

# Governmental Liability: Some Comparative Reflections

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### *Abstract*

*Modern States face the task of compensating individuals in many ways, some of which do not fall within the domain of liability, in the sense of responsibility for an event that caused harm. Thus, it must be stressed the different nature of the right to compensation that arises either from the fault of the governmental bodies or from the risky activities that they undertake –that is, public liability- and the right to compensation in which underlies motives of solidarity, compassion and efficiency. This article explores such a topic with special reference to British Law, French Law and EU Law.*

*This article also addresses the question whether public liability for fault is actually different from fault as it is used in the domain of Private Law. Furthermore, it aims to ascertain the particular features of the liability regime stated in the European Convention and EU Law, its interpretation by the courts, and its impact on the development of public liability in the States Members, which basically consists on fixing a minimum standard. In fact, there are certain criteria that serve as a common basis for the liability of public administration, but there are significant differences in the conceptions of liability and duties to compensate as well.*

### *Summary*

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## 1. Introduction

The law on the liability of governmental bodies is changing across Europe for a number of reasons. Some relate to social values (a greater focus on the citizen as consumer of public services, rather than the grateful beneficiary of community largesse). Some relate to Europeanisation and the greater scrutiny of national legal orders. These reasons have importance specifically for the law on governmental liability, but also as illustrations of the processes of legal development across Europe.

The argument of this paper will be that there are certain values that serve as a common basis for the liability of the public administration in Europe, but we also have to recognise that there are also divergent traditions, based on different understandings of the conceptions of liability and duties to compensate. These divergences remain significant as they underpin certain basic philosophical conceptions of the relationship of society to the individual.

The comparative lawyer faces a number of metaphors that characterise the nature of a legal system. One picture is that of the toolbox. The law offers a number of techniques for dealing with social problems. Improved tools are developed in all different legal systems. The legislators or judges can then transplant or copy the solutions from another system to provide more effective methods of dealing with the problems of a national system. The other picture is of the national system (or at least major parts of it) as a kind of computer operating system. There is an integrated and embedded structure of concepts, values, procedures, institutions and techniques that work together to make a specific legal system distinctive. Any new software programme (legal rule) loaded on the machine must be compatible, and it may work with different functionality, depending on the operating system of the machine.

If we focus on the first picture, then we are concerned about the effectiveness of particular rules or groups of rules to deal with a problem. In the approach of MATTEI<sup>1</sup> and SMITS<sup>2</sup>, there is a competition for the most efficient solution, which judges and legislators seek to identify and apply. This idea is picked up by a former judge of the European Court of Justice, Yves Galmot, who argued that his court made use of comparative law to identify not the lowest common denominator, but rather the most effective solution (*la solution la plus performante*).<sup>3</sup> Either the legislator or judge simply transplants the foreign legal rules, or does some ingenious copying (often unacknowledged) to fill the local legal system with foreign, look-alike solutions. Clearly this approach makes it more straightforward to conceive that European legal systems are converging. The superior legislator can simply tinker with individual legal systems by making piecemeal changes.

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<sup>1</sup> Ugo MATTEI (1998), *Comparative Law and Economics*, Univ of Michigan Press, Ann Arbor, ch 5.

<sup>2</sup> J. SMITS (2002), *The Making of European Private Law*, Intersentia, Antwerp, 59-72.

<sup>3</sup> Y. GALMOT (1990), "Réflexions sur le recour au droit comparé par la Cour de justice des Communautés européennes" *Rfda*, 255, 260. For a more sensitive view of the approach of comparative law in this field, see B.S. MARKESINIS (2001), *Always on the Same Path*, Hart, Oxford, ch 9.

The alternative picture would stress the integrated nature of the national legal system, both internally and in relation to its environment. When one learns the law, one acquires a way of reading social reality through a conceptual map. That map makes particular links between different features of reality and uses particular foci of attention. One system might be focused on the fault of the official, another on the fairness of the burden placed on the victim of an action undertaken in the public interest. There would be a suggestion that any change must be assessed not only in terms of its immediate solution, but also in terms of its impact on the system as a whole. Can we just take one new idea within EU law and treat it as a computer software patch that can be spread throughout the EU national legal systems, as if they were all machines operating on the same computer network? If the different machines have different operating systems, then the patch is going to fail in some systems and work in others, cause some to malfunction, and others to work better. Clearly this approach favours an analysis that looks at the special character of each legal system.<sup>4</sup> Here, piecemeal tinkering with individual parts of a legal order can lead to incoherence and inconsistency.<sup>5</sup>

It seems to me that the field of governmental liability is capable of offering a specific insight into this comparative law debate, and can help to point to trends in the developing legal system.

## 2. *Why should the state be liable?*<sup>6</sup>

There are a number of rules of compensation that are typically grouped together within different national systems under the umbrella of 'governmental liability'. But I do not think that they are fundamentally the same. I think we have to be more cautious in our use of the term 'liability' and limit it to situations where there is a responsibility for the harm-causing event, rather than just a moral responsibility to care for the victim of a harmful action or event. It seems to me that it is useful to talk in terms of five general foundations of a right to compensation from a public authority.

The first concept is *fault*. We have a moral responsibility to make good the harm, which has been caused by our neglect or wrongdoing. Clearly there is an issue about the standards that are expected of us, but the concept of responsibility for fault is clear.

The second concept is that of *risk*. Even without fault, if we have created a situation of risk of harm for our own purposes (or for the community which we serve), then there is ground for holding us responsible. The idea that taking the benefits implies sharing the burdens is well

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<sup>4</sup> J. BELL (1998), "Mechanisms for the Cross-Fertilisation of Administrative Law in Europe" in J. BEATSON and T. TRIDIMAS, *New Directions in European Public Law*, Hart Publishing, Oxford, 147

<sup>5</sup> See Teubner's critique of the introduction of "good faith" by means of a directive on consumer protection: G. TEUBNER (1998), "Legal Irritants: Good faith in British Law", 61 *Modern Law Review* 11.

<sup>6</sup> See generally, J. BELL (1996), "Governmental Liability in Tort", 6 *National Journal of Constitutional Law* 85.

acknowledged. In economic terms, we must internalise the costs of the operation, rather than externalising them to other people.

Both of these justifications apply equally to public and private persons. But there is a further set of justifications which apply more specifically to public authorities. Roger ERRERA explains that *equality before public burdens* justifies French public law liability, both in areas of fault and risk.<sup>7</sup> This is based on art. 13 of the Declaration of the Rights of Man under which all have to contribute to public expenses, and from which is deduced the principle that no one can be expected to contribute an excessive amount for the public good. Now this principle is easy to understand where there is a risk created for the public benefit, such as the case of the ammunition store that explodes.<sup>8</sup> But there are other situations, such as where there is an expropriation of the private property of one person for the benefit of the community where we are already moving from a notion of liability to social justice. In expropriation, no wrong is done, but the social benefit of the loss requires the community to compensate the person whose land is expropriated. In the same way, where the community takes a legitimate action that may cause substantial harm to an individual, we might consider that it has a responsibility to compensate the victim. The *Couitéas* decision<sup>9</sup> shows this kind of expropriation, where the authorities refused to remove squatters from private land, because this would upset local public order. One person was suffering for the benefit of the community. The same might arise where one company suffers a particular loss as a result of a blockade which the authorities do not want to break up. This form of liability is based on an idea that burdens must be shared, rather than lying where they fall. But this is not really justified by a notion of liability, taking responsibility for one's actions and the harm they cause, but it is a matter of social solidarity – social burdens, however created, should not be unequally borne.

*Social solidarity* offers an alternative basis for requiring the state to pay compensation to those who suffer injury. The French Constitution proclaims the solidarity of all in the face of national calamities. The moral idea is based on the view that, if we find ourselves as part of a community, that situation of mutual dependence generates duties of solidarity. We are not lone actors, as the private law model of liberty would suggest. Our obligations do not arise simply from our voluntary choice, but also from the social position we occupy. The argument is founded on an idea of social justice. Solidarity with those who suffer provides a special justification for injuries resulting from industrial and social diseases, but also from major risks in the field of medicine. For example, many countries provide compensation to children who suffer adverse reactions from vaccinations. The mechanisms are often some form of insurance fund. But the justifications differ between countries. For example, in France compensation was originally justified on the basis that the vaccination was an activity undertaken in the public interest, the risk incurred was a disproportionate burden on a few individuals, and so the community ought to pay.<sup>10</sup> The argument is one of fairness in the apportionment of burdens.

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<sup>7</sup> R. ERRERA (1986), "The Scope and Meaning of No-Fault Liability in French Administrative Law", CLP 157.

<sup>8</sup> See CE *Régnauld-Desroziers*

<sup>9</sup> CE 30 November 1923, Leb. 789.

<sup>10</sup> See C. GUETTIER (1996), *La responsabilité administrative* (LGDJ Paris), 149.

The English Vaccine Damage Act 1979 is an illustration of compensation based more on *compassion*, rather than an argument of social justice. The ability of society to shoulder the burden, its deeper pocket, is more in evidence, rather than a sense that society is benefiting from an activity and so should, in fairness, share the burdens. *Compassion* is a commendable virtue, but not a matter of moral duty. It is a work of supererogation. Common lawyers have enormous problems in accepting the idea that one has a duty to help those who fall into misfortune. They would not punish the Bad Samaritan who fails to rescue a child who is drowning in a shallow pool of water, even though the rescue would put him in no danger.<sup>11</sup> Of course, a utilitarian argument could be put in favour of compensation for those who are the victims of industrial injury, since we benefit from the labour of the individuals in question. But vaccine damage is far more a matter of insurance and compassion, rather than social justice.

A fifth justification is the State is simply best placed as the *organiser* of compensation. Given its information and resources, it can manage the provision of compensation in the most efficient manner. The issue is well illustrated by the situation of technological risks and disasters. After a particular disaster at a chemical plant in Toulouse, a recent French law was passed under which the compensation of victims is secured by a guarantee fund which will pay them if a person does not have appropriate insurance cover.<sup>12</sup> This is a situation of society arranging some form of collective protection against risks which are not obvious to most people, but where the State can be expected to undertake a risk assessment. The privileged position of the State to make provision for a major pollution incident justifies giving the State a responsibility. This is a way of socialising risk not so much out of solidarity, as through a process of identifying the best informed organiser of compensation.

The different justifications in this area seem to me to relate to different conceptions of the role of *liability law*, as opposed to the *law on compensation*. French lawyers frequently use the term 'responsabilité' when talking of both, but they are only connected by the idea that the state has to pay in both circumstances. We can legitimately conceive of an argument that justifies the compensation of the victim without imputing liability to any individual. The court process is appropriate for identifying blame either individual or institutional, and this function is often cathartic for the victims and their families. To this extent, the use of *criminal* liability against public officials in France in the 1980s and 1990s provided a strongly expressive mechanism to achieve this end.<sup>13</sup> English public administration tends to use other mechanisms for dealing with blame. Political accountability and administrative responsibility are sufficient. Whereas fault and risk are clear instances of liability, I would argue that the situations of solidarity, compassion and organisation are best seen as instances of publicly established compensation.

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<sup>11</sup> J. FEINBERG (1984), *Harm to Others* (Oxford UP Oxford), 163-171.

<sup>12</sup> *Loi* of 30 July 2003; J-P BOIVIN and S. HERCÉ (2003), "La loi du 30 juillet 2003 sur les risques technologiques et naturels majeurs" *AJDA*, 1765.

<sup>13</sup> It as subsequently been much reduced by reforms of criminal liability which impose this on public officials only in cases of clear fault (see art. 1781-1 of the Code pénal).

As seen from ERRERA's analysis, the French system is more inclined to have a broad interpretation of the notion of 'responsabilité'. But there are also trends to establish perhaps a more appropriate balance between liability and other justifications for compensation paid to victims. It is one thing to move from trying to find fault in a hospital to making the hospital liable without fault for the defective equipment it uses.<sup>14</sup> In 1993, the Conseil d'Etat held that the public hospital was liable without fault where a known, but rare, risk of an operation caused a woman to be paralysed.<sup>15</sup> But the move to make the State pay for all 'medical accidents', rather than just for 'therapeutic risks' inherent in a particularly novel or dangerous form of treatment very clearly moves from 'liability' to 'social solidarity'. This has occurred under a law of 2002 which was concerned with patients' rights and the quality of the health system.<sup>16</sup> The new art. L 1142-1 of the Code de la santé public provides that medical professionals and institutions are only liable for fault in prevention, diagnosis and care. Institutions are liable for bacterial infections, unless they can prove that this resulted from some external cause. All these must be insured. In other cases, and 'on the basis of national solidarity' there is a right to compensation for serious medical conditions resulting from infections or medical treatments. This neatly captures the right approach, moving thus from responsibility of the State to organisational burden, justified by national solidarity.

### ***3. In what way is public liability for fault different?***

#### **3.1. The Nature of Fault**

In private law, fault is the failure to live up to a standard of ordinary care. In Romanist terms, this is the care of the *bonus paterfamilias* or, in more modern English parlance, the commuter on the underground.<sup>17</sup> Normally, failure to comply is a matter of social criticism. In more recent years, the standard has become less subjective and more objective. In France, this can even lead to children under the age of reason being held liable for fault, in that they fall below an objective standard of behaviour.<sup>18</sup> But the sources for such private law standards are notoriously vague. They rely ultimately on social conventions, which are not well evidenced, and are not really attributable to a legal standard. In marked contrast, public international law has a self-contained system. The International Law Commission's articles on State Responsibility require that the State engage in an act or omission that is 'a breach of an international obligation of the State'.<sup>19</sup> There are obviously some unwritten principles of international law, but most obligations owed are written down in treaties and the like. Between these extremes of imprecision and precision, in public law, the movement has been from situations in which an official has behaved badly to

<sup>14</sup> CE 9 July 2003, *Assistance publiques- Hôpitaux de Paris c/Marzouk*, AJDA 2003, 1946.

<sup>15</sup> CE 9 April 1993, *Bianchi*, Leb. 127.

<sup>16</sup> *Loi* of 4 March 2002, see S. TAYLOR (2003), "Clinical Negligence Reform Lessons from France", 52 ICLQ 737; M. DEGUERGUE, *La responsabilité du fait des produits et appareils de santé défectueux à l'hôpital*, AJDA 2003, 1949-50.

<sup>17</sup> Lord Steyn, *McFarlane v Tayside Health Board* [2000] 2 AC 59, 82.

<sup>18</sup> See Cass. Ass. 9 May 1984, D 1984 J 525.

<sup>19</sup> See J. CRAWFORD (2002), *The International Law Commission's Articles on State Responsibility*, Cambridge UP, pp 83-4.

where the organisation has failed in its mission (a *faute de service*), without it being possible to identify any particular individual as at fault. Whereas the analogy with private law is quite clear where an official misbehaves, where there is a failure of the system, more careful argument is required.

Because the State takes on the responsibility to organise a range of non-profit-making services for the good of the community, we need to be wary of a simple objective basis of liability – if you have not done what you said you would do, then you are at fault. The line between an obligation of public service and merely an expectation of what the service will deliver is hard to define. The bus timetable at least generates an expectation that there will be a bus about the specified time, but does it generate an obligation on the service provider to make a bus run and on time? Is there a difference between the legitimacy of the service user's complaint that things are not running well (which might give rise to an apology and a promise to do better), the user's demand for compensation for the failed service, and a liability for the consequences of non-performance? It seems to me that liability is based on violation of rights, not on mere failure to meet expectations or legitimate interests in a public service.

The failure to deliver a public service becomes in itself a justification for liability more easily in some systems than in others. Where there has been held that the failure of the State to ensure that there are sufficient teachers to deliver the curriculum constitutes a fault, which entitles the parents to compensation. Unlike in private law, there is no contractual relationship here, but the consumer analogy applies – the failure to deliver the service defeats legitimate expectations.<sup>20</sup>

The issue of liability for the deficiencies in public services raises the question of the function of law. In England, in the area of education, amounts of compensation for failure to deliver services is provided by the Ombudsman.<sup>21</sup> The absence of adequate schooling is a legitimate subject for criticism and a demand for compensation, but not for liability. In line with the tradition begun in the early 1990s of the 'Citizen's Charter', there is compensation on an *ex gratia* basis where the service is not delivered. This allows the amount of compensation to be fixed within limits of affordability. After all, the service is provided for the benefit of the community and the need to maintain that service sets limits to the appropriate level of compensation that people can expect from the community. If a major business deal depends on you arriving in time, then you cannot expect the community to pay when its bus gets stuck in traffic. At the very least, where you know of a major risk, it behoves you to take out your own insurance and not treat the community as an insurer. This conception of the role of liability as giving rise to an *entitlement* to full compensation restricts the English conception of what are appropriate areas for the law on liability. By contrast, the French have a more expansive role for the law, and a much lower role for non-legal mechanisms. There is a real sense of transforming expectations into rights in France, rather than taking the benefit of a lower form of protection.

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<sup>20</sup> CE 27 January 1988, AJDA 1988, 352.

<sup>21</sup> Equivalent of the *difensore civico* in Italy.

But does this make a substantive difference to the compensation received? If we take education, then there are interesting comparisons. On 3 November 2003, the TA of Versailles awarded 11 parents between €150 and €450 for repeated failure by the State to cover absences of teachers.<sup>22</sup> In these cases, the children failed to receive between 60 and 80 hours of teaching in a year. In practice, some 5% extra staff would be needed to cover these absences and the local Academy was obliged to make provision for absences of longer than 15 days, so the inaction by the State in these cases was a matter of calculation, rather than mere incompetence. The Annual Report of the English Local Government Ombudsman for 2003<sup>23</sup> gives an account of total non-provision for children with special educational needs leading to payments of £8000, £1250 and £2250 per child, plus £250 to the parents for general trouble caused. The failure to perform was characterised by the Ombudsman as ‘maladministration’. i.e. failing to perform to the expected standard. By contrast, where the normal standard was complied with, then no maladministration was found.<sup>24</sup> The facts are not directly comparable, because the French students lost fewer hours of schooling. But this does suggest that the English position is not, in practice, a matter of saving costs. Rather, there is almost a philosophical preference for not giving parents legal rights or entitlements.<sup>25</sup>

We do not need to base compensation on establishing legal liability. In relation to public services, there can also be consumer confidence reasons for compensation, a conception of service to the user. Thus, in England, if your train is delayed for over an hour due to circumstances within the control of a rail service provider, you will be entitled to compensation up to 20% of the fare.<sup>26</sup> The terms are contractual and leave much to discretion. In a similar way, in France, if the train is over 30 minutes late, you get a third of the price, but as a commercial, rather than a legal obligation.<sup>27</sup> Non-legal arrangements suffice.

So the failure of performance is not always a matter of ‘fault’. There is a spectrum running from wrongdoing to incompetence to seriously defeated expectations. Why, then, would deficiency not be treated as “fault”, albeit fault of the service? First, in the English tradition, there is a greater association of “fault” and blame. Compare, for example, the cases collected by VAN GERVEN in his *Casebook*<sup>28</sup>. In the English case, a girl of 15 is not held liable when she was fencing with a plastic ruler in class and damages the eye of a classmate. The standard was the ‘ordinarily prudent and reasonable 15-year old schoolgirl in the defendant’s situation’. The German case relied on ‘average expectations of suitable behaviour’ among children of that age. The French, by contrast use the objective standard of ‘a prudent and circumspect individual placed in the same circumstances’. ‘Fault’ is an expansive justification for compensation, rather than just a matter of blame. Secondly, there is a conceptual view of the entitlements of an individual to a public

<sup>22</sup> Le Monde 28 February 2004, p 9.

<sup>23</sup> <http://www.lgo.org.uk/educ.htm> (visited on 31 March 2004).

<sup>24</sup> See *ibid*, *Plymouth City Council (01/B/18577)*.

<sup>25</sup> Contrast this with the analysis of legal liability by B. MARKESINIS and A. R. STEWART (2002), “Tortious Liability for Negligent Misdiagnosis of Learning Disabilities” in ch 9

<sup>26</sup> National Conditions of Carriage § 43

<sup>27</sup> [http://www.voyages-sncf.com/info\\_resa/guide\\_du\\_voyageur/Horaire\\_Garanti.htm](http://www.voyages-sncf.com/info_resa/guide_du_voyageur/Horaire_Garanti.htm) (visited 3 August 2004).

<sup>28</sup> W. VAN GERVEN, J. LEVER and P. LAROUCHE (2000), *Cases, Materials and Text on Tort Law*, Ius Commune Casebooks, Hart, Oxford, 332-357.

service. In England, there is not the same sense that the law needs to play a role. The mere fact that we consider that compensation should be paid to victims does not mean that legal liability should be the mechanism for delivering this. Where the service merely fails, then the notion of liability is not appropriate, even if compensation is provided. Things may be changing. In relation to medical services, the seriousness of injury is leading to substantial payments. The National Audit Office estimated that the net present value of outstanding claims for clinical negligence as at 31 March 2000 was £2.6 billion (up from £1.3 billion on 31 March 1997).<sup>29</sup> This amounted to 4.7% of the National Health Service budget. The number of claims closed increased from 660 in 1997-8 to 3200 in 1999-2000. Such increases suggest a change in culture. But these figures also illustrate another feature. If compensation is part of the budget for a service, then the amount paid out to disappointed users will diminish the amount of money available to provide the service for others. The mechanisms for obtaining a change in the quality of service may not be the imposition of liability, but other mechanisms requiring officials to deal with complaints and criticisms in a more personal way. After all, *faute de service* really amounts to the liability of no one person, and no individual may even be aware that his or her action has contributed to a loss of money for the service with which he works. On the other hand, personal liability can have immediate effects.

### 3.2. Liability for Regulation

Although the Convention is useful in dealing with the interference with rights, it has less to say on the exercise of discretion. After all, the exercise of discretion is a major feature of administrative life. In those situations in which rights are affected, decisions like *X v Bedfordshire*<sup>30</sup> provide some standards. But in situations in which there are no rights affected, but interests or legitimate expectations are affected, then a different standard is required. EU law offers this in that most of the decisions its liability rules relate to the exercise of legislative or administrative discretion by either the EU itself or by Member States. In the case of legislative action, liability only arises where there has been manifest illegality.<sup>31</sup> Ordinary fault is insufficient. A similar concern is reflected in the handling of administrative discretion. In other words, we do not have the same kind of protection in areas where the European jurisdictions create their own standards. Whether we describe this in terms of the inhibiting effect of liability or a recognition of the legitimate scope for making assessments, then we do need to have a special scope of liability for discretion. The tendency of recent years in France has been to reduce the scope of gross fault (*faute lourde*) to genuine policymaking discretion or where there is a policy element in operational decisions.<sup>32</sup>

Modern administration is moving very much towards a regulatory model. Rather than providing services directly through public service operators, the public authority is commissioning the work, or regulating it. The development of a competitive single market in which different

<sup>29</sup> National Audit Office, *Handling Clinical Negligence Claims in England* (London 2001), 1. About 80% of the value of claims and 26% of their number were accounted for by claims for brain injuries and cerebral palsy.

<sup>30</sup> Below note 40.

<sup>31</sup> See *Brasserie du Pêcheur*, below note 50.

European operators can compete to provide services in a given country reinforces this competitive and regulatory model of the public sector. Yet the question arises how far the public body retains responsibility. In *Barrett*, the public authority remained the legal custodian of the child. It retained a responsibility for organising the various placements and ensuring their suitability. Similarly in a recent French case, a public authority placed a contract with a private association to provide adventure activities for children from disadvantaged backgrounds. Several children were killed in an accident as a result of the inexperience of the helpers employed by the association. The State was held liable for failing to ensure that the association has sufficient qualified staff to perform the task for which the contract was made.<sup>33</sup> There is a situation of claims of right between the children and the State that it is seeking to perform by employing other people. A similar situation arises with prisoners. Once they are under the control of the State, they are owed care. As a result, there are duties to ensure that vulnerable prisoners do not commit self-harm.<sup>34</sup> Where the State is merely regulating the activity of private parties done for their own benefit, then its involvement is to ensure public order. It is a kind of policing role. The citizen merely has a legitimate expectation that the State will exercise its regulatory functions diligently. This has become increasingly important in areas such as banking and financial services.<sup>35</sup> The issue in these cases is the level of fault. Should simple fault be required, or some higher standard? If the liability under EU law for failure to implement EU legislation correctly depends on *manifest* illegality, then we are in the realms of a higher level of fault. But this remains contested, as the *Three Rivers* case shows.<sup>36</sup>

Does the European Convention change all this? As VAN GERVEN points out, EU law and the ECHR base themselves on the most protective standards in European national legal systems.<sup>37</sup> These are then applied to EU institutions, as well as to member states. As he suggests, there is a process of dialogue between the legal orders. On the whole, this passes through the central courts, rather than horizontally, though the work of Markesinis does note the way in which national legal systems influence each other.<sup>38</sup> As the *Barrett v Enfield* and *Z v UK* decisions show, although Strasbourg may appear to be the final court, a more European attitude to precedent, viz. a process of respectful disobedience, may ensure a more sensible outcome.

The saga of the dialogue begins with the decision of the English Court of Appeal in *Osman v Ferguson*<sup>39</sup>. In that case, a teacher became dangerously obsessed by a particular male pupil and harassed him. This was reported to the police over several months, but they did not take sufficient steps to prevent the teacher attacking and killing the pupil and injuring other members of the family. The family sued the police for negligence in failing to take sufficient steps to protect

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<sup>32</sup> C. GUETTIER, *op. cit.*, 111-112.

<sup>33</sup> CAA Bordeaux 19 December 2002, *Société mutuelle d'assurance des collectivités locales* AJDA 2003, 1343.

<sup>34</sup> See CE 23 May 2003, [2003] *Public Law* 822.

<sup>35</sup> See M. ANDENAS and D. FAIRGRIEVE (2002), in D. FAIRGRIEVE, M. ANDENAS and J. BELL (eds), *Tort Liability of Public Authorities in Comparative Perspectives*, BIICL, London, ch 8.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> B.S. MARKESINIS (2003), *Comparative Law in the Courtroom and Classroom*, Oxford, Hart, ch 6.

<sup>39</sup> [1993] 4 All ER 344.

the pupil and his family. A precedent of the House of Lords in *Hill v Chief Constable of West Yorkshire*<sup>40</sup> had held that, in principle, there was no relationship of proximity between the police and a potential victim of a crime which grounded a duty of care owed between them, and so there could be no liability in negligence. Lord Keith justified the absence of a duty of care on the policy ground that liability would have an inhibiting effect on the actions of the police. The Court of Appeal in *Osman* applied this precedent to refuse any duty of care owed by the police to prevent the teacher harming the pupil. Rather than basing its decision on an analysis of the particular factual relationship between the parties, the Court of Appeal appealed to a general reason of principle which justified saying that no action could lie in this category of relationship. The European Court of Human Rights<sup>41</sup> held that the Court of Appeal's refusal of a right of action amounted to a breach of article 6 of the European Convention in restricting access to the court. The view was taken that this was a blanket immunity, an exclusionary reason which justified not considering the facts of the case. The decision was subjected to significant academic and judicial criticism in the UK.<sup>42</sup> The argument was that the procedure of 'striking out', i.e. stating as a point of law that the claim is unfounded, is an important process. One should not have to look at the facts of the case before saying that, even if all the facts alleged are right, no claim in law is sustainable. While *Osman* was pending before the Strasbourg court, the House of Lords decided *X v Bedfordshire CC*<sup>43</sup> in which it held that there was no duty of care owed by a local authority which had failed to intervene in a case of appalling neglect by parents in relation to their children over a period of five years. Again, there was a finding of no duty of care owed in principle in such a situation. The argument was that an absence of the duty of care was justified by the kind of context in which the challenged decisions had to be made – the complexity of the decision, the need to co-ordinate the approach of social workers employed by the local authority with the police and doctors, who were not, and the fear of defensive approaches resulting from the imposition of liability which would harm the interests of children. The House of Lords in a sense renegotiated its position in *Barrett v Enfield LBC*<sup>44</sup>. In this case, a child was taken from his mother into the care of the local authority. During his childhood, he was placed with a number of foster families and his case was monitored by a succession of social workers employed by the local authority. He developed a number of behavioural problems and it was claimed that these resulted from the failure of the local authority to manage his care arrangements properly. The House of Lords distinguished the *X* decision and decided that the claim should go to trial and that there was no sufficient policy reason for saying that there could be no duty of care. The question was whether the duty owed under the statute to care for the child had been properly exercised, and that was a question of fact. In other words, one does not classify this as a 'local authority supervision' case and therefore reject the existence of a duty of care. Rather, one examines the specific relationship, the character of the statutory duty, including the kinds of decision which have to be made, and says whether, as a matter of principle, a duty of care is owed. In the light of this re-interpretation and refinement of the English law, the European Court

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<sup>40</sup> [1989] AC 53.

<sup>41</sup> ECHR 28 October 1998, Application 23452/94, 1998-VIII

<sup>42</sup> See Lord Hoffman, "Human Rights and the House of Lords" (1999) 62 MLR 159.

<sup>43</sup> [1995] 2 AC 633.

<sup>44</sup> [2001] 2 AC 550.

of Human Rights backed away from its decision in *Osman*. When *X v Bedfordshire* came to Strasbourg under the name *Z v UK*<sup>45</sup>, the Court held that the law on negligence did not create an immunity in that case, and so there was no breach of the Convention:

The Court considers that its reasoning in *Osman* was based on an understanding of the law of negligence ... which has to be reviewed in the light of the clarifications subsequently made by the domestic courts and notably by the House of Lords. The Court is satisfied that the law of negligence as ... recently analysed in the case of *Barrett* [2001] 2 AC 550 includes the fair, just and reasonable criterion as an intrinsic element of the duty of care and that the ruling of law concerning that element in this case does not disclose the operation of an immunity. In the present case, the Court is led to the conclusion that the inability of the applicants to sue the local authority flowed not from an immunity but from the applicable principles governing the substantive right of action in domestic law. There was no restriction on access to a court ....

There was a dialogue in that the English courts backed away from refusing a duty of care simply on the basis of blanket arguments of public policy, as was done in *Hill*. The Strasbourg court backed away from insisting that every claim had to be examined on its facts and that excluding categories of activity from the tort of negligence was improper. As long as attention is paid to the particular matrix of obligations and pressures on a public authority faced with a particular type of decision, then it is permissible to have a general rule that there is no substantive right to liability for this category of loss caused by this category of person.

The saga shows the way in which the European courts have a difficult task to understand the complexity of national laws and to establish standards. The function seems to be far more a review jurisdiction than that of reshaping national laws into a European standard.

#### ***4. The Nature of European Standards***

But what kind of standards do the European Convention and EU law represent? VAN GERVEN rightly suggests that the interventions are 'piecemeal'.<sup>46</sup> I would argue that they actually work at the margins of fault liability. They ensure a greater application of fault liability than many national systems have recognised, but they do not really engage with no-fault liability, let alone the areas of social solidarity. The European Convention is about rights and wrongful breaches of rights. It is also about the existence of effective procedures for establishing remedies. Almost all of this is dealt with by traditional ideas of fault, even if fault lies in the systems established, rather than in the actions or inactions of individuals. The mere fact that people have suffered and that it would be socially or morally fair to share the burden does not enter into the discussion. Only if states choose to establish mechanisms for providing such compensation and establish

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<sup>45</sup> ECHR 10 May 2001, Application 29392/95, 2001-V

<sup>46</sup> Op.cit., 145.

entitlements could there be any discussion of articles 6 and 13 of the Convention. Similarly, the European Union is concerned to ensure breaches of rights under EU law are remedied.<sup>47</sup>

As far as the European Convention is concerned, three areas of impact stand out. The first is that there should be effective remedies for breaches of Convention rights. If, as in *Osman*, there is no effective remedy for a breach of a right then the liability law systems of the country will have to be changed to provide a remedy. In this situation, the Convention identifies a gap in the system of protection.

The second area of impact is article 6, and the provision of access to the courts. At first sight, this is a negative provision in that it removes obstacles to access to the courts, but does not prescribe the remedy that should be made available. But, as *Osman* and *Z* show, the finding that certain rules constitute barriers to access to the court effectively encourages a legal system to create a direct, if limited, remedy. The careful renegotiation of the ruling in *Hill* and *X* by the House of Lords in *Barrett*, and the parallel redefinition of the liability in France for failings in judicial administration have followed from the rulings in the European Court of Human Rights. In future, the existence of a duty of care or a level of fault is to be determined far more on a case-by-case basis, rather than by creating blanket rules of immunity. Looked at in general, both the Strasbourg and Luxembourg courts are stressing the way in which special immunities of courts, lawyers, and the administration from the normal application of national rules on fault liability have to be subjected to particularly strict scrutiny. The effect is that the range of fault liability is expanded. On the whole, the Strasbourg court conceives of fault liability as a general principle, and the islands of exclusion or exceptional regimes have to be justified and often aligned. The *Factortame* caselaw is similar in effect, establishing remedies where there was previously state immunity.

A French example shows the interaction between national and European standards is really focused on ensuring that exceptions from national rules are justified, rather than setting out a general European standard of liability, and certainly not one founded on anything wider than fault. A law of 1972 created liability of the State for failures of the civil courts, but this did not apply to the administrative courts. In 1978, the Conseil d'Etat laid down that there could be liability for the defective performance of the administrative courts, but only in situations of gross fault and not in relation to individual judicial decisions.<sup>48</sup> The European Court of Human Rights decided in *Kudla v Poland*<sup>49</sup> that the State must provide a remedy for undue delay in deciding cases, since delay was a breach of art. 6 of the Convention. In *Lutz v France* of March 2002,<sup>50</sup> it went further and held the Conseil d'Etat's ruling in 1978 to be insufficient to protect Convention rights to an effective remedy under art. 13 of the Convention where there had been excessive delay in deciding an individual case. The French Government pointed to decisions at first

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<sup>47</sup> Cases C-46 and C-48/93 *Brasserie du Pêcheur v Germany* and *R v Secretary of State for Transport, ex p Factortame Ltd* [1996] ECR I-1029.

<sup>48</sup> CE Ass 29 December 1978, *Darmont*, Leb. 542.

<sup>49</sup> ECHR 26 October 2000, Application 30216/96

<sup>50</sup> ECHR 26 March 2002, Application 48215/99

instance and in the Paris Cour administrative d'appel in the *Magiera* case which showed that an excessive delay did constitute gross fault. But the Strasbourg court thought this did not really provide an effective remedy to this earlier case. When the *Magiera*<sup>51</sup> case came to the Conseil d'Etat in June 2002, the Conseil d'Etat decided that simple fault in the administrative court process did create liability in the case of delay in coming to decisions. The decision of the Conseil in *Mme Popin*<sup>52</sup> makes it clear that the liability is of the State and not of the individual administrations responsible for the courts, thus insulating the decisions from thoughts of potential liability. This liability is now under further threat in relation to the decision of the Luxembourg court that decisions of the courts could constitute a breach of Community law for which the State is responsible.<sup>53</sup> The State would then be liable for ordinary fault in relation to individual decisions, despite the 1978 ruling of the Conseil d'Etat.

As in *Barrett*, we have the French courts in *Magiera* changing caselaw in the light of earlier Strasbourg rulings, and these serving as an influence on the decision adopted by that Court. In *Lutz*, the *Magiera* caselaw at first instance confirmed the view that the previous caselaw was unsatisfactory.

The third area is the adequacy of compensation. The Convention and the European Court of Human Rights establish areas in which compensation will be awarded. Where a national legal system fails to match such compensation, it may be guilty of a breach of the Convention's art. 13. On the whole, this is not much of a challenge to national legal orders, since the Strasbourg court does not have well developed principles as yet on compensation.<sup>54</sup>

These standards are not more than thresholds. They pick on national notions of fault and compensation for it, and try to expand liability into areas where this is less than complete. On the whole there is no radical rethink. In terms of general principle, the first principle recognised by the Committee of Ministers of the Council of Europe in 1984 seems to fit what is now current:

Reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person. Such a failure is presumed in case of transgression of an established rule of law.

At best, it is the limited scope for exceptions which is now being enforced at European level.

None of this requires compensation for reasons of social solidarity, however worthy the motives might be.

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<sup>51</sup> CE Ass 28 June 2002, *Magiera*, AHDA 2002, 596; Rfda 2002, 756 concl. Lamy; R. ERRERA, [2002] *Public Law* 807. See generally, J. COURTRAIL (2004), "La responsabilité de l'activité des juridictions de l'ordre administratif: un droit sous influence européenne?" AJDA, 423

<sup>52</sup> CE 27 February 2004, N° 215751 concl. Schwartz

<sup>53</sup> C-224/01, 30 September 2003, *Köbler*; AJDA 2003, 2146.

<sup>54</sup> See J-P COSTA in D. FAIRGRIEVE, M. ANDENAS and J. BELL, op. cit., ch 1.

## 5. Conclusion

I have tried to argue that there are a number of different bases on which the State may be called upon to pay compensation to individuals. Not all of these properly belong in the realm of the 'liability' (*responsabilite*) of the State. It would be helpful if we did distinguish the realms of fault and risk, where the moral principles of individual and collective responsibility apply and full reparation is an entitlement, from the areas of social solidarity, compassion and efficiency in which different moral arguments apply and reparation can be moderated by other considerations. It seems to me that the French justification based on equality before public burdens has more in common with social solidarity as a justification than with reparation for wrongs or created risks.

Even within the core area of fault, there are important differences between public and private liability. The nature of 'fault' depends on the nature of the service that is provided and the extent to which defective performance is, in itself, fault. In the case of hospitals, then there is a major distinction between a medical accident and a fault in diagnosis and treatment. A result-oriented approach, which appears to expect a good outcome from all treatment and makes the State pay when this does not occur, seems to blur the essential difference between liability and social solidarity. In addition, the regulatory role of the State requires a careful definition of what is expected. Where loss is caused by a bank to its customers, then the bank is the principal body against who redress should be sought. We have to be clear why the State should pay anything to the victims. It may be, as in the French case of catastrophes, that the State is best placed to be a kind of organiser of insurance, but that has nothing to do with liability. The expectations of action by the State have to be something more substantial and more clearly defined. Outside these two areas of fault, there is a very limited contribution that Europe is making, except in niche areas such as product liability. These areas of often radical difference on the role of law between legal systems are untouched by the current European debates in Luxembourg and Strasbourg.

The future development of public liability in Europe will depend on the ability of legal systems to adapt to and influence European-wide debates on principles of liability. The fact that liability is not merely a matter on which individual legal systems are criticised by a central body, but on which they can influence the liability of bodies like the European Commission, enables a fruitful debate to be established.

As far as the more general debate on comparative law is concerned, the approach of the European courts has been to offer an impetus for national courts to find appropriate solutions to the problems of public authority liability. They have identified weaknesses and set out a minimum standard, but then left the national systems to produce their own customised solution. It is what VAN GERVEN has called harmonisation by directives.<sup>55</sup> There is law reform under external pressure, but the results are national. Like VAN GERVEN, we have to live happily with the

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<sup>55</sup> See A. HARDING and E. ÖRÜCÜ (2002), *Comparative Law in the 21<sup>st</sup> Century*, Kluwer, The Hague, 155 at 162-4.

combination of 'top down' and 'bottom up' harmonisation, combined with respecting the value of different national treatments of questions as ways of coping with the provisionality and fallibility of our knowledge and invention of solutions. We can accept the systematic character of national law, with its unique combinations of purposes for liability law and other means of providing compensation, but recognise the value of a contribution from outside in evaluating critically the merits of the solutions adopted and identifying undesirable inconsistencies. All the same, there would be great merit in a greater clarity between where we expect the state to pay compensation because it is at fault or is responsible for a loss, and where it pays compensation in order to help a needy victim of a loss.

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