I. Liability for Failure to Regulate Health and Safety Risks

Second-Guessing Policy Choice or Showing Judicial Restraint?

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1. Introducing Policy Choice and Tortious Liability

1 Can the State be held liable in tort for failure to enact protective legislation preventing the spread of a contagious disease? Can a regulatory agency responsible for occupational health and safety be held liable for not safeguarding employees from being exposed to a specific noxious substance? Are civil courts the appropriate forum to evaluate legislative policy in this respect? Or should they abstain from second-guessing public policy and leave these issues to politics?

2 These are difficult questions on the intersection between tort law, regulatory law, constitutional law and administrative law, to which there are no clear cut answers. Besides, national preferences may dictate diverging approaches to this matter, rendering a comprehensive comparative analysis virtually impossible. However, it should be possible to identify some of the arguments used in favour and against judicial activism concerning liability for failure to regulate. Therefore, in the following we aim at giving an overview of liability for regulatory failure concerning health and safety risks and the arguments used to dismiss and allow claims for tortious liability.

3 The structure of this paper is as follows. In Part 2 we will present three examples of liability issues concerning health and safety risks. There we will distinguish between failure to regulate and failure to enforce existing regulatory law. In Part 3 we will briefly sketch the position of the European legal systems with regard to both forms of failure. By means of contrast, in Part 4 we will elaborate on the French approach to State liability for failure to regulate. In

* This paper was concluded in May 2006. Subsequent developments were not included.

Part 5 we will present two alternative perspectives to the subject of this paper: the conditions set by the European Convention on Human Rights on the one hand, and the paradigm of compensation for excessive public burdens on the other. In Part 6 we will try to balance the arguments.

4 What will we not deal with in this paper? First, we will not concern ourselves too much with constitutional obstacles to tortious liability of the State and its institutions. For instance, in some countries, tortious liability for legislative inaction is structurally hindered by some form of State immunity. This is what we would call a national preference and, important as such obstacles may be, we will not be able to deal with them extensively. Second, we will not address the issue of State liability for breach of EU law.[1] Furthermore, we will not deal with the practical point of identifying the right entity for the purpose of liability.[2] Failure to regulate by definition implies the use or omission to use public powers to regulate the behaviour of citizens. Therefore, this type of liability can involve both the central government, regional and local authorities, and decentralized regulatory agencies. We will not discuss the inherent problems of legislative competence and enforcement structure within the State's institutions. Instead, we will refer to abstract notions such as 'regulator' (in the sense of any institution or governmental body with some legislative powers) and 'enforcement agency'. Finally, it should be noted that this paper does not deal with the formidable hurdle of causation that claimants would need to overcome. If for instance a court were willing to decide that a road authority acted negligently by not reducing the speed limit on a certain section of a highway and thus negligently allowing an unacceptably high accident rate to subsist,[3] the claimant would still have to prove on the balance of probabilities that he would not have been injured if the speed limit had been lowered. This aspect of regulators' liability will not be dealt with in this paper.[4]

5 Finally, before turning to three examples of regulatory failure, we should first introduce the concepts 'regulation' and 'failure'. Admittedly, the concept of 'regulatory failure' in itself is somewhat biased: The word 'failure' implies that liability is based on the notion that the defendant regulator has done something wrong in the process of balancing the interests of society at large and the interests of specific persons or groups within society in specific. Moreover, by using such a word – which fits well into the vocabulary of tort law but seems less apt to express the essence of democratic accountability – we have already set the scene for a primarily tort-centred view on regulation of health and safety risk. As we shall see, however, it is very much open for debate whether tort

[1] We refer to the excellent contribution by Cornils to this volume.

[2] On the point of identifying the right debtor in this respect, see, e.g., the recent decision by the German Bundesgerichtshof (BGH) 2 February 2006, III ZR 131/05, Versicherungsrecht 2006, 698.

[3] Note that a similar claim was dismissed in *Gorringe v Calderdale Metropolitan Borough Council*, [2004] 1 Weekly Law Reports (WLR) 1057.

[4] On causation with respect to State liability, see, e.g., *D. Fairgrieve*, State Liability in Tort (2003) 165 ff.

law can and should be used as a means of evaluating policy choice. As can be concluded from this paper and from the other papers in this volume, there is an ongoing debate within all of the major legal families on the role of tort law concerning the State and its institutions. In particular with respect to the issues involved here, the key question seems to be: *Should the court be second-guessing policy choice or should it show judicial restraint?*[5]

6 Next, what exactly is 'regulation'? It has been argued by one author that the term 'regulation' is vague and imprecise and that it encompasses various instruments of control and constraint.[6] It has been loosely defined by another author as "any system of rules intended to govern the behaviour of its subjects".[7] In a narrower sense, it is said to be "a distinctive set of techniques used by States to control the operations of markets".[8] In this narrower sense, regulation is traditionally associated with public law and is considered to be the domain of government agencies vested with public law powers.[9] So, evaluating liability for failure to regulate health and safety risks is in fact the evaluation of the use or non-use of public powers (non-feasance) to enact legislative measures aimed at mitigating or reducing a certain health or safety risk. The mitigation or reduction of these risks may vary from a compulsory warning measure (e.g., compulsory health warnings on tobacco products) to the implementation of comprehensive protective precautionary measures (e.g., occupational health standards).

2. Three Examples

7 In The Netherlands, some 15 pedestrians and bicyclists used to get killed every year in collisions with heavy semi-trailer trucks making a right turn. In all of these cases, the truck driver had impaired vision from the driver's cabin which caused him to be totally unaware of the pedestrian's or bicyclist's presence alongside the truck or trailer.[10] Until 2003, there was no statutory duty to have some sort of a device such as a special mirror fitted to the truck which could prevent such accidents. The dangers of trucks to pedestrians and bicyclists, however, were long known to policy makers at the Department of Transport. Prior to enactment, calculations showed that if all Dutch trucks were to be equipped with a special mirror at a total cost of approx. € 27 million, to be discounted over ten years, effectively some 5 casualties and 20 seriously injured would be prevented. This would amount to an investment of ap-

[5] Cf. *P. Cane*, Tort Law as Regulation, Common Law World Review (C.L.W.R.) 2002a, 326 ff.
[6] *P. Cane*, Using Tort Law to Enforce Environmental Regulations? Washburn L.J. 2002, 450 f.
[7] *H. Collins*, Regulating Contracts (1999) 7.
[8] Ibid.
[9] *Cane*, C.L.W.R. 2002a, 305. Note that in a broader sense, tort law in itself can also be thought of as a system of regulation, provided that we accept that tort law sets standards of behaviour, monitors the behaviour and enforces the standards against non-compliers. For this definition of regulation, see *Cane*, C.L.W.R. 2002a, 309.
[10] *L.T.B. van Kampen/C.C. Schoon*, De veiligheid van vrachtauto's (1999). The example is drawn from *W.H. van Boom*, Structurele fouten in het aansprakelijkheidsrecht (oratie Tilburg) (2003) 1 ff.

prox. € 110,000 per prevented victim.[11] Surely a sound investment for a wealthy country such as The Netherlands. Decisions regarding such investments, however, are deemed to be the central government's prerogative.

8 In a recent Dutch employers' liability case, the facts were as follows.[12] An employee of a nursing home for the elderly was walking down a narrow hallway in the nursing home. Alongside the hallway, there are a number of doors which open into the hallway. These doors were quite wide and opened into the narrow hallway (1.97 metre wide hallway, 1.17 metre wide doors). If opened, the doors would virtually block the hallway. And indeed, an employee was struck in the face by an opening door. Although the building complied with all relevant public law occupational health and safety standards and the building code, this was not considered to be a valid defence for the employer to escape liability. Now, assuming that there was no solvent employer to claim compensation from, could the injured nurse instigate a tort claim against the regulatory agency responsible for setting the safety rules at too low a level, provided that the agency had the statutory capacity to implement more stringent standards? Another issue is also to determine whether the employer, after having compensated the employee, has a recourse claim against the State for the failure to properly regulate this matter.

9 In 2000, the Dutch town of Enschede was partially destroyed by a disastrous fireworks depot blast.[13] 177 tons of fireworks exploded, leaving a crater 13 metres wide and 2 metres deep. 22 people died, hundreds were injured and left in shock. Hundreds of houses and businesses were lost; entire streets were wiped out. Material loss was estimated at half a billion Euro. Although the fireworks depot owners were in violation of the permit that the local enforcement agency had granted them – violations included using the wrong storage containers, not keeping the containers closed at all times, having too many fireworks on the premises – they were not found guilty of manslaughter. Instead, they were convicted for not complying with the appropriate environmental regulatory standards. In the aftermath of the disaster, it turned out that the local authority had for a long time tolerated the non-compliance of the owners with these standards. It had applied a well-known policy of persuasion by 'speaking softly'[14] but it failed to use the 'big stick' when it was necessary. In retrospect, the local enforcement agency was publicly blamed for lack of firm enforcement activity.[15] In a subsequent tort procedure instigated by in-

[11] *Van Kampen/Schoon* (fn. 10) table at appendix 10.

[12] Hoge Raad der Nederlanden (HR) 5 November 2004, Nederlandse Jurisprudentie (NJ) 2005, no. 215 (Lozerhof).

[13] On the legal implications of this disaster, see, e.g., *W.H. van Boom/I. Giesen*, Civielrechtelijke overheidsaansprakelijkheid voor het niet voorkomen van gezondheidsschade door rampen, Nederlands Juristenblad 2001, 1675 ff.

[14] On this technique of securing compliance, see, e.g., *I. Ayres/J. Braithwaite*, Responsive Regulation – Transcending the Deregulation Debate (1992) 19 ff.

[15] For an account of the Enschede Fireworks disaster, see, e.g., *A.E. Dek*, De vuurwerkramp in Enschede, in: A.J. Akkermans/E.H.P. Brans (eds.), Aansprakelijkheid en schadeverhaal bij rampen (2002) 55 ff.

jured inhabitants of the afflicted city, both the local authority and the State were blamed for the disaster. The claim against the local authority was dismissed by the court of first instance because no specific tortious failure to enforce was proved. The claim against the State for failure to regulate this branch of industry more heavily was dismissed, in part because the State was held to have a broad discretionary power to decide what to regulate and what not, and, in part for constitutional reasons, the court held itself incompetent to judge legislative inaction.[16]

10 The three examples present different problems and can be subject to a different framework for deciding tortious liability. The first example presents us with a clear case in which there is no regulation and there was no superior legal rule (e.g., a statutory rule or an EC rule) compelling the regulator to devise such a rule. So, effectively, tortious liability would have to be based on wrongful omission leading to infringement of physical inviolability or the wrongful omission contrary to unwritten standards of care for regulators to enact protective legislation.

11 The second example is slightly different. There, the agency has the statutory power to implement more stringent health and safety standards, but it chose not to do so. Here, tortious liability can shift between the basis of wrongful omission contrary to unwritten standards of care to enact protective regulation on the one hand and the basis of wrongful administrative acts or omission subject to judicial review – be it in an administrative procedure or before the ordinary courts – on the other hand. Moreover, in some jurisdictions eliciting the promulgation of more stringent standards can only be achieved through a specific administrative procedure, leaving no room for courts to second-guess the health and safety policy.

12 The third example presents us with the problems of (alleged) failure to enforce regulatory standards and (alleged) failure to introduce more stringent regulatory standards. In legal terms, as far as failure to regulate is concerned, the evaluation of this case may be subject to different rules altogether. First, there are jurisdictions that rigorously distinguish between regulatory failure and failure to enforce by flatly denying any claim on the former basis. Second, the evaluation of failure to enforce may strongly depend on the system of enforcement: The omission of annual inspections by a local authority may be evaluated by different standards from the omission of the police to respond to a call for enforcement.

13 In the following, we will focus primarily on the problems presented by the failure to regulate, although necessarily some reference to failure to enforce is made.

[16] Rechtbank 's-Gravenhage 23 December 2003, Case 01-2529, NJ Feitenrechtspraak 2004, no. 185. On discretionary powers and State liability according to Dutch law, see *I. Giesen*, Toezicht en aansprakelijkheid (2005) 86 ff.

3. The General Picture Is One of Restraint

If we reflect on how European legal systems deal with regulators' liability, the overall picture is one of utmost restraint. Courts generally do not seem to feel the urge to second-guess regulator's decisions. Furthermore, there is little case law on regulatory failure. Most case law deals with failure to enforce, i.e. failure to employ existing and readily available command and control instruments. Indeed, in some legal systems the lack of enforcement effort can amount to tortious omission.[17] Most jurisdictions, however, seem reticent in allowing claims for compensation against government and its institutions. Clearly, courts and legislatures showing restraint with regard to liability of the administration for negligent enforcement abstain from intervening in order to leave the administration sufficient space to prioritise policy objectives.[18] 14

The legal method by which courts show this restraint is usually by applying a high threshold for liability.[19] Sometimes, a threshold of *qualified negligent omission* has to be passed before a claim succeeds.[20] Under French law, a similar stance is taken with regard to specific services. Taxing and policing for instance are only subject to liability in case of *faute lourde*.[21] Indeed the no-fault liability regime grounded on the principle of *rupture de l'égalité devant les charges publiques*, and particularly the liability of the State regarding legislative acts and regulatory decisions is not applicable. First of all, it only concerns positive decisions of the State not to act.[22] Secondly, when the statute's purpose is to satisfy very general interests of society such as public health, protection of the environment or even national economy, no-fault liability is excluded and compensation can be claimed only in the presence of a fault of the public administration.[23] 15

In other jurisdictions, the claim for compensation in case of failure to enforce may fail for *lack of a protective purpose of the statute* at hand. The position under English law with regard to failure to enforce seems to be that the claimant would first have to show that he or she was part of a specific class for 16

[17] See the contributions of Attila Menyhárd (Hungary), Alberto Monti and Andrea Chiaves (Italy) and Philippe Billet and Francois Lichère (France) to the book: Tort and Regulatory Law (W.H. van Boom/C. Kissling/M. Lukas, eds.), Springer Publishers, forthcoming 2006.

[18] *Fairgrieve* (fn. 4) 59 ff. Cf. *P. del Olmo*, Spain, in: W.H. van Boom et al. (eds.), Tort and Regulatory Law (forthcoming).

[19] Polish law seems to allow claims against the agency only in case there was a positive statutory duty to act. See *M. Jagielska/G. Żmij*, Poland, in: W.H. van Boom et al. (eds.), Tort and Regulatory Law (forthcoming).

[20] *B. Askeland*, Norway, in: W.H. van Boom et al. (eds.), Tort and Regulatory Law (forthcoming) no. 51; *Del Olmo* (fn. 18) no. 129 ff.

[21] *B.S. Markesinis et al.*, Tortious Liability of Statutory Bodies (1999) 17; *Fairgrieve* (fn. 4) 106 ff.; *M. Paillet*, La responsabilité administrative (1996) 116 ff.

[22] See Conseil d'Etat (CE) 30 Novembre 1923, Couitéas, Lebon, 789; Dalloz 1923, 3, 59, conclusions Revel, Revue de droit public (RDP) 1924, 208, note G. Jèze; Sirey 1923, 3, 57, note M. Hauriou, refusal to enforce by the administrative authority of a judicial decision.

[23] *R. Chapus*, Droit administratif general (2001) no. 1308 and the case law quoted.

whose benefit the statutory regime was designed.[24] A seemingly comparable test is used with the German concept of *drittbezogene Amtspflicht*.[25] This concept of *Drittbezug*, which bears some resemblance with the common tort law concept of *proximity*,[26] obviously gives the courts some leeway in autonomously ascertaining the protective purpose of the statute, because in most cases the phrasing of the statute itself and the relevant parliamentary proceedings tend to be vague if not silent on the class of protected persons.[27]

17 In a Dutch case concerning a negligently executed overhaul of a Rhine barge by a government agency, a concept was used similar to the German *Drittbezogenheit*. The agency was admittedly negligent and as a result a third party suffered property damage when the barge sank and damaged the claimant's property. The *Hoge Raad der Nederlanden* decided against State liability nonetheless. The regulatory standards obliging the agency to perform inspections according to a specific standard were held to aim at transport safety in general and not at protecting specific particular interests.[28] Hence, the damage that the barge caused to another vessel as a consequence of its unsafe condition could not be claimed from the State.[29] Similar tools for restricting the protective ambit of regulatory standards are used in other legal systems as well.[30]

18 From the above we can conclude that liability for failure to regulate is exceptional. Most jurisdictions seem to take the position that legislative acts are owed to the public in general and not to individuals. Hence, tortious liability vis-à-vis citizens for regulatory failure seems difficult to construe.[31] In contrast, the French legal system seems much more accommodating to victims of personal injury. Indeed, recent developments under French law seem to make

[24] *K. Morrow*, United Kingdom, in: W.H. van Boom et al. (eds.), Tort and Regulatory Law (forthcoming) no. 60.

[25] *F. Ossenbühl*, Staatshaftungsrecht (1998) 105. Note that the subsidiary nature of German State liability would be a further obstacle for directly claiming compensation from the administration, unless gross negligence of the civil servant was involved. See *U. Magnus/K. Bitterich*, Germany, in: W.H. van Boom et al. (eds.), Tort and Regulatory Law (forthcoming).

[26] On proximity, see *Ch. Booth/D. Squires*, The Negligence Liability of Public Authorities (2006) 99 ff.

[27] Cf. *Ossenbühl* (fn. 25) 105 f.

[28] Hoge Raad (HR) 7 May 2004, case C02/310HR, NJ 2006, no. 281 (duwbak Linda). The Hoge Raad also argued that admitting liability in this case would allow protection to an unlimited group of third party interests for potentially unforeseeable damage.

[29] Hence, effectively the marine limitation of liability of the shipowner was upheld. Note that if the negligent inspection had led to personal injury, the decision might have been different (the Court's reasoning is unclear whether the decision would also apply to personal injury). On the differentiation between personal injury, property damage and pure economic loss, cf. *R. Rebhahn*, Staatshaftung wegen mangelnder Gefahrenabwehr (1997) 482.

[30] Cf. *M.S. Shapo*, Tort and Regulation in the United States, in: W.H. van Boom et al. (eds.), Tort and Regulatory Law (forthcoming) no. 9 and 19, referring to Restatement (Second) of Torts § 288 (1965). See also *Morrow* (fn. 24) no. 36, referring to *Stovin v Wise*, [1996] Appeal Cases (A.C.) 923. Cf. the concepts of general and specific reliance (on enforcement by the public authorities), used in, e.g., *Pyrenees Shire Council v Day*; *Eskimo Amber Pty Ltd v Pyrenees Shire Council*, [1998] High Court of Australia (HCA) 3.

[31] Cf. *Markesinis et al.* (fn. 21) 27 fn. 61.

France 'the odd one out'. In France, the 2004 Conseil d'Etat decisions[32] concerning the *scandale de l'amiante* have tightened State liability by holding that the State is under the obligation to adopt regulation in the face of scientific knowledge of the serious health risks concerning asbestos. Moreover, not adapting existing regulation to new insights can also amount to administrative liability.[33] The question arises what the consequences of this line of reasoning are with regard to tobacco litigation against the State. All in all, French law seems worthy of further attention for our purposes. Hence, in the next part we will give an outline of these developments under French law.

4. The French Seem to Prefer Second-Guessing

Until recently claiming compensation under tort law from the French State for health and safety risks was not common. The reason for this probably is the quasi-systematic creation of ad hoc compensation funds (AIDS contracted as a result of contaminated blood transfusion, asbestosis, injuries sustained from medical accidents, etc.). As a consequence, damage caused to health by hazards that cannot be prevented or that are too late to prevent is compensated through a solidarity system and does not require a claim in tort but merely an administrative request for compensation.[34] Of course, sometimes compensation through the system of solidarity is capped and a claim in tort can be necessary to ensure full compensation of the damage suffered by the victim. Usually, the eyes of the victim seeking full compensation were then turned to the primary responsible persons. 19

The fact that in the past no one claimed compensation from the State arguing a failure to regulate health and safety risks is probably also explained by the theory of *risque-profit*. According to this theory, the party that is liable for the manifestation of such a risk is the one that has an economic advantage of the risky activity. For example, the employer has a general obligation to ensure the security and the protection of his employees and is liable in case of physical injury.[35] 20

[32] CE 3 March 2004, *Min. de l'emploi et de la solidarité v Xueref, Thomas, Botella, Bourdignon*, Juris-Classeur Périodique (JCP) 2004.II.10098 with note G. Trébulle; Droit Administratif 2004, no. 87, with note G. Delaloy; Responsabilité civile et assurance (Resp. civ. ass.) 2004, no. 234, with note G. Guettier.

[33] See *P. Billet/F. Lichère*, France, in: W.H. van Boom et al. (eds.), Tort and Regulatory Law (forthcoming) no. 28.

[34] On this system of compensation, see, e.g., *M. Mekki*, Les fonctions de la responsabilité civile à l'épreuve des fonds d'indemnisation des dommages corporels, Petites Affiches 12 January 2005, 3.

[35] Art. L. 230-2 Labour Code, and especially the concept of "faute inexcusable de l'employeur" which allows the employee to receive a complementary compensation to the one awarded by social security. For asbestos, Cour de Cassation, Social Chamber (Cass. Soc.) 28 February 2002 (5 cases), JCP G 2002, II, 10053, concl. A. Benmakhlouf: "en vertu du contrat de travail le liant à son salarié, l'employeur est tenu envers celui-ci d'une obligation de sécurité de résultat, notamment en ce qui concerne les maladies professionnelles contractées par ce salarié du fait des produits fabriqués ou utilisés par l'entreprise; que le manquement à cette obligation a le caractère d'une faute inexcusable, au sens de l'article L. 452-1 du Code de la sécurité sociale, lorsque l'employeur avait ou aurait dû avoir conscience du danger auquel était exposé le salarié, et qu'il n'a pas pris les mesures nécessaires pour l'en préserver".

There is, in principle, no reason to sue the State for professional liability issues when the employer is already liable.

21 The first case that made the public think that the State could be liable for not having regulated health and safety risks concerned injuries and death caused by the use of tobacco. Initially, lawyers sought the liability of tobacco manufacturers for the deaths of smokers who were not informed of the dangers involved. In the famous *Gourlain* case, French case law has recently ruled that the manufacturer cannot be liable. The Court of Appeal of Orléans did not justify this solution because the risks of tobacco are very well known, but because it was of the competence of the State to regulate the commerce of tobacco.[36] The Supreme Court rejected the appeal against this case.[37] The solution was based on the fact that cigarette manufacturers were never under an obligation to inform of the dangers involved. The ruling gives the impression that the debtor of such an obligation was the government. It is, in a certain way, an obligation of the State. Such is the case even when manufacturers are subsidiaries of the State, because their activity consisted in maximising the tax income generated by the marketing of tobacco. The Court added that during the 1960s within the government there was a discussion regarding the necessity to inform the population about the danger of smoking. If the Ministry of Health was in favour of providing such information, the Ministry of Finance was against and considered that the risks involved were limited. This led people to think that victims of tobacco, instead of seeking the liability of the manufacturers, could bring claims against the State because during the 1960s it failed to protect the health of smokers, for example by informing them of the dangers involved.[38]

22 To some extent this feeling has recently been confirmed by the administrative courts ruling on the issue of liability of the State for workers developing asbestosis. Four recent cases of the same day ruled by the French Conseil d'État held the State liable.[39] The motivation of the case is particularly interesting. The Supreme administrative court considered that, if the employer has the duty to guarantee the safety of the employees under his authority, the State is competent to prevent professional risks, to know of the dangers that the manipulation of particular products could involve for the employees and even to enact the necessary measures to eliminate such danger in compliance with scientific knowledge.

[36] CA Orléans 10 September 2001, JCP 2002.II.10133 with note B. Daille-Duclos; Resp. civ. ass. 2001, no. 23.

[37] Cour de Cassation 2nd Civil Chamber (Cass. Civ. 2) 20 November 2003, *Gourlain v SA Seita*, Bull. no. 355; Dalloz 2003, 2909 with conclusions R. Kessous and with note L. Grynbaum; JCP 2003.II.10004 with note B. Daille-Duclos; JCP 2004.I.163 with note G. Viney.

[38] *G. Viney*, JCP 2004.I.163 observations quoted above.

[39] Conseil d'État (CE) 3 March 2004, *Min. de l'emploi et de la solidarité v Xueref, Thomas, Botella, Bourdignon*, JCP 2004.II.10098 with note G. Trébulle; Droit Administratif 2004, no. 87, with note G. Delaloy; Resp. civ. ass. 2004, no. 234, with note G. Guettier.

These cases are of an essential importance for the eventual liability also regarding products other than asbestos. If there is nowadays space in French law for liability of the State for failure to regulate health and safety risks, the conditions and the regime of such a liability are still unknown and difficult to determine. In part, this is caused by the fact that State liability is part of French administrative law and is not governed by private law rules on liability that can be found in art. 1382 and ff. of the French Civil Code. This is the consequence of the very famous *Blanco* case law of the French *Tribunal des conflits*.[40] Administrative liability is generally case law based and most of the conditions of the liability are set by the cases of 3 March 2004. 23

In ruling on claims for compensation by workers who were victims of asbestos-related diseases, the Conseil d'État "discovered" a general obligation of the State to regulate health and safety risks. It held that "it is up to the public authority in charge of the protection of professional risks to keep itself informed of the dangers that workers could face during the exercise of their professional activity, as regards notably the products and substances that they make use or are in contact with, and to decide, according to scientific knowledge, if necessary after complementary studies or research, for the most appropriate measures in order to limit and, if possible, eliminate such dangers".[41] 24

From this general statement one can draw several conclusions. First of all, the liability of the State is based on fault and is not a case of strict liability. The State is not systematically liable for damage occurring to workers due to heath and security risks. The State is liable only for those kinds of risks that were known or that could have been known at the time they arose and that could be prevented or at least alleviated. According to a common expression used in contractual liability, the State is not under an obligation of results, but only under an obligation of means. The diligence that the State is supposed to show is twofold. First of all, it is under a duty of supervision and vigilance and secondly under a duty of reaction. 25

In the cases of 3 March 2004 the Conseil d'État noticed a breach of the duty to react. It stressed indeed the fact that health risks of asbestos were known since the beginning of the 20th century and that its carcinogenic features had been known since the mid 1950s, whereas the State only reacted, insufficiently, in 1977. Such a delay characterises negligence and leads to the liability of the State towards the victims. The case of asbestos does not require the reference to a duty of vigilance because such risks were apparently well-known. 26

[40] TC 8 February 1873, Grands arrêts de la jurisprudence administrative (GAJA), Dalloz 15th ed. 2005.

[41] Our translation of the French: "il incombe aux autorités publiques chargées de la prévention des risques professionnels de se tenir informées des dangers que peuvent courir les travailleurs dans le cadre de leur activité professionnelle, compte tenu notamment des produits et substances qu'ils manipulent ou avec lesquels ils sont en contact, et d'arrêter, en l'état des connaissances scientifiques, au besoin à l'aide d'études ou d'enquêtes complémentaires, les mesures les plus appropriées pour limiter et si possible éliminer ces dangers".

27 On the other hand, the duty of vigilance could be an important reference to justify liability in case of uncertainty of the dangers of a product or an activity. In such a case the State could be obliged to impose precautionary measures. By reference to "the dangers that workers could face in the framework of their professional activity", the Conseil d'État gives the impression that not only risks that are certain, but also potential risks could oblige the State to react and, in absence of such reaction, its liability if they turn out to be dangerous for health and safety. The duty of vigilance will oblige the State to conduct experiments and research in order to precisely assess the nature and the consequences of a potential danger to determine whether precautionary measures and, if any, of what nature will be required. One can easily imagine how burdensome such a duty is and how important is the freedom given to administrative courts to determine whether the State lived up to its duties or not. Such a duty of vigilance seems to go even further than the definition of the precautionary principle given by the European Commission.[42] If the precautionary principles should, according to the Commission, be triggered once potential negative effects are identified in scientific research, the obligation imposed by the French Conseil d'État could also have as purpose to determine whether such potential negative effects exist at all, which implies an obligation to stimulate and, if necessary, finance scientific research when a sufficiently in-depth analysis is not available.

28 The incertitude also lies in the content of the State's obligation to react. The Conseil d'État considers that this duty consists in taking the most adequate measures to limit or eliminate the risks in question. This gives large powers of assessment to courts. It must be stressed that this analysis could only be carried out with ex ante data, i.e. according to the information available at the date of the reaction or on the date when the State should have reacted. In any case, it is not allowed to include ex post data in the assessment of the adequacy of the reaction.

29 Probably the most intriguing question concerns the determination of the precise scope of the obligation of the State to prevent and regulate health and safety risks. Although through the case of asbestos the Conseil d'État enacted a very general principle, it limited its discussion to professional risks. The question that immediately arises is to know whether the rule is only limited to professional risks and whether it could be extended to any kind of health and safety risks. Of course, this bears relevance to the question whether smokers who suffered injury due to tobacco could claim compensation from the State arguing that the State omitted to take sufficient precautionary measures in the past. Furthermore, one may ask whether the State should take measures today in order to reduce the dangers of tobacco (should it forbid the sale of cigarettes on French territory?). Being limited to professional risks, the duties of the State enacted by the decisions of 2004 could only force the public authorities to prohibit smoking in public places, such as bars and restaurant, protecting

[42] COM (2000) 1 final.

therefore people who carry out their professional activity in these places (waiters). Beyond the particular question of tobacco liability, the question concerns a large number of products whose use could endanger the health of people although the products are not related to their profession.

Even in absence of a line of case law on the issue, it seems that there is no obvious reason why the duty of the State with regard to the prevention of health and safety risks should be limited to professional risks and why it would exclude risks that could arise from a person in the framework of a non-professional activity. Certainly the situation is often different because a professional often faces constantly the risk while the non-professional may be exposed sporadically. Such is however not necessarily true as the tobacco example shows. The difference can probably be found in the fact that, first of all, the worker does not choose to run a risk, because he is obliged to do so because of the hierarchical power of the employer and, secondly, because of the necessity for most of us to work to earn a living. On the other hand, non-professional risks are often risks that people explicitly accept to take. However, to accept to take a risk, one has to be sufficiently informed of the dangers involved in carrying out a particular activity or in the use of a particular product. So the liability issue can turn to whether the State sufficiently informed the public of the inherent risks of a specific activity. According to French law, the duty of the State to inform the public can be an adequate reaction to some risks. Once people are informed of the risks, they can decide to take them or not or to take particular precautionary measures.[43] 30

One notices that the obligation invented for professional risks perfectly fits non-professional ones. Sometimes the existence of a risk would imply the prohibition of a substance or an activity. In such a case, the State is in an uncomfortable position because it is obliged to strike the correct balance and it is liable if it does too much or too little. If the failure to regulate could lead to liability following the conditions of the regime of 3 March 2004 cases, a too stringent regulation or the prohibition of an activity that is not justified by the public interest lead to the liability of the State vis-à-vis the party that is prevented from carrying on its professional activity.[44] More often the adequate reaction could be the provision of information by the persons concerned or simply imposing a duty to inform on the party that has an economic advantage from marketing a product or carrying out an activity (cf. risque-profit). In the tobacco cases the line of reasoning was that it was up to the State to impose 31

[43] Case law traditionally excludes liability on the basis of non-fulfilment of a duty to inform when the risk is so well-known that it does not require to be disclosed. See, e.g., Cour de Cassation, 3rd Civil Chamber (Cass. Civ. 3) 20 November 1991, Bull. Civ. III, no. 284, "l'obligation de conseil ne s'applique pas aux faits qui sont de la connaissance de tous".

[44] On this hypothesis of liability of the State for enactment of a statute, see Conseil d'Etat (CE) 14 January 1938, Soc. des produits laitiers La Fleurette, Lebon, 25; Dalloz 1938, 3, 41, conclusions Roujou, annotation L. Rolland; RDP 1938, 87, annotation G. Jèze; Sirey 1938, 3, 25, annotation P. Laroque, regarding a statute aiming at protecting the milk market and prohibiting the activity of companies manufacturing alternative products.

such duties to inform and not to the private manufacturer to do so by itself. In effect, the only person that could be under a duty to inform the public of the dangers of tobacco, before the State imposed such a duty on manufacturers in 1976, was the State itself.

32 There may also be a rather "down-to-earth" reason why the French courts may be inclined to extend the 2004 decisions to non-professional risks. As regards professional risks, there is nearly always a liable party, the employer, that is under an obligation of result and that is necessarily insured.[45] This is not the case with injuries sustained outside the workplace. On the contrary, it is not so easy for victims of non-professional risks to find a tortfeasor. French courts may find themselves faced with the question why, with regard to State liability for omitting to warn or mitigate health and safety dangers, similar risks should be treated differently depending on whether they arise in the course of a professional or a non-professional activity.

5. Possible Future Developments

a) The European Convention on Human Rights

33 The French approach to regulatory failure is special. However, we feel that the duty to react with regulatory action cannot be considered to be a strictly French deviation from the common pattern in European tort law. Admittedly, the French position seems eccentric, but a duty to react may be part of the other legal systems as well. Leaving aside national constitutional safeguards for life and limb, and merely considering the European Convention on Human Rights, then the overall picture may become 'more French' than it may seem at first glance.

34 In fact, the Convention may demand a duty to react to known health and safety risks.[46] In this respect, the Convention in principle does not distinguish between enforcement and regulatory failure.[47] With regard to either there can be 'positive obligations' under the Convention. These obligations are, however, the product of careful balancing. On the one hand the case law of the European Court of Justice reflects the wide margin of appreciation granted to States.[48] On the other, breach of the Convention – notably art. 2 (life), 5 (security), 8 (family and home life) – may occur if a known health or safety risk of some proportion is ignored and the public authorities do not actively pursue a policy of protection.[49] In *Osman* this duty was phrased as follows:

[45] Provided that the exposure to the risk amounts to "faute inexcusable"; as we explained supra no. 20, the obligation of result renders virtually all industrial disease into the employer's "faute inexcusable".

[46] See *C. Harlow*, State Liability – Tort Law and Beyond (2004) 125 f.

[47] See *Ossenbühl* (fn. 25) 536 f.

[48] Cf. *Booth/Squires* (fn. 26) 328.

[49] Seminal on failure to enforce: European Court of Human Rights (ECHR) 9 December 1994, case 16798/90 (*López Ostra v Spain*). See also ECHR 16 November 2004, case 4143/02 (*Moreno Gómez v Spain*) and ECHR 30 November 2004, case 48939/99 (*Öneryildiz v Turkey II*). Cf. *Giesen* (fn. 16) 72.

> (par. 116) For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Art. 5 and 8 of the Convention.
>
> In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life (see paragraph 107 above). Such a rigid standard must be considered to be incompatible with the requirements of Art. 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Art. 2 (see, mutatis mutandis, the above-mentioned McCann and Others judgment, p. 45, § 146). For the Court, and having regard to the nature of the right protected by Art. 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.[50]

35 In principle, the positive obligation under the Convention is not restricted to a duty to actively enforce existing regulation but may also include a duty to implement additional legislative measures.[51] For instance, in a recent case concerning night flights at London Heathrow airport, the question was whether

[50] ECHR 28 October 1998, case 87/1997/871/1083 (*Osman v United Kingdom*).

[51] On positive obligations under the European Human Rights Convention in general, see, e.g., *J. Wright*, Tort Law & Human Rights (2001) 117 ff.

the United Kingdom had struck the right balance between economic interests and the interests of local residents wanting to enjoy a peaceful night rest.[52] First, the court sketched the framework for deciding:

> 98. Art. 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly. Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Art. 8 or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Art. 8, in striking the required balance the aims mentioned in the second paragraph may be of a certain relevance (see Powell and Rayner, p. 18, § 41, and López Ostra pp. 54–55, § 51, both cited above).
>
> 99. The Court considers that in a case such as the present one, involving State decisions affecting environmental issues, there are two aspects to the inquiry which may be carried out by the Court. First, the Court may assess the substantive merits of the government's decision to ensure that it is compatible with Art. 8. Secondly, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual.

36 Then, the court continued to evaluate the regulatory policy at hand by looking at, e.g., whether there was some form of scrutinizing the public policy before a national court and whether some safeguards for public accountability of government policy were available. The outcome of this balancing test was that there was no violation of art. 8 of the Convention.[53] In contrast, failure to reduce environmental pollution caused by a steel-plant in a densely populated town in Russia did amount to a violation because the State did not react to the pollution problem with due diligence and give balanced consideration to all competing interests.[54]

37 The duty to react under the Convention was also considered in the Dutch legal battles following the Enschede Fireworks Depot disaster. In one of the tort cases, a beer brewery claimed compensation from the State on the basis that the State had not enacted protective legislation. The court of first instance decided that the State was under the obligation to react to clear indications of

[52] ECHR 8 July 2003, case 36022/97 (*Hatton and others v United Kingdom*).
[53] Cf. *Booth/Squires* (fn. 26) 356 f.
[54] ECHR 9 June 2005, Case 55723/00 (*Fadeyeva v Russia*).

pending danger for life and limb, but that the protective purpose of this obligation to react – which the court held to be based on art. 2 of the Convention – only covered personal injury. Hence, whereas the brewery only suffered property damage and consequential loss, the obligation to react was held not to protect the brewery's interests.[55]

A final observation on the relevance of the Convention for tortious liability for regulatory failure may be the following. If we transpose the case law of the ECHR to tortious liability for regulatory failure, then it seems that a number of factors need to be taken into account when judging the regulator's behaviour. First and foremost, there is a wide margin of appreciation. This does not, however, render the regulator immune to liability.[56] Whether the regulator did in fact act tortiously, depends, inter alia, on the nature of the risk, whether the risk was known or should have been known to the regulator, what actions it had actually taken to prevent the risk, and what – in balancing all the relevant interests at hand – it could have been expected to do to mitigate or reduce the risk. Although we have to be cautious in drawing too firm a conclusion on the basis of the meandering case law of the ECHR, there seem to be clear parallels with a number of jurisdictions regarding tortious liability for dangerous activities and situations.[57] 38

b) The Deliberate and Lawful Omission as an Excessive Burden for the Few

Another possible future development is the extension of the liability for lawfully caused losses. In some jurisdictions, the administrative law concept of *rupture de l'egalité devant les charges publiques* – or similar concepts such as *Aufopferungsanspruch* and *enteignender Eingriff* – render it possible to shift the burden of regulatory action from particular groups within society to the public purse.[58] The conditions under which this is thought to be possible vary, but in general the meritorious cases include regulatory action justified by the public good, burdening specific persons or well-defined groups of persons in society with an excessive burden – usually a financial burden. The *egalité*-paradigm holds the regulator liable to compensate. Compensation does not neces- 39

[55] Rechtbank 's-Gravenhage 9 November 2005, Case 02-2319, NJ Feitenrechtspraak 2006, no. 47 (Grolsch insurers).

[56] We infer this from the Osman decision (ECHR 28 October 1998, Case 87/1997/871/1083), where it was decided that immunity is not allowed if "the limitations applied (…) restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired." and "if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved". Admittedly, this was not a case of regulatory failure.

[57] There is some resemblance between these factors and the balancing test from the well-known case of *United States v Carroll Towing Co*., [1947] 159 F. 169. See, e.g., *R. Cooter/T. Ulen*, Law & Economics (2004) 313 ff.; *W.M. Landes/R.A. Posner*, The Economic Structure of Tort Law (1987) 85 ff. Most European legal systems use similar factors in deciding negligence cases.

[58] Cf. *Fairgrieve* (fn. 4) 136 ff. Note that the *Aufopferungsanspruch* does not include property damage; this is considered to be part of the *enteignende Eingriffe* (lawful interference with property).

sarily equal full compensation in the private law sense, but may be restricted to pecuniary loss exceeding the "normal risk of life as a citizen of the State".[59] Cases vary widely and may include factual action of the State as well as regulatory action.[60] Examples include damage caused to innocent victims of stray police bullets,[61] and damage suffered by the few as a result of the inherent small risks of compulsory inoculation programmes.[62]

40 However, as always the devil is in the details. In some jurisdictions, the emphasis is put on statutory frameworks for compensating the excessively burdened, whereas in others the emphasis seems to be on court-designed grounds for compensation. Moreover, the application of the *egalité*-paradigm may vary considerably in the respective national legal practices: Even in France, the use of the instrument in case of burdens caused by legislation is very much restricted.[63]

41 On a more abstract level, however, the question can arise what the relevance of the *egalité*-paradigm may be for regulatory *inaction* (which is not necessarily the same as failure). Admittedly, as we already noted supra no. 15, liability for lawfully caused losses in principle usually concerns some form of State intervention, i.e., an activity rather than an omission.[64] Naturally, there are good policy reasons to restrict compensation to cases of wilful and deliberate State intervention, because inaction is virtually boundless. Extending the *egalité*-paradigm to include all cases in which there was inaction is nonsensical. In some cases, however, the analogy with compensation on the basis of *egalité* is less absurd. Imagine, for instance, a case where the regulator contemplates enacting preventive legislation for the benefit of a small group of unidentified persons who will be struck by a particular disease – compare, e.g., preventive health screening of women for diagnosing breast cancer or some other disease that can be detected at an early stage and treatment can then be given at an early stage, greatly improving chances of survival. In such a case, the regulator will balance the costs and benefits of such a general investment in preventive medicine. The outcome of such a balancing test may be either that the preventive screening is introduced or is not introduced. If screening is introduced, all potential victims profit from the policy and the taxpayer pays. If it is not, then the taxpayer saves money and the few victims suffer the consequences of rational risk policy. The instrument of compensating these few victims may then be a logical choice under the *egalité*-paradigm.[65] Admittedly, as the famous

[59] German law, e.g., excludes non-pecuniary loss; see *Ossenbühl* (fn. 25) 131 and 139 f.

[60] Note that under French law, the question would then be whether the legislative intent was indeed aimed at compensating the excessively burdened. See *Fairgrieve* (fn. 4) 145.

[61] Cf. *Fairgrieve* (fn. 4) 138 f.; *Markesinis et al*. (fn. 21) 19, referring to CE 24 June 1949.

[62] Cf. BGH 19 February 1953, BGHZ 13, 88 (Impfschäden).

[63] *Paillet* (fn. 21) 157 f.

[64] For the distinction between action and omission in respect of State liability, see *Booth/Squires* (fn. 26) 147 ff. See also recently BGH 10 February 2005, Case III ZR 330/04, deciding that the mere omission of a public authority cannot amount to *Enteignungseingriff* unless the omission can be considered as targetting a specific group or person, which presupposes clarity on the required action by the authority.

[65] Cf. supra no. 15.

quote of Oliver Wendell Holmes goes, the life of the law has not always been logic, but rather experience. Experience here indeed shows that – to our knowledge – deliberate inaction has not yet been subject of *egalité*-compensation.

42 In essence, the example given here is the mirror image of the German inoculation case, in which it was decided that the State can be held liable if it enacts a preventive national inoculation scheme to the benefit of society which foreseeably and excessively burdens small groups (e.g., if it is foreseeable beforehand that 1 out of 100,000 inoculated persons will have an extreme and lethal allergic reaction to the inoculation).[66] The mirror image is the decision of the State in such a case *not* to implement such protective legislation because it is thought that the health benefits to society do not outweigh the cost – in the sense of medical cost and the foreseeable lethal allergic reactions. That may imply that the deliberate inaction excessively burdens a limited group of persons, and if it does, the argument in favour of applying the *egalité*-paradigm is significant.

43 All this does not mean that we necessarily favour the idea of stretching the *egalité*-paradigm to cover deliberate non-feasance. The only point we would like to make here is that from a logical point of view there do not seem to be convincing reasons to distinguish between deliberate feasance and deliberate non-feasance in this respect.

6. Balancing the Arguments

44 When dealing with State liability for regulatory failure ultimately the question arises what are the functions liability would have to perform? From a law and economics perspective, the focus would be on the need for efficient deterrence of administrative negligence.[67] Others emphasize the importance of tortious liability as a means of compensating victims, a means of holding the State publicly accountable for its inaction,[68] an instrument for fact finding in (mass) injury cases and generally an instrument for scrutinizing government policy. Such arguments seem to suggest greater trust in courts than in government.

45 Again others may argue that liability of the State cannot further optimise the pressures that democratic institutions and the political process already exert on the State and that consequently there is no need for liability in this respect.[69] Such arguments display great confidence in the self-cleansing properties of politics and civil service. The argument that alternative instruments for evaluating regulators' behaviour are available and which pre-empt tort law, resembles an argument sometimes used as a defence against liability of tortfea-

[66] We note that the position under German law for *unforeseeable* damage caused by lawful State measures may be slightly more complicated.

[67] Cf. the introduction to the law and economics analysis of State liability in *Markesinis et al.* (fn. 21) 4 ff.

[68] *Harlow* (fn. 46) 49. Cf. *Paillet* (fn. 21) 29.

[69] On these arguments, see, e.g., *Markesinis et al.* (fn. 21) 45 ff.

sors that have a permit to engage in the allegedly tortious activity: the 'regulatory permit' or 'regulatory compliance' defence.[70] This defence is rejected in virtually all European legal systems. The fact that a tortfeasor complies with all relevant public regulatory standards does not bar a claim in tort. Hence, if a factory is permitted by environmental protection legislation to emit X-amount of a certain substance, this permit does not preclude neighbouring farmers to claim in tort from the factory if the emission causes damage to their crop. Hence, courts are effectively allowed to second-guess the regulator's choices. By setting their own standards, courts in fact embark on scientific evaluation and policy choices (for which they are possibly ill-equipped). So, if the fact that another regulatory instrument has been applied in principle does not bar a claim in tort, similar reasoning could be applied to State liability: the fact that parliamentary consent was given to regulatory feasance (or non-feasance) should not pre-empt the possibility of evaluating the outcome with the 'tort yardstick'.

46 Cane argues that there can only be one justification for allowing tort standards to go beyond standards in public regulation, namely providing a mechanism for the judicial input into the regulatory standard-setting process.[71] From a democratic point of view, it seems strange at first sight to allow courts to give democratically elected bodies and institutions feedback on their policy. This, however, does in fact seem to be one of the roles of modern judiciary in Western society. So, perhaps to some extent a bit of second-guessing is part of a balanced legal system anyway.

47 Moreover, in law and economics, there is some experience with evaluating the concurrency of tort law and regulatory law with regard to their respective efficacy in accident reduction. Although some argue that regulatory law – with administrative enforcement and criminal sanctions – is superior to tort law, the arguments in favour of having *both* systems in operation are well expressed.[72] These arguments, which need not be repeated at length,[73] include the following considerations: public enforcement agencies lack full information, have limited resources, need to prioritise and therefore cannot enforce all rules with similar efficacy;[74] agencies may or may not maximize enforcement efforts (we cannot really know as a result of the principal/agent phenomenon),[75] therefore additional efforts should be welcomed; agencies are in danger of suffering

[70] On the interplay between tort law and regulatory law in this respect, see, e.g., *P. Cane*, Atiyah's Accidents, Compensation and the Law (1999) 78 ff.; *R.L. Rabin*, Reassessing Regulatory Compliance, Geo L.J. 2000, 2049 ff.

[71] *Cane*, Washburn L.J. 2002, 464 f.

[72] See, e.g., the contributions of A. Ogus and M.G. Faure to: Tort and Regulatory Law (W.H. van Boom/C. Kissling/M. Lukas, eds.), forthcoming.

[73] Seminal *S. Shavell*, A model of the optimal use of liability and safety regulation, Rand J. of Economics 1984a, 271 ff. Cf. *S. Rose-Ackerman*, Tort Law in the Regulatory State, in: P.H. Schuck (ed.), Tort Law and the Public Interest – Competition, Innovation, and Consumer Welfare (1991) 80 ff.

[74] Cf. *Ayres/Braithwaite* (fn. 14) 103.

[75] On that topic, e.g., *J.E. Stiglitz*, Economics of the Public Sector (2000) 202 ff. Cf. *K. Hawkins*, Law as a Last Resort (2002) 16 ff., 415 ff.

from 'agency capture',[76] which could be corrected with the ancillary instrument of private enforcement; private entities can finish off what agencies started.[77] This reasoning may to some extent also apply to the relationship between State liability and public instruments of giving regulators incentives to reduce the number of accidents. In other words, where parliament does not discover negligent non-feasance of the State and its institutions, courts may fill this gap and indeed help democratic checks and balances by second-guessing. Naturally, drawing this analogy is somewhat frivolous. The regulator is not equal to a 'normal citizen'. The State has specific powers and a special position and therefore the regulator is allowed more leeway.

We feel, however, that this does not preclude liability. Instead, at face value 48
the arguments in favour of State liability seem valid. Especially if a claim in tort draws media attention, it could add to the democratic checks and balances concerning government action. For instance, media attention on a court decision on State liability may stimulate political pressure to commence some institutional preventive or compensatory scheme.[78] On the other hand, however, tort law is a blunt instrument when compared to alternatives such as independent boards of investigation (disaster investigation boards, transport boards, health and safety inspections). The powers that these boards enjoy usually go far beyond the powers that courts have in investigating. So, in practice, the appearance of all kinds of investigative boards has pushed tort law more and more into a residual role concerning mass injury. Moreover, in those jurisdictions that have a strong tradition of solidarity, some instances of State liability will be virtually pre-empted by specific ad hoc compensation schemes.

Serious arguments of a financial nature have been voiced against liability as 49
well.[79] For instance, it has been said that imposing liability on regulators – and government institutions in general – would stifle government action or rather induce regulators to start 'defensive legislating'.[80] Furthermore, liability would divert resources from the budgets where they are most needed.[81] This budgetary argument is considered in more detail in the excellent contribution by Fedtke to this volume. We especially endorse Fedtke's argument that we need empirical evidence to either support or falsify these rhetorical assertions.[82] Note,

[76] See, e.g., *M. Faure/R. van den Bergh*, Objectieve Aansprakelijkheid, Verplichte Verzekering en Veiligheidsregulering (1989) 148; *S.S. Simpson*, Corporate Crime, Law, and Social Control (2002) 86 ff.; see also *C. Albiston*, The Rule of Law and the Litigation Process – The Paradox of Losing by Winning, in: H.M. Kritzer/S.S. Silbey (eds.), In Litigation – Do the "Haves" Still Come Out Ahead? (2003) 174.

[77] This is the so-called "follow-on private enforcement" as it is usually referred to in competition law.

[78] *Paillet* (fn. 21) 11 f.

[79] For an overview of these arguments, see, e.g., *Fairgrieve* (fn. 4) 64 ff., *Markesinis et al.* (fn. 21) 39 ff.

[80] On these arguments, see, e.g., *Booth/Squires* (fn. 26) 180 ff. and 671 ff.

[81] On this argument, see *Booth/Squires* (fn. 26) 175 ff.

[82] On the call for more empirical evidence in this respect, see also *Markesinis et al.* (fn. 21) 40 and 61.

however, that the lack of evidence works both ways: There is no evidence available either for the law and economics assertion that liability may give regulators incentives for an efficient level of care.[83]

7. Conclusion

50 As one can notice, the discussion on liability of the State for failure to regulate health and safety risks is at a very early stage. Judicially, many jurisdictions have not yet been confronted with the question. Others have generally ruled on the issue only rarely and recently. Theoretically, an important doctrinal effort seems necessary to conceptualise, understand and delimit precisely the scope and the conditions of this specific case for liability. This paper was a first attempt to draw some conclusions from the viewpoint of positive law and to sketch some of the possible future scenarios. Our impression is that there is in our legal systems more space for this type of State liability than one would initially expect. Empirical data are necessary to precisely assess whether the court second-guessing could in fact achieve the objectives of the legal system. Our feeling is that the control by courts of State's action or inaction to regulate health and safety risks is beneficial, at least in some circumstances. The delimitation of the scope of the control and the precise conditions for compensation needs to be further elaborated upon.

[83] Cf. *Markesinis et al.* (fn. 21) 79 f. Note that the empirical evidence that these authors refer to stems either from the U.S.A. and Canada or relates to first party insurance schemes for traffic injuries (which does not seem very similar to State liability for failure to enforce or regulate).