



Contracting Out of the Provision of Welfare Services to Private Actors and Liability Issues

Ulfbeck, Vibe Garf; Andrecka, Marta

Published in:
Journal of European Tort Law

DOI:
[10.1515/jetl-2017-0004](https://doi.org/10.1515/jetl-2017-0004)

Publication date:
2017

Citation for published version (APA):
Ulfbeck, V. G., & Andrecka, M. (2017). Contracting Out of the Provision of Welfare Services to Private Actors and Liability Issues. *Journal of European Tort Law*, 8(1), 78-99. <https://doi.org/10.1515/jetl-2017-0004>

Articles

Vibe Ulfbeck* and Marta Andrecka

Contracting Out of the Provision of Welfare Services to Private Actors and Liability Issues

DOI 10.1515/jetl-2017-0004

Abstract: The article discusses liability issues related to the contracting out of welfare services. It focuses on the possible liability of the private actor and of the public entity towards the individual (the citizen) for non-performance or mal-performance of the welfare service. It is argued that since there is no contract between the individual and the private service provider there may be several obstacles to a claim against the private service provider based on contract. At the same time it is a general tort law principle that there is no vicarious liability for independent contractors, making it difficult also to succeed with a claim against the public entity based on tort law. Thus, a liability gap seems to exist. However, the article demonstrates that there are signs in different jurisdictions that solutions are being found in case law to this problem allowing to some extent for the imposition of some kind of vicarious liability on the public entity. Four different models are identified. The reasoning behind these models varies but they all have in common that the public law nature of the service that has been outsourced somehow plays a role.

I The phenomenon of contracting out

Traditionally, welfare states have seen governments as custodians of public wealth. Today however, states struggle with budgetary restraints. It is becoming still harder to find funding for general welfare services such as education, health care and long term care. This has brought about a push for commercialisation of

***Corresponding author: Vibe Ulfbeck**, Professor, Centre for Enterprise Liability (CEVIA), Faculty of Law, University of Copenhagen, Denmark and Professor of Law at the University of Oslo, Norway, E-Mail: Vibe.Ulfbeck@jur.ku.dk

Marta Andrecka, Assistant Professor, Centre for Enterprise Liability (CEVIA), Faculty of Law, University of Copenhagen, Denmark, E-Mail: marta.andrecka@jur.ku.dk

governmental activities.¹ Thus, over the past decades, private sector providers of welfare services have been used to an increasing extent in Europe.²

Private provision of welfare services may be organised in different ways. A classical way of doing it is by contracting out so that the public entity enters into a contract with the private party for the provision of the services that would otherwise have been rendered by the public entity itself.³

It is a basic question whether there are limits as to the extent to which public tasks can be contracted out at all. According to a widespread understanding, some tasks are considered ‘core tasks’ of the state. Certain specific areas are often mentioned as falling into this category⁴ but, cutting across all areas, the ‘exercise of public power’ can probably be mentioned as a typical core task of the state.⁵ At least in some legal systems, such tasks are also considered non-delegable.⁶ The

1 *H Wollmann/G Marcou*, *The Provision of Public Services in Europe: Between State, Local Government and Market* (2010) 1; *N Seddon*, *Government Contract: Federal, State and Local* (5th edn 2013) 1.

2 *Wollmann/Marcou* (fn 1) esp chs 4, 5 and 6. On the current discussions in the UK as to privatisation of the national health care system, see eg <<https://www.theguardian.com/healthcare-network/2015/oct/02/nhs-one-way-road-privatisation>>.

3 Another way of turning the private actor into the provider of the public services could be by allowing the citizens to buy the services they need on the market up to a certain amount, paid for by the public actor by issuing a ‘voucher’ (Voucher-model). The most far-reaching model for using private actors for the provision of public services is by privatising the public service provider (asset privatisation).

4 For instance, French law proceeds from the starting point that certain tasks are the prerogative of the state (*activités régaliennes*) such as the handling of external affairs, the defense, the exercise of justice, taxation and police activity, see *M Gjidara*, *Les Procédés contractuels entre partenaires publics: Les contrats entre l’Etat et les collectivités territoriales* (2/2011) 48 *Zbornik radova Pravnog fakulteta u Splitu* 203, 289.

5 In German law, according to art 22, para 4 of the German Constitution (Bürgerliches Gesetzbuch, BGB), the exercise of public power in general (hoheitsrechliche Befugnisse) seems to be regarded a core task of the state.

6 In German law for instance, art 33, para 4 BGB reserves, as a general rule, the exercise of public power (hoheitsrechtlicher Befugnisse) to the public authorities. See also *U Stelkens*, *Amtshaftung und Regress bei Schädigungen durch Verwaltungshelfer*, *JuristenZeitung (JZ)* 2004, 656 pointing out that as a general rule decision making cannot be delegated from the public authority to a private actor. Also in French law, one can observe a distinction between the exercise of public power (which cannot be delegated) and related activities (which can be delegated), see *P Cossalter*, *Le droit de l’externalisation des activités dans les principaux systèmes européens* (2007) 11ff. Also in the Nordic countries, there is a basic distinction between acts that represent the exercise of public power and other acts. In Danish law, acts representing the exercise of public power cannot be delegated to private parties unless there is a clear statutory basis for doing so, see *S Rønsholdt*, *Forvaltningsret* (4th edn 2013) 197.

distinction between core tasks of the state and other tasks seems to some extent to draw on the classical distinction between acts *jure imperii* (the state acting in its capacity of the state) and acts *jure gestionis* (the state acting in its capacity of a commercial actor).⁷ The distinction is, however, by no means clear cut and may be drawn in different ways in different legal systems.

This article focuses on contracting out of welfare services. Moreover, it focuses on the actual delivery or performance of welfare services as opposed to decision making about the rights to welfare services. The actual delivery of welfare services rarely involves the exercise of public power but may nevertheless be regarded a core task of the state in any legal system.⁸ Contracting out of the provision of welfare services is, however, allowed for in many legal systems. This is also reflected by the fact that European public procurement law encourages outsourcing of this type of service by clearly establishing the legal framework for it.⁹

II Liability issues

A basic concern with regard to contracting out is whether this diminishes accountability. On the one hand, enthusiasts of governmental contracts for outsourcing have claimed that there is no negative effect on accountability.¹⁰ It has been argued that accountability has been supplemented by the detailed specification of required outputs in the concluded contract.¹¹ On the other hand, several critics see the consequences of outsourcing through more sceptical lenses claim-

7 However, the distinction does not entirely solve the problem. For instance, not only tasks that are of a commercial character (such as building a house) can be contracted out.

8 For instance, in German law the provision of education seems to be regarded a public task, see *H Papier*, § 839 Haftung bei Amtspflichtverletzung, in: M Habersack (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Band 5, Schuldrecht, Besonderer Teil III §§ 705–835, Partnerschaftsgesellschaftsgesetz, Produkthaftungsgesetz (6th edn 2013) no 168.

9 See Council Directive 2014/24/EU of 26 February 2014, art 74 concerning ‘social and other specific services’ and Annex XIV clarifying that the services referred to in art 74 include such services as ‘Health, Social and Related Services’, ‘Administrative Social, Educational, Healthcare and Cultural Services’, ‘Compulsory Social Security Services’, ‘Other Community, Social and Personal Services’, etc.

10 *K Horten-Stephens/C McAlister*, *Competitive Tendering and Contracting Out by Public Sector Agencies* (1996).

11 *R Mulgan*, *Government Accountability for Outsourced Services* (2006) 2/65 *Australian Journal of Public Administration* (AJPA) 48–58.

ing a definite reduction in the accountability of government.¹² This article analyses the question whether accountability, understood as liability towards the citizen, is reduced in an outsourcing situation.

A distinction is made between two different situations. In the first situation (situation A) it is a breach of the contract with the public entity (that is, non-delivery or malperformance) that causes a loss on the part of the citizen.

An example could be a private party that has contractually undertaken with a public entity to deliver long term care services in private homes but does not deliver these services or delivers them in a substandard manner, causing individuals to suffer either personal injury (for instance if vital medicine is not given) or purely economic loss in respect of the loss of service. The question is whether the individual can claim damages for the loss suffered from either the private service provider or the public entity that has outsourced the task of delivering these services.

In the second situation (situation B), the loss is caused by an infringement of ordinary behavioural standards (tort law duties) that exist regardless of the contract.

An example could be the private service provider of long-term care services who causes property damage in the home of an individual while performing the service or steals something from the house.¹³ Again, the question is whether the individual can claim damages for the loss suffered from either the private service provider or the public entity that has outsourced the task of delivering these services.

This article focuses primarily on the breach of contract situation (situation A) which is the more complicated one.¹⁴

The article analyses first the extent to which public and private entities can be held liable outside the outsourcing situation for non-delivery or malperformance of welfare services (Part III below) and contrasts this situation with the outsourcing situation (Part IV below). As will be shown, contracting out seems to fundamentally change the position of the citizen.

12 *Seddon* (fn 1); *M Considine*, The End of the Line? Accountable Governance in the Age of Networks, Partnerships, and Joined-Up Services (2005) 1/15 *Governance* 21–40; *R Mulgan*, Contracting Out and Accountability (1997) 4/46 *AJPA* 106–116.

13 Obviously, the two situations cannot always easily be distinguished as the duties arising out of ordinary tort law obligations may be closely connected with the performance of the contract.

14 In situation B, the private service provider will normally be liable according to ordinary tort law rules, securing an avenue of redress for the citizen.

III Liability of public and private entities for the provision of welfare services in general

A Public authority liability for the provision of welfare services

Public authority liability is seen as a complicated topic in most jurisdictions and legal solutions vary.¹⁵ Historically, it has been the starting point in many legal systems, that public authority liability was not recognised at all. However, gradually, public authority liability became recognised as a possibility, to differing extents, in different national legal systems.¹⁶ Today, different national legal systems represent a variety of alternative views on public authority liability.¹⁷ According to one model, represented by the US, the principle of immunity (formally) still plays a central role, making it the general rule that public authorities cannot be held liable under tort law unless special provisions provide a basis for liability by waiving governmental immunity.¹⁸ The other extreme may be said to be represented by jurisdictions such as Denmark, Norway, Belgium and the UK,¹⁹ in principle applying ordinary tort law rules to public authorities. Intermediate

15 See in general *K Oliphant* (ed), *The Liability of Public Authorities in Comparative Perspective* (2016); *O Dörr* (ed), *Staatshaftung in Europa, Nationales und Unionsrecht* (2014); *C van Dam*, *European Tort Law* (2nd edn 2013) 18.

16 For historical developments along these lines in different national legal systems, see for England and Wales: *K Oliphant*, *The Liability of Public Authorities in England and Wales*, in: idem, *The Liability of Public Authorities in Comparative Perspective* (2016) 129f, for France: *D Fairgrieve/F Lichère*, *The Liability of Public Authorities in France*, in: *K Oliphant* (ed), *The Liability of Public Authorities in Comparative Perspective* (2016) 156f and for Norway: *B Askeland*, *The Liability of Public Authorities in Norway*, in: *K Oliphant* (ed), *The Liability of Public Authorities in Comparative Perspective* (2016) 332f. See also for Germany: *O Dörr*, § 5 Deutschland, in: *O Dörr* (ed), *Staatshaftung in Europa, Nationales und Unionsrecht* (2014) 123, for Belgium: *C van Schoubroeck*, § 3 Belgium, in: *O Dörr* (ed), *Staatshaftung in Europa, Nationales und Unionsrecht* (2014) 63 and for Spain: *O Mir*, § 22 Spain, in: *O Dörr* (ed), *Staatshaftung in Europa, Nationales und Unionsrecht* (2014) 703.

17 In some legal systems public authority liability is not covered by tort law but by administrative law under which separate rules to deal with liability questions have been developed. For instance, this is the case in French law where public authority liability is governed by *droit administratif*, see *van Dam* (fn 15) 531f. However, the administrative law rules on liability have been developed in part with inspiration from tort law, see further *ibid* at 534.

18 See *MD Green*, *The Liability of Public Authorities in The United States*, in: *K Oliphant*, *The Liability of Public Authorities in Comparative Perspective* (2016) 539f, describing the Federal Tort Claims Act (FTCA) introduced in 1946 and waving immunity at federal level. Similar acts have been introduced at state level.

19 See *van Schoubroeck* (fn 16) 63.

positions exist in some legal systems, sometimes to a certain extent by making a distinction between negligence and gross negligence,²⁰ and at other times by distinguishing between situations in which the public entity acts in its capacity of a public authority (acts *jure imperii*) and situations in which it acts in its capacity of a private (commercial) actor (acts *iure gestionis*). The general line of thought regarding the latter being that ordinary tort law principles apply to the extent that the public entity acts in its capacity as a commercial actor, whereas the state may be subject to special liability rules if it acts in its capacity as a state.²¹

To the extent that welfare services, such as health care, long term care services and child care, are to be provided by a public entity, and the service is not performed or is performed in a substandard manner, it will often be possible to hold the public entity liable towards the citizen for non-performance according to tort law rules. Thus, if a public entity does not live up to its statutory obligations to deliver a particular service to a citizen and this is due to the negligence on the part of an employee of the public entity, then the citizen may be able to bring an action in tort against the public entity.²² In some legal systems, the possibilities of bringing such an action may be limited by a general rule barring tort law claims for purely economic loss,²³ whereas in other legal systems this rule does not

20 In French law, for instance, the state in some cases is only subject to liability in cases of gross negligence. This milder liability used to apply in a broad range of situations but today it is limited to supervisory tasks of the state, see *N Marsch*, § 7 Frankreich, in: O Dörr (ed), *Staatshaftung in Europa, Nationales und Unionsrecht* (2014) 207f.

21 Interestingly, these special rules seem to at times render the liability milder, the US principle of immunity being the clearest example of this, whereas at other times turn it into a stricter liability, as exemplified by the rule in ch 3, § k2 in the Swedish Damages Act (*Skadeståndslagen*) according to which there is public authority liability for acts that are acts de jure imperii (*myndighetsutövning*). The rule implies an extension of liability to also cover cases of purely economic loss. It is discussed whether the rule also entails strict liability, see *T Bull*, § 18 Sweden, in: O Dörr, *Staatshaftung in Europa, Nationales und Unionsrecht* (2014) 576f. As will be explained below, there are also examples in Polish law and French law of stricter liability in cases concerning the exercise of public authority.

22 In both Denmark and Norway such cases are quite common. Recently, quite a few cases have concerned parents suing for damages for insufficient school service in one form or the other, see further *V Ulfbeck*, *Kommunalt erstatningsansvar for mangelfuld specialundervisning* (2010) 9/92 *Juristen* 266ff. The type of case has also been brought in France, see *Marsch* (fn 20) 205. It may also be possible to bring such suits in the UK on the basis of breach of a statutory duty but such claims are subject to the requirement that there must be a parliamentary intent to confer a civil right of action, see *Oliphant* (fn 16) 137, noting that courts are reluctant to find such an intent when the defendant is a public authority. See also *van Dam* (fn 15) 547.

23 This is the case in English law, see eg *van Dam* (fn 15) 213. See also Principles of European Tort Law (PETL) art 2:202 (4), reflecting the reluctance in several European legal systems to award damages for purely economic loss in tort.

apply,²⁴ or special provisions provide for liability for purely economic loss with regard to public authority liability.²⁵ The liability will often be a mild liability in the sense that limited financial resources may be an excuse that can exempt the public authority from liability.²⁶

B Private actor liability for the provision of welfare services

When private service providers of welfare services, such as private schools and private hospitals, are licensed or otherwise certified to provide services to individuals, they often do this on the basis of a contract with the individual. If the service is not performed or is badly performed, the individual can sue the private party on the basis of this contract. In principle, the contract determines the basis of liability but the obligation under the contract to deliver welfare services will often be a ‘reasonable care’ obligation or a ‘best effort’ obligation. Since the private actors involved are most often professional parties, the best effort standard may be a professional liability standard.²⁷ This means that, as a general rule, the private service provider may be subject to a rather strict liability regime, also reflecting the fact that the private service provider is being paid to deliver its services. Certainly, a private service provider will not be able avoid liability by pleading ‘limited resources’. Whereas the public service provider is under a statutory duty to deliver services, the private party has voluntarily entered into a

24 This is the case in French law, see eg *van Dam* (fn 15) 210. The same is true of Danish law, and Norwegian law, see for instance, *V Ulfbeck*, *Modern Tort Law and Direct Claims under the Scandinavian Insurance Acts* (2001) 41 *Scandinavian Studies in Law* (Sc St L) 523.

25 See eg the Swedish Damages Act (*Skadeståndslagen*) ch 3, § 2 allowing for tort law actions to be brought against public authorities also in cases of pure economic loss. Also in German law, liability based on § 839 BGB covers claims for purely economic loss, see *van Dam* (fn 15) 542 with reference to the German Federal Court of Justice (*Bundesrichtshof*, BGH) 12.6.1986 – III ZR 146/85, *Neue Juristische Wochenschrift* (NJW) 1987, 585–588.

26 See for French law: *Marsch* (fn 20) 205 and for Danish law: *V Ulfbeck*, § 4 Dänemark, in: O Dörr (ed), *Staatshaftung in Europa, Nationales und Unionsrecht* (2014) 104. A similar line of thought is reflected in the English concept of ‘justiciability’ and the distinction between policy issues and operational issues, see *Oliphant* (fn 16) 140 and *van Dam* (fn 15) 548f.

27 In English law, the ‘reasonable care’ standard would apply to the private actor. In the US, on the other hand, the private service provider will often be subject to a professional liability standard. For a report on liability costs in the long term care sector in the US, see <<http://www.aon.com/risk-services/thought-leadership/report-2015-long-term-care.jsp>>. As an example of professional liability insurance options in the childcare sector in the US, see <<https://www.trustedchoice.com/small-business-insurance/children-pet/daycare/op>>. For liability insurance options for private and charter schools in the UK, see eg <<http://www.charterschoolcover.com/>>.

contract to this end and could have chosen not to do so if resources were a problem.²⁸

C Summing up and perspectives

As described above, when it comes to the delivery of welfare services, the citizen will often have a choice between a public and a private service provider. Whereas the public service provider may be subject to a milder liability regime than the private service provider, both the public and the private service provider will be subject to some form of liability. As will be shown in the following, contracting out seems to fundamentally change this premise.

IV Liability in the outsourcing situation

A Liability of the private service provider

1 General

If a private actor has undertaken to deliver welfare services to individuals on the basis of a contract with a public entity, the private actor functions as a ‘subcontractor’ of the public entity. This means there will be no contractual relationship between the private party and the individual. This may complicate matters with regard to the liability of the private service provider towards the individual. For instance, if a public school has contracted out the task of looking after the children during recess to a private actor and one of the pupils suffers personal injury due to the neglect of the private actor, the question may arise whether the private actor could be held liable towards the pupil.

2 Tort law approach

Obviously, if the private service provider infringes ordinary behavioural requirements (situation B) liability will most often follow from ordinary tort law rules.

²⁸ It goes without saying that the private service provider would also be liable according to ordinary tort law principles for causing harm by the infringement of ordinary behavioural standards (situation B).

For instance, in the example above, if the private guard negligently pushes or hits a child during recess, causing personal injury, the guard would most often be liable according to tort law principles.²⁹

The problem is more complicated if the case concerns a situation in which the private service provider has not lived up to its obligations under the contract (situation A). For instance, in the example given above, this would be the case if the private guard did not watch over the children and did not prevent a child from getting beaten up by another child. As a general rule there is no liability for omissions in tort law³⁰ and consequently the obligation to take care of the children seems to arise only from the contract to which the pupil is not a party. Legal systems have responded differently to this problem.

In German law, it has been argued that a private party who enters into a contract like this undertakes not only a contractual duty towards the contracting party but also a tort law duty of care towards third parties.³¹ In English law, the doctrine of assumption of responsibility may be relevant, in particular the part of the doctrine which concerns the assumption of responsibility for another's welfare.³² The application of tort law will in some legal systems be limited to cases concerning property damage or personal injury, whereas claims for the recovery of purely economic loss in these systems as a general rule fall outside the scope of

29 Specific rules may lead to the result that the private actor cannot be held liable despite a negligent act. In German law, for instance, it has recently been held that the private party (contractor) carrying out tasks for the police with regard to securing safety during the winter, cannot be held (directly) liable towards an injured third party, since the task is regarded a task that was *hoheitlich*. For this reason, liability rested on the state rather than on the private party according to § 839 BGB, see BGH 9.10.2014 – III ZR 68/14, NJW 2014, 3580–3582.

30 See art 4:103 PETL on the duty to protect others (only) in special situations.

31 See for instance *van Dam* (fn 15) 252. See also *P Rott*, Case Studies, in: L Bergkamp/M Faure/M Hinteregger/N Philipsen (eds), *Civil Liability in Europe for Terrorism-Related Risk* (2015) 162, with reference to BGH 13.3.1962 – VI ZR 142/61, NJW 1962, 959f, BGH 12.6.1990 – VI ZR 273/89, *Neue Juristische Wochenschrift – Rechtsprechungsreport: Zivilrecht* (NJW-RR) 1990, 1245f and Kammergericht Berlin (KG) 20.11.1998 – 25 U 8244/97, NJW-RR 2000, 242–244. However, liability cannot be imposed on the private party if the task is *hoheitlich*, see BGH 9.10.2014 – III ZR 68/14, NJW 2014, 3580–3582. In French law it may be possible to reach the same result as it has been acknowledged by the courts that a breach of contract can be invoked as a tortious delict by third parties to whom such a breach caused a loss, see *F G'sell*, Case Studies, in: L Bergkamp/M Faure/M Hinteregger/N Philipsen (eds), *Civil Liability in Europe for Terrorism-Related Risk* (2015) 161 with reference to Cour de cassation, Assemblée plénière (Cass Ass plén), 6 October 2006, 05–13.255, *Bulletin des arrêts de la cour de cassation* (Bull) Ass plén no 9, 23.

32 See for instance *van Dam* (fn 15) 106f, 251 and further below on the *Woodland* case under Sec IVB2b above.

tort law.³³ In these legal systems tort law cannot be used as a basis for claiming damages for the economic loss suffered in cases where the social service simply has not been delivered but no physical loss has been caused.

3 Contract law approach

The bar to recovery in tort law stemming from the doctrine of purely economic loss may be overcome by relying not on tort law but on contract law by invoking the concept of third party beneficiary law. The theory of the third party beneficiary is an exemption from the principle of privity of contract, where a third party who is not a party to the contract itself can, under certain circumstances, claim the benefit of the contract. In order for a contract to be classified as a third party beneficiary contract it must contain a provision that can be interpreted to the effect that B (here: the private service provider) towards his contractual partner A (here: the public entity) undertakes an obligation to do something that is beneficial to C (here: the citizen). The concept of the third party beneficiary contract is recognised in several jurisdictions.³⁴ One of the requirements that must be fulfilled is that the contractual parties must *intend* to confer a right on the third party. Quite often contracts for the outsourcing of tasks from the public sector to private actors will not live up to this requirement.³⁵ However, Finnish law provides an interesting example of an (perhaps half-hearted) attempt to use third party beneficiary law to provide the citizen with a remedy against the private service provider for lack of fulfilment of its contractual obligations.

33 As explained above, examples of such legal systems include the English legal system and the German legal system, although in English law it is possible to claim damages for purely economic loss if the action is based on assumption of liability, see for instance *van Dam* (fn 15) 213.

34 See eg for German law: § 328 BGB, French law: art 1121 Code civil (CC), English law: Contracts (Rights of Third Parties) Act 1999 and US law: The Restatement Second § 302ff. For US law, see further *D Summers*, Third Party Beneficiaries and the Restatement (Second) of Contracts (1982) 4/67 Cornell Law Review (CLR) 880 ff. The concept is also recognised in Scandinavia, see *T Iversen*, Tredjemandsaftaler (1994) 107 Tidsskrift for Rettsvitenskap (Journal of Legal Science TFR) 14–116. The concept of the third party contract is also recognised in what could be called ‘general international contract law’ as reflected in UNIDROIT Principles arts 5.2.1.–5.2.6, PECL art 6:110, CESL art 78 and DCFR art 9:301.

35 For an examination of the possible third party effects of the Danish standard contracts used for contracting out of long term care services, see *V Ulfbeck*, Ansvar over for borgeren når private aktører leverer velfærdsydelser (2016) 2/98 Juristen 86 ff reaching the conclusion that no such third party effects can be found in the contracts.

In 2014 the Finnish Ministry of Finances in its *General Terms of Public Procurement in Service Contracts* formally recognised that service users, the persons using the outsourced services, have independent rights to compensation for damages arising from the private service provider's breach of the contract.³⁶ This provision was introduced in order to clarify the service provider's liability for damages and the procedures related to the processing of the claim for compensation between the customer and the service provider. The aim is that rather than the customer (government) acting as intermediary in the process, the service provider (private service supplier) will handle the matter directly with the user of the service.³⁷

Sections 17.1 and 17.2 read as follows³⁸

The service provider is obliged to compensate damage it caused to the service user through acting in violation of the procurement contract between the customer and the service provider.³⁹ If the service provider is presented with a claim for compensation, the service provider will notify the customer about the claim for compensation without delay. The service provider will strive to agree on the amount of compensation with the party claiming compensation. If an agreement is reached about the amount of compensation, the private service provider will pay the compensation directly to the service user and notify the customer without delay about the payment made.⁴⁰ Should the service provider find that it is not liable for damages in the matter or no agreement can be reached concerning the amount of compensation, the service provider must inform the service user and the customer about this, with justification, in writing within a reasonable time of the arrival of the claim for compensation.

The formulation of the clauses illustrates some of the difficulties related to using the third party beneficiary theory as a solution to the problem. Thus, the model is based on the idea of negotiations between the parties and in reality the clause does not grant the citizen any right against the private actor. Presumably, the clauses simply reflect the fact that the parties to the contract (the public entity and the service provider) in reality have no incentives to grant the citizen such a right.

36 Finnish Ministry of Finances, *General Terms of Public Procurement in Service Contracts 2014*, available at: <<http://vm.fi/documents/10623/307565/JYSE+2014+services/920004d3-fbfd-4e82-b4ce-fccdf6e9dbc5>>, sec 17.

37 *Ibid*, secs 17.2 and 17.3.

38 *Ibid*, sec 17.2.

39 *Ibid*, sec 17.1.

40 *Ibid*, sec 17.2.

4 Summing up and perspectives

To sum up, on the basis of the above it can be concluded that raising a claim against the private actor in an outsourcing situation may be quite complicated. In some situations, tort law may provide a remedy, but in some legal systems the remedy will be limited so as not to include cases of purely economic loss. Third party beneficiary law will only provide the citizen with a remedy to the extent that this is the intention of the parties to the contract, which will not always be the case. Even if a remedy exists in either tort law or contract law, it may not be possible to enforce the claim. For example, the private service provider may have gone bankrupt or for other reasons no longer exist. This raises the question whether the public entity that has contracted out the task can be held liable for the inadequate performance of the private party.

B Liability of the public service provider when contracting out

1 General

Most often, there is no specific statutory regulation around the question of the liability of the public entity in the outsourcing situation. Even if a statute indicates that the public entity is still ‘responsible’ or ‘accountable’ when outsourcing, this does not necessarily answer the question whether the public entity is liable if the private service provider causes a loss.⁴¹ To the contrary, in tort law it is normally a requirement for imposing liability that it is possible to prove fault on the part of the tortfeasor. Most often, this will not be possible in the outsourcing situation. Thus, most often it will not be possible to prove that the public party has negligently chosen an incompetent subcontractor (*culpa in eligendo*), has neglected a duty to supervise the private party or has been negligent in choosing to outsource in the first place. Consequently, the question arises whether the public entity (the contractor) could be held vicariously liable for the private party as an independent contractor.

⁴¹ See Sec I above on the concepts of ‘responsibility’ and ‘accountability’. When the provision of welfare services is contracted out to private parties, most often there will be no contract (private or public) between the public entity and the individual, but to the extent that such a contract does exist this contract could form a basis for the claim. In the following it is assumed that no such contract exists.

In tort law, it is the general rule in most jurisdictions⁴² that there is no vicarious liability for independent contractors. The policy consideration underlying this rule is that the employer will not be in a position to control and instruct the independent contractor. Thus, if the negligent act of the independent contractor causes damage to a third party, the contractor will not be subject to vicarious liability. In contract, by contrast, the position is the opposite. If a person (the employer) who is under a contractual duty to deliver a service (or goods) to someone else (the contractual partner) chooses to outsource the task of delivering the service to a subcontractor who fails to do so, then the contractor will be vicariously liable if the negligent act of the subcontractor causes a breach of the contract with the contractual partner.⁴³ The policy reason underlying this rule is that the employer should not be able to release himself from his contractual obligation towards the contractual partner by delegating the performance of the contract to someone else. To use the English term, the duty to perform the contract towards the contractual partner can be categorised as a ‘non-delegable’ duty.⁴⁴

If these basic private law principles are applied in the outsourcing situation, the result is that the public entity will not be liable for the negligence on the part of the private service provider. Since there is no contractual relationship between the public entity and the citizen, the tort law rule rather than the contract law rule would apply. This leads to no liability on the part of the public entity. Not least, seen in the light of the fact that – as described above – it may also be difficult to hold the private party liable, this result may not seem very satisfactory.

From this perspective, it is not surprising that different models for holding the public entity liable have been developed in different legal systems.

It might be argued that, also with regard to vicarious liability of the public entity, a distinction should be made between situations in which the private service provider has only breached the contract with the public entity (situation A) and situations in which the private service provider has caused damage by infringing ordinary behavioural standards (situation B). However, as will be shown this

⁴² See *S Galand-Carval*, Comparative Report on Liability for Damage Caused by Others, in: J Spier (ed), *Unification of Tort Law: Liability for Damage Caused by Others* (2003) 290, 306f.

⁴³ This principle is generally acknowledged in European law, see *Galand-Carval* (fn 42) 290, 306f.

⁴⁴ ‘Non-delegable’ does not mean that the task cannot in fact be delegated but that the entity remains liable for the acts of the party to whom it has delegated the task. The contractual rule, imposing vicarious liability for independent contractors, will most often be the relevant rule if the case concerns private as opposed to public outsourcing since the task that is outsourced by a private party to a subcontractor will most often be based on a contract between the private party and another private party.

distinction is less clear in the existing models for imposing vicarious liability on the public entity.

2 Different models for imposing vicarious liability on the public entity

a Model 1: The private service provider is regarded an integrated part of the public entity

In some legal systems it is recognised that, although it is the general rule that there is no vicarious liability for independent contractors, the public entity could still become liable if the private service provider must be regarded as an integrated part of the public entity.

In German law this line of thought is represented with regard to the interpretation of § 839 sec 1 BGB, which is the basic rule regulating public authority liability.⁴⁵ According to this provision, liability is imposed on the ‘public official’ (*Beamter*) for intentional and negligent acts, but the liability is ‘transferred’ to the state on the basis of art 34 Basic Law (*Grundgesetz*, GG).⁴⁶ Moreover, the liability of the public official is under certain circumstances extinguished if the public official has only acted negligently. A central question with regard to the understanding of this provision is the concept of the ‘public official’. In this regard, it has been recognised for a long time that independent contractors that are employed to carry out public tasks may – in the circumstances – be regarded as ‘public officials’ in the sense of § 839 sec 1 BGB.⁴⁷ One of the central criteria for determining whether this is the case is the extent to which the independent contractor can make decisions of its own and to what extent the private actor simply just functions as a ‘tool’ (*Werkzeug*) of the public entity.⁴⁸

Likewise, under Spanish law it seems to be accepted that:⁴⁹

⁴⁵ § 839 sec 1 BGB reads: ‘(1) If an official intentionally or negligently breaches the official duty incumbent upon him in relation to a third party, then he must compensate the third party for damage arising from this. If the official is only responsible because of negligence, then he may only be held liable if the injured person is not able to obtain compensation in another way’ (semi-official translation of the Ministry of Justice).

⁴⁶ Art 34 para 4 reads: ‘The exercise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law’ (Semi-official translation of the Ministry of Justice).

⁴⁷ MünchKomm *Papier* (fn 8) no 17.

⁴⁸ MünchKomm *Papier* (fn 8) no 17, BGH 21.1.1993 – III ZR 189/91, NJW 1993, 1258–1260 and <https://www.vrsdigital.de/content/link/128_002>, NJW 2014, 3580–3582. In cases that involve administrative acts that in a burdensome way interfere with the life of the citizen (Eingriffsverwaltung) it is assumed that the state is liable on the basis of art 34 GG, regardless of the extent

when the cooperation between the public administration and the private enterprise is organized in such way that the private body acts under the control and under the orders of the public administration, this leads to imposing liability on the state in the same manner as if an authentic civil servant had acted.

The US doctrine on ‘state acts’ seems to reflect the same idea. According to this doctrine it is also decisive to what extent the private actor who is carrying out public tasks is in reality instructed by the government on how to perform the task or has the right to decide for itself.⁵⁰

Thus, in jurisdictions accepting this theory, to the extent that welfare services are provided under contracts with private service providers that in reality leave them little choice as to how the service is to be carried out, there may be a case for the vicarious liability of the state.⁵¹

This liability model does not require a distinction between situations in which the private actor has caused a loss to the citizen by breaching the contract with the public entity (situation B) and situations where the loss has been caused to the citizen because the private service provider has infringed general behavioural standards (situation B). Vicarious liability – it appears – may be imposed in both situations.

b Model 2: Analogy from contract law

Closely related to model 1 is model 2 which is based on an analogy from contract law. A recent English case provides a very good example of this. Thus, in *Woodland*,⁵² where the question of the vicarious liability of a public entity was relevant, the court accepted that there could be no deviation from the general tort law rule that there can be no vicarious liability for independent contractors but achieved

to which the private service provider has been able to act independently, see Münchkomm *Papier* (fn 8) no 18.

49 See *P del Olmo*, Case Studies, in: L Bergkamp/M Faure/M Hinteregger/N Phillipsen (eds), *Civil Liability in Europe for Terrorism-Related Risk* (2015) 176, 159.

50 See eg *GE Metzger*, *Privatization as Delegation* (2003) 6/103 *Columbia Law Review* (Colum L Rev) 1429–1432 explaining how the state action doctrine as it is interpreted by the courts creates ‘perverse’ incentives for the public entity to ‘police private providers and regulators from afar’, since too much control may lead to liability for the public entity for the acts of the private actor.

51 Danish contracts for the outsourcing of long term care services could perhaps be mentioned as an example of this, see *O Hansen*, *Strategier for længerevarende kontrakter om udlicitering af kommunal service* (2016) 2/98 *Juristen* 53f making the point that the Danish standard contracts apply a model that give full control to the public entity.

52 *Woodland v Essex Country Council* [2013] United Kingdom Supreme Court (UKSC) 66.

the same result by imposing liability on the public entity for its breach of a non-delegable duty with reference to the parallel in contract law.

The case concerned a state school which had contracted out the provision of swimming lessons to a private party. Due to negligence on the part of an employee (a lifeguard) of the private party in carrying out this task, a pupil suffered personal injury and the question arose whether the state school could be held liable. The court found that this was the case. Thus, the court found that the school had been subject to a non-delegable duty existing where pursuant to an ‘antecedent relationship’ between the parties. Lord Sumption stated:⁵³

the defendant is assuming a liability analogous to that assumed by a person who contracts to do work carefully...The analogy with public services is often close, especially in the domain of hospital treatment in the National Health Service or education at a local education authority school, where only the absence of consideration distinguishes them from the private hospital or the fee-paying school performing the same functions under contract.

Lord Sumption further added that, as fee-paying schools’ responsibilities ‘are already non-delegable because they are contractual’ there was ‘in this particular context...no rational reason why the mere absence of consideration should lead to an entirely different result when comparable services are provided by a public authority.’⁵⁴

This reasoning is very interesting.

It questions the appropriateness of applying the tort law rule of no vicarious liability in a situation where the employer – admittedly – is under no contractual obligation to perform towards a contractual partner, but is under a statutory obligation to perform towards the citizen. Implicit in this argument is the thought that, although there is no contractual relationship between the employer and the employee, the employer does have (legislatively based) performance obligations towards the citizen (the injured party), making the relationship more comparable to the contractual situation than to the tort law situation in which the injured party is an innocent third party with no relationship to the employer. When it is not possible to delegate a contractual obligation, it should also not be possible to delegate an obligation imposed by law, seems to be the line of thought.⁵⁵

⁵³ Ibid, para 7.

⁵⁴ Ibid, para 25(5).

⁵⁵ The reasoning in *Woodland* has been criticised in the following way: ‘There are many situations where liability is quite unproblematic in contract...while controversial in tort. Many have argued for the expansion of tort liability in these areas, for various reasons. But few before *Woodland* passed from the trite observation that, had a contract existed between the parties, the defendant would have been liable to assert liability and that therefore there must be liability in

This line of thought also seems to play a role in German law. Thus, in legal theory the parallel to § 278 sec 1 BGB has been made.⁵⁶ According to this provision a contracting party is liable for its subcontractors towards its own contractual partner for the non-performance of the contract. It has been argued that, in an outsourcing situation, the relationship between the public entity and the citizen is comparable to the relationship between the contracting parties in a subcontracting situation.⁵⁷ Also the contractual terminology ‘performance helper’ (*Erfüllungsgehilfe*) is used to describe the role of private service providers performing public tasks.⁵⁸

In Scandinavian legal theory too, it has been argued that vicarious liability of the public entity should be imposed on the basis of an analogy from contract law.⁵⁹

Thus, in legal systems accepting the analogy from contract law, it may be possible to argue that the public entity which has outsourced the provision of welfare services to a private party should be vicariously liable for non-performance or mal-performance of this obligation.

If this line of reasoning is followed it could be argued that a distinction should indeed be made between situations in which the private actor has caused a loss to the citizen by breaching the contract with the public entity (situation A) and situations where the loss has been caused to the citizen because the private service provider has infringed general behavioural standards (situation B). In the first situation, the public entity should be held vicariously liable on the basis of an analogy from contract law, whereas the public entity should not be held vicariously liable in the second situation, since contract law would not provide for liability in this situation.⁶⁰

tort. Such reasoning seems dubious’, see *J Morgan*, Liability for Independent Contractors in Contract and Tort (2015) 1/74 Cambridge Law Journal (CLJ) 111.

⁵⁶ Münchkomm *Papier* (fn 8) no 18, *Stelkens*, JZ 2004, 656, 658 with references.

⁵⁷ *Stelkens*, JZ 2004, 656, 658 with references.

⁵⁸ See eg the recent decision BGH 9.10.2014 – III ZR 68/14, NJW 2014, 3580–3582. It could also be considered whether the German concept of a ‘Sonderverbindung’ between the public entity and the individual could trigger liability under such rules § 278 BGB and § 1313a Austrian Civil Code (ABGB).

⁵⁹ See for Swedish law *J Kleinemann*, De offentliga rättssubjektens skadeståndsansvar- offentlig-rättslig reglering med privaträttslig metod (1991–1992) Jurisdisk Tidskrift (JT) 63, 93 and for Danish law, see *Ulfbeck* (2016) 2/98 Juristen 86 ff, 90.

⁶⁰ See *Stelkens*, JZ 2004, 656, 659 making this distinction and also for Danish law *Ulfbeck* (2016) 2/98 Juristen 90, 94.

c Model 3: Distinction between tasks *jure imperii* and *jure gestiones*

A third model places emphasis on the extent to which the task that is being outsourced is a task that would have been characterised as a task *de jure imperii* and thereby of a public law nature, rather than an act *de jure gestiones* and thereby of a private law nature.⁶¹ The fact that an act is of a public law nature is sometimes used as a justification that the public entity should be held vicariously liable for the acts of the private service provider. A clear example of this is provided by Polish law. According to the Polish Civil Code (*Kodeks cywilny*) art 417 § 2, the public entity which has contracted out tasks that are ‘public authority tasks’ and the private service provider taking on these tasks are jointly liable for losses.⁶² Although broadly formulated, a distinction between acts *jure imperii* and acts *jure gestiones* with regard to this article was introduced by the Constitutional Court in a ruling in 2001.⁶³ Thus, if the task is of a more commercial character (in the sphere of the *dominium*) the ordinary rules of tort law apply, which means that as a general rule the state will not be liable for the acts of the private service provider. Interestingly, in a case from 2006⁶⁴ it was held that services provided by a state hospital (for MRSA infection) was not a manifestation of the state’s actions in the sphere of the *imperium* but only in the sphere of *dominium*.

This distinction (or a similar one) may also be relevant in French law. Thus, in a recent case it was held by the *Conseil d’Etat* that the state could be held liable for the acts of a private contractor carrying out (practical) police tasks.⁶⁵

In this case, an administrative court had decided that cattle belonging to farmer (F) was to be slain and the farm and the equipment at the farm to be disinfected. The task of disinfecting was contracted out by the police to a private party. In carrying out the task, the private actor negligently caused property damage. F sued the state claiming damages for his loss and arguing that the state should be held liable for the acts of the private party. The *Conseil d’Etat* affirmed the decision handed down by the appellate court of Lyon that the state was liable. The (formal) reason given for this was that when police powers are contracted out they must be exercised under the control and the responsibility of the administration.

⁶¹ How to draw the distinction between these categories is debated in most jurisdictions.

⁶² Art 417 § 2 reads as follows: ‘If tasks of a public authority have been commissioned under an agreement to a local government unit or other legal entity, then the commissioning entity and the commissioned entity are jointly and severally liable for damage caused’. See further *T Milej*, § 15 Polen, in: O Dörr (ed), *Staatshaftung in Europa: Nationales und Unionsrecht* (2014) 470f. See also *E Bagińska*, *The Liability of Public Authorities in Poland*, in: K Oliphant (ed), *The Liability of Public Authorities in Comparative Perspective* (2016) 351, 357f.

⁶³ Judgment of 12 April 2001.

⁶⁴ Case of 12 October 2006 (ACa 838/706).

⁶⁵ CE 10/10/2011.

By its decision, the *Conseil d'Etat* imposed liability on the state for the acts of the private actor. The reason given for this in the decision is the fact that the private actor carrying out police tasks is – or must be – under the control of the state. However, in a commentary to the case it has been argued that the decision in reality and implicitly reflects the fact that the task carried out by the private party was an act *régalienn*e (act *jure imperii*) and that this was the real reason why vicarious liability was imposed.⁶⁶

The same tendency can be seen in German law where it has been established in case law that the more a task has the character of reflecting the exercise of sovereign power (*hoheitlicher Charakter*), the stronger the argument for regarding the private service provider carrying out this task as part of the public administration under § 839 sec 1 BGB, whereby the public entity will be liable.⁶⁷ As in Polish law, it seems also in German law to be the general rule that hospital services are not to be regarded as a reflection of the exercise of sovereign power.⁶⁸

In jurisdictions such as Poland that connect the question of the vicarious liability of the state with the question whether the service provided reflects the exercise of public authority, it will be decisive whether the particular welfare service that has been provided can be regarded as a reflection of the exercise of sovereign power or not. Hospital services have been held to fall outside the scope of this concept. However, other welfare services may be regarded differently.⁶⁹

This liability model does not seem to require a distinction between situations A and B.

d Model 4: Combination model

Sometimes all of the models above are combined. German law provides an example of this. Thus in the case from 1993,⁷⁰ the Federal Court of Justice (*Bundesgerichtshof*, BGH) pronounced the following:⁷¹

⁶⁶ See Fallait Pas Faire du Droit, La référence du droit en ligne, 'Délégation contractuelle d'une activité matérielle de police et responsabilité de l'Etat (CE 10/10/2011, Ministre de l'alimentation, de l'agriculture et de la pêche)'.

⁶⁷ See BGH 21.1.1993 – III ZR 189/91, NJW 1993, 1258–1260 and the recent decision in BGH 9.10.2014 – III ZR 68/14, NJW 2014, 3580–3582.

⁶⁸ Münchkomm *Papier* (fn 8) nos 165–167, whereas it is debated how to categorise the task of keeping the roads in a proper condition, see *ibid* at nos 177–184.

⁶⁹ For instance, in German law the provision of education seems to be regarded an exercise of public authority, see Münchkomm *Papier* (fn 8) no 168.

⁷⁰ BGH 21.1.1993 – III ZR 189/91, NJW 1993, 1258–1260.

⁷¹ 'Je stärker der hoheitliche Charakter der Aufgabe in den Vordergrund tritt, je enger die Verbindung zwischen der übertragenen Tätigkeit und der von der öffentlichen Hand zu erfüllen-

The stronger the public authority character of the task, the closer the connection between the transferred task and the public authority task which must be fulfilled by the public entity, and the more limited the space for decision making by the independent contractor, the more compelling it becomes to reach the conclusion that the independent contractor should be regarded as being part of the public administration with regard to liability issues.

As will be apparent, this ‘guideline’ combines all three of the above criteria. First, the more limited the space for decision making on the part of the private party, the stronger the case for vicarious liability. This reflects model 1, according to which the extent to which the private actor is in fact controlled by the public entity is central. Second, the closer the connection between the transferred task and the public authority task which must be fulfilled by the public entity, the stronger the case for vicarious liability. This reflects model 2, according to which an analogy should be made to the basic principle of vicarious liability in contract law. This principle also rests on the idea that if someone, who is under a contractual obligation to somebody else, chooses to subcontract the exact same obligation to a third party, then the subcontracting party remains liable for non-performance or mal-performance to its contractual partner. Third, it is emphasised that the character of the task matters. The more it involves the exercise of public authority, the stronger the case for vicarious liability. This reflects model 3, according to which the distinction between acts *jure imperii* and acts *jure gestionis* is decisive.

It is an open question whether the combination model requires a distinction between situations A and B.

3 Summing up and perspectives

As will be apparent from the above, the question of the possible vicarious liability of the public entity in an outsourcing situation has been approached from different angles in different jurisdictions. It is a common feature that as a general rule there is no vicarious liability for an independent contractor and for that reason it is difficult to establish liability. At the same time, it is also a common feature that the public law nature of the task is in one way or another used as an argument in favour of adopting an exception to the general rule so as to be able to impose vicarious liability. In model 1, the basic idea is that the private actor

den hoheitlichen Aufgabe und je begrenzter der Entscheidungsspielraum des Privaten ist, desto näher liegt es, ihn als Beamten im haftungsrechtlichen Sinne anzusehen’. This passage was also quoted in the recent decision BGH 9.10.2014 – III ZR 68/14, NJW 2014, 3580–3582.

should be regarded as part of the public authority. In model 2, the basic idea is that outsourcing from a public entity creates a special situation that makes an analogy from contract law compelling. In model 3, the public authority character of the task is the central argument for imposing liability. Thus, the public law nature of the task forms the basis of the argument in all of the models identified above.

At the same time, the public law nature of the task also complicates the imposition of vicarious liability. Thus, on a closer look, models 1–3 signify two inherently different approaches. In models 2 and 3, the public entity becomes liable towards the citizen for the acts of the private service provider constituting a breach of the contract with the public entity or a negligent act. Whether or not the private service has breached the contract or acted negligently will be decided on the basis of a professional liability standard. Thus, in a way this rather strict standard is transferred to the public entity, which would otherwise often have been subject to a milder liability standard. In this manner, imposing vicarious liability for private actors can indirectly lead to subjecting the public entity to a stricter liability. Put differently, the strict private actor liability standard is transferred to the public entity. Conversely, in model 1, the private actor is regarded as forming part of the public administration. This may lead to a mildening of the liability of the private actor. Thus, under German law, the private actor is exempted from liability, unless it has acted with gross negligence or intent. Under US law, the principle of immunity may in some cases lead to exempting the private actor entirely from liability. Put differently, features of the milder public authority liability are transferred to the private actor.

V Conclusion

As described in the introduction to this article, a basic concern with regard to outsourcing of public services is whether it diminishes accountability. This article has shown that, with regard to accountability in the shape of liability, contracting out of welfare services may in fact bring about a ‘liability gap’. Specifically, contracting out may have as a consequence that the citizen ends up in a less favourable position than would have been the case had the provision of the service not been outsourced. This liability gap is only created in some situations. If the private service provider has simply infringed ordinary behavioural standards, ordinary tort law rules will apply, most often providing a remedy for the citizen in tort law as against the private service provider. In contrast, a liability gap seems to be created if the loss is caused by the private service provider breaching the contract with the public entity. In these situations, the citizen may

well have difficulties succeeding with a claim against the private service provider since there is no contractual relation between the parties and since it will not always be possible to argue that the breach of the contract also constitutes a tort towards the citizen. Likewise, as a general rule, the public entity will not be vicariously liable towards the citizen for the acts of the private service provider unless specific exceptions apply. In other words, whereas outside the contracting out situation the citizen would be able to claim damages from whomever provided the service (a private actor or a public entity), contracting out seems to change this situation and create a situation in which the citizen may be able to sue neither the private party nor the public entity. This is an unacceptable position.

The problem seems to be surfacing in case law and theory and different solutions may be under development. One possibility is to seek solutions in contract law and let citizens sue the private actor on the basis of third party beneficiary law. However, this would require the parties to the contract to make rather express provisions for this solution in the contract and incentives will often be lacking. A better option, therefore, might be for the courts to further develop the concept of vicarious liability in order to hold the public entity liable for the acts of the private service provider. There are signs in case law and legal theory that this approach has been taken. However, it is also not without its complications. Depending on the choice of model, one may end up imposing a stricter liability on the public authority or a milder liability on the private actor than would have been the case outside of the outsourcing situation. In addition, so far the vicarious liability models that have been under consideration do not seem to distinguish between situations in which the private service provider has infringed ordinary behavioural standards (situation A) – where arguably there is a lesser need for vicarious liability since the private service provider can be held liable – and the situations in which the loss is caused by a breach of contract by the private service provider (situation B), creating a liability gap. To the extent that the concept of vicarious liability is going to be further developed in this area of the law, it should be considered whether this distinction should be made.

Note: The article is a contribution to a project on Public-Private Enterprise Liability funded by the Danish Research Council for Independent Research. All translations in this article are by the authors unless otherwise indicated.