

## **STATE LIABILITY: CASES (ECONOMIC ANALYSIS)**

We will make an attempt to address the cases from the perspective of economic analysis. However, it should be stated from the outset that this may not always be possible since not all variables necessary for an adequate economic analysis may be present; moreover, to some extent the analysis also depends on how one weighs the advantages and disadvantages of public authority liability as they were discussed above. We will try to relate the cases to some of the literature discussed in the general report.

### *Wrongfully cancelled licence*

As we explained above, there may be an economic argument for such a multi-task agent (like C) to limit his liability to gross negligence. C is undoubtedly a multi-task agent since he has to balance two different types of external costs: the costs to the public at large of abusing old people versus the cost of having his activity prohibited. Given the uncertainties concerning this multi-task activity there is reason for a higher threshold of liability under negligence and hence to limit negligence to cases of gross negligence.

There could be personal liability of the grossly negligent agent C, but probably this will barely be efficient since C may have limited assets and thus not be able to compensate for the (potentially huge) damage. A strong case can be made in this case for vicarious liability of state agency B: state agency B can be considered as a superior risk-bearer and allocating the liability primarily to state agency B may have the advantage that it will more diligently control the behaviour of official C. Liability of state agency B could e.g. lead to an improvement of its decision-making (e.g. better guidelines, better supervision by a hierarchical superior officer etc.), as a result of which the grossly negligent behaviour of C (or his colleagues) could be prevented in the future.

### *Negligent safety inspection*

We have explicitly discussed the case of supervisor liability. We have concluded that the case for excluding liability towards third parties (even for small mistakes) is quite weak. The

question that can be asked is to what extent H in this particular case can be considered as a multi-task agent which had room for discretion. Obviously H has various tasks and probably limited time and resources and thus will execute random safety checks to control the safety of boats. However, the case mentions that H should have identified that the hull of the boat is structurally unsound. This could lead to the conclusion that H is grossly negligent which could lead to his liability and, more importantly, to the vicarious liability of G, the state agency responsible for H. As we have argued under Case I, it may make more sense to impose vicarious liability on G instead of liability on H. If any case for immunity would have to be made, there could be an immunity of H, but certainly not of G. J should therefore be able to recover from state agency G and (depending on whether one accepts immunity for H or not) from H as well.

The case for liability *towards the supervisee* (I) would be especially strong if H acted grossly negligent. Also, the fact that it was not reasonably discoverable for I that the hull of the boat was structurally unsound, shows that there was no issue of moral hazard, which makes the case for state liability stronger.

#### *Missing (stop) sign*

A first question would be whether the behaviour of F, the responsible public authority, would have to be considered as negligent (perhaps grossly so). An argument in favour of that (and hence of liability) would be that there was a lapse of several months and the knowledge (which the authority admitted) that the section of the cycle path was potentially dangerous. Being aware of the dangerous character (that's why there was probably a warning in the first place) the failure to take action, knowing the potentially dangerous character of the local situation could make the behaviour of authority F (grossly) negligent. Framing this in terms of the Learned Hand formula: the prevention costs were probably much smaller than the expected reduction in harm if prevention was taken.

However, a second aspect to consider is the behaviour of the victim E. Liability of the responsible authority F could lead to a moral hazard on the side of E, the victim, who gets a full public insurance, paid by the taxpayer, which may dilute the incentives of E to take care

as well.<sup>1</sup> Little is known on optimal preventive measures that E could have taken. From the description it appears that neither cyclist is able to see the other until the last moment because of a wall at the side of the cycle path. If that is the case it is a potentially dangerous situation which would call for a particular careful behaviour on the side of E as well. A full liability of F without taking into account E's behaviour may therefore dilute the incentives of E to take care. The liability of F (for being grossly negligent in the failure to repaint) should therefore be mitigated with a contributory or comparative negligence rule to provide incentives for care to E as well.<sup>2</sup>

#### *Fireworks store*

Y is clearly a multi-task agent which has room for discretion. Y has various tasks and limited time and resources and will thus execute random safety checks. Unless in the specific case there was no room for discretion (e.g. there was a rule that specifies precise actions which were not taken), or Y made a policy choice that no reasonable person would ever take (e.g. it had accurate information that an explosion was imminent but Y did not act), it should not be held liable. Even when one would conclude that Y is liable, it should not be held (fully) liable for the harm suffered by X because of moral hazard reasons.<sup>3</sup>

#### *Unpasteurized cheese*

As stated before, when a public body makes a policy choice –whether it is an act or an omission - that no reasonable person would ever make, there should be no immunity. It was clearly unreasonable not to lift the ban, so the state should be held negligent.

#### *Police cross-fire*

---

<sup>1</sup> Dari-Mattiacci, Garoupa and Gomez-Pomar, 19.

<sup>2</sup> We do not discuss here the differences between comparative and contributory negligence as far as providing efficient incentives for care to the victim is concerned.

<sup>3</sup> And possibly not for the harm suffered by Z (at least if Z knew about the potentially dangerous situation).

Given that P reasonably concluded that he must fire back, if liability were to be found in this particular case, it would amount to a strict liability. The case for liability may be weak. For multi-task agents (like police officers) strict liability can lead to overprecaution (here: police officers may be too hesitant to fire back, or may get instructions to be overly prudent). Next one could argue that the state is a superior risk bearer compared to the victim of the shooting. However, the fact that insurance is usually available may significantly weaken this argument. Furthermore, state liability as a compensation mechanism may be far too costly given high litigation costs of the tort system. If compensation is the goal to be achieved, this can better be realised via alternatives such as (state provided) insurance or a public compensation mechanism. The transaction costs of those mechanisms may be lower than a costly liability system for lawful conduct.