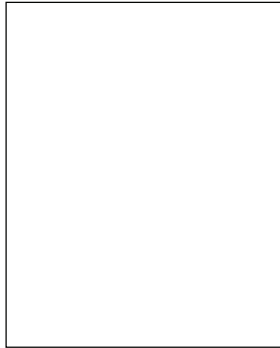


Professionals' Duty to Inform their Customers

by Professor, dr.jur. Bo von Eyben, Faculty of Law, University of Copenhagen



I artiklen behandles særligt to grupper af ansvarssituationer, nemlig dels forsikringsselskabers rådgivningsforpligtelser med henblik på at sikre, at kunden får den "rigtige" forsikringsdækning, dels lægers pligter til at informere patienterne om risikoen for komplikationer m.v. ved behandlingen.¹

Bo von Eyben

1. Introduction

This paper will be concentrated on problems of the extent of a duty to provide information in connection with contracts of professional service or other semi-contractual relationships and with questions of the suitability of tort liability for the professional provider of services to enforce such a duty.

Of course, the problem of professionals' duty to inform their customers reaches beyond this delimitation, but in other respects the problem does not concern the duty to give information as such. If e.g. the manufacturer of a product does not give consumers adequate information about risks in connection with the expected use of the product, this failure may in itself make the product defective (according e.g. to the EEC-directive on products liability), entitling the consumer to damages for harm caused by that failure. In principle there is no difference between cases of insufficient information and cases of lack of safety in design. Similarly, the duty to give information is a part of e.g. a seller's obligations according

to ordinary sales law so that the purchaser may invoke remedies for breach of contract (e.g. a claim for damage for the reduced value of the subject of sale when the seller failed to give the purchaser information of a defect which he knew or should have known). Again, the duty to give information is an integrated part of more general obligations to discharge the duties according to the contract and general principles of contract law.

In some cases the substance of a contract of service is to provide information, when e.g. a bank or a credit bureau is requested to furnish a reference regarding a customer's financial standing. In these cases also the duty to provide information presents no special problems; it is simply a matter of performing the contract so that the bank or the credit bureau may be liable for damage resulting from non-performance apart from losing the claim for

¹) Paper presented at the XXIInd Colloquy on European Law, La Laguna, Spain, November 17—19, 1992.

Second working session on: Liability regarding Information.

The paper was commissioned by the Council of Europe.

charge for the service.

As opposed to these cases, specific problems of information arise in situations where the issue is whether the customer has entered the right kind of contract. Thus, the issue to be discussed here is not whether the professional performs the contract according to its terms, but whether the professional apart from the “primary” duty is obliged by law to ensure that the customer understands the terms of the contract and their consequences to him. I will concentrate the discussion on two specific groups of cases in which this problem is particularly pertinent: The possible liability for insurance companies for ensuring that the insured actually gets an insurance protection that corresponds to his needs, and doctors’ duty to inform patients about risks that are connected with the proposed treatment. In both cases the “customer” may get precisely the service he has accepted (the insurance protection he has paid for as stipulated in the insurance policy, or the medical treatment he has consented to, performed with the degree of care required by ordinary tort law principles of negligence), but nevertheless he is dissatisfied with the service because he thought e.g. that a certain damage that occurs would be covered by the insurance or because a certain complication caused by the medical treatment was not taken into consideration by him when he accepted the treatment.

The problem raises two questions. The first is the extent of the professional’s duty to furnish the other, non-professional party with a certain basis for making an *informed* choice. The second question is whether the professional can be held responsible merely because his information was insufficient to enable the other party to make an informed choice. The argument will be that if better information had been given, the insured would have chosen another insurance which would have covered the actual damage, or the patient would have chosen another kind of treatment (or no

treatment at all) so that the injury would have been avoided. Obviously, this kind of argument involves difficult problems of causation: Would the insured or the patient really have acted differently if they had been better informed or is the allegation merely an expression of hindsight rationalizations? Causation is a fundamental prerequisite for tort liability; if lack of information does not “cause” any damage or loss, tort liability may therefore be an inadequate instrument for enforcing any duty to give information that might be imposed on the professional. Thus, it must also be considered whether other legal instruments exist that are better suited to that purpose.

2. The Need for Information

No doubt an increasing information gap exists between professional providers of various kinds of service and their customers (at least the majority of them who are not professionals in the area in question). The whole body of consumer protection legislation is aimed at straightening out differences in bargaining position between professionals and consumers, but it is characteristic of this legislation that it is primarily concerned with securing the consumers legal remedies if the professional does not fulfil his obligations according to the contract. The purpose is — to put it very simply — only to prevent the professional from exploiting his superior bargaining position to contract himself out of the rights that the consumer would otherwise have in case of the professional’s failure to perform the contract.

This kind of legal intervention does not interfere with the substance-matter of the contract. A basic assumption underlying the free market economy is still that consumer preferences are the best way to achieve efficient use of resources. What matters is therefore primarily regulation to ensure that the market is really competitive and transparent. If

the consumers have choices, the sum of these choices is presumably better than any other method of regulation to determine what products should be produced and what services should be rendered.

However, from a microeconomic point of view the choices presented to modern consumers are precisely the problem. New products and services are constantly being developed, and old products and services become more and more sophisticated. It used e.g. to be a rather simple matter to take out insurance of persons (accident, sickness or life insurance), but many different kinds of insurance and pension schemes have been developed during the last decade or two, making the choice between different schemes extremely difficult. Even if the person seeking insurance knows what kind of insurance protection he needs, it will be difficult to determine whether any given scheme covers his needs and even more difficult to compare different schemes. The more information he succeeds to gather to make the choice, the more confused he will probably get.

One way of trying to overcome the information gap is to make e.g. insurance policies more standardized (normally on a voluntary basis), providing some minimum-coverage that can be supplemented according to individual needs. However, such a basic standard coverage may impede market response to new demands, and also the choice of level for the basic coverage is problematic: If it is too high, many consumers may have to pay for a coverage that they do not need, and if it is too low, many consumers will need supplementary coverage — which reintroduces the information problem.

The point is simply that a person seeking insurance nowadays not only needs insurance but also advising. Without some guidance from the insurance company (or companies) the market is not transparent — for the individual consumers. The question is there-

fore to what extent the insurance company should assume responsibility for an analysis of the applicant's need for insurance and for ensuring that he gets insurance protection according to this — neither less, nor more. Thus, it is not simply a question of providing information but rather of undertaking an advisory function in connection with the making of the insurance contract.

This is not meant to say that the applicant in all cases needs guidance in the insurance jungle. Examples of simple products still exist also in this area (e.g. an ordinary accident insurance), and there would be no point in *forcing* a person seeking such an insurance to be subjected to a closer analysis of other potential insurance needs and possible ways to cover them. A formal, general requirement to provide information and advising could easily go to the other extreme, wasting resources on consumers who neither need nor want more than the product or service they apply for. Ultimately, the insured persons themselves must pay for the service they get, and they should therefore be free to avoid the expense by buying a standardized product without any individual guidance. We must be careful not to impose obligations on the professional that would in effect prevent consumers from shopping on a discount basis.

Even if medical treatment — being heavily socialized in most European countries — is generally considered not to be governed by rules of contract law, the problem of information is essentially the same in this area. The gap of information between the professional and the patient is even greater because the parties generally do not enter into a written contract. In most cases therefore the patient is totally dependent on the information he gets from the doctor. Also in this area the services have become more sophisticated — but also more risky as e.g. complex operation techniques have been developed against diseases that were previously incurable. The right for a

person to decide what is best for himself is even more central in relation to medical treatment, because it is not — or at least not primarily — a matter of achieving market efficiency but rather of preserving and protecting the right to self-determination in matters of outmost personal importance. The paternalistic view that the doctor knows best what serves the interests of the patient has gradually been replaced by a recognition of the importance of patient participation in the decision process, stressing the necessity not only of a formal consent to the treatment but also that it should be an *informed* consent.

However, in this area also, a duty to provide a full disclosure (e.g. of all risks that the treatment could involve) might be counter-productive. Some patients may be unable to cope with extensive information, perhaps even to the point where they abstain from necessary treatment because they tend to overestimate the risks associated with it. Therefore the need for information must be balanced against the equally important notion that the information must not cause unnecessary anxiety that can promote irrational decisions which otherwise would not have been made.

Common to the two areas to be discussed in the following is that lack of information makes the insured person or the patient dissatisfied with the professional when damage or injury occurs: The insured person is frustrated because he expected the damage to be covered by the insurance, and the patient is frustrated because he did not expect the treatment to involve the risk that produces the injury. In both instances then, the injured person wants to seek redress from the professional, based on a duty to give information. The point is not that the professional is liable for the damage in itself, but that he should be held responsible for not having informed about the risk — of damage not covered by the insurance or of complications in connection with the medical treatment.

3. The Liability of Insurance Companies for providing adequate Insurance Protection

It is a characteristic feature of most insurance contracts acts that they deal extensively with the duty of the insurance applicant to give information of circumstances that are relevant to the evaluation of the risk for the insurance company and thus to the calculation of premiums. On the other hand little or nothing is stated as to any duty for the insurance company to give information of e.g. possible ways to achieve the insurance protection that the applicant wants — or should want if he knew his true needs for protection and was able to relate this knowledge to available insurance products.

Of course, general rules of regulation of marketing practice and specific rules of public insurance supervision impose certain duties on insurance companies to observe good trade practices not only towards competitors but also towards society and consumers at large. This kind of regulation may include a certain duty to present the products in a way that gives consumers reasonable guidance, but it has no direct bearing on the individual contractual relationship. If e.g. an insurance company advertises that it has developed a life insurance unparalleled by competitors, this kind of marketing may be subject to an injunction (and possibly a fine) if in fact the offer is not more advantageous to the consumer than existing products, but that does not in itself give the consumer any relief (possibly apart from a right to cancel the insurance without the notice ordinarily required). Besides, the individual circumstances may call for more information than good trade practices require towards consumers in general.

In most cases an insurance contract is entered into through an insurance agent. Often the problem arises as a question of whether the agent's oral statements as to what the

insurance covers are binding on the insurance company. The policy-holder claims that he asked whether a certain damage would be covered by the insurance and that the agent confirmed that it would; unfortunately the insurance policy says otherwise, but normally the policy is not sent to the insured until after the contract has been entered into. The policy-holder therefore claims that he relied on the insurance agent's promise without reading (or at least without understanding) the terms of the contract.

Normally, however, an insurance agent has no authority to grant deviations from standard insurance terms. He may be personally liable to the policy-holder, but his promise is normally not binding on the insurance company. Similarly, if the agent has informed the applicant of the amount of premiums to be paid for the insurance and made a mistake in that respect, this cannot generally be considered an offer according to the general law of contract. Even if the applicant is in good faith as to the mistake, he has therefore not a right to take out the insurance at the cost stated by the agent. There may be cases, however, where the agent is given an appearance to make an impression that he has a certain authority to bind the insurance company. In such cases there is no question of liability (apart from the question of the agent's liability to the company) because the contract is entered into according to the terms agreed upon between the agent and the insured. This means that the insured shall not tolerate any deduction of damages because he has in fact saved money by paying too little premiums for the coverage of the insurance policy or by not paying the additional premium he should have paid for the supplementary insurance which the agent erroneously claimed to be included in the actual insurance policy.

In most cases, however, the insurance company is not bound by the agent's promises. But obviously such promises may induce the insured to *believe* that he is covered against

certain risks so that he makes no efforts to get the insurance coverage that he actually lacks. If the risk materializes the question is whether the insurance company is liable to pay tort damages (as responsible employer for the fault of its employee)—not for the damage as such, but for the insurance benefits that the insured would have been entitled to if he had achieved the coverage he asked for.

The problem of course is not only one of erroneous information from the agent but also of lack of information. The applicant may e.g. be unaware of general or special limitations of the coverage; or a business enterprise seeking insurance of machinery and other property does not obtain the additional consequential loss insurance it needs, or an enterprise which only occasionally performs excavation works is not aware that the ordinary occupational liability insurance does not cover liability for such works.

An interesting provision has been introduced in the new Norwegian Insurance Contracts Act; according to this the insurance company must as far as possible advise the person seeking insurance about the coverage of existing needs of insurance. Besides, the insurance company must give information of insurance terms, premiums etc. of different types of insurance that can provide the needed coverage. Finally, it must inform of important limitations of the coverage in relation to the coverage which the insured can reasonably expect according to the insurance in question. However, these far-reaching duties have not been sanctioned in any way. It was only presupposed that the insurance company *might* be held liable towards the insured according to general principles of tort liability, at least in cases of gross violation of the duty. Nevertheless, there is no doubt that the insured has a stronger case against the insurance company when he can refer to a statutory, contractual duty to give information and not only to general principles of socially desirable

market behaviour.

But what is the need for insurance? The problem only arises when damage occurs that is not covered by the insurance, and at *that* point it is easy for everyone to see the need! If damage does not occur, many insured people would say instead that they had no need for the insurance so that the money paid in premiums is wasted; they fail to understand that what they paid for was not the coverage of damage but the coverage of risk. Obviously, the need for insurance cannot be judged by such hindsight-evaluations. The insured will claim that if he had known that supplementary insurance would be necessary to cover the damage in question, he certainly would have decided to take out that supplementary insurance. But would he really have done so given the fact that additional premiums should have been paid? Hindsight-evaluations may also interfere even if no actual damage is involved. The value of a pension or pension insurance scheme depends very much on the extent of addition of bonus to the amount of the policy. When informing the insured about the insurance benefits he can expect the insurance company to make forecasts which necessarily must be based on certain assumptions regarding the rate of interest, inflation etc. The way the insurance companies handle the reserve capital (investment policy and so on) may yield totally different amounts of bonus. Unless the insured is properly informed about the uncertainty of the forecast, he may take it as a promise, especially if — at hindsight — the choice of another insurance scheme would have yielded higher amounts of bonus.

The problem is that a considerable element of estimation is involved in the decision of proper insurance coverage. The policy-holder cannot be relieved from the responsibility for making the decisive choices. Thus, the insurance company cannot be held responsible just because the estimation turns out to be wrong. To avoid hindsight-evaluations it is

necessary to apply a more objective test which focuses on the basis of the insured person's decision making. Thus, the issue is whether the insured person has been enabled to exercise a reasonably skilled estimation of potential insurance solutions, based on existing conditions as they were appreciable to the insurance company or its agent. In this way it is possible also to overcome — to a certain extent — the difficulties of deciding afterwards what the insured would have chosen if he had been better informed. If a purely subjective test was applied it would be necessary to consider e.g. whether the insured is an especially risk averse person who prefers to be insured against all possible risks (even the remotest ones), almost irrespective of what the cost is.

If, however, the insurance agent should have realized e.g. that he faced such a person, this fact must influence the requirements to inform him about the possibilities of obtaining insurance protection. Also, the expectations of the customer, based on the way the insurance company markets itself, must be taken into consideration. If the insurance company e.g. advertises that it undertakes individual analysis of needs for insurance to provide an insurance package tailored to the needs, it has thereby assumed the part of an adviser and thus also a responsibility for the way the part is played. This is the problem when a general rule — like the Norwegian rule — is introduced. Taken literally, the rule establishes an absolute duty to give information regardless of the applicant's expressed wishes or implied needs and regardless of the way in which the insurance company presents itself to the customers. Thus, the rule might impede discount-sale of heavily standardized insurance products to the detriment of customers who do not want or need more than that. However, that was clearly not the intention with the Norwegian rule, and one may therefore wonder whether such a rule makes

any major difference compared to general tort law principles of liability for professional advising activity as an integrated part of the writing of insurances.

Even without such a rule, there is no doubt that the insurance company may be liable if manifest needs for insurance have been overlooked or ignored. Especially if the applicant has expressed certain wishes of risks to be covered or has asked for a thorough examination of the possibilities of getting e.g. personal insurance protection covering various situations of loss of income, the insurance company can be held responsible if the customer was not informed about actual possibilities of obtaining that coverage. Similarly, liability may rest with the insurance company if the agent fails to make it clear to the insured that a certain risk, which the insured claims to be important, is not covered, due to special limitations in the insurance policy. However, if the limitation is clearly stated in the policy and the policy itself is shown to the insured in connection with the negotiations (and not mailed to the insured only when the insurance company accepts the insurance proposal), there is no reason why the liability of the insurance company should be more extensive than stipulated by the insurance policy.

There is no doubt, either, that the insurance company is liable for misrepresentations and other mistakes by the agent. If e.g. the insured asks for a certain coverage and the agent erroneously tells him that such coverage is not available, a clear causal link exists between the fault and the lack of insurance protection once the damage occurs. However, an insurance agent can only be expected (or required) to give information of the kinds of insurance that his own company offers. But if he actually gives information of products by other insurance companies it must be correct.

The distinction between own products and the products of others has, however, become somewhat blurred due to the increasing over-

lapping among providers of services in the financial sector. Banks establish e.g. subsidiary insurance companies to use their branch offices and close contact to the customers to sell insurance, thereby giving bank employees a task they may not be (sufficiently) trained to carry out. Nevertheless, the advisory function encompasses then both traditional savings in banks for pensionable purpose and pension schemes based on insurance. For a professional provider of services the lack of necessary professional skill is of course no excuse in the customer's action for damages. However, even if the professional is not allowed to disclaim this liability, he probably can confine his part to that of being merely an intermediary between the customer and the insurance company.

If the applicant wants counselling that includes the whole market, he must make use of an independent insurance broker whose primary task is to analyse needs for insurance and all possible ways of providing coverage. The use of an insurance broker will on the other hand limit the advising required by the insurance company because he can be supposed to make up for the information gap between the company and the insured.

In order to claim damages the insured must establish that the breach of the duty to give information has caused some economic loss. In some cases this is not possible. If e.g. the insurance agent gave the insured the impression that a certain risk was covered by the insurance, the insured suffers no loss if in fact such coverage is not available at all. As mentioned supra the main problem is for the insured to prove that he would have preferred a broader insurance — at a higher cost — if he had been informed about (unexpected) limitations or exceptions in the insurance policy. The burden of proof is heavy especially if the supplementary insurance protection is very costly or for other reasons normally not taken out. An important question is therefore wheth-

er the burden of proof for the insured can or should be alleviated. Some well-established rules of evidence may be invoked so that e.g. the burden of proof is shifted to the party whose negligence is clearly established provided that the fault — from a general point of view — had the ability to inflict the damage that actually was suffered. If so, the insurance company escapes liability only if it proves that the lack of information was of no importance to the decision of the insured. This burden of proof may be as difficult to overcome as the one ordinarily lying with the party who claims damages, which indicates that the allocation of the burden of proof concerning the question of causation is often decisive in cases of “information faults” — cf. also the examples in the next section. It is probably more important than the allocation of the burden of proof of negligence.

If the insurance company is held liable, general principles of the assessment of damages imply that the insured should be compensated as if adequate insurance protection had been taken out. The liability-solution therefore contrasts with the contract-solution as any savings on the insurance (e.g. not having paid for the supplementary coverage that was needed) must be deducted from the damages. Similarly the assessment of e.g. the damaged uninsured thing must be made according to insurance principles and not according to tort law principles.

4. Doctors' Duty to inform Patients of Risks of Complications

It is a basic principle for medical treatment that it is unlawful if it is carried out without the patient's consent (if the patient is an adult, mentally healthy person). If the doctor violates this principle, he will incur criminal liability as

well as tort liability, not only for any damage inflicted in connection with the unlawful treatment but also for the infringement of the patient's right to self-determination. This is true even if — from a medical point of view — there was sufficient indication for the treatment and even if the treatment itself was carried out with due care.

The requirement of consent would, however, be entirely formal if it was not substantiated by a duty for the doctor to give the patient information of e.g. the likely consequences of different kinds of treatment and the risk of complications. It is generally acknowledged that the duty to give information of risks of complications is subject to certain limitations so that the doctor does not have to tell the patient about very rare complications unless the patient expressly asks for total information. Thus, the scope of the duty depends on the circumstances, including the seriousness of the disease and to a certain extent the doctor's perception of what the patient really wants.

In some cases lack of information clearly invalidates the patient's consent, e.g. if the patient was not informed of more or less inevitable consequences of the treatment or of obvious risks of complications. But because the duty to give information cannot be given an absolute scope it is assumed that lack of information cannot generally be equated with lack of consent. This means that the doctor is not liable for complications in connection with the treatment *just* because he did not inform the patient of the risk. The doctor's liability depends on ordinary tort law principles of negligence as opposed to a liability for “battery” in cases of lacking consent.

Because of this we face the same problem of proving a causal link between fault and injury that was discussed *supra*. The argument (for the doctor) will be that no causal connection exists if it must be assumed that the patient

would have consented to the treatment even if he had been informed of the risk of the complication. If the burden of proof lies with the patient (according to general tort law principles), he faces the difficult task of convincing the court that his allegation — that he would not have consented to the treatment if he knew about the risk — is not based on a purely hindsight rationalization. Of course, this is especially true if the risk concerned — from a pre-treatment estimation — was immaterial compared to the likely consequences of not undergoing the treatment. Thus, in this connection also the question is whether a subjective or objective test should be applied, but even if a subjective test is allowed experience shows that the patients are rarely able to convince the courts that they would have abstained from treatment which reasonable, average patients would have accepted, cf. supra of the especially risk averse person who applies for insurance.

If we stick to general tort law principles of negligence and causation, it is therefore generally not possible to enforce the duty to give information by means of tort liability. Of course, we do have other means, e.g. disciplinary sanctions or even criminal liability, but these sanctions are applied only in cases of gross violations of the duty (especially in cases where the patient has actually been misled by lack of information so that it amounts to an invalidation of the consent). Besides, these sanctions do not help the patient who wants compensation. The patient may well be entitled to a certain compensation for the mere fact that his right to self-determination has been infringed on; indeed, this will be the only compensation that the patient can claim if the treatment was medically justified (apart from the requirement of informed consent) and if it does not cause any injury. However, if a certain risk of complication should have been disclosed to the patient and that complication actually occurs, the patient wants compensation not

only for the non-disclosure as such but for the complication as well. If the complication itself was not caused by negligence from the doctor (apart from the issue of information), the question is whether an “information fault” should be recognized as a separate basis for an action for damages.

This problem has caused considerable difficulties for the courts in many countries. A recent Danish High Court decision is illustrative of the problem. The case concerned a young woman who suffered from occasional headaches; in connection with an especially painful attack of headache her doctor referred her to a chiropractor who gave her so-called manipulation treatment (pressing his fingers at various points of the skull), which caused a lesion of the brainstem because the blood stream in certain blood vessels was blocked. Because of this the patient was totally and permanently paralysed. This kind of complication is well-known but extremely rare; the patient had not been informed of the risk. There was no question of negligence as to the chiropractor’s performing of the treatment. The patient claimed tort damages, arguing that she should have been informed of the risk — adding, of course, that she would not have undergone the treatment if she had been so informed.

Ordinarily, a doctor would not be obliged to inform a patient of a risk so rare, at least not on his own initiative, but in this case an expanded duty to give information could be asserted because of the seriousness of the complication compared to the seriousness of the sickness (the headache would probably pass off in a couple of days without any treatment) and because no evidence could be presented to the effect that manipulation treatment was able to promote the patient’s recovery.

From reading the decision of the court it is evident that it *wanted* to award the patient damages but at the same time was at a loss to

give legally convincing reasons for doing so. First of all the court reversed the burden of proof, stressing that because of the seriousness of the risk the chiropractor must prove that there was sufficient indication for the treatment. As such proof had not been produced he was furthermore obliged to prove that the injury was inevitable - and such proof had not been produced either (according to the court). Thus, the patient was awarded damages, without establishing a precedent that a patient is entitled to damages for non-negligently inflicted injury *just* because the patient should have been informed of the risk.

This kind of manipulation with the burden of proof to reach to desired result is not satisfactory. It should be acknowledged openly that the reason why such a patient should be compensated is not the lack of information as such, but the fact that the patient suffered from the unfortunate fate of a totally unexpected complication which leaves the patient considerably worse off than if the treatment had not been carried out. Besides, the court decision really does not cope with the issue of causation; there was actually no indication that the patient would have acted differently if told that there was a 1:1.000.000 risk of paralysis. Finally, the decisive question of legal policy is whether it is reasonable to place the patient who was *not* informed in such an advantageous position in terms of the recovery of tort damages compared to a patient who *was* informed. Should we deny the patient in question tort damages simply because she had been told about the risk, especially when recognizing that the information in all probability would have made no difference?

Thus, traditional tort liability — as based on notions of negligence and causation — is not suited to solve the problems of the consequences of breaches of the duty to give information. A far-reaching liability for doctors' breach of the duty may induce them to overfeed

patients with information, causing unnecessary anxiety and thereby in fact *impairing* their ability to exercise the right to self-determination. We must be careful that the patient's right to be informed does not evolve to a point at which it rather works — or at least is perceived — as a way of exempting the doctor from liability by leaving not only all the decisions but also all the underlying judgments to the patients.

What, then, is the alternative to tort liability? In the Scandinavian countries (including Finland) *patient insurance schemes* have been introduced in recent years (Sweden being the pioneering country whose — voluntary — scheme was introduced in 1975; Finland followed suit in 1987 with a statutory scheme, and a provisional, voluntary scheme — covering only some hospitals — was introduced in Norway in 1988. The latest development is the Danish Act on Patient Insurance (Act no. 367 of 6. June 1991) which came into effect 1. July 1992). The various schemes differ in matters of detail (the scope of coverage, the administrative organization etc.), but common to them is the basic notion that a patient's right to compensation for injury caused in connection with medical examination and treatment should not be conditioned by a personal liability for the doctor according to rules of negligence. On the other hand the liability is not a general strict liability for any injury that can be linked to the treatment (or to the lack of treatment). Rather, the liability should be considered a *sui generis* kind of expanded enterprise liability, primarily covering injuries that are avoidable in an objective sense (including to a certain extent avoidability based on hindsight evaluations) and some injuries that are unavoidable even in this sense. Thus, the Danish Act contains a provision of damages for (unavoidable) complications (of any kind), caused by the examination or the treatment, stating that the patient is entitled to compensation — at the level of tort damages

— if the complication is more extensive than the patient should reasonably tolerate. Two factors are to be considered when making this evaluation: The seriousness of the complication in relation to the seriousness of the disease against which the treatment was given; and the frequency of the type of complication (so that compensation is given only for complications that are rare in general and whose occurrence also in the individual cases is unexpected).

If we apply these criteria to the chiropractor-case it is easy to see that the conditions would be met. The patient would therefore be entitled to damages, irrespective of any fault from the chiropractor, including any fault to inform the patient of the risk. Thus, the coverage according to the Act provides the solution that the court in question wanted but could not express directly. This also means that we no longer have to establish a (breach of) duty to give information in order to award damages for non-negligently inflicted complications, and neither do we have to distinguish between patients who were informed of the risk and patients who were not. Thus, even if the patient in the chiropractor-case had been informed of the risk, she would *still* be entitled to damages according to the provision of the Act.

The patient insurance schemes offer a simple and more direct solution to the compensation problem in case of injury than the round-about method of establishing negligence for information faults. However, this does not mean that the patient insurance schemes entirely solve the problem of liability for (lack of) information.

For one thing, the doctor may violate his duty without any injury occurring during the treatment; the schemes cover personal injuries only (in Sweden and Denmark even confined to *physical* injuries) which generally means that compensation cannot be given for the mere fact that the doctor violated the duty

to give information. That is true even in case of lack of consent if the —unlawful— treatment apart from that was justified by medical reasons and caused no other harm than the infringement of the patient's right to self-determination.

For another thing, as mentioned *supra* damages for (unavoidable) complications according to the Patient Insurance Act are awarded only in cases of rare and unexpected complications, and typically the doctor is not obliged to inform the patient of the risk of precisely these complications. Thus, there may still be cases in which the patient tries to claim damages according to tort law principles against the doctor (and the hospital), based on the argument that the patient should have been informed of the risk. If a complication is covered by the Act, the patient is barred from bringing an action against the doctor (and the hospital), but of course the patient is free to do so if the complication is not covered by the Act.

Finally, the scope of coverage of the Danish Act — as opposed to the Swedish and the Finnish schemes — is confined to injuries in connection with medical treatment in hospitals. Thus, injuries caused by private practitioners, specialists, dentists etc. are not covered; should a new case involving a chiropractor appear it would therefore have to be decided in the same way as the case mentioned *supra*.

Being concerned with injuries only and not with other infringements of patients' rights, the patient insurance schemes only provide a half-way solution (albeit a better one) to the problem of the proper way of dealing with information faults. It is submitted that as a general rule patients should not be awarded tort damages for medical injuries (not inflicted negligently) just because the doctor should have informed the patient of the risk. We cannot disregard the general requirement of tort law that a causal relationship between fault and injury must be established. The real issue is therefore the allocation of the burden

of proof of the causal connection. Placing the burden on the doctor may make it as difficult for him to prove that the patient would have accepted the treatment even if he had been better informed as it is for the patient to prove that he would not have accepted the treatment. As mentioned supra in section 3 the reasons for paying regard to the doctor's difficulties in producing evidence appear less weighty the more serious the information fault is. If the patient succeeds in establishing a clear violation of the duty to inform, and the lacking information would have been likely to influence the patient's considerations according to a general, objective judgment, it would be reasonable to reverse the burden of proof as to the question of causal connection.

It should be added that the same problems arise in cases of serious side-effects of drugs. All drugs involve the risk of side-effects; otherwise they would not have any main effect either. Lack of information of the risk of side-effects from the producer of the drug may make it defective according to general rules of products liability or the special rules implemented in the EEC-countries according to the EEC-directive on products liability. However, some risks of well-known side-effects are so small that it is inconceivable that a court should find the drug defective because of the risk or because of lack of information of the risk. Penicillin may e.g. cause very serious injury (especially anaphylactic shock which may cause the patient's death — a risk, however, as rare as the one in the chiropractor-case), but that does not make penicillin defective. The doctor, on the other hand, is obliged to ask the patient whether he is allergic to penicillin but injuries do occur even if the patient had no previous record of hypersensitivity. Thus there will be cases in which the drug causes injury without being defective and in which the doctor did not act negligently in administering of the drug.

In such cases the patient is nevertheless

entitled to damages according to the Drug Injury Compensation Schemes operating in Sweden, Finland and Norway. In principle, damages are awarded according to the same criteria as used in the Danish Patient Insurance Compensation Act, cf. supra. This means that the question of giving information of the risk is not an issue when deciding the patient's entitlement to damages. Injuries caused by rare and unexpected side-effects which are disproportionately serious compared to the disease against which the drug was given give rise to claims for damages, regardless of whether the manufacturer and/or the doctor should have informed of the risk and regardless of whether information actually was given.

A similar insurance scheme is not operating in Denmark for the unfortunate reason that it is precluded by the EEC-directive on products liability. We are not allowed to impose by legislation a more far-reaching liability on manufacturers of drugs (e.g. a liability for certain injuries not caused by defects), and we are thus forced to try to persuade the drug manufacturers and importers to assume such a liability on a voluntary basis! So far we have not been successful, thus facing serious problems of demarcating injuries caused by drugs from injuries otherwise caused by the medical treatment.

Another problem of special importance for drug related injuries is the requirements of proof for the causal connection between the drug and the injury. In several cases e.g. women have claimed damages for thrombosis allegedly caused by the use of contraceptive pills. The cases have generally been lost by the claimants because they could not satisfy general requirements of proof of causation even if it could be established on a statistical basis that the pill is a significant risk factor in relation to thrombosis. The EEC-directive, however, does not allow for an relief of the burden of proof of causation or even a reversal of that burden. In the countries having Drug Injury

Compensation Schemes these injuries are generally compensated if no other significant risk factors are involved (e.g. heavy smoking).

5. Conclusions and Subjects for (further) Discussion

The foregoing examples should have demonstrated that it is hardly possible to formulate general rules on the extent of professionals' duty to give their customers information. No doubt, such a duty is generally part of their duties acting as professionals and the duty is certainly one of increasing importance due to the customers' increasing ignorance of the services the professionals render. The similarity between the problem of information in the two groups of cases discussed here should also have demonstrated that there is no reason for making a sharp distinction between duties based on contractual obligations and duties based on principles of tort liability. Whether or not the relationship between the professional and the customer in other respects is considered to be contractual, the mere fact that professional service is applied for (by a non-professional) imposes certain duties on the professional not only to provide that service (in case that is agreed upon), but also to take reasonable care of the customer's interests in relation to that service. If we stress the contractual nature of the relationship, this duty might be considered an accessory duty to the primary duty of providing the service itself. Generally, negligent breaches of this duty entitle the customer to tort damages for harm or injury caused thereby. The professional is not allowed to disclaim this liability which is tortious in nature. However, that does not mean that any contract between the parties is irrelevant; the contract may define — and thereby limit — the task which the professional undertakes, thus limiting also the extent of the service which the customer is entitled to expect. The amount of the professional's

charge for the service may be a relevant factor in this respect.

The extent of the professional's duty to use his special skill to protect the interests of his customer, who relies — and must rely — on his superior skill, depends on the kind of service in question and on other circumstances, including (as mentioned) to a certain extent the contract (if any) between the parties. Therefore, statutory duties e.g. to give information to the customer are not likely to provide more precise solutions to the question of liability than general principles of liability for negligence. Probably, statutory provisions of e.g. doctors' duty to inform patients of risks of complications can hardly accomplish more than just reformulating the negligence rule. At most, such provisions call attention to the problem of information (cf. the example of the Norwegian Insurance Contracts Act) and they may possibly furnish the customer with a somewhat better foundation for a claim based on negligence. However, the lack of such provisions certainly does not mean that no duty to give information exists.

The compensation problem is most pressing in cases of professional service that can result in personal injuries. It is no coincidence that doctors' liability has attracted more attention than e.g. lawyers' liability. This fact is reflected also in the EEC-proposal on the liability of suppliers of services. Its main purpose is to improve (among others) patients' right to damages by reversing the burden of proof of negligence. However, the examples discussed in this paper clearly demonstrate that as far as the information problem is concerned the decisive issue is not the issue of negligence but the issue of causation, especially the burden of proof of a causal connection. Like the directive on products liability, the EEC-proposal does not relieve this burden for the customers and it is therefore not likely to alter the state of law in cases of information faults.

The causation issue makes in many cases tort liability an inefficient instrument for enforcing duties to give information. Trying to make it more efficient (e.g. by reversing the burden of proof of causation) may cause more problems than it solves. Strengthening professionals' liability towards their customers is not necessarily only beneficial to them if a requirement of exercising more than due care results in vast quantities of information which rather tend to obscure the *relevant* pieces of information to the customer. We are said to be entering the "information society"; that is probably especially true in the sense that it becomes more and more important—and more and more difficult—to discern relevant information from irrelevant information. Anyone who has tried to study the manual for the operation of e.g. a personal computer will know what I mean.

Liability for information faults is not going to be effective if the professional escapes liability just by stating some general warnings of the risks. In some cases consumers of cigarettes have claimed damages against manufacturers arguing that they should have been warned against the risk involved. In many countries the manufacturers are now required to warn against the risk on packs of cigarettes and in advertising. Should the manufacturer be absolved from any possible liability just because he complies with the requirement? Should he be liable just because he does *not* comply with the requirement — given the fact that such a warning probably exerts very little influence on most people's decision whether or not to smoke cigarettes.

Similarly, one may ask whether a patient who was informed of the risk of anaphylactic shock due to penicillin is less deserving of compensation for such injury than the patient who was not informed of the risk? We should recognize that this piece of information—like the warning against damages of cigarette smoking—is unlikely to make any difference

(and in this case — as apposed to the cigarette example — hopefully does not make any difference); therefore it is questionable whether the information issue should be a decisive — or even a relevant — factor as to the right to claim damages.

We should therefore confront the issue of unexpected harmful outcome of the professional service directly instead of trying to resolve it by means of more or less strained legal devices aimed at establishing the causal connection between information fault and damage which in fact is rarely present. Insurance schemes — like the patient and the drug injury compensation schemes mentioned above — are one possible way of confronting the issue directly. To put it sharply: The best way of dealing with the consequences of information faults is to remove the issue from the compensation problem — as far as possible. However, as mentioned above even in the areas of these schemes the problem is not entirely overcome, and no doubt such schemes are not generally feasible outside areas in which risks of personal injuries are involved. The schemes operating in Scandinavia do not exhaust the possibilities; one might e.g. imagine a similar scheme covering injuries caused by cigarettes (whether or not the consumers are warned against them), financed by the manufacturers of cigarettes who would presumably pass over the costs to the consumers as a kind of mandatory insurance premium added to the price of cigarettes. However, the EEC-directive on products liability impedes such solutions, at least if introduced by legislation, cf. the comments *supra* on drug injury compensation in Denmark.

All experience shows that (reasonable) information from the professional to his customer is crucial for the customer's satisfaction with the service in cases where the outcome of the service is not as successful as one (including the professional) would normally expect. Professional ethics in the various fields

should sustain a development of greater openness, not least of the limitations of what the professional can do. A higher level of information as a moral standard for the profession will automatically influence the liability of the professionals who do not comply with the standard. This is simply a matter of applying the rule of negligence; it is not a reason for making the liability more rigorous. Of course the professionals also have an interest in avoiding conflicts with frustrated customers. Tightening up their liability (e.g. by reversing the burden of proof of fault and/or of causation) is not the way for society to minimize conflicts. If a duty to give information is intended to promote trust between professionals and their customers, far-reaching rules of tort liability may have the opposite effect.

Doctors (or other professionals) are not obliged to inform the other party that some damage or injury has been caused in connection with the service that might entitle the customer to a claim for damages. This is one of the reasons why tort liability does not work as intended, especially in the field of injuries in connection with medical treatment. Many patients are quite simply unaware of the fact that an injury has been caused, believing e.g. that it is some (unavoidable) complication stemming from the disease. Besides, most of them are unaware of the complicated rules of tort liability. Obviously, we cannot expect the

doctor to function as an adviser to the patient since the issue would be whether he is liable because of negligence. As long as the tort process involves a confrontation between conflicting parties, tort liability is not likely to induce doctors (or other professionals) to take care of the other party's interests, e.g. by informing them of their right to and possibility for claiming damages. Imposing stricter liability on the professionals would only worsen conditions. In order really to promote openness and trust between the parties, helping to close the information gap, it is desirable to replace systems of tort liability with insurance schemes (like e.g. the patient insurance schemes) according to which the coverage is not conditional on notions of fault.