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# Public authority liability and the chilling effect

Jef De Mot and Michael Faure\*

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*According to some, the imposition of liability on public authorities would lead them to adopt defensive practices. Others are much more sceptical and believe that chilling effects may be illusory. Empirically, some studies seem to confirm that chilling effects exist, while other studies do not find such an effect. In the authors' judgment, the ambiguity in the existing literature is fuelled by the lack of a theoretical model which analyses the cause of chilling behaviour and the various elements that may influence it. The article examines under what circumstances a chilling effect is more likely. Such an analysis can help to delineate the types of cases for which a restrictive approach towards public authority liability is justified. Furthermore, the article discusses the available empirical research on the existence of chilling effects due to the liability for public authorities. The authors' argue that the economic criteria are useful in explaining the contradicting findings in the existing empirical literature.*

## INTRODUCTION

Although the traditional blanket immunity for sovereign entities has long since been abrogated in many countries, public authorities generally retain a large amount of freedom from tort liability, particularly with regard to “discretionary decisions” made in the course of governing. The rationale behind this is that public authorities making discretionary decisions must balance various precious but conflicting interests as they think fit.<sup>1</sup> These interests include, but are not limited to, order, individual liberty, personal security, and care of the vulnerable.<sup>2</sup> It is quite generally accepted that the courts should not review this process by imposing (regular) liability. For example, in the United States (US), one of the broadest<sup>3</sup> exceptions from public authority liability is the exemption of public authorities from liability for their discretionary activities.<sup>4</sup> In the United Kingdom the concept of discretion remains of vital significance in the case law on the liability of public bodies.<sup>5</sup> In France, judicial fears of influencing the exercise of discretionary powers have been put to rest by the application of *faute*

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\* Jef De Mont, Postdoctoral Researcher, Research Foundation, University of Gent, Flanders. Professor Michael Faure, Rotterdam Institute of Law and Economics, Erasmus University. The authors are grateful to Charles Epp, Gerrit De Geest, Ben Depoorter and to the participants of a MEPLI Seminar (Maastricht University) on 19 March 2014 for useful comments on an earlier version of this article.

<sup>1</sup> See De Geest G, “Who Should be Immune from Tort Liability?” (2012) 41 *Journal of Legal Studies* 291.

<sup>2</sup> Schuck PH, *Suing Government: Citizen Remedies for Official Wrongs* (Yale University Press, 1983) pp 64, 68.

<sup>3</sup> Niles MC, “‘Nothing but Mischief’: The Federal Tort Claims Act and the Scope of Discretionary Immunity” (2002) 54 *Administrative Law Review* 1275 at 1300.

<sup>4</sup> The discretionary function exception of the *Federal Torts Claim Act*, 28 USC § 2680(a) (1946) shields the federal government from liability for “any claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused”. The US Supreme Court adopts the discretionary-ministerial test to delineate discretionary activities: see *Indian Towing Company v United States*, 350 US 61, 65 (1955). Generally, discretionary acts are of a “judgemental, planning, or policy nature”. “Ministerial activities” which merely involve the execution of set tasks, do not enjoy this immunity. In Australia, the distinction between policy and operational issues made its debut in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424. These labels have attracted a lot of criticism. According to some authors, it is best to avoid them: see, eg, Aronson M, “Government Liability in Negligence” (2008) 44 *Melbourne University Law Review* 44. Note that the authors’ do not focus on the Australian legal regime in this article.

<sup>5</sup> Lunney and Oliphant stress that there is “no absolute distinction between discretionary and nondiscretionary spheres; rather there is a sliding scale along which the nature of the discretion present varies considerably”: see Lunney M and Oliphant K, *Tort Law and Materials* (5th ed, OUP, 2013) p 494.



lourde in the regulatory and supervisory sphere.<sup>6</sup> According to some, the imposition of liability would lead public authorities to adopt defensive practices.<sup>7</sup> This has been named the “chilling effect” of liability, which includes both unnecessarily delayed and overly cautious decisions.<sup>8</sup> As mentioned by Van Dam, “in establishing liability of public authorities, courts have to steer between not hampering a good government on the one hand, and correcting bad government on the other”.<sup>9</sup> However, the existence of chilling effects is not universally accepted. Although many authors seem to believe that chilling effects are real and that these may lead to significant negative consequences for overall social welfare, others are much more sceptical<sup>10</sup> and believe that chilling effects may be illusory. They argue that victims often do not file suit, liability sums are rarely paid via the budget of the responsible agency or department, and that insurance blunts incentives. The current empirical literature does not seem to pinpoint which side has the strongest case. Some studies seem to confirm that chilling effects exist, while other studies do not find such an effect.<sup>11</sup>

Whether chilling effects exist or not is highly relevant for choosing tort rules that are in society’s best interest. If chilling effects are real, a limiting approach to public authority liability may be warranted. If they are illusory, curbing the liability of public authorities will merely negatively affect incentives to take adequate care. In this article, the authors’ analyse to what extent the conflicting opinions can be reconciled. In the judgment of the authors’, the ambiguity in the existing literature is fuelled by the lack of a theoretical model which analyses the cause of chilling behaviour and the various elements that may influence it. The article will examine through an economic lens under what circumstances a chilling effect is more likely. Such an analysis can help to delineate the types of cases for which a restrictive approach towards public authority liability is justified. Furthermore, there will be discussion on the available empirical research on the existence of chilling effects due to the liability for public authorities.<sup>12</sup> The article will argue that economic criteria are useful in explaining the contradicting findings in the existing empirical literature.

## THE CHILLING EFFECT: A THEORETICAL ECONOMIC ANALYSIS

### Uncertainty leading to over-precaution

Legal standards of due care are often uncertain. The exercise of judgment by the court – and the uncertainty that this necessarily entails – is inherent in the judicial role.<sup>13</sup> Uncertainty comes in different forms. First, courts may err in determining due levels of care. For example, they may hold a civil servant negligent for granting a permit for an activity that later caused substantial harm, even

<sup>6</sup> Cliquennois M, “Essai Sur La Responsabilité de l’Etat du Fait de Ses Activités de Contrôle et de Tutelle” (1995) 98 *Les Petites Affiches* 4.

<sup>7</sup> See Schuck, n 2; Posner R, “Excessive Sanctions for Government Misconduct in Criminal Cases” (1982) 57 *Washington Law Review* 635 at 640. Case law in many countries refer to chilling effects (or “defensive practices” or “overkill”) as a possible reason to limit liability of public authorities. See, eg, *Steenkamp NO v Provincial Tender Board of the Eastern Cape*, 2007 3 SA 121 (CC) at 139-140, *Rowling v Takaro Properties Ltd* [1988] AC 473 at 502 (Lord Keith); *Hill v Chief Constable of West Yorkshire* [1989] AC 53 at 63 (Lord Keith); *State of Israel v Levi*, 48(iii) PD 45 (1994).

<sup>8</sup> Others also refer to this phenomenon as “defensive bureaucracy”: see Stolker CJJM, Levine DI and de Bel CL, “Defensive Bureaucracy? Rampen, de Overheid en de Preventieve rol van het Aansprakelijkheidsrecht” in Muller ER and Stolker CJJM (eds), *Ramp en Recht. Beschouwingen over Rampen, Verantwoordelijkheid en Aansprakelijkheid* (Boom Juridische Uitgevers, 2001).

<sup>9</sup> Van Dam C, *European Tort Law* (OUP, 2006) p 472.

<sup>10</sup> See, eg, Markesinis BS, Auby JB, Coester-Waltjen D and Deakin SF, *Tortious Liability of Statutory Bodies: A Comparative and Economic Analysis of Five English Cases* (Hart Publishing, 1999).

<sup>11</sup> See further below.

<sup>12</sup> About 15 years ago, Markesinis et al, n 10, correctly observed the paucity of empirical research in this domain, “this is one (of the many) areas of tort law that could benefit from both conceptual and empirical areas of study concerning the economic and insurance consequences of the imposition of liability”. In the meantime, several interesting studies have been published.

<sup>13</sup> Oliphant K, “Against Certainty in Tort Law” in Pitel SGA, Neyers JW and Chamberlain E (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing, 2013) p 1.



though granting the permit was reasonable from an ex ante perspective.<sup>14</sup> Conversely, the court may also erroneously not hold a civil servant liable for granting a permit which should not have been granted. Secondly, courts can make errors in assessing a party's true level of care. For example, a physician may have performed a diagnostic test,<sup>15</sup> but the court might think that he or she did not. Conversely, the court may believe that the physician performed a diagnostic test while he or she did not.

Often, the underlying source of uncertainty is the difficulty for either the potential injurer (ex ante) or the court (ex post) to determine the socially desirable level of care. For example, police officers may have to decide how aggressively to intervene in a conflict. They must then balance the risks to presumed criminals against the risks to victims. Logically, there may be much disagreement in society as to the optimal aggressiveness police officers should exhibit in certain types of conflicts. There may be quite a lot of uncertainty as to how courts will assess a given level of aggressiveness. Another example concerns an administrative agency that has to decide on approving a particular drug: it has to balance the potential costs of not allowing the drug (losing the beneficial effects of the drug and hence more illnesses which cannot be prevented) against yet another external cost (the potential danger of side-effects or other negative effects resulting from the use of the drug). Such balancing is sometimes extremely difficult, and even if the agency performs this exercise with optimal care, it is still possible that a court will ex post disagree with the decision of the agency. In the absence of precise knowledge of the costs and benefits of a certain measure, the social desirability of that measure will often be in the eye of the beholder. Opinions in society will differ, and this creates uncertainty, especially when the points of view within the judiciary may vary substantially. With respect to England, Marsh notes that: "The way in which English law on the negligence liability of public bodies has evolved over the last two decades suggests that it would not be imprudent for public bodies to assume that the boundaries of negligence are rather uncertain."<sup>16</sup>

The article will now examine the consequences of uncertain legal standards on the behaviour of potential injurers. First, the authors' will look at the situation in which the potential injurer acts on his own behalf. Then it will analyse what changes when the injurer is a governmental entity. For reasons of simplicity, the authors' will focus on the situation in which courts may err in determining due levels of care. More specifically, courts may either be too severe (holding the defendant liable, even though he or she did not behave negligently, this is called a "Type I error"), or too lenient (not holding the defendant liable, even though he or she behaved negligently, this is called a "Type II error"). In the stylised examples developed below, the following simplifying assumptions are made.

First, it is assumed that potential injurers have to choose between several units of precaution<sup>17</sup> and that there is a fixed cost for each unit of precaution. It is also assumed that each additional unit of precaution reduces the expected accident costs, but that the marginal return is decreasing (in other words, precaution becomes less productive as one takes more of it). Neither of these assumptions is always valid. However, the results would not change if these assumptions were dropped. The only thing that matters is that at some point taking additional precaution is more costly than the benefits it generates. With this in mind, an economic definition of the chilling effect can be given. It arises when due to liability pressures a potential injurer goes beyond the socially optimal level of precaution.<sup>18</sup> At

<sup>14</sup> Behavioural law and economics has shown that it is quite likely that judges will ex post hold that, with hindsight, the tortfeasor could have prevented the harm at reasonable costs, even though this may ex ante not have been clear at all. It is referred to as the hindsight bias. For a detailed discussion, see Rachlinski JJ, "A Positive Psychological Theory of Judging in Hindsight" (1998) 65 *The University of Chicago Law Review* 571.

<sup>15</sup> For example, listening carefully to a person's heartbeat after some exercises. Such a test may not be easily verifiable, unlike, for example, an electrocardiogram: see Shavell S, *Foundations of Economic Analysis of Law* (Belknap Press, 2004).

<sup>16</sup> Marsh A, *The Impact of Liability on Public Bodies: Lessons from the Literature* (Socio-Legal Studies Association Conference, 2008).

<sup>17</sup> For example, a civil servant may decide to spend half an hour, one hour, two hours, three hours etc, on studying a certain file which leads to a decision to grant or deny a certain permit.

<sup>18</sup> For example, a civil servant denies to grant a permit out of fear of liability, even though granting the permit would be entirely reasonable.



the optimal level, the marginal costs of additional precaution equal the marginal benefits. Beyond this optimal level, the marginal costs outweigh the marginal benefits, creating a social loss. One consequence can be that given the additional costs, a potential injurer may decide not to undertake a socially valuable activity anymore, because the total liability costs (including the costs of precaution) outweigh the potential injurer's benefit of the activity.<sup>19</sup>

Secondly, it is assumed that potential injurers are deterred by the *monetary consequences* of liability. This assumption is quite controversial, especially in the context of the liability of public authorities.<sup>20</sup> The article will argue below that even when this assumption is not fulfilled, chilling effects can still arise.<sup>21</sup> Other consequences attached to being found liable (and the prospect of it) can have strong incentivising effects.

Starting with the case in which the potential injurer acts on his or her own behalf. It can easily be seen that the influence of Type I and Type II errors are quite different by looking at the following numerical example in Table 1. The first column represents the level of care a potential injurer can take. The second column represents the costs of each level of precaution (one unit of precaution costs 100). The third column represents the expected accident costs (the probability of an accident times the loss in case an accident happens) for each level of precaution.<sup>22</sup> The fourth column represents the total social costs (the sum of the costs of precaution and the expected accident costs).

**TABLE 1 Injurer's choice of precaution level**

Precaution level	Costs of precaution	Expected accident costs	Total social costs
0	0	10,000	10,000
1	100	5,000	5,100
2	200	3,000	3,200
3	300	2,500	2,800
4	400	2,300	2,700
5	500	2,250	2,750

It is easy to see that the optimal level of precaution equals four units. The total social costs are smaller for four units ( $400 + 2,300 = 2,700$ ) than for any other unit level (respectively 10,000, 5,100, 3,200, 2,800, and 2,750). Under a perfect negligence rule, in which all judges set due care at four units, a potential injurer will take optimal care. The reasoning is simple. If he or she takes less care (zero, one, two, or three), he or she bears the precaution costs and the expected accident costs (respectively 10,000, 5,100, 3,200 and 2,800). In other words, he or she bears the total social costs. But total social costs are lowest for four units (2,700), and if he or she takes four units, then he or she

<sup>19</sup> Note that from a dynamic perspective, the chilling effect may also include unnecessarily delayed decisions. At one point in time, the costs of additional delay in making a decision outweigh the benefits of (perhaps) making a better decision.

<sup>20</sup> See, eg, Rodgers WH, "Negligence Reconsidered: The Role of Rationality in Tort Theory" (1980) 54 *Southern California Law Review* 1; Sugarman SD, *Doing Away with Personal Injury Law: New Compensation Mechanisms for Victims, Consumers, and Business* (Quorum Books, 1989); Patton AL, "The Endless Cycle of Abuse: Why 42 USC § 1983 is Ineffective in Deterring Police Brutality" (1993) 44 *Hastings Law Review* 753; Levinson DJ, "Making Government Pay: Markets, Politics, and the Allocation of Constitutional Torts" (2000) 67 *University of Chicago Law Review* 345.

<sup>21</sup> The authors' will also look at the influence of insurance and the fact that the money to pay out the victim may not come from the budget of the public authority that was held negligent.

<sup>22</sup> The authors' have of course made up the numbers in this example. However, they are realistic in the sense that they assume that more investments in precaution (hence, increasing precaution costs) reduce the expected accident costs, but that the marginal return on those investments is decreasing. This is a standard assumption in the economic analysis of accident law. See, eg, Shavell S, "Strict Liability Versus Negligence" (1980) 9 *Journal of Legal Studies* 1.



does not even bear all costs, but only the costs of precaution (400). Thus, he or she will not take less than four units because all alternatives in which he or she takes less than four units are more costly. Similarly, the potential injurer will not take more precaution than the socially optimal level of due care (he or she will thus not take five units). The reason is that there is no benefit for the injurer to take more than four units. As soon as he or she takes four units, the courts will never let him or her pay damages. If he or she takes four units, the cost equals 400. If he or she takes five units, the cost equals 500. So taking four units is cheaper.

Things change, however, when the authors' introduce the possibility of judicial error. Suppose the injurer knows that judges set due care at three units instead of four (even though four units is socially optimal). Then it is easy to see that a potential injurer will take three units instead of four. As soon as he or she takes three units of care, he or she will not be held liable for any damages. The private cost is minimal when he or she takes three units of care (300 versus, respectively, 10,000, 5,100, 3,200, 400, and 500). Note that the advantage for the potential injurer for this type of judicial error equals 100; for without the error, the injurer would have spent four units of care (cost of 400), with the error he or she only spends three units (cost of 300). The authors' will now look at the other type of error. Suppose the potential injurer knows that judges set due care at five units. Then it can be seen that he or she will effectively take five units of care. For any lower number of units, the injurer will bear all the costs (10,000, 5,100, 2,800, 2,700). If he or she takes five units, he or she only bears the costs of precaution (that is, 500). Note that the advantage of taking too much care is quite large: if the injurer only takes four units, he or she bears an expected cost of 2,700; if he or she takes five units, he or she only pays 500. So, in conclusion, the effect of Type I and Type II errors is fundamentally different. Even when both type of errors are equally likely from an *ex ante* perspective (for example, there is a 10% chance for a Type I error and a 10% chance for a Type II error), potential injurers will be more inclined to take too much care rather than too little care.

The article will now argue that this problem of overprecaution is much more intense where a public authority is involved. A (private) tortfeasor typically balances an external cost (the expected accident cost) against an internal cost (the precaution cost). The incentive of such a tortfeasor to take too much precaution is limited, since he or she has to pay all the costs of overprecaution him or herself. However, public authority officials typically balance *two external costs*.<sup>23</sup> Unlike the private tortfeasor, the public authority itself (often) does not bear the costs of overprecaution. The public authority is thus much more inclined towards taking too much precaution, since others are bearing the costs of it. For example, fire-fighters balance damage caused by water (due to an intervention) against damage caused by fire (the costs of inaction). Both of these costs are externalised. Likewise, a safety inspector balances the expected accidents cost against the precaution costs. The former are borne by the victims (in case of an accident), the latter by the inspected firm (for example, additional safety measures).<sup>24</sup> Briefly summarised, uncertainty of legal standards together with the possibility of the government to externalise the costs of overprecaution may lead to a strong *chilling effect*.

### Conditions for a chilling effect

The previous theoretical analysis illustrates that chilling effects may indeed exist given the uncertainty surrounding due care. Consequently, restrictions on the liability for public authorities may be welfare enhancing. However, these restrictions should not go further than necessary. This raises the question: under what conditions are chilling effects more likely?

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<sup>23</sup> This point is stressed by De Geest, n 1.

<sup>24</sup> As De Geest argues, these injurers are in a *multitasking agent* situation. The multitask agent literature shows that incentives usually need to be softer for these agents than for single-task agents, because hard incentives for one output can distort the incentives for the other output. For example, professors who are paid per publication may neglect their teaching efforts, when these teaching efforts are hard to verify (and thus to sanction). In the context of liability, multitask agents should be allowed to exercise discretion within a well-defined zone with clear minimum constraints. The reason is that uncertainty has a strong *chilling effect* in a multitask agent situation, because the multitask agent does not internalise the precaution costs. For example, if a public servant needs to decide whether a firm should get a permit or not to carry out a risky activity that can cause substantial harm to third parties. See De Geest, n 1.



### Uncertain legal standards

First, as discussed above, there needs to be a substantial degree of uncertainty regarding the desirable behaviour and a certain risk that due care standards will be defined too strictly by the courts (Type I error). When courts always adopt a socially optimal due care standard and potential injurers know this, chilling effects are unlikely.<sup>25</sup> Potential injurers can then simply escape liability with certainty by taking due care. In other words, when the rules which a public authority needs to follow are quite clear, the risk of chilling behaviour is small. When the law is vague or ambiguous, chilling behaviour is more likely.

Note that “bright line” rules do not necessarily provide more certainty than an approach where relevant factors are identified, a weight is attached to each factor, and on that basis courts make a flexible assessment. Indeed, trying to provide more certainty may backfire. As Oliphant has recently put it:

[T]he pursuit of “bright line” rules of tortious liability in the interests of certainty is counter-productive and results in incoherence and injustice. It is counter-productive because in practice it invariably creates more uncertainty than existed before, often as to the very rules to be applied. Rules whose consequences are sometimes arbitrary are adopted in the name of certainty, but courts attempt to mitigate their effects by recognising exceptions and qualifications which, because they lack any convincing basis in principle, are themselves of uncertain scope. The pursuit of certainty also results in incoherence because a weighing of the full set of relevant considerations cannot be reduced to the mechanical application of a rule; consequently, outcomes are attained that are at odds with underlying values and fundamental principles.<sup>26</sup>

At first glance, a legal regime may seem to provide quite a lot of certainty, but public authority staff may nonetheless be of the opinion that outcomes of litigation are difficult to predict. Alternatively, a legal system that relies on a complex mix of rules and principles may provide more certainty than would appear at first glance. Halliday et al provide an interesting example with respect to liability risks associated with road maintenance services in Ireland and Scotland.<sup>27</sup> In Ireland, local authorities are statutorily immune from liability for their operations under roads legislation.<sup>28</sup> Under the common law duty of care, liability arises only if a repair is carried out negligently, but not for the failure to maintain a road. Furthermore, Irish courts quite generally recognise public policy reasons for not applying liability to public authorities in an excessive manner.<sup>29</sup> Still, local authority staff in the case studies acted on the basis that outcomes of litigation are hard to predict. The reason is that a perception exists among some public authorities that the judgments of the lower courts are as likely to be shaped by the justice of the case at hand as by the strict application of legal doctrine. This contrasts starkly with the situation in Scotland. Scottish authorities have a statutory obligation to manage and maintain roads.<sup>30</sup> Failure to meet the statutory obligation gives rise to liability. Authorities must inspect carriageways and footways for safety defects in accordance with the common and accepted practice of local authorities.<sup>31</sup> If hazards are found or brought to the attention of the authority, it has a duty to make the road safe again.<sup>32</sup> Litigants often rely on a professional code of practice<sup>33</sup> to support their arguments about what is the common and accepted practice of local authorities. Although the Scottish courts have not been inclined to formally rule on the precise status of the code vis-a-vis

<sup>25</sup> Of course, it is still possible that other accountability systems besides liability may create a chilling effect.

<sup>26</sup> Oliphant, n 13, p 1. According to Oliphant, an approach based on the identification of relevant factors and their flexible assessment on the facts of individual cases is preferred. The appellate courts should set the parameters within which this balancing exercise is conducted, and establish the weight that is to be attached to the various factors.

<sup>27</sup> Halliday S, Ilan J and Scott C, “The Public Management of Liability Risks” (2011) 31 *Oxford Journal of Legal Studies* 527.

<sup>28</sup> *Roads Act 1993* (Ireland), s 13; *Road Traffic Act 1961* (Ireland), s 95.

<sup>29</sup> *Beatty v The Rent Tribunal* [2005] IESC 66.

<sup>30</sup> *Roads (Scotland) Act 1984* (UK), s 1.

<sup>31</sup> See, eg, *Hutchison v North Lanarkshire Council* [2007] CSOH 23.

<sup>32</sup> *Gibson v Strathclyde Regional Council* 1993 SLT 1243.

<sup>33</sup> Roads Liaison Group, *Well Maintained Highways – Code of Practice for Highway Maintenance Management* (2005).



standards of care, they have incorporated into their jurisprudence the code's assertions about good road maintenance practice.<sup>34</sup> Local authorities have further developed practice rules which complement the rules in the code. Interestingly, this complex mix of internal and external rules and principles is applied by local authorities in the firm conviction that it fulfils the duty of care and avoids liability. There are two reasons for this. First, the courts support the code of practice (especially with respect to inspection frequencies). Secondly, unless the rules are untenable, claims companies support the internal rules of local authorities about safety thresholds and repair time targets.<sup>35</sup> Consequently, Scottish authorities operate "in a quasi-private legal realm which offered legal certainty".<sup>36</sup>

Finally, the way verdicts are rendered has an enormous impact on the degree of uncertainty. More particularly, it has been argued that the way jury verdicts and appellate reviews are articulated makes it difficult for defendants to learn which aspects of their practices are found inadequate.<sup>37</sup> If jurors are not required to sort out conflicting claims or clarify which alternative behaviours would be deemed appropriate, defendants may be left wondering what is the precise locus of negligence. Simple verdicts "for the plaintiff" leave much to the imagination.

### **Scale of damages if found negligent – the scale of reputational risk**

When potential injurers are deterred by the *monetary implications* of a negligence verdict, defensive behaviour is more likely when damages (in case the court finds that the public authority did not take enough care) are substantial. There are at least three reasons for this: plaintiffs will often not pursue small damage claims, which has the practical consequence of isolating tortfeasors from liability for such claims; risk aversion generally leads to more care, and risk aversion is larger for relatively large claims;<sup>38</sup> and small damages may be like a drop in the ocean for large departments with substantial budgets.

Many scholars have, however, characterised liability's sanction as weak. Its deterrent effect would be undermined due to several reasons. First, contrary to popular wisdom, only a fraction of all accident victims recover any damages at all from the tort system.<sup>39</sup> Secondly, public authorities often use insurance as part of their response to risks of liability. Liability insurance creates a risk of moral hazard so that authorities may lack incentives to minimise the likelihood of liability arising.<sup>40</sup> Thirdly, due to internal budgetary reasons, liability costs are not always directly or proportionally charged to the responsible department, so that they do not face direct economic incentives to limit their exposure to liability. Many commentators believe that if agency budgets were charged for payment, departments

<sup>34</sup> See, eg, *Hutchison v North Lanarkshire Council* [2007] CSOH 23.

<sup>35</sup> This is important because very few compensation claims end up in court.

<sup>36</sup> Halliday et al, n 27 at 535.

<sup>37</sup> See, eg, Poythress NG, *Negligent Release*, Paper presented at the Mid-Winter Meeting of the American Psychology-Law Society (1986); Poythress NG, *Avoiding Negligent Release: Explicit Standards versus Legal Fictions*, Paper presented at the Eleventh Annual Symposium on Mental Health and the Law (Institute of Law, Psychiatry and Public Policy, University of Virginia School of Law, 1988); Bonnie R, "Professional Liability and the Quality of Mental Health Care" (1988) 16 *Law, Medicine and Health Care* 229 at 237.

<sup>38</sup> This argument is only valid if the decision maker is risk-averse.

<sup>39</sup> For example, in the Netherlands, empirical research conducted in 2003 shows that about two out of three Dutch citizens encountered a legal problem during the previous five years. Most frequently, these problems are related to the purchase of goods or services, the job performed, financial problems, real estate, renting, family matters and health problems. In almost half of the cases (48%), the parties reach an agreement themselves and in 7% a third party makes a decision. In 35% there is no agreement or a decision of a third party, though some form of action was initially undertaken. Finally, in 10% no action at all is undertaken to solve the legal problem. So for 45% of legal disputes no agreement is reached and no decision by a third party is taken. People gave the following reasons for not acting: the problem was not worth to take action (the costs were greater than the benefits); and the belief that nothing could be done about it. See Van Velthoven B and Voert M, *Geschiedbeslechtingdelta 2003: Over Verloop en Afloop van (Potentieel) Juridische Problemen van Burgers* (Ministerie van Justitie, WODC Onderzoek en Beleid) p 219. An earlier and similar study in England and Wales had also shown that a substantial fraction of individuals do not take any action (or at least not a lot) when they face a "justiciable" problem: see Genn H, *Paths to Justice: What People Do and Think About Going to Law* (Hart Publishing, 1999) p 382.

<sup>40</sup> See, eg, Hood J and Kelly S, "The Emergence of Public Sector Risk Management: The Case of Local Authorities in Scotland" (1999) 20 *Policy Studies* 273.



and agencies would respond more to the threat of liability *ex ante* by internalising the costs of their negligent behaviour.<sup>41</sup> However, each of these three criticisms needs to be nuanced. First, studies finding a low rate of tort recoveries by accident victims are utterly silent on the issue of what percentage of all injuries are indeed caused by the tortious conduct of another party. In other words, they say nothing at all about the extent to which those victimised by tortious conduct are declining to bring or enforce valid tort claims.<sup>42</sup> Nor do they shed light on the proportion of bogus claims, except perhaps that claims about litigiousness in its most extreme form may be exaggerated. Secondly, in many countries, public authorities do not insure themselves for liability risks.<sup>43</sup> Furthermore, insurers have instruments at their disposal which gives the insured an incentive to change their practices. This will be addressed below. Thirdly, while commentators frequently assume that government departments and agencies do not pay money damages from their budgets,<sup>44</sup> this is not always the case. For example, Fougere examines who pays the liability costs of state correctional agencies in 15 US states.<sup>45</sup> He finds that states use a variety of approaches to paying claims against their agencies – ranging from a statewide judgment fund to charging the agency budget. Fougere hypothesises that if a more direct source of money damages impacts cost internalisation and promotes better policy at the agency, then cases filed against them should be fewer in number because victims should have less cause to sue. He finds indeed that there are significantly fewer filings in the “budget” states than in other states.<sup>46</sup>

Even when the monetary sanctions attached to liability only have a weak deterrent effect, the reputational loss that may follow from a liability verdict can have a strong incentivising effect. As Epp puts it:

[W]hat agency officials fear most about liability is the threat of public embarrassment and reputational damage. Although losing a costly case is undoubtedly embarrassing, lawsuits have the potential to erode an agency’s legitimacy in the eyes of the public even if the agency wins. As one official observed to me, “Lawsuits bring publicity, and publicity alters the public perception of us, and for practical purposes, perception is reality. So that can be a big cost, and it can take a long time to overcome it.”<sup>47</sup>

Schlanger formulates it as follows: “Even for an agency that doesn’t care about payouts (perhaps because those payouts come from some general fund rather than the agency’s own budget), media coverage of abuses or administrative failures can trigger embarrassing political inquiry and even firings, resignations, or election losses.”<sup>48</sup> Logically, reputational pressures can lead to chilling effects. If courts sometimes hold public authorities liable even when they actually took sufficient care, and the media may frame the authority’s conduct as an administrative failure, this can provide an incentive to go beyond what is necessary in order to reduce the possibility of suit and being found negligent.

Reputation is a relational concept. A person’s reputation is whatever others think of that person. So for every particular context, one needs to unveil the key relationships. In the context of public authorities, Halliday et al hypothesise that these are the relationships with: the public they serve (sometimes through the medium of local politicians); peer public authorities; and public sector

<sup>41</sup> Schuck, n 2, p 104; Emery R and Maazel IM, “Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution” (2000) 28 *Fordham Urban Law Journal* 587 at 596-600.

<sup>42</sup> See, eg, Saks MJ, “Comment on Empiricism and Tort Law” (2004) *University of Illinois Law Review* 463.

<sup>43</sup> See, eg, Van Dam, n 9, p 85.

<sup>44</sup> Schuck, for example, states that “the litigation, liability, and settlement costs resulting from misconduct by agency employees are in practice borne by the Treasury, not by the agency’s own budget”. See Schuck, n 2, p 107.

<sup>45</sup> Fougere JJ, “Paying for Prisoner Suits: How the Source of Damages Impacts State Correctional Agencies’ Behavior” (2010) 43 *Columbia Journal of Law and Social Problems* 283.

<sup>46</sup> As Fougere, n 45, acknowledges, the use of filings as a proxy for *ex ante* cost internalisation is rough and most probably imperfect. Many other factors influence filing rates.

<sup>47</sup> Epp C, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* (University of Chicago Press, 2009) p 22.

<sup>48</sup> Schlanger M, “Inmate Litigation” (2003) 116 *Harvard Law Review* 1555 at 1681.

regulators.<sup>49</sup> The influence of liability on the reputation of a public authority depends on many items, including, but not limited to whether: the department is politically a hot issue (does the department win votes or not?); claims are responded to swiftly and, more generally, whether there is a consumer oriented service delivery; claims are often settled rather than litigated (and thus enter the public domain); third party claims handlers are involved (which distances the public authority from the decision); and the key performance indicators in relation to liability claims built by the public sector regulator carry the respect of the relevant public authorities.

Reputational pressures associated with liability can lead to chilling effects, but other accountability pressures can curb this. Tortious liability is just one of the accountability regimes within which public authorities have to operate. Administrative justice research has shown that public authorities can be exposed to many conflicting accountability pressures simultaneously.<sup>50</sup> How these conflicts are resolved is very context-dependent.<sup>51</sup>

There are some interesting relationships between the amount of tort damages and the scale of reputational costs. When damages are low, few individuals will be willing to file claims even when the behaviour of the public authority was grossly negligent, unless plaintiff-friendly rules have been introduced (for example, one way fee shifting, punitive damages). When few claims are filed, the chance of culpable behaviour entering the public domain is reduced, which decreases the possibility of reputational costs. Also, publicity about amounts paid out in compensation by public authorities can harm their reputation.<sup>52</sup>

#### **Liability for defensive behaviour**

Extreme chilling behaviour is less likely when public authorities can be held liable for their (extreme) defensive behaviour. Note that this is an important difference with private individuals. If these take too much care due to uncertain legal standards, the only consequence for them is that their costs of prevention increase. Public authorities, however, can, in some circumstances, be held liable for acting too cautiously. If a public authority, for example, refuses to grant a permit out of fear that the activities of the company asking for the permit may at some stage cause harm for which the authority could be held liable, and the courts ex post determine that it should have granted the permit, then the government may be held liable and be obliged to compensate the lost profits. In other words, public authorities need to balance the potential liability costs of being too lenient with the potential liability costs of being too strict. More generally, taking into account that both a finding of having acted too leniently and having acted too strictly can also create reputational loss, public authorities need to weigh the financial and reputational costs of acting too leniently with the financial and reputational costs of acting too strictly.

Several particularities of a legal system may greatly influence the balancing exercise undertaken by the public authority. For example, it may matter a great deal whether the legal system imposes liability for pure omissions or not.<sup>53</sup> In the common law, for example, there is no general duty of care in tort to prevent harm occurring to another.<sup>54</sup> The normal mechanism for creating affirmative duties of action is contract or statute. By virtue of the nonfeasance doctrine, public authorities can withdraw from providing certain services without having to fear liability. This may substantially enhance the scope for chilling effects. Another example concerns the rules on pure economic loss. In some jurisdictions, when the courts are faced with loss that is purely economic in nature – that is, loss which

<sup>49</sup> Halliday S, Ilan J and Scott C, *Managing Liability Risks in Public Agencies: A Comparative Study of Road Maintenance in Ireland and Scotland*, Compensation Culture Project Working Paper No 3 (July 2009) p 3, [http://www.ucd.ie/roads/roads\\_documents/compcult%20wp%20no3.pdf](http://www.ucd.ie/roads/roads_documents/compcult%20wp%20no3.pdf).

<sup>50</sup> See, eg, Scott C, "Accountability in the Regulatory State" (2000) 27 *Journal of Legal Studies* 38; Galligan D, "Authoritarianism in Government and Administration: The Promise of Administrative Justice" (2001) 54 *Current Legal Problems* 79.

<sup>51</sup> See also Halliday et al, n 27 at 547.

<sup>52</sup> Kennedy E, "Falls and Trips Costing Councils More than they Spend on Repairs", *Irish Independent* (27 March 2007).

<sup>53</sup> In other words, whether there is liability not only for misfeasance, but also for nonfeasance.

<sup>54</sup> *Smith v Littlewood Organisations Ltd* [1987] 2 AC 241.



does not stem from any physical damage to the claimant or his or her property this loss is not recoverable in the tort of negligence.<sup>55</sup> In some cases, this can lead to chilling behaviour. Suppose that a public authority must decide on granting a permit to a firm for a relatively dangerous activity which may primarily cause physical damage if something goes wrong,<sup>56</sup> and that not granting the permit leads to pure economic losses. Then the public authority may be more likely to deny a permit when pure economic losses are not recoverable. By not granting a permit, it can escape liability costs in case the activity causes physical harm and the court concludes that the authority was too lenient when granting the permit, without having to worry about potential liability costs in case a court would conclude that the permit should have been granted. In other cases, however, limitations on pure economic loss can mitigate chilling effects. This will be the case when liability for acting too lenient is typically associated with pure economic loss, while liability for acting too strict is more often associated with physical damage. In such cases, the public authority mainly internalises the costs of being too strict, but not the costs of acting too lenient. This dampens the chilling effect.

### **Insurance**

As mentioned above, not all public authorities are insured against liability losses. To the extent that they are, incentives to act too defensively may be mitigated. Insurance may indeed create a risk of moral hazard so that public authorities lack incentives to reduce the likelihood of liability arising.<sup>57</sup> However, some losses are typically not insured. Nonfinancial costs – such as loss of time, stress, and especially damage to reputation – are also important. Given that the foresight of reputational costs can be a strong deterrent (see above) chilling effects may still arise even under full insurance.

Furthermore, there are three reasons why insurance may not blunt monetary incentives completely. First, insurance coverage is not always complete. Insurers often incorporate a deductible (or excess) in the insurance policy. In other words, part of the settlement sum or judicial award is covered not by the insurer but by the public authority. Secondly, when setting premiums, insurers will take the claims history of the public authority into account. A record that shows quite a lot of claims ending in damages being paid may increase future premiums substantially. Thirdly, one should take the incentives and the regulatory powers of insurance companies into account. Insurers may either require or advise changes in public practices so as to decrease financial exposure.

The article now looks at these three elements from an empirical perspective. First, one should not expect a one-to-one relationship between whether an insurance policy incorporates a deductible (even a relatively large one) and the efforts of a public authority to reduce liability. For example, in their case studies, Halliday et al find that with respect to Ireland, the most pro-active authority had no excess at all on its policy. Another authority, with a high excess, was much less pro-active.<sup>58</sup> The explanation for this is whether the policy incorporates an excess or not is just one of the many factors influencing the behaviour of the authority. Secondly, premium increases due to claims history may be relatively modest, because the insurance contracts public authorities enter into often cover many issues of which liability is just one. Liability is often a small area of coverage within the policy. For example, for one local authority examined by Halliday et al, public liability insurance accounted for only 8% of the premium.<sup>59</sup> Thirdly, the evidence whether insurance companies act as “risk bullies” by *demanding* changes in public practices is mixed. Halliday et al do not find any evidence of this in their case studies. But they do find that insurers offer risk control *advice* as an extra to their insurance services (for example, on improving inspection systems and better records keeping to reduce the likelihood of

<sup>55</sup> On pure economic loss in Europe, see Bussani M and Palmer VV (eds), *Pure Economic Loss in Europe* (Cambridge University Press, 2003).

<sup>56</sup> There is a probability that the authority will be held liable for the losses.

<sup>57</sup> On moral hazard in the context of public authorities, see, eg, Hood and Kelly, n 40.

<sup>58</sup> Halliday et al, n 27 at 543.

<sup>59</sup> Halliday et al, n 27 at 548. They also stress that due to the cyclical nature of insurance (oscillating between soft and hard positions), public authorities have limited power to influence premiums.



liability). Others have found insurers to act more aggressively. McCoy finds that insurance companies in the 1980s placed pressure on police departments to improve their systems of control over officers' use of force.<sup>60</sup>

Finally, too few empirical studies exist to make a firm conclusion whether public authorities with liability insurance take more prevention than those without it. Through statistical analyses of variations among police departments, Epp found that police departments were more likely to adopt elements of legalised accountability if their city self-insures for police liability.

### ***Internal organisation of the public authority***

Several aspects of the internal organisation of public authorities can influence the extent of chilling behaviour. First, it is important whether the chain of command within the public authority is able to channel incentives to the responsible individuals. This can work both ways: there can be more but also less defensive behaviour when incentives can be channelled. The reason is that higher level civil servants or entities may be either more or less vulnerable to engage in defensive behaviour than lower level civil servants or entities. When higher level civil servants face large reputational costs due to findings of negligence (for example, for mismanaging their department) they may try to reduce liability by demanding overly cautious behaviour from their staff. If the lower civil servants do not face any other reason for such behaviour, the attempts of the higher level officials may fail when the chain of command is not able to channel sufficient incentives to comply. Conversely, a failing chain of command may also increase the likelihood of chilling behaviour. This will be the case when lower level civil servants are more likely to feel the consequences of adverse court decisions than higher level civil servants. In that case, a failing chain of command may hinder the higher civil servants' attempt to mitigate chilling behaviour at the basis. Empirical research by Hartshorne et al shows that higher level officials may sometimes not inform lower level officials about liability verdicts because this could lead to overly defensive behaviour.<sup>61</sup>

Another important element of the internal organisation of public authorities which can influence incentives is the extent to which departments collect and analyse information about past suits. A critical question is whether officials have enough useful information about past suits so that they can make informed decisions about whether to make changes to decrease the likelihood of a future suit. Schwartz, drawing on documentary evidence and interviews for 26 law enforcement agencies across the US, demonstrates that law enforcement officials very often do not have information about suits brought against their departments and officers. More than two-thirds of police departments and over 80% of sheriffs' departments with more than 1,000 sworn officers have no computerised system to track lawsuits brought against them. Moreover, law enforcement agencies rarely investigate claims made in lawsuits or review closed litigation files. Those departments with formal policies to gather data from lawsuits typically stumble in the implementation stage due to employee error, sabotage, and technological problems.<sup>62</sup> However, when officials actually process information from lawsuits, they use that information to decrease the likelihood of future misbehaviour. It is stressed, however, that information deficiencies do not prevent chilling effects from arising, perhaps even to the contrary effect, given that uncertainty about how legal rules will be applied by the courts is one of the cornerstones of chilling behaviour. In the absence of precise information, it is not implausible that officials will sometimes think that courts demand more than they should (even when that is not the case).<sup>63</sup>

<sup>60</sup> McCoy C, "How Civil Rights Lawsuits Improve American Policing" in McCoy C (ed), *Holding Police Accountable* (Urban Institute Press, 2010).

<sup>61</sup> See Hartshorne J, Smith N and Everton R, "'Caparo Under Fire': A Study of the Effects upon the Fire Service of Liability in Negligence" (2000) 63 *Modern Law Review* 502.

<sup>62</sup> Schwartz JC, "Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking" (2010) 57 *UCLA Law Review* 1023.

<sup>63</sup> Note further that even when departments ignore information from lawsuits and do not notice the additional plaintiff victories, those victories may create outside pressures to increase accountability.



## CHILLING EFFECT: EMPIRICS

Some empirical studies conclude that chilling effects are unlikely to exist, at least in the context these studies examine. In a survey, Van Dam asked several Dutch supervisors whether their behaviour is influenced by the fear of liability. They claim that it is not. They do, however, sometimes change their policy *ex post*, that is, after a judicial decision has been taken. Obviously, the value of these types of studies (surveys) is limited because they do not measure actual decisions. Furthermore, in the Netherlands public authorities enjoy discretion for decisions involving policy. A more relevant question is whether behaviour would change if there was no such discretion (or if this discretion were substantially limited). Moreover, the study contains an element which may suggest that chilling effects could exist. Insurers of supervisors claimed that one of the most important “protection constructions” for supervisors in current Dutch tort law is the discretionary freedom that the courts allow these supervisors.<sup>64</sup> In other words, the behaviour of supervisors could change in the absence of this protection. This is of course mere speculation in the absence of strong empirical research.

In another study, Schlanger investigates whether the possibility of inmate litigation has a chilling effect. In other words, do correctional agencies and line officers try to reduce their exposure to liability by conflict avoidance (not acting to enforce order)? Schlanger interviewed several jail and prison administrators to find an answer to this question. Some do indeed complain about litigation, but none of them reported that it forces them to cede control to inmates. In light of the economic criteria discussed, this is not so surprising. Conflict avoidance would not reduce liability exposure very much. Many of the expensive kinds of constitutional tort liability in corrections stem from failure to act. In a correctional setting, making out a constitutional case is no harder for omissions than for acts (on the contrary, US police and welfare agencies may be able to avoid constitutional liability by doing less, because their constitutional duties are negative. Doing nothing is generally not unconstitutional). This is in line with the articles theoretical argument that chilling behaviour is less likely if the government can be held liable for defensive behaviour. Other elements discussed also make chilling behaviour unlikely in this context. Prisoners only rarely win a suit (8%-15% of the cases). This is consistent with the hypothesis that judges and juries have set the doctrinal/persuasive standard for liability in inmate cases too high. In other words, the probability of a Type I error is very small: it is very unlikely that courts will demand an excessive amount of precaution of correctional agencies and line officers. Consequently, when taking adequate care, the possibility of suffering financial or reputational loss is very small. Moreover, for those cases that are won by the prisoners, damages are typically very low. Even when inmates have suffered grievous harm, tort awards are often very small.<sup>65</sup> The reason is that the ordinary rules of tort damages are limiting compensation; injured inmates who remain incarcerated after the injury have no (or very low) lost wages and no medical expenses.

In yet another study, Hartshorne et al analysed the impact of the English case *Capital and Counties Plc v Hampshire County Council*<sup>66</sup> upon the Fire Service.<sup>67</sup> The facts of the case can be summarised as follows. A fire broke out in a large commercial premise, activating the automatic sprinkler system. When the Hampshire Fire Brigade arrived at the scene, a station officer ordered that the sprinkler system should be shut down, because he thought the operation of the sprinklers was hindering the fire fighting operation. The fire then spread and destroyed the building. The respondents argued that the building would have been saved if the sprinklers had been left on. In 1997 the Court of Appeal decided that a fire authority can be held accountable for the property loss resulting from negligent fire fighting by its officers. The court held that it would be fair, just, and reasonable to impose a duty of care.<sup>68</sup> By doing so, it rejected the usual arguments to the contrary, for example, that

<sup>64</sup> See Van Dam C, *Aansprakelijkheid van Toezichthouders* (WODC Ministry of Justice, 2006) pp 64, 159.

<sup>65</sup> Schlanger, n 48 at 1620.

<sup>66</sup> *Capital and Counties Plc v Hampshire County Council* [1997] QB 1004.

<sup>67</sup> Hartshorne et al, n 61.

<sup>68</sup> A fire service owes no duty of care to respond to an emergency call, but liability can arise if, whilst attending to the fire, the fire service commits some positive act which causes the fire to become more dangerous and create additional damage.



liability would lead to defensive fire fighting.<sup>69</sup> Hartshorne et al aimed to identify the effects of imposing a duty of care upon fire authorities by sending a structured questionnaire to the chief officer of all public fire brigades in England and Wales. They conclude that:

In *Hampshire*, for example, the discussion of whether the imposition of liability may lead to defensive fire fighting rested on the premise that fire fighters would be aware both of any legal decision imposing liability, and its full legal implications. The research demonstrates that instead, this information is taking time to filter through to all ranks, and in some instances is becoming distorted in the process. Moreover, there is a suggestion that in some cases information supplied to lower ranks may be, albeit for what are conceived as good reasons, to a certain extent diluted. The research even demonstrates that as regards the highest echelons of an organization, the supply of legal information to it may be patchy, and the understanding of it variable.<sup>70</sup>

Hartshorne et al went on and said that: “On the surface, the study demonstrates that the imposition of liability has not led to widespread defensive fire fighting.”<sup>71</sup> This result is in line with the economic criteria discussed above. This article has argued that when information problems exist, officials may still exhibit defensive behaviour if they believe courts may demand excessive care. However, in this particular case it was clear that brigades did not appreciate the full legal significance of *Hampshire*, believing it only to be a case concerning sprinklers. As Hartshorne et al conclude: “If this is how the case is perceived, it is understandable that officers may feel they have nothing to be defensive about.”<sup>72</sup> More generally, when liability verdicts are systematically interpreted very narrowly or when ambiguities in a verdict are interpreted with a bias in favour of potential injurers, chilling effects are less likely to occur.

Other studies have found evidence of chilling behaviour. Halliday et al empirically examine the existence of defensive behaviour through a set of case studies about the management of liability risks associated with road maintenance services in Scotland and Ireland.<sup>73</sup> They find that excessive risk aversion is certainly a response on the part of some local authorities. Some Irish local authorities withdrew road maintenance services as a result of fear of liability.<sup>74</sup> They state that this approach was partly a result of the perceptions of uncertainty about how lower courts make their decisions (see above). The authorities could withdraw by virtue of the nonfeasance doctrine. In other words, there were no liability costs attached to their defensive behaviour. Note that the majority of local authorities did not adopt such a drastic approach. Most Irish authorities were reactive to complaints and requests for repair, and a few carried out pro-active road inspections. Poythress and Brodsky undertook empirical research in a large state psychiatric hospital.<sup>75</sup> In January 1985, a suit was filed against several staff members, alleging that they had been negligent in releasing a patient from the hospital’s substance abuse treatment unit. About two and a half months after the release, the patient killed a member of the plaintiff’s family. Two years later, the case went to trial. Several staff members at the state psychiatric hospital were found negligent and the jury awarded damages totalling \$11.75 million. Nearly a year after the verdict, the state Supreme Court overturned the judgment and ruled that hospital staff are entitled to qualified immunity for their involvement in release decisions. Poythress and Brodsky explored the impact of the suit on the hospital staff members and on the functioning of the institution. Archival data show that significantly fewer patients were released during the trial and follow-up period than prior to the litigation. In the six months prior to the filing of the suit, the average monthly discharge rate was 10.9%. During the 23-month pretrial period, the average monthly

<sup>69</sup> Examples of defensive fire fighting include: officers delay fighting the fire until possible litigation risks have been identified; or they commit extra pumps to a fire, pumps which may be more effectively deployed elsewhere.

<sup>70</sup> Hartshorne et al, n 61 at 518.

<sup>71</sup> Hartshorne et al, n 61 at 521.

<sup>72</sup> Hartshorne et al, n 61 at 521.

<sup>73</sup> Halliday et al, n 27. They also examine other concerns about the potential negative effects of liability on public administration (eg, the diversion of financial resources, the fear that insurers will curtail public service activities).

<sup>74</sup> Halliday et al, n 27 at 540.

<sup>75</sup> Poythress NG and Brodsky SL, “In the Wake of a Negligent Release Lawsuit: An Investigation of Professional Consequences and Institutional Impact on a State Psychiatric Hospital” (1992) 16 *Law and Human Behavior* 155.



discharge rate was 10.6%. However, the period from the month of trial (January 1987) and the six months following, the average monthly release rate was only 6.7%. Participants further reported that no significant learning took place in terms of clarifying the appropriate procedures and standards for release decision making. A number of the participants in this study were of the opinion that the verdict for the plaintiffs was simply emotional, made independently of any finding of real negligence. The authors conclude that “in the absence of evidence that the case was meaningfully instructive, the archival data suggest that the staff resorted to defensive clinical practice by indiscriminately reducing hospital discharges”. Several of the criteria discussed in this article indeed make a chilling effect likely. First, the court verdict did not provide any certainty regarding adequate release practices. Many staff members had the feeling they could be held liable even when carefully weighing the advantages and disadvantages of releasing a patient. Secondly, the verdict in favour of the plaintiff had a huge negative impact on staff members. Although they would most likely not have felt any adverse financial impact (the damages awarded were huge, but would likely have been paid by the clinicians’ insurance companies or by the state’s general fund),<sup>76</sup> the judgment created substantial emotional costs:

The emotional impact as reflected in answers to the open-ended inquiry was powerful, wide ranging, and profound on most staff. The negative impacts reported ranged from anger and despair to loss of confidence in clinical decision making, to contemplation or implementation of early retirement, and to increased tension in family and other social situations.<sup>77</sup>

Thirdly, the costs of acting defensively are probably modest. Unless it is very clear that a patient should have been released, courts may hesitate to find a hospital and its staff liable for not releasing a potentially dangerous patient. Even if they are held liable, the emotional costs of such a verdict may be much lower than the emotional costs of a verdict in which the defendants are liable for releasing a patient who subsequently harms third parties.

## CONCLUSION

The current literature is divided over whether tort liability creates incentives for defensive behaviour by public authorities. This article’s theoretical analysis shows that several conditions have to be fulfilled for chilling effects to arise. In the view of the authors’, it seems unlikely that these conditions will never be met. Existing empirical research indeed confirms that chilling effects are not a complete illusion.

This study offers a framework for the further examination of defensive behaviour caused by public authority liability. The methodological challenges for further refining this framework are substantial and require a truly interdisciplinary approach. Economics can help to decide whether certain public practices constitute defensive behaviour by rigorously comparing the costs and benefits of the practices and its alternatives. Psychology can illuminate whether individuals interpret liability verdicts with a bias, and whether the bias is greater or different when the verdict reaches the individual through the media or via official channels. Political science and sociology can illuminate the key relationships that influence the reputational costs in very specific contexts, and so on.

From a normative perspective, it seems that a wholesale reliance on the public policy argument of defensive practices to limit liability is overly simplistic. The research shows that the factors that have been identified may play an important role in delineating the types of cases in which a restrictive approach is justifiable. Taking into account these elements could significantly limit the scope for the chilling effect argument to be incorrectly decided.

<sup>76</sup> Poythress and Brodsky, n 75 at 169.

<sup>77</sup> Poythress and Brodsky, n 75 at 163.

