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 (e.g. Rose-Ackerman 1991, Viscusi 2002) or ombudsman (Linden, 1973 & 1983) over public authorities and the fulfilment of their missions. These are important claims, both analytically and practically. They take us some distance away from corrective justice model of liability as being concerned with attributing responsibility and granting redress which still prevail in the European and other common law jurisdictions (Cane 2002b; Harlow 2004). 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. Nevertheless it is consistent both with interests among tort scholars, particularly in law and economics (Dewees, Duff and Trebilcock 1996), in a deterrence model of tort law and with attempts to find common ground between legal and regulation scholarship, and to assess the nature and impact of legal regimes through a regulatory lens (Parker et al 2004).[1] 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.

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 form a normative perspective. If, in practice, insurance companies and risk managers call the shots on whether 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 the market actors involvement. To what extent, for example, do insurance companies shy away from insuring

[1] Intriguingly, regulation scholarship has moved somewhere beyond deterrence models of regulation. Arguably the more reflexive conception of regulation, discussed in the regulation literature (eg Ayres and Braithwaite 1992), which draws on the internal capacity of targeted organisations to shape norms and to determine their own compliance (for example through enforced self-regulation), might offer some new thinking on compliance with tort law norms. See Parker and Braithwaite 2003.

potentially risky activities where they lack capacities to acquire or use the information which would enable them to set appropriate premiums, 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?

Any debate about the effects of civil liability on organisational behaviour must be linked to argument about the rise of a 'compensation culture' both in the UK and Ireland. Industry organisations, in particular, have been complaining over a number of years about increasing costs of meeting liability claims (IBEC nd), a matter which has caused worry to governments both because of the effects on industry, and because of a perception that public authorities too were spending larger proportions of their budgets on meeting claims. An official report to the UK government, whilst concluding that the compensation culture was a myth, noted that one local roads authority reported that it spent £2M of a £22M annual budget on meeting the costs of claims. The Better Regulation Task Force noted the upside to claims: 'Many claims will be genuine and should act as an encouragement to better risk management (Better Regulation Task Force 2004: 3). If there is a problem, they suggested, it was not crippling costs of litigation, but rather the behavioural response to an exaggerated fear of litigation.

This 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. Legal Liabilities and Public Service Providers

The main focus of empirical work on liability of state authorities and its significance to public administration has traditionally been on civil liability – the effects of the pursuit of claims in tort (or sometimes in contract) (e.g. Epp, 2000; 2005). This focus is important, in particular, because civil liability is distinguished by the availability of damages. In framing liability as regulation, 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. The mechanisms through which such disciplining might occur, however, are not necessarily direct as we discuss further below.

Nevertheless, state bodies face other 'liability' risks linked to other 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. But 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. However, damages may, in theory, be available in some cases in some jurisdictions. Of course, the fact that they are awarded very rarely means that judicial review may operate more as a reputational risk, as opposed to a liability risk as such. Adverse findings in judicial review actions may operate as sanctions by underpinning 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).

3. Regulation and Liability

To what extent is it helpful to translate the above '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? There is a growing literature which frames public sector bodies as the objects of regulation (e.g. Hood *et al*, 1999; Vincent-Jones, 1999; Davies, 2000; Hood et al. 2004). Despite strong challenges from within the legal academic community to the project of applying a regulatory lens to distinct areas of law (Cane 2002a; 2004; Stapleton, 2004; Galligan, 2006), we suggest there is considerable purchase in thinking about liability as a form of regulation.

'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 (Selznick 1985). 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). In yet broader conceptions of regulation, the primacy of governmental activity is abandoned to embrace discussion of wider mechanisms of social ordering, such as community and market mechanisms. This more expansive conception of regulation, we suggest, permits a framing of liability as a form of regulation.

Scholars of tort law have noted the difficulties faced by the courts in being effective 'regulators' of public agencies. As Corbett notes, "[t]he limits of a tort based system of compensation as a form

of command and control regulation are well understood by tort lawyers" (2006: 263). Such limits may lie in the lack of predictability of the incidence of tort liability and the opaque messages sent to defendants by individual negligence actions (Corbett, 2002). Equally, drawing on public law scholarship about the influence of judicial review over public agencies, we might point to limits set by how legal knowledge is received into, and disseminated within, public agencies; levels of legal competence within organisations in terms of translating legal judgments into practical policy; and the relative significance of the courts to other actors within regulatory spaces (Halliday, 2004).

However, we must be careful to distinguish the difficulties the courts may face as command and control regulators from the potential regulatory effects of liability risks. The key here is to recognise 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 and risk management professionals. Most personal injury claims are, in practice, defended by insurance companies, and resolved through the bureaucratic actions of insurers without resort to litigation (Lewis 2006). This is particularly true in areas of compulsory insurance such as employers' liability and motor accidents. In the area of liability for provision and maintenance of roads and pavements some local authorities which insure may nevertheless carry a substantial degree of risk themselves, up to a threshold amount or excess. Others self-insure fully. Thus the presence of intermediaries is likely to be variable in intensity. Equally, the social construction of 'risk' is likely to vary between organisations (Douglas and Wildavsky, 1983; Hood, *et al*., 2001). However, generally speaking, we would expect to see insurance companies and risk managers as key actors within some public administration regulatory spaces. There may be a considerable gap between the norms applied in the day-to-day activities of insurance bureaucracies and risk managers on the one hand, and the 'lawyer's law' of the statute book and the higher court decisions. However, such differences do not prevent these key intermediaries from responding to liability risks, at least in some cases, by developing systemic programmes of action.

The analytical payoff 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

4. 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 and particularly in respect of the impact on behaviour of those subject to tortious liability (Stapleton 2004: 131). 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 (Mashaw, 1983; Adler, 2003). 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, 2004). 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).

An interesting hypothesis here, one requiring empirical testing, 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 may 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. Alternatively, compensation claiming may be more readily framed as a matter of 'risk' and trigger more systematic risk-management responses by the organisation concerned. This raises the question of the significance of a commitment to legality in understanding bureaucratic responses to liability risks. Legal conscientiousness may be more significant to how public authorities respond to judicial review when compared with, for example, compensation claims under tort, or ombudsmen investigations.

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 hypothesise 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.

Factors underlying such organisational changes include not only actual increases in numbers and quantum of liability claims but also changes in institutional factors. In England and Wales a system of conditional fee (no-win, no-fee) agreements was introduced in 1995 (and in 2003 for Northern Ireland) in order to reduce the costs to the legal aid system of personal injury claims, in particular (Partington 2001: 123-125). There are competing views on the impact of CFA. Opponents suggest that Conditional fee agreements (CFA) are likely to encourage solicitors to seek and to vigorously pursue litigation where there is a good case, since their fee is product of their success in securing damages, rather than of the hours devoted to the matter. Solicitors will be discouraged from taking on less good, but winnable, cases. Supporters suggest that this both leads to better targeting of litigation activity, but also signals to defendants that claimants' advisers believe in the strength of the case, thereby encouraging settlement. CFAs have also spawned a new industry in claims management, more directly oriented to the commercial opportunities presented by personal injuries litigation, though the success of these new firms who advertise widely and then hand cases over cases to law firms, has been quite mixed in practice. It has been reported that research by a municipal insurance company found that more than 85 per cent of councils believe that the introduction of CFAs has resulted in an increase in the cost of meeting claims made against them (Zurich Municipal and Local Government Association 2004). It should be noted that the research did not compare these perceptions against data which would show whether or not the perceptions were correct.

These changes, together with changes in media reporting of civil litigation, appear have generated changing perceptions within public authorities, and in particular an anxiety that a 'compensation culture' is taking hold in such a way as to require significant changes to the way that the management of risk is conceived of and organised (Better Regulation Task Force 2004). Addressing this perception recent research in England and Wales suggests within the tort system as a whole, the period of greatest anxiety about the rise of the compensation culture, since the late 1990s, has been one in which numbers of claims have remained relatively stable (Morris 2007). Intriguingly anxiety about the rise of a compensation culture is just as prevalent in Ireland, driven in particular by rising claims against the military, notwithstanding the fact that neither CFAs nor claims management companies are permitted. This anxiety was addressed by the PIAB Act

2003, which appears to have reduced, in particular, the costs associated with claims (Hogan 2006).

As Morriss points out, claims about the 'compensation culture' represent a political position on responses of accident victims to their accident and their relationship to the legal system (Morriss 2007: 363). From the perspective of the legal system a successful claimant is entitled to compensation and an unsuccessful one not. The compensation culture addresses claimants who are successful, but who, in aggregate, create a political (and economic) problem through excessive litigiousness. The implication is that their claiming is wrong (Better Regulation Task Force 2004: 5). The political problems include unwarranted risk aversion amongst public authorities (and their insurers) and risks of fraud (Morriss 2007: 367), as well as questions about appropriate use of public money.

The position of the judiciary, in respect of claims against local authorities in tort law, and by way of judicial review, is also a factor in shaping perceptions. Over time immunities for public authorities have given way to a somewhat more liberal approach to public authority liability but one that is nevertheless more restrictive than is the case for private defendants (Markesinis and Fedtke 2007). A number of House of Lords decisions in the UK have directly addressed the responsibilities of highways authorities both in common law negligence and under legislation, and the corresponding liabilities which arise from those responsibilities. In the highways area their Lordships have tended towards a line which is restrictive of liability, and consequently construes both statutory and common law duties narrowly. (eg *Stovin* v *Wise* [1996] AC 923; Gorringe v *Calderdale MBC* [2004] UKHL 15). In *Gorringe*, for example, their Lordships held that in the face of an obvious hazard to drivers created by the crest of a hill, the statutory duty to maintain the road did not extend to a duty to paint a 'SLOW' sign on the road. In the absence of such a statutory duty there could not, *a fortiori*, be a common law duty to paint such a sign and therefore liability for omission to do this in negligence. The Irish courts have explicitly approved this restrictive approach under which no statutory liability is recognised, and omissions to do things permitted under legislation will not constitute a breach of a common law duty of care (*Flynn* v *Waterford County Council,* [2004] IEHC 335).

The restrictive approach in highways cases is possibly underpinned by the (nearly always) tacit assumption that, in the case of road-users, there is legally required to be an insurance policy to cover personal injury at least to third parties (Harlow 2004: 40). In other litigation their Lordships have explicitly ruled out the imposition of positive common law duties on the policy ground that it might encourage unduly defensive practices (eg *Hill* v *West Yorkshire Police* [1989] AC 53).

Whatever the factors underlying changes within responses to liability risks there appears to be a trend for affected organisations 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, may increasingly be 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. Such a focus, rather obviously, creates a different risk, that authorities focusing on such risk management activity neglect or undermine their capacity to deliver on other public objectives in their provision. In the roads domain such alternative objectives might include: construction of a pleasant urban environment; encouraging reduction of urban car use; reducing journey times; etc.

5. 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 (Personal Injuries Assessment Board Act 2003). Only where the proposed award is not accepted or liability contested are cases likely to get to court. In England and Wales the legislative response has included an attempt to re-balance decision making so at to codify the capacity of judges to consider the adverse affects of liability on the performance of 'desirable activities' (undefined) and the introduction of statutory regulation of claims management companies (Compensation Act 2006).

The legitimacy of 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 (eg Carr 2007). Such stories, to the extent they have some factual basis, may exemplify the problem of 'phantom risks' (Huber 1993). In many instances it is not that there is no risk, but rather that reasonably quantifiable risks are overstated or overweighted in decision making, and societal benefits of proceeding with and activity might be thought to outweigh the application of a more

cautionary approach. This is different from policy domains, notably involving environmental protection and public health, where risks associated with an activity are not known and where, in many instances, EU and domestic governments may favour the proper application of the precautionary principles (O'Riordan and Cameron 1994).

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 premiums. A proper evaluation would assess whether premiums are set at appropriate levels having regard to the risks involved. The setting of appropriate premiums 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), including the UK and Ireland. Ireland maintains a mutual approach to local authority insurance, with the local authorities jointly owning a company established under statutory authority which, in practice, offers public liability insurance to all. This contrasts with the position in the UK where, following the collapse of Municipal Mutual in 1993, the public liability business of local authorities was taken over by a division of the commercial insurance company, Zurich, precipitating a fragmentation processes, as some authorities have sought other insurers.

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. Power (2004: 11) argues that risk management tends to displace 'professional judgement in favour of defendable processes'.

6. Conclusions

This paper argues for an expansive and inclusive treatment of the concepts of liability and regulation. In terms of 'liability', although a principal focus of our empirical work concerns liability in tort/delict, it is our contention that it is productive to include within the concept additional ways by which users may call public authorities to account. Such a move accommodates the fact that there is a degree of overlap between accountability regimes. It would, accordingly, be artificial and potentially misleading to examine the impact of one regime to the exclusion of others. Such overlap relates both to the substance of accountability claims (compare, for example, aspects of 'maladministration' supervised by ombudsmen, and aspects of injustice under administrative law),

and the consequences for public agencies where liability is found (compare, for example, financial compensation recommended by the ombudsman and damages under delict/tort law). Further, although from an external perspective different regimes may be viewed as analytically distinct, from a public agency's perspective they may appear to be linked. For example, a complaint may be viewed as a nascent tortuous/delictual claim. The handling of certain 'non-legal' accountability claims may nevertheless occur in the 'shadow of the law' (Mnookin and Kornhauser, 1979).

It is equally important to recognise that, conversely, in a crowded accountability space some liability regimes may compete against each other for the attention of public service providers in terms of moulding the direction and character of public service delivery (Adler, 2003). Our deepest insights into the impact of liability on public service delivery, then, will be gained from examining regimes relationally – i.e. seeing how one regime impacts upon service delivery in the context of other demands also being made from other regimes. Finally, defining 'liability' widely in this way will allow us to explore the extent to which, and why, different kinds of legal liabilities are framed as 'risks' and the implications of this in terms of organisational responses.

In relation to 'regulation', we have argued that there is much to be gained by framing such liability regimes as instances of regulation. Such framing allows us explore the development of the role of liability in contemporary public management from sporadic and *ad hoc* dispute resolution to something that is considered more systematically as part of the organisation and consciousness of public authorities. Such a shift is important both for the way public activities are organised and for the ways in which we conceive of public management regimes. A deliberately wide conception of 'regulation' permits us to explore, from the perspectives of public authorities, the 'regulatory' effects of the various legal, political and administrative pressures around and within their environments.

Within liability regimes, of course, regulatory dimensions are not limited to the 'official' actions of legislators and courts in setting and enforcing legal rules. We have noted that intermediary institutions such as insurance companies and legal and other professionals are likely to play a central role not only in interpreting and applying norms, but also in setting norms which govern practice. This is an aspect of 'private regulation of the public sector' (Scott 2002). Indeed, under conditions where the higher courts decline to take an activist approach to regulating public authorities through liability, as has happened with claims involving roads authorities in England and Wales, the somewhat more expansive approach to risk which appears to be taken by insurers may fill a gap (Lewis 2006). A key example of the latter is provided by insurance companies, who, we are told, routinely simplify somewhat open-textured negligence rules so that the low-level bureaucrats can apply them with reasonable efficiency (Lewis 2006). More proactively, insurers may use their resources to support enhanced public services. In 1995 the publicly owned Insurance Corporation of British Columbia, a motor vehicle insurer, is reported to have spent $35M on road and traffic safety programmes (Ericson, Doyle and Barry 2003: 270).

The ICBC reportedly provided the financing to install left turn lanes in a city street when the roads authority would not, regarding this as a good investment in reducing claims arising from accidents (Ericson, Doyle and Barry 2003: 277).

Our reconceptualisation of liability as regulation 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. Furthermore the way that intermediaries translate risks of liability into responses may or may not reflect the underlying risks associated with particular activities. If liability is regarded as 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.

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