Foreword

Ilse Samoy* and Christopher Borucki

Public Authorities and Tort Law: a Difficult Marriage?

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Abstract: This short foreword serves as an introduction to the present special issue of the Journal of European Tort Law, entitled ‘Public authorities and tort law: a difficult marriage?’.

I Introduction

The articles collected in this special issue of the Journal of European Tort Law are the intellectual fruit of a workshop on insurance and liability, titled ‘Public authorities and tort law: a difficult marriage?’, held in November 2018 at the 23rd annual conference of the European Ius Commune Research School, a cooperation between the law schools of Maastricht University, KU Leuven (University of Leuven), Utrecht University and the University of Amsterdam. The Research School has as its mission to encourage and support research that examines the possibility (or impossibility) of harmonisation or unification of the rules of law at international and European level. Through the execution of comparative legal research it seeks the underlying foundations of legal systems in order to determine how European and international law may or may not influence a *ius commune* Europeanum or globale. The contributions in this special all originate in that aspiration.

***Corresponding author: Ilse Samoy**, Professor of Private Law, Institute for the Law of Obligations, KU Leuven (University of Leuven) and UHasselt (Hasselt University), Belgium, E-Mail: ilse.samoy@kuleuven.be

Christopher Borucki, PhD researcher, Institute for the Law of Obligations, KU Leuven (University of Leuven) and UHasselt (Hasselt University), Belgium, E-Mail: christopher.borucki@kuleuven.be

II Intertwinement of public authorities and tort law

Concretely, this collection of articles reflects on the issues that can arise when public authorities meet private tort law, discerning which challenges this legal area bordering both fields of law can pose. Because of the rapid growth and diversification of public services in modern day society, public authorities have become inextricably intertwined with many aspects of everyday life. Those authorities are not confined to the realm of public law when participating in society. They can also engage with their citizens through private law. For example, they enter into contracts seemingly as private actors. Thus, an ever increasing number of persons comes into contact with a broad and varied range of public authorities via acts of a diverse nature. The intensification of contact between public authorities and private individuals entails an increased risk of events occurring, wherein one wrongs the other. This begs the question whether the relationship between both parties lends itself to a claim in tort. The difference in nature of the opposing parties poses peculiar challenges. After all, governments hold state power, which not only grants them certain privileges, but also burdens them with the obligation to promote the interests of all their citizens. Therefore, they are not analogous to self-interested private actors, but represent society as an embodiment of its collective interests. Does that nature neatly fit the framework of tort law? On a more fundamental level the position of public authorities as an actor in a tort suit calls for a deeper reflection on which role tort law can or should play both as an instrument in the hands of the individual to influence policy and as a tool for public authorities themselves to enforce policy. Do public interests constrain the reach of tort law into the field of public law?

III Peculiar marriages between both

The contributions to this special issue focus on the lessons that can be drawn from a comparative legal perspective. They do so by boiling down the tension between public and private law to its underpinning principles in a search for the fundamental basis to which all legal systems can relate. Other research methods are the comparison of legal systems with one another and the analysis of the (harmonising) influence of the international and supranational multi-levelled legal order on national systems. With this research angle, the overarching conclusion of this special issue is that the position of public authorities is indeed special when it comes to tort law. This does not mean that they are categorically excluded from tort law. Rather, their peculiarities make for a quite interesting marriage. Whereas the bond between congruent fields of law might allow for a blissful study and

application, it runs the risk, as does any steadfast and long-standing marriage, of becoming somewhat dull and unsurprising. The junction between public law and private tort law, however, calls for a constant re-examination of their reciprocal influence and mutual compatibility. That continual demand provides ample opportunities to remould and reshape the connection between both fields of law, a rejuvenation that kindles the love between them time and time again.

IV Structure of this special issue

What follows is an overview of how the special issue is structured. Beginning from a general, comparative introduction on the fundamental questions and policy considerations surrounding public authorities and tort law, the focus then shifts to the sometimes challenging application of general tort principles on the conduct of public authorities.

A General comparative introduction

A first contribution by Anne Keirse concerns the general and fundamental questions that surround the liability of public authorities.¹ From a comparative law perspective it immediately sets the tone for the subsequent contributions by highlighting how the special position of states influences their liability. It highlights the policy considerations that underlie the evolution of said liability. Importantly, it finds that that evolution does not progress in a linear fashion. Rather, it is a perpetual process of expansion and declination. The overview sketched by the author provides for a comprehensible, yet thorough insight into the tension between public authorities and private tort law.

Next, Pieter Gillaerts examines another overarching question of the liability of public authorities.² His contribution delves into the instrumentalisation of tort law as, amongst others, a means of pursuing public goals by an individual. A staple example of such an instrumentalisation is climate change litigation in which individual citizens bring suits against the public authorities for failing to undertake adequate action against the threats posed by the deterioration of the

¹ A Keirse, Policy Orientation in Public Authority Liability: a Comparative Law Perspective (2020) 11 Journal of European Tort Law (JETL) 6.

² P Gillaerts, Extracontractual Liability Law as a Policy Instrument: Public Law in Disguise or in Chains? A Fundamental View on the Use and Usefulness of Extracontractual Liability Law for Public Goals from Belgian and Dutch Law (2020) 11 JETL 16.

human living environment. In such cases the compensation of damage is often only a subsidiary aim that is sought. However, the author stresses that the main, compensatory function of tort law should not be forgotten. The internal coherence and context of tort law forces this field of law to function in a compensatory strait-jacket. Thus, attention is needed not to overstretch tort law's prerequisites.

B Public authorities as wrongdoer

After the general comparative introduction of the position of public authorities in private tort law, the three contributions that follow are about more concrete topics. The first two focus on public authorities as the alleged wrongdoer in a tort suit. The last mirrors the subject matter and homes in on the question of public authorities as a wronged party.

The contribution by Françoise Auvray deals with the wrongful behaviour itself of public authorities and delves into a challenges that the multi-levelled legal order poses for the national tort system.³ It inquires how the violation of an international treaty relates to liability in the national legal system. More specifically, the author examines if it is necessary to limit the concept of fault to the infringements of international treaties with direct effect, excluding the violation of those without such effect.

Thereafter, Kim Watts conducts a study of the practice by states of establishing alternatives to tort law damages claims for mass harm by public authorities.⁴ In particular the author explains how the tortious framework of wrongful behaviour by public authorities may be overshadowed by the use of compensation funds by making heavy reliance on alternatives. The justification for those funds requires an appropriate balance between efficiency and enabling access to justice. The author uses Ireland as a case-study and finds that the balance between both interests is not always level in this country. Drawing inspiration from other European jurisdictions she offers solutions to that asymmetry.

³ *F Auvray*, Is the Infringement of a Treaty a Fault? The Impact of the Absence of Direct Effect on the Extra-Contractual Liability of the State (2020) 11 JETL 37.

⁴ *K Watts*, Managing Mass Damages Liability via Tort Law and Tort Alternatives, with Ireland as a Case Study (2020) 11 JETL 57.

C Public authorities as wronged party

In the final contribution the roles of the parties in tort are reversed. Christopher Borucki examines the position of public authorities as a wronged party.⁵ Even though it is certain that public authorities are not exempt from tortious liability, as proven by the previous contributions, doubts exist that they can claim in tort as wronged parties. A particular sore spot is whether public authorities can recover the costs of their incurring a legal obligation. One such obligation is the duty of public authorities to protect the environment on their territory and to safeguard the health of their citizens. When environmental damage occurs, that duty obliges them to take preventive and remedial measures against that harm. This raises the question of whose burden the costs of that obligation are. The contribution examines the implications of the polluter pays principle and European legislation that deals with that question and inquires in what way they may have a harmonising effect on the national legal system. It draws lessons from a comparative perspective, in particular regarding German and Dutch law.

⁵ C Borucki, Cost Recovery of Preventive and Remedial Measures against Environmental Damage from the Polluter through Tort Law: European Spill Over, Troubled National Waters? (2020) 11 JETL 86.