

Articles

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Policy Orientation in Public Authority Liability: a Comparative Law Perspective

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Abstract: Turning the spotlight on the historical evolution of public authority liability in Europe shows us a movement from immunity to liability of increasing extent but, at the same time, opposite tendencies can be observed as well. Public authority liability evolves in waves, not always going in the same direction and, more than once, recurring to old solutions. These motions are partway prompted by policy considerations, interrelated with the special position of the state. This paper aims to set the right tone for answering the main question of the Ius Commune Workshop, entitled ‘Public Authorities and Tort Law: a Difficult Marriage?’. Using a comparative perspective, this paper sets out to illustrate how policy orientation has an impact on public authority liability in Europe without giving a constant and lasting direction towards either expanding or limiting this liability.

I Starting point

Can public authorities and tort law be seen as lovebirds or are they entangled in a difficult marriage? This paper aims to set the right tone for answering this leading question of the Ius Commune Workshop on Liability and Insurance 2018. It sheds light on the particularities and difficulties of the bond between public authorities and tort law and on their round dance of coming closer and turning away. My objective is to exemplify how policy arguments are at play in construing and moulding the liability framework of wrongful behaviour by public authorities. The term ‘public authority’ is used in a broad sense. This article reflects upon compensation for damage arising from acts (such as administrative acts, regulations and judgments) or omissions of central and local government, including

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both the politically responsible and the executive arms of government, the legislator, judges and other officials.

A first question that pops up is what kind of birds we are dealing with here? In the debate on public authority liability a great deal of importance is attached to the exceptionality of public authorities, to the so-called special position of governments and governmental institutions. While holding state power, governments are granted certain privileges but, also, burdened with the obligation to look after the public interest. Therefore, all over Europe, the question is put forward whether the liabilities and accountabilities are, or should be, more or less stringent for public authorities as opposed to private parties.¹

Assigning the label ‘public authority liability’ assumes a distinction between public and private spheres, but how to define these spheres and make meaningful distinctions, especially given the rapid growth, diversification and out-sourcing of public services in modern times? Does private tort law, on the one hand, have public aspects? And is it, on the other hand, an adequate instrument to pressurize and influence public services? These general questions, taking centre stage at the *Ius Commune* Workshop, are dictated by the special position of the state.

This special position may also explain why the topic of public authority liability has, until lately, been excluded in the academic initiatives to harmonise the European law of tort. Both the Principles of European Tort Law (PETL), published in 2005, and the Draft Common Frame of Reference (DCFR), issued in 2009, show reluctance to set foot on this territory and plainly lack model rules or specific guidelines regarding public authority liability. The liability of a person or body arising from the exercise of, or omission to exercise, public law functions or from performing duties during court proceedings is explicitly excluded from the scope of Book VI of the DCFR.² The view of the European Group on Tort Law (EGTL) at the time of the publication of the PETL in 2005 was that no recommendation should be made as regards public authority liability because this area is strongly influenced by historical and cultural heritage and incorporation may cause too much interference with administrative law.³

1 *ALM Keirse/R Ortlep*, Policy-argumenten in het overheidsaansprakelijkheidsrecht: een rechtsvergelijkend perspectief (2017) 1 Overheid & Aansprakelijkheid (O&A) 3.

2 *V Sagaert/ME Storme/E Terryn*, Draft Common Frame of Reference (DCFR) (2009) art VI (7):103 ‘This Book does not govern the liability of a person or body arising from the exercise or omission to exercise public law functions or from performing duties during court proceedings.’

3 *European Group on Tort Law*, Principles of European Tort Law, Text and Commentary (2005) 113, 119; *K Oliphant*, Introduction, in: K Oliphant (ed) *The Liability of Public Authorities in Comparative Perspective* (2016) 3.

Recently, however, EGTL embarked on a major comparative study of public authority liability considering the current state of play across Europe, the United States, South Africa and Israel and the possibility of European harmonisation in this area.⁴ EGTL accounts for the reversal of its previous view by referring to current developments, the changing position of governments in modern society and the intertwinement of public and private law as well as public and private services.⁵ In the last decades, public authority liability has been one of the main focuses of development of tort law in Europe, with major legislative reforms implemented at national level and a stream of key court decisions at national level in different jurisdictions and at international level from both the Court of Justice of the European Union and the European Court of Human Rights.⁶

Considering all this, there is most certainly reason enough for us to have a closer look at this bond between public authorities and tort law. EGTL's study of 'the liability of public authorities in comparative perspective' is the source of information for this paper, and I should also disclose that I was involved in this comparative research project as a current member of EGTL. That being said, let us have a closer look at how special public authorities are.

II Special position of the state

All over Europe liability rules have been developed in order to adequately deal with the special position of public authorities; in some jurisdictions, through case law, and in others, via specific legal regimes. This separate attention is warranted because of the range of special powers public bodies are granted, especially since this increases the vulnerability of private citizens towards them.⁷ The tasks of making regulations, passing judgments and performing the public administrative function are attributed exclusively to the state. Accountability is implied with these legislative, judicial, political and democratic processes. Of course, being the recipients of public funds goes along with special responsibilities. Furthermore, the doctrine of the separation of powers and the need for balancing powers affect the applicable norms and establishment of liabilities. It also influences the role of the courts compared to what is expected from the legislature and policymakers. Last but not least, the necessity to facilitate effective and efficient delivery of public services also has an impact on the limits of accountability and liability.

4 *Oliphant* (fn 3).

5 *Oliphant* (fn 3) 886.

6 *Oliphant* (fn 3) 1; *Keirse/Ortlep* (fn 1) 3.

7 *Oliphant* (fn 3) 882; *Keirse/Ortlep* (fn 1) 14.

With these extra powers and freedoms come additional responsibilities.⁸ They need to be wielded with the care and diligence that cannot be expected from regular citizens. This makes public authority liability law ‘special’. And indeed, when addressing the liabilities of public authorities, the various legal systems make significant departures from the approach taken in adjudicating the liabilities of private persons.⁹ There is consensus in Europe and elsewhere globally that public authorities merit special attention. However, the sort of special attention varies.

In many countries, such as the Belgium, Denmark, Israel, Italy, Netherlands, Norway, South Africa and the United States, public authority liability involves merely the application of the general tort law regime, be it that tailored rules have been developed in case law in order to adequately deal with the special position of public authorities.¹⁰ These jurisdictions thus adopt a primarily private law approach, with the addition that they include special adaptations to cater for the particular position of public authorities.

Some legal systems go a step further, relying upon special rules within the fabric of general tort law and establishing special bases of liability for specific forms of unlawful state behaviour. German law, for example recognises a special ground of liability for a civil servant’s breach of official duty.¹¹ And then there is the common law tort of misfeasance in public office in England and Wales.¹²

In other foreign jurisdictions the source of public authority liability is a special law, for example a separate statute or a stand-alone section of the civil code. This is true for Austria the Czech Republic, Spain and Switzerland.¹³ These countries have enacted self-contained statutes to resolve the liability of public autho-

8 *ALM Keirse*, The Liability of Public Authorities in the Netherlands, in: *Oliphant* (fn 3) 306.

9 *Oliphant* (fn 3) 882.

10 *Keirse* (fn 8) 296; *I Durant*, The Liability of Public Authorities in Belgium, in: *Oliphant* (fn 3) 58; *V Ulfbeck*, The Liability of Public Authorities in Denmark, in: *Oliphant* (fn 3) 112; *I Gilead*, The Liability of Public Authorities in Israel, in: *Oliphant* (fn3) 238 ff; *G Comandé/L Nocco*, The Liability of Public Authorities in Italy, in: *Oliphant* (fn 3) 268; *B Askeland*, The Liability of Public Authorities in Norway, in: *Oliphant* (fn 3) 340; *MD Green/J Cardi*, The Liability of Public Authorities in the United States, in: *Oliphant* (fn 3) 545 f; *J Neethling*, The Liability of Public Authorities in South Africa, in: *Oliphant* (fn 3) 430; *K Oliphant*, The Liability of Public Authorities in England and Wales, in: *Oliphant* (fn 3) 134.

11 § 839 German Civil Code (Bürgerliches Gesetzbuch, BGB) juncto § 34 German Basic Law (Grundgesetz); *U Magnus*, The Liability of Public Authorities in Germany, in: *Oliphant* (fn 3) 184 ff.

12 *Three Rivers District Council v Bank of England (No 3)* [2002] AC 1; *Oliphant* (fn 3) 137.

13 *BA Koch*, The Liability of Public Authorities in Austria, in: *Oliphant* (fn 3) 20; *M Martin-Casals/J Ribot*, The Liability of Public Authorities in Spain, in: *Oliphant* (fn 3) 464 ff; *L Tichy*, The Liability of Public Authorities in Czech Republic, in: *Oliphant* (fn 3) ff; *P Widmer/B Winiger*, The Liability of Public Authorities in Switzerland, in: *Oliphant* (fn 3) 508 ff.

rities: the *Amtshaftungsgezetz* (Liability of Public Bodies Act) in Austria, the Spanish *Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común* (Legal Regime of Public Administrations and General Administrative Procedure Act), *Zákon o odpovědnosti za škodu způsobenou při výkonu veřejné moci rozhodnutím nebo nesprávným úředním postupem* (Act on Liability for Damage Incurred in the Course of Exercise of Public Powers through a Decision or Incorrect Administrative Procedure, as amended) in Czech Republic and the Swiss *Bundesgesetz über die Verantwortlichkeit des Bundes sowie seiner Behördenmitglieder und Beamten* (Federal Act on Responsibility of the Confederation as well as of the Members of its Authorities and its Civil Servants). In Greece a section on public authority liability is to be found in the Introductory Law of the Greek Civil Code.¹⁴ In Poland the tort of a person acting as a public authority is specifically addressed in the Civil Code and procedural requirements for bringing claims involving unlawful decisions, legislative acts and court judgments are to be found in procedural codes.¹⁵

The most offbeat model of public authority liability is adopted in France; it is a public law model, remarkable for being an autonomous area of judge-made law.¹⁶ This is unique, because elsewhere, even where the source of the liability is a special law, general principles are drawn from the general tort law regime to fill the gaps in the special regime.¹⁷

Following from the above, different classifications can be mapped:¹⁸ in some legal systems, the law of public authority liability is considered to be public law and, in others, it is considered private law. Sometimes, the law of public authority liability is a mixture of both laws. Notwithstanding these differences, the law of public authority liability is in all jurisdictions regarded as special law. Moreover, the degree of particularisation is not dictated by the classification. How public authority liability is categorised (public, private or a mixed approach) seems to have very little impact upon what substantive principles are applied or what policy orientation is chosen.¹⁹ This is illustrated clearly by comparing Belgian law with French and English law.²⁰ In Belgium, the ordinary tort law provisions of the Code Civil apply to deal with the liability of public authorities, whereas in France

14 Articles 104–106 Greek Civil Code (*Astikos Kodikas*); *E Dacoronia*, The Liability of Public Authorities in Greece, in: Oliphant (fn 3) 196 ff.

15 *E Baginska*, The Liability of Public Authorities in Poland, in: Oliphant (fn 3) 352 ff.

16 *D Fairgrieve/F Lichere*, The Liability of Public Authorities in France, in: Oliphant (fn 3) 158 ff.

17 *Oliphant* (fn 3) 863 f.

18 *Oliphant* (fn 3) 880 f.

19 *Oliphant* (fn 3) 881.

20 *Oliphant* (fn 3) 881 f.

public authority liability is conceived as public law. Nevertheless the Belgian and French substantive principles of public authority liability are not far apart but, rather, are quite similar. At the same time the policy orientation regarding public authority liability in Belgium and England are noticeably very different, even though they share the private law approach in which the liability principles applied to private persons are extended to the state and its institutions. There is a rift between the expansive approach to public authority liability taken by France and Belgian law and the more reluctant approach taken by English law.²¹

In review, where does this leave us in trying to answer the leading question of the *Ius Commune* Workshop: ‘Public Authorities and Tort Law: Lovebirds or Troublemakers?’. Well, in countries where tort law and public authority liability are partners in marriage there are difficulties and we do not witness the forging of an ever-closer union between the two. But they nevertheless stick together. In those countries where public authorities and tort law are not married, or at least live apart, we see seduction. I leave it up to the readers to draw their own conclusions on the pros and cons of living together, apart, dancing or fighting. I would only like to stress that public authority liability is special, regardless of how it is conceived.

The fact that public authority liability is special justifies particular legal rules, be they rules of a private law nature or a public law nature, and either specific legislation or tailored case law. The ultimate question is whether the factors making public authority liability special point towards a liability that is more narrow than the liability of persons generally or towards a liability that is more extensive. The following section shows there are no black and white answers here either.²²

III Policy considerations

Previously, it was believed that the special position of the state justified far-reaching limitations of liability and even immunities. Back then all legal systems expressed the legal maxim *rex non potest peccare*: the king can do no wrong. However, from the mid 19th century onwards, the immunities were limited in application and were later abolished.²³ It started with the idea that the state should be held liable for wrongs insofar as it acted in the private field and, later, expanded to wrongs in the public field. Former limitations of liability were discarded and

²¹ *C van Dam*, *European Tort Law* (2013) para 1811.

²² See also *JEM Polak*, *Overheidsaansprakelijkheid: iets aparts?*, in: T Barkhuysen et al (eds) *Coulant compenseren? Over overheidsaansprakelijkheid en rechtspolitiiek* (2012) 135–150.

²³ *Oliphant* (fn 3) 851 ff.

liabilities of a wider scope were accepted. Bradley and Bell present an on-going movement to liability of increasing extent:²⁴

The general picture which emerges is of a widening of governmental liability. Immunities are declining and the grounds for obtaining compensation are expanding. This trend is likely to continue.

However, our recent EGTL study shows that while some national regimes may still be moving in the direction of more and broader liability, others are retreating with the feeling that previous expansions were perhaps pushed too far:²⁵

Our research shows a further widening of governmental liability in many legal systems but also highlights the need for caution in seeking to identify international trends as there may in fact be quite considerable differences in the 'direction of travel' of different national regimes.

The lesson to be learned is that legal systems apply special liability rules to public authorities, sometimes to limit the liabilities they face relative to private parties, and sometimes to extend them:²⁶

Contradictory tendencies can be evident at the same point of time, with rival schools of thought calling respectively for expansive and restrictive approaches.

Interestingly, policy argumentation is used for both tendencies. In Denmark, England, France, Israel, Italy, the Netherlands, Norway, South Africa, the United States and Wales, policy arguments are currently deployed in pleas against the broad extension of liability.²⁷ Amongst the considerations put forward in this context are the need to preserve limited public financial resources, the risk of defensive action by public authorities, which would endanger the ability to deliver general public benefits, an overkill due to fear of liability and the tension between the authority's duty to the public and the (proposed) duty of care towards individuals.²⁸

At the same time, opposite arguments also hold sway, especially in the Czech Republic Germany, Greece, Poland, Portugal, Spain and Switzerland.²⁹ In these

24 *AW Bradley/J Bell*, *Governmental Liability: A Preliminary Assessment*, in: *AW Bradley/J Bell* (eds), *Governmental Liability: A Comparative Survey* (1991) 15.

25 *Oliphant* (fn 3) 884.

26 *Oliphant* (fn 3) 863.

27 *Ulfbeck* (fn 10) 111; *Oliphant* (fn 3) 129; *Fairgrieve/Lichere* (fn 16) 162; *Gilead* (fn 10) 235–238; *Comandé/Nocco* (fn 10) 267 f; *Askeland* (fn 10) 339 f; *Neethling* (fn 10) 429; *Green/Cardi* (fn 10) 544.

28 *Oliphant* (fn 3) 860; *Keirse/Ortlep* (fn 1) 11 ff.

29 *Magnus* (fn 11) 184; *Dacoronia* (fn 14) 205; *Baginska* (fn 15) 363 f; *M Reis Rangel de Mesquita*, *The Liability of Public Authorities in Portugal* in: *Oliphant* (fn 3) 400–402; *Martin-Casals/Ribot* (fn 13)

countries policy considerations are used to stress the importance of establishing public authority liability and the provision of a remedy to injured citizens for state wrongs. Furthermore, the emphasis in this context is on ensuring the application of principles of good administration. Additionally, the protection of the fundamental rights of citizens is highlighted as well as the fair allocation of risks and harms. Also mentioned is the importance of loss spreading via the state's 'deep pockets'. Further arguments are to incentivise public authorities to promote efficient administration and to look after the overall quality of public service, as well as the avoidance of unnecessary risks.³⁰

Answering the question of what policy considerations should be given the most weight is complicated by the fact that some policy arguments cut both ways. The element of granting public power, for example, can work both ways in public authority liability cases. On the one hand, public authorities should not be held back from using their powers to achieve public benefit. Since the state looks after the public interest, one can argue that the base assumption is that public authority conduct is lawful conduct. Furthermore, public authorities need (to some extent) more power and freedom than regular citizens in order to achieve goals for the common cause. But, on the other hand, the fact that public authorities are granted special powers provides reason for holding them responsible for their proper exercise. When reviewing conduct, stricter norms apply for public authorities than for other (civil) parties, corresponding with the responsibilities that come with the powerful position of the state.

Likewise, the argument of the state's public funding has two sides as well. It creates a pool from which individuals can be compensated – the state has deep pockets – and one could argue that it would be fair to compensate an individual for bearing disproportionate costs by using communal money. But, at the same time, one should be aware of the risk of taking away funds from the performance of the public functions. The fact that damages are paid from the public means is also a restraining factor in granting damages, since using communal money for damages would endanger the capacity for other public tasks of the state.

479; Tichy (fn 13) 90; Widmer/Winiger (fn 13) 515–517; P Machnikowski, The Liability of Public Authorities in the European Union, in: Oliphant (fn 3) 568.

30 Oliphant (fn 3) 861; Keirse/Ortlep (fn 1) 10 ff.

IV Synthesis: drawing the lines together

To conclude, the fact that the state is in a special position is reflected in the applicable liability rules: with its extra powers and freedoms come additional responsibilities. This means that relying on policy considerations is no indicator of policy orientation. There are considerable differences in the direction of orientation.

Turning the spotlight on the historical evolution of public authority liability in Europe shows us a movement from immunity to liability of increasing extent, but at the same time opposite tendencies can be observed as well. To put it bluntly, public authority liability does not evolve in a linear manner. Quite the contrary, the evolution of public authority liability must be perceived as a process of waves. Back-and-forth motions can be observed. In some legal systems the arguments against extensive liability once held sway but are now discounted. Controversially, in other countries, such as the Netherlands, there is a concern that the extension of public authority liability may now have gone too far, requiring a contraction of public authority liability law.³¹

These developments call for a constant re-examination of the tensions and junctions between public law and private tort law. As is illustrated by this special issue, cross and counter currents are set in motion when public authorities meet private tort law. On the one hand, tort law can function as an instrument in the hands of private parties to influence policy and, on the other hand, tort law can function as a tool for public authorities to enforce policy. Pursuing public goals by private parties through public interest litigation makes tort law ‘more public’ with its collective *ex ante* approach, shifting the focus from compensation of damage to preventing harm. Again, we encounter a two-way street, giving rise to questions regarding conceptions of the separation of powers and, at the same time, awaking worries not to overstretch tort law’s prerequisites.³² The flip side of *facing* tort law as public authority is *using* tort law as public authority as a tool to enforce policy, or simply as a tool to shift the burden of costs from the public sphere to private parties, applying the polluter pays principle. Can this ‘public use’ of private tort law serve as a crowbar to break open tort law to grant compensation for harms that in a traditionally tort law perspective would not be eligible for damages? Or, vice versa, does tort law act as a straitjacket constraining the core

³¹ Keirse (fn 8) 295 ff.

³² See further the contribution of Gillaerts to this special issue: *P Gillaerts, Tort Law as Policy Instrument: Public Law in Disguise or in Chains? A Fundamental View on the Use and Usefulness of Tort Law for Public Goals from Belgian and Dutch Law* (2020) 11 *Journal of European Tort Law* (JETL) 16.

concepts and prerequisites of tortious liability?³³ To what extent is tort law focused on private interests and to what extent do public interests constrain the reach of tort law into the field of public law? In light of these diverging inclinations, the concern of opening the floodgates of civil liability of the State too wide is understandable and pragmatic,³⁴ as is states' practice of establishing alternatives to tort law damages claims for mass harm by public authorities in the form of compensation funds.³⁵

To summarise, from a comparative perspective my paper illustrates how policy orientation has an impact on public authority liability in Europe without providing a constant and lasting direction towards either expanding or limiting liability. Instead, due to rival schools of thought calling respectively for expansive and restrictive approaches, contradictory tendencies are evident in succession and even at the same point of time. Think of waves and how their propagation can be in different directions from the source direction of motion; as molecules and atoms, policy argumentations impact each other at many different angles and, over time, transfer the energy and momentum of the motion outwards in various directions. These continual motions endorse the need and provide for ample opportunity to remould and reshape the connection between public authorities and tort law; renewals that spark or, conversely, subside the love between them.

33 See further the contribution of Borucki to this special issue: *C Borucki*, Cost Recovery of Preventive and Remedial Measures against Environmental Damage from the Polluter through Tort Law: European Spill-over, Troubled National Waters? (2020) 11 JETL 86.

34 See for an example the contribution of Auvray to this special issue: *F Auvray*, Is the Infringement of a Treaty a Fault? The Impact of the Absence of Direct Effect on the Extra Contractual Liability of the State (2020) 11 JETL 37.

35 See further the contribution of Watts to this special issue: *K Watts*, Managing Mass Damages Liability via Tort Law and Tort Alternatives, with Ireland as a Case Study (2020) 11 JETL 57.