

# LIABILITY AS REGULATION

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## 1. Introduction

There are longstanding claims in the North American literature that civil liability can be regarded as a form of regulation or ombudsman over public authorities and the fulfilment of their missions (e.g. Rose-Ackerman 1991). These are important claims, both analytically and practically. They take us some distance away from more traditional conceptions of liability as being concerned with attributing responsibility and granting redress which still prevail in the European common law jurisdictions. Conceiving of liability as an aspect of regulation is also somewhat removed from traditional conceptions of regulation rooted in proactive agency monitoring and enforcement by reference to rules. This reconceptualisation of liability offers a vision of law as part of a wider system for the regulation and accountability of public service providers, and offers a means to better communicate between the disciplines of law and public administration through the lens of regulation.

This paper offers a theoretical analysis of the role of liability, broadly defined to encompass all mechanisms under which a service user may seek redress and compensation, as a mechanism of regulation over public service providers. The paper is a prelude to the undertaking of empirical work on systems of 'legal liability as a form of regulation' in Europe, specifically in Scotland and Ireland, of a kind which is already being undertaken in North America (see, for example, Epp, 2000; 2005).

Empirical investigation of liability regimes as regulation is important in establishing the extent to which liability claims are not simply two party matters geared towards the provision of individuated redress, but rather part of a major industry involving the provision of public services, legal services, insurance and risk management. The diffuse responsibilities within regimes must be understood not only from a practical point of view, but also from a normative perspective. If, in practice, insurance companies and risk managers call the shots on whether or not potentially risky activities are undertaken, and if so on

what terms and with what precautions, then we need to consider how to adapt our views on public sector decision making to reflect this market driven and non-democratic involvement. We might also want to ask how effective and efficient are market actors. To what extent, for example, do insurance companies shy away from insuring potentially risky activities where they lack capacities to acquire or use the information which would enable them to set appropriate premia, under which public activities can be permitted to proceed. To what extent can the effects of such commercial decision making be challenged by those adversely affected by decisions to reduce exposure of public service providers to risks?

This short paper offers first a conceptual discussion of the relationship between regulation and liability regimes. It moves on to explore questions regarding the impact and effects of liability regimes on public service providers, before concluding with an evaluation of the normative issues.

## **2. Regulation and Liability**

Regulation may be conceived of more or less narrowly for different purposes (see generally Baldwin and Cave, 1999; Baldwin, et al 1998). Much public policy analysis employs a working definition of regulation which focuses on the monitoring and enforcement (and sometimes the making) of rules by agencies over businesses. Arguably such a focus emphasises only one form of regulation, but also only one, very important, set of regulatory subjects. Broader conceptions of regulation abandon the institutional focus on agencies, in some instances to encompass a wider range of governmental activities directed at securing behavioural change (for example taxes and subsidies from government ministries, information campaigns, etc), and in yet broader conceptions of regulation, abandoning the primacy of governmental activity to include discussion of wider mechanisms of social ordering, such as community and market mechanisms. In discussion of regulatory subjects a growing literature examines the regulation of public sector bodies (e.g. Hood *et al*, 2000).

The main focus of work on liability of state authorities has traditionally been on civil liability – the effects of the pursuit of claims in tort (or sometimes in contract). This focus is important, in particular, because civil liability is distinguished by the availability of damages. The significance of damages lies not in its capacity to compensate the claimant, but rather in its potential for disciplining or regulating the defendant to the action, and potential defendants in potential actions. However, the mechanisms through which such disciplining might occur are not necessarily direct, as discussed below. State bodies face other ‘liability’ risks linked to alternative mechanisms of grievance handling. Most prominent of these is adverse decision-making by ombudsmen and other specialised grievance handlers. Ombudsman decisions may carry the risk of compensatory awards, though these are frequently non-binding on the

public authority. If in practice such awards are honoured, for whatever reason, their non-binding nature is not of such great significance (Drewry and Harlow, 1990; Seneviratne, 2002). A third category of 'liability' risk involves the application of mechanisms of judicial review. In most common law jurisdictions, and certainly in Ireland and Scotland, judicial review is more commonly a mechanism for testing the legality of a public authority action, rather than for seeking or securing damages. Though damages may, in theory, be available in some cases they are very rarely awarded. However, adverse findings in judicial review actions may, in themselves, act as sanctions (Daintith and Page, 1999; Halliday, 2004). Such findings may underpin adverse publicity of the 'authority found to have acted unlawfully' type, with consequent shaming of the body involved. Perceptions of such liability risks, of course, may also arise through instances of internal administrative review where complaints or challenges from citizens are resolved under the 'shadow of the law' (Cowan, *et al*, 2006). A fourth 'liability risk' affecting public services relates to the less frequently observed internal review mechanisms, the establishment of which is often taken to be a requirement of good public management practice.

To what extent is it helpful in translating such liability mechanisms, traditionally conceived of as *ex post* and *ad hoc* solutions to particular problems between users/citizens and public bodies, into the language and conceptual frames of regulation with its emphasis on more proactive and systematic scrutiny and control? Despite strong challenges from within the legal academic community to the project of applying a regulatory lens to distinct areas of law (Cane 2002; 2004; Stapleton, 2005), we suggest there is considerable analytical purchase in thinking about liability as a form of regulation.

Such a move involves a recognition of the role of intermediaries between potential claimants and public authorities in translating the sporadic and *ad hoc* liability risks into a more systematic way of thinking about responses to such risks. These intermediaries include insurance companies, lawyers and risk management professionals. The way that such intermediaries translate risks of liability into responses may or may not reflect the underlying risks associated with particular activities. If liability is a facet of regulation then such questions bear on an evaluation of how good it is in steering public bodies towards appropriate reduction of risky activities, whilst enabling them to sustain their public-regarding activities with appropriate regard to risks involved.

The analytical payoff, then, of treating liability as a form of regulation is that it introduces the 'legal' into the study of regulatory space in a helpful and productive way. When we are able to observe the regulatory effects of tortious compensation claiming, or of judicial review, internal review or ombudsman investigations, we can begin the process of identifying additional actors and resources within regulatory spaces: courts, lawyers, legal advisors, claims firms, insurance companies, risk

managers and so forth. We can explore how dispute resolution and adjudication (or risks of such) may affect regulatory processes by having their own regulatory effects. Casting liability as regulation, accordingly, offers a distinctly socio-legal contribution to the study of regulation. Such an approach is consistent with the emphasis in contemporary regulation scholarship on the identification of diffuse actors within the regulatory space of decentred regulatory regime.

### **3. Impact of Liability Regimes on Service Providers**

What is the impact of different forms of liability on public service providers? Though there is probably a greater volume of empirical socio-legal work concerning judicial review relative to work on tortious liability or ombudsmen (see Hertogh & Halliday, 2004), the question of impact is still an under-researched question in general. It is important to note from the outset, however, that, in terms of accountability, public authorities may be pulled in a number of different directions at the one time (Adler, 2003; Halliday, 2004). To put it another way, they are inhabitants of multiple and overlapping regulatory spaces. Even legal doctrine itself may retain competing images of what it requires of public authorities at different times or in different settings (Halliday, 2004; Stapleton, 2005). Answers to questions of impact, accordingly, must be sought relationally or comparatively, in the sense that we must examine how well the demands of a particular liability regime compete with alternative regimes. Relative strength will be determined by the extent of sanctions attached to a regime - political, financial and legal. Equally, relative strength will be affected by matters internal to the public authority such as levels of knowledge concerning liability and levels of legal conscientiousness or commitment to legality (Halliday, 2004).

One of the interesting issues here is that the intermediaries who translate legal knowledge and liability concerns into bureaucratic knowledge and priorities are likely to be different according to the kind of liability at issue. Whereas legal advisors may be the key mediators between judicial review and bureaucratic knowledge, this role is more likely to be performed by risk managers or insurance companies when it comes to tortious liability. The identity of such intermediaries may reflect or affect the ways in which liabilities are framed and acted on by public bodies. For example, bureaucrats may be more likely to identify judicial review as involving more 'legal' matters than compensation claims. This raises the question of the significance of a commitment to legality in understanding bureaucratic responses. Alternatively, compensation claiming may be more readily framed as a matter of 'risk' and trigger more systematic risk-management responses by the organisation concerned.

Our broad definition of liability and our comparative approach of observing how different accountability regimes compete with each other may, then, shed light on three important issues: first,

the extent to which different kinds of legal liabilities are framed as ‘risks’ and the implications of this in terms of organisational responses; second, the reasons why some liability issues are more readily framed as ‘risks’ while others are less so; and third, the relative importance of sanctions versus values (e.g. financial penalty versus commitment to legality) in influencing bureaucratic outcomes.

So answers to questions of impact are likely to be shaped in particular contexts by the institutional structures surrounding questions of liability. At one extreme a small public authority may barely advert to liability risks, even though it may periodically be subject to liability claims which it must respond to in some way or other. At the other extreme is a public body within which no action is taken without full assessment of the potential liability risks. It is possible to suggest that pressures of (or perceptions of) increasing liability underlie a shift under which authorities progressively move from the first to the second type. This is about how authorities change their organisational responses to liability in its various forms such that, over time, front line staff consider themselves as part of the apparatus for tackling liability risks. As such a change occurs then organisations are likely to progressively incorporate more defensive practices into their operations. Thus, in the case of liability for the provision and maintenance of roads, a key focus for our research, engineers involved in the design and maintenance routines for roads and pavements, are increasingly encouraged not just to think of the best technical solutions in terms of traffic flow, safety, efficiency and so on, but also in terms of minimising liability risks.

#### **4. Evaluation of Normative Implications**

A key aspect of the regulatory impact of regimes of liability is likely to arise from the enrolment of third parties such as insurance companies, professional and other networks and professional advisers in defining and managing risks. The interventions of these third parties might be considered sporadic in authorities where liability claims are met in an *ad hoc* fashion as and when they arise. However, the implications of a shift towards a more systematic and proactive management of liability risks is that such third parties are more routinely built into decision making not just in cases where claimants are before the authority, but also in the more basic design of activities and operations. Such processes are likely to be affected by measures taken to reform civil liability and other liability processes to address concerns about an excess of liability claims. In Ireland, for example, anxiety about the development of a ‘compensation culture’ has led to the introduction of a Personal Injuries Assessment Board which, in most cases (the major exceptions involving medical liability), carries out paper-based assessment of liability with a view to making an award. Only where the proposed award is not accepted or liability contested are cases likely to get to court.

The legitimacy of such third party actors within these regulatory regimes may be evaluated from both a procedural and substantive perspective. Procedurally we may be anxious that democratic decision making is being subjected to non-democratic scrutiny and modification to take into account liability risks. Such scrutiny may be perfectly appropriate in many cases. But it has the potential to generate classic examples of displacement of political with technocratic decision making. Urban myths of councils closing playgrounds on the demands of insurance companies unwilling to cover the risks of injured children suing for damages exemplify this problem.

Substantively questions are raised as to how well these intermediaries are able to calculate and act on risks faced by public authorities. It would be inappropriate for the emergence of risks to be met with responses from insurers that they were unwilling to provide cover for such activities (though this appears to happen). A key instrument is the setting of insurance premia. A proper evaluation would want to assess whether premia are set at appropriate levels having regard to the risks involved. The setting of appropriate premia is in part a product of the generation and use of appropriate information on risks, and in part on the market positioning of insurance companies.

Various mechanisms are available to reduce the impact of insurers on authority decision making. These include the setting of large excess payments so that authorities effectively self-insure up to a certain point (which may be quite substantial). Taking this mode to a further level involves full self-insurance or the pooling of self-insurance between two or more authorities (and this is how the practice of mutual public insurance arose in a number of jurisdictions).

The normative issues are not simply about the interplay of often competing interests, but also about the construction of expertise in risk management and its increasing role in public authority decision making.

## **5. Conclusions**

The story we tell in this paper involves a shift in the role of liability in contemporary public management from sporadic and *ad hoc* risk to something that is considered more systematically as part of the organisation and consciousness of public authorities. This shift is underpinned both by changing ways of thinking about liability within public authorities and the emergence of new professional groups, such as risk managers, to supplement and work alongside other professional groupings. The change is important both for the way public activities are organised and for the ways in which we conceive of public management regimes. Investigation of the management of liability risks demonstrates the interpenetration of public and private actors in core areas of public service provision. The bottom line

relates to the impact of the changes on the ways in which public services are delivered., whether through the lens of the lawyer ('do the liability regimes ensure justice?) or of the public management specialist concerned with effective and efficient provision.

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