achieving a just result in accident law. It is not justice for accidents, which can be prevented at a reasonable cost, to occur, but it is not just justice for everyone in a society to be significantly worse off in order to avoid each and every accident. It is not justice for someone to be crushed by accidents (unless another goal requires such crushing). For many, it is not justice for the poor to bear the same burden as the rich, just as in 19th century England it was not just for landowners to bear the same burdens as manufacturers. Is it just for a person who was injured by someone else's fault to receive the same compensation as a person who was not; for all to receive the same compensation for the same injury regardless of the behavior of the injurer? Many differ on this. Finally, it is not just to have a system of accident law which wastes the precious time and resources of the society in order to accomplish what could, through other approaches, be achieved more efficiently.

The justice of a system of accident law depends, both at the beginning and at the end, in how well it amalgamates these (and other unmentioned) ultimately inconsistent goals as they are defined and worked out in any given society. For this reason any evaluation of an approach like Sweden's must be precarious. Who can say—except those in the country itself—that the particular mixture of inconsistent goals achieved by the Swedish approach is wrong? The goals are inconsistent with each other. Thus, perfect spreading may give extraordinarily poor safety/deterrence. Optimal deterrence may burden the poor or some disadvantaged minorities intolerably. Perfect spreading, or optimal deterrence, may result in a treatment of wrongdoers that is utterly inconsistent with treatment deemed appropriate for like behavior in other areas of law (like criminal law), and so on. Each society must find its own mixture of goals and achieve them as efficiently as it can. Moreover, what is *efficient* depends not only on a simplistic calculus of costs and benefits, but also on what is likely to work within a given economy and political system. (The New Zealand approach would in some countries, like the U.S., quite possibly be used to give hidden subsidies, that would not otherwise be acceptable, to certain categories—like the trucking industry, because of the nefarious political influence of the Teamsters Union. If so, that plan, which might be efficient in New Zealand, might not be so in the U.S., since to guard against its corruption would entail huge costs.)

Nevertheless, some things can be said about the Swedish approach. One can describe how it seems to deal with the different goals and the weight it seems to give to each of them. And one can raise questions whether it really means to do some things that it seems to be doing. It is to these things that I will now turn.

The characteristics that strike me most about Sweden's approach as described by Professor Hellner are the following. First, the basic economic costs of accidents are met by a system of *general* social insurance. Spreading, wealth distributional considerations, and reduction of costs of administration seem of primary concern with respect to these costs, which seem to play no role in inducing safety either at an individual level or at an industry-activity level. They are not a part of the cost that a pharmaceutical manufacturer must consider in making decisions on what safety devices are worthwhile. They are not a part of the decisions a car owner faces in choosing one car rather than another, because they do not affect the cost of insurance for the cars. Nor do they influence the number of drivers or their ages. This would not be so were the social insurance funds derived through taxation of categories of injurers and victims according to their propensity to give rise to such basic economic costs. Nor would it be so if these costs were not subtracted from the

recoveries obtained under the various specific insurance approaches described by Oldertz. As it is, they are treated like ordinary costs of living or unavoidable illnesses, etc.,—costs which should not affect the level of activities or accident-safety decisions, and which, in a social-democratic-welfare state, should be borne by the collectivity and paid for through ordinary taxes.

As to these, questions of who, on account of behavior, *ought* to pay seem to be treated as irrelevant, as are issues concerning individual links between injurer and victims. One assumes that both the desire to burden individual wrongdoers and the desire to take into account the riskiness of activities with respect to such basic injury costs are dealt with outside of accident law. For such basic injury costs are not *in fact* like unavoidable illnesses—many could be avoided at a price. Moreover, some individuals (both injurers and victims) by their behavior and by their activities disproportionately increase the risk of such basic injury costs occurring. It is implausible that Sweden takes no heed of this, and so one assumes that there exists both a complex system of governmental safety regulations designed to achieve an optimal mix of accident and safety costs (with respect to basic injuries) and a system of criminal and semi-criminal, uninsurable, penalties designed to punish those whose behavior is unduly risky with respect to such costs.

Were this the entire Swedish system, it would be fairly simple, intelligible, logical, and intellectually uninteresting. It would be one in which the safety/deterrence goal was met by collectively imposed fines and regulations, in which all “wrongdoers” would be burdened in a similar manner, in which compensation-spreading would be achieved by a unitary decision as to what burdens should not be borne individually but should instead be socialized, and in which the wealth-status goals would be served by assessing taxes to pay for the social insurance programs on the appropriate wealth-status categories.

What makes the Swedish system worth discussing is instead the fact that many of the goals that are ignored in its treatment of basic accident injuries return into play when one deals with extra injury costs and especially pain and suffering costs. But before I turn to how these goals re-enter into play, I would like to emphasize one thing. The fact that one splits accident costs, so that different parts are allocated to serve different goals, is not in itself either good or bad. It is a complication, but the goals to be served are also complex and inconsistent. There is nothing intrinsically bad (except that complexity usually brings expense) in such a split. Nor would there be in the opposite split. That is, one could conceive of a system in which *basic* injury costs were assigned so as to achieve deterrence/safety, while catastrophic or non-economic costs were sought to be

spread, their risks being controlled through regulation and punishment. Still, it is a matter of great significance that the Swedish system, without *in any way* wishing to undercut its commitment to a regulation-spreading wealth distribution approach for basic accident costs, finds it worthwhile to go beyond that approach and does it in a quite unusual way.

This leads to the second characteristic of the Swedish approach, and that is its extraordinary reliance on private insurance arrangements to achieve a combination of goals that in other places is thought best achieved through public arrangements together with state insurance. The degree to which Sweden has abandoned individual litigation, together with fault, defect, and even extra-hazard as a basis for liability, is usually thought to imply a public insurance framework. It obviously does so when the object is primarily to spread losses (as in Sweden for basic injury costs), but it also does so when the object is not *just* compensation but the achievement of compensation and of safety/deterrence, regardless of fault or pseudo-fault, through the allocation of accident costs.

Thus, one might have expected a public fund from which those who were injured could automatically recover their extra—tort size—damages, to be established. And one would have expected that this fund, instead of being fed by general taxes (like the basic social insurance fund), would be created by taxing those activities (perhaps even those individual acts), whether of injurers or of victims, which were found statistically to be disproportionate causes of such extra damages. These taxes would serve to induce the desired level of extra care, while the payments from the fund would yield the desired degree of compensation.

What is unusual, and unusually interesting, about the Swedish approach is that it rejects this way, at the same time that it rejects the notion that whether or not extra damages are justified depends on the particular behavior of the individual injurer or victim, which is a private matter between them. For reasons that I cannot go into here, I am in full sympathy with the idea that any system that attempts to link extra damages (or basic damages, for that matter) to the behavior of the individual injurer and victim is deeply flawed. So I reject and have long rejected the traditional private fault or semi-fault based approaches that are still common in many countries. I am also committed to the notion that at least in many areas accident law has an important role to play in achieving safety/deterrence and not merely compensation. (I have been skeptical of this primarily in medical cases and so find Sweden's emphasis on category deterrence in patient cases particularly interesting.) But I had always assumed that the successful achievement of the safety-deterrence goal, once fault and semi-fault were abandoned, was

bound to lead to a public fund, with equal payment for equal injuries to victims, and assessments of taxes on victim and injurer activities according to their statistical accident proneness.

Under this approach, the bathtub accident would lead to a similar payment as the automobile or work accident, and from the same fund. But while the fund would draw its moneys by taxing the injurer category in work accidents (i.e., from the employer), and by taxing a mixed injurer-victim category in auto accidents (i.e., from the car owner—who might be either injurer or victim), it would, in the bathtub accident, draw its moneys predominantly from a victim category (i.e., the owner of the house who would be charged a tax on home-owning based on bathtub and analogous risks). The effect would be to achieve spreading-compensation by paying the individual victim, and deterrence/safety by charging an appropriate tax to the victim or injurer activities most linked to the harm. This tax would (if deterrence/safety were significantly achievable) induce structural choices for safety. (Homeowners would find that houses with showers were taxed at lower rates than those with tubs, and tubs with rails would lead to lower taxes than tubs without rails. These tax differences might be accentuated when the homeowner (or her family) was of a particularly *bathtub* accident prone age.) If no activity—whether injurer, victim, or mixed—were statistically linked to greater accident proneness, the fund-tax would automatically, *by definition* almost, become a general one, and the accident risk would automatically be treated as a socialized risk of living.

Sweden attempts an analogous mixture of compensation and category safety/deterrence, with an analogous lack of interest (by and large) as to individual behavior, but does it privately, and only for those categories in which such safety-deterrence seems worth having or where special spreading needs are perceived. There are both advantages and disadvantages to doing it this way. The clearest advantage is that by employing essentially private insurance devices and rates that are presumably actuarially set, the Swedish approach avoids the danger of hidden political tinkering with the amounts charged to risk-prone categories. I mentioned earlier how, in the United States, I would expect that any accident compensation fund that sought to tax injurer and victim activities according to their accident propensity would quickly be corrupted by political pressures. Highly accident-prone activities, like trucking would, in my judgment, quickly obtain relief in their rates because of alleged “national security needs” based on political clout.

I do not mean that subsidies to high risk groups are not ever appropriate. If a disadvantaged minority group had unusually high automobile accident rates a society might choose to tax the members of this group less than the amount “justified” by the statistical risk re-

quired to fund the goal. It might opt for fewer safety incentives and for more accidents in order not to stigmatize the group. Herein lies a possible disadvantage of the Swedish approach. Insofar as it was thought *undesirable* to charge higher fees to certain categories of employers, drivers, or pharmaceutical producers (despite their higher risks), a private system has more trouble subsidizing the category than would a public system. That is simply the opposite side of the coin of the advantage the private system has in being relatively free from political pressure.

The second advantage of the Swedish approach is that by being limited to specific areas it does not need to compensate the world fully in order to achieve its aims. The fund approach, in effect, compensates everyone to an equal extent in order to create a system of incentives on those categories (perhaps few) in which allocations of accident costs may lead to significantly better safety/deterrence results. The Swedish approach selects out a few areas where such allocations seem likely to be significant and does not bother with the rest. That it does so under the rubric of seeking those areas in which extra compensation and extra charges seem "fair", rather than by focusing directly on deterrence, is of little consequence except that it adds insult to injury for those not receiving the extra compensation. The decisions made on whom to charge, with few exceptions, reek with the underlying aim of charging those who can control the risks and choosing between safety and accident costs. It is in these cases that extra/compensation is deemed appropriate, while in other cases the victims are not deemed deserving of extra compensation.

Unless, however, the decision is explicitly linked to safety/deterrence grounds, one is bound to feel that the choice of who receives extra compensation is haphazard and unprincipled. There is, moreover, another concomitant disadvantage of creating different categories of injured parties who are treated differently. For such an approach inevitably leads to borderline problems. It is bound to be the case that individual victims will try very hard to describe their injuries as being within or outside a given category in order to increase their chances of recovery. This process entails case-by-case determinations.

Such case-by-case decisions are not only expensive, but also lead to results that are apt to be myopic. Contrast how a fund would treat transfusion hepatitis with how such hepatitis is treated in Sweden. The Swedish decision is that hepatitis cannot be avoided by testing blood in certain types of cases; hence the victim must bear the extra damages. (I could say, instead, "Hence there is no sense charging hospitals in order to induce them to take greater care in transfusions.") The fund, instead, would charge the hospitals be-

cause no class of victims, no victim *category*, suitable to bear the tax would appear to be as closely linked statistically to the injury as the hospitals. If, in fact, no test for hepatitis were feasible, under a fund approach all hospitals would end up charging the same to all blood recipients in order to cover their tax, and blood recipients would treat this as a cost of their illness. Were it the case, however, that a test for hepatitis blood could be developed (unbeknownst to the panel that decided the Swedish case), the fund would have created incentives—missing in the Swedish system—to develop the test.

Often in reading the patient insurance cases, I was convinced that the Swedish approach was correct in its difficult judgments on whether the cost was more properly of the underlying illness (that is, of the patient) or whether it derived from the type of medical care received. But sometimes I was far from sure and wondered whether the (for me) odd result was based on too much attention to the individual case, and too little to which category—victim or injurer—could act, at a structural or research level, effectively to reduce the risk. In other words, the case-by-case decisions implicit, especially in the pharmaceutical and patient areas, seemed to have an occasional flavor of semi- or pseudo-fault to them, whereas the whole point of the system was to assign costs regardless of fault reasons. A statistically-based involvement tax, under a fund approach, would avoid this problem.

Someone may, however, say that I miss the whole point and that the object of the entire system is *compensation* and not cost assignment. And certainly the discussions speak frequently of whether the victim *ought* to be compensated by tort-size damages. I cannot, though, accept that as underlying the system, for I cannot understand why many of the victims chosen should receive much larger compensation than others for analogous injuries, *except* because it would lead to better safety/deterrence decisions. Indeed, if I believed that the system was, in fact, designed primarily to grant added compensation to some victims who *deserved* more, I would find the approach irrational. Compensation can play a role—thus the decision throughout to ignore minor injuries can be easily justified on compensation as well as on administrative cost grounds. But if compensation were the dominant fact, then the third characteristic of the Swedish system, namely, that similar individuals injured in different contexts receive widely differing recoveries, would be close to absurd.

Severity of pain, and severity of injury generally, would justify different levels of compensation. Some categories of activity may well be sufficient centers of severe or severely painful injuries to justify separate treatment from other activities on these grounds. But there is no indication that the activities chosen in Sweden are

the only, or the principal, ones that should be selected on this basis. Rather, the differential in compensation that the Swedish system maintains must in practice justify itself, as it does again and again—though beneath the surface, and in ways that relate to the relative capacity for making choices between safety and accidents, and not truly in ways that relate to compensation. Whenever it is suggested that *compensation* is not justified, it is easy to find behind the statement the implicit belief that the injurer could do little or nothing to avoid the harm even if given incentives to do so.

Nevertheless, there is not complete clarity on the matter. There is at one point the suggestion that an advantage of one of the insurance plans is that it doesn't differentiate in rates among different injurers on the basis of their risk/loss experience. That surely would be wrong on safety/deterrence grounds, and justifiable only on spreading grounds, and even then only if needed in order to avoid crushing the injurers. Similarly, one might ask whether, if safety/deterrence grounds were as important to the approach as I have suggested, one could justify the purely social insurance manner of treating basic economic losses. Why, one might ask, should incentives for safety be limited to exposure to extra pain and suffering-type damages? The purist from the University of Chicago would certainly question that. This troubles me less, for I find it quite possible to assume that the *basic* deterrence/safety decision is achieved in Sweden through regulation, and the insurance plans work only to induce the extra or marginal safety that pain and suffering-type costs may make appropriate.

What, however, for me ultimately indicates that deterrence/safety is at the root of the Swedish approach are the differences among the different private plans described. In both the automobile and workplace injury cases, compensation is virtually automatic, but in workplace injuries the burden is on the injurer, while in the auto cases it is a first-party, victim burden (except as to bicyclists and pedestrians). Both the automaticity and the choice of parties to burden make enormous sense from a deterrence/safety point of view in these classes of cases. I have written at length elsewhere why first party or owner-victim insurance is appropriate in car cases from a deterrence point of view.<sup>2</sup> Many have expressed the same thought with respect to *injurer* (third party) liability in workplace accidents.

Automaticity, instead, makes very little sense in patient or pharmaceutical cases, even though it might well do so if compensation-spreading were the object. In both areas, user choices are often

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2. Calabresi, "First Party, Third Party, and Product Liability Systems: Can Economic Analysis of Law Tell Us Anything About Them?," 69 *Iowa L. Rev.* 833 (1984).

important—though much less so in the pharmaceutical area than in the patient area (a fact again reflected in the different treatment accorded to each area in Sweden). Indeed, in the patient area I and others have questioned whether there is any point to a safety/deterrence goal at all (our suggestion being that the added pressures to safety are sufficiently slight, while the decisions on when they are appropriate are sufficiently difficult, so that it may be worthwhile abandoning the goal in this area and limiting ourselves to achieving that general level of spreading which seems societally warranted).<sup>3</sup> The reason for my skepticism is not that incentives do not work in the patient injury area, but that they often create concomitant wrong incentives—what in the United States goes by the name of defensive medicine. Sweden strives quite impressively to decide, on a faultless case-by-case basis, what type of medical maloccurrences ought to be charged to medical care, and what, instead, are costs of the underlying illness. Though full of admiration for the attempt, I remain somewhat skeptical whether the game is worth the candle. Still, that is to the side of my point, which is, once again, that were the object compensation-spreading no real reason would suggest itself for the different treatment *among* these four “special insurance” categories, just as none presents itself for differentiating these four from the rest of the world of injuries. The moment one focuses instead on the safety/deterrence goal to be achieved by creating structural incentives for categories rather than by motivating individuals in their last-minute decisions, the distinctions the Swedish approach makes become quite plausible, even if not always altogether convincing.

In the end, though, one must still ask whether the whole rather complex system is worth it. It clearly is not if one focuses primarily on the spreading-compensation, or on the wealth-status distribution goals. Then the Swedish treatment of *basic* injury costs, enlarged or not, is the appropriate model. Similarly, it is not worth it if one focuses on the moral-distributional goal. Then an enlargement of criminal sanctions or the creation of uninsurable tort fines for wrong-doers would be the appropriate route. To some, though not to me, the preservation and expansion of negligence-based, traditional tort notions might also be appropriate. The question that remains, then, is does the Swedish approach justify itself because of the way it furthers the deterrence/safety goal? It is to this that I shall address my final observations.

First, I would note that compared to automatic compensation from a governmental fund with taxes assessed on the appropriate

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3. Calabresi, “The Problem of Malpractice: Trying to Round Out the Circle,” 27 *U. Toronto L. J.* 131 (1977).

victim and injurer categories, the Swedish approach is bound to be relatively costly. There are too many ad hoc decisions to be made, and too many borders to be fought over where being on one side of the line or the other makes too much difference to the parties. And this is bound to be a serious defect. Second, the decisions as to which categories warrant special treatment are not totally convincing. Why pharmaceuticals and not other products? Why not the bathtub case, if it is plausible that homeowners, or at least elderly ones, may be induced to shift to showers? Indeed, can *anyone* tell *ex ante* which categories would give rise to significant safety incentives if full compensation were given? Under a fund, if one kept statistics (derived by sampling accidents), correlated accident costs with any number of possibly related activities, and charged taxes on an involvement basis, one might well find that many other safety incentives of significance could be established.

Why not, then, opt for such a fund; why not adopt a New Zealand plan which affords more nearly full recovery (at the Swedish special insurance levels) and which assesses taxes on victim and injurer activities (but with greater differentiation than New Zealand gives) in order to pay the costs of maintaining the fund? The principal argument against this must lie in the disadvantages that attach to governmental approaches of that sort, or to put the same thing in the opposite way, in the advantages that attach to private arrangements such as the Swedish ones. If I believed that a governmental fund would make its tax assessment decisions as coldly as would private insurance companies (or if I believed it would only deviate from actuarially-based assessments in those situations where *I* would wish to do so to satisfy my political aims), I would have no hesitation in favoring such an approach over the Swedish one. Since I don't, my own hope is that the Swedish way can expand so that it eliminates most compensation differentials and ultimately approaches the structure of the governmental fund, but with private insurance companies at its center and with assessment decisions made free from governmental pressures.

At the moment, that is quite a distance from the Swedish approach. Nor can I tell you, even in rough terms, how one could move from the Swedish way to a generalized system of privately structured full accident compensation. It does seem to me, however, that that approach would have, if established (and supplemented by uninsurable tort fines), the greatest capacity for meeting the combination of goals that accident law seeks to achieve. It also seems to me that of all the approaches extant, the Swedish way has the greatest potential for evolving into such an approach. And so, whatever its current inconsistencies and ambiguities, it deserves both praise and further study.

