

Governmental Liability in Swedish Law

Bertil Bengtsson

1. A characteristic trait of Swedish tort law is the importance attached to the possibility of insurance, liability insurance as well as insurance of property or persons, for compensating the victim and distributing the risk of damage among a collective of persons. Ideas of the preventive effect of liability have not influenced the rules in the same way. Neither the deterrent influence in the individual case nor the economic effects of locating the costs on a party who can take measures to diminish the risk have been emphasized in modern legislative discussion. This attitude will account for many particular traits in the Swedish Tort Liability Act, 1972 (TLA), which partly differ from the rules of most other states in Europe as well as in America.

At all events, this is true as far as concerns injury to persons and damage to property. As for pure economic loss, social considerations or ideas of risk distribution have not had much importance (unless in a negative way, as difficulties to insure such loss have counteracted any extensive reform plans based upon the same thoughts as other parts of the tort legislation). The main rule is that, contractual liability apart, such loss is only compensated when it is caused by a criminal act by the defendant or his employee.

However, there is an important exception from this principle, namely when the loss is caused by a public agency in connection with the exercise of its authority. In such cases, pure economic loss is treated in the same way as physical damage; the state or the municipality is liable for its employees and other representatives, if negligence is established on the part of the agency (ch. 3 sec. 2 TLA). It is rather natural that these situations should not be judged in the same way as other cases of pure economic loss; the typical case where such loss is caused outside contractual relationships is where a public servant has made a wrong decision or given misleading information, and it would be a serious flaw in the system of tort law if the citizen suffering damage could not sue the state or the municipality for compensation.

Concerning this liability (here for short called governmental liability), considerations of risk distribution have played an important part; the loss will be distributed in an effective way among the taxpayers (and, as far as concerns

municipalities, by the particular liability insurance for municipal bodies). To some extent, ideas of prevention have also contributed to this rule; liability for negligence has appeared to be an effective way of controlling the activity of public agencies, as it can expose not only the negligence of individual officials but also general deficiencies in the work and organization of administrative bodies. However, an extended liability has only seemed justified in such cases where a public agency has exercised its particular power to make decisions concerning the rights or duties of the citizens. In such situations, the citizen is dependent in a characteristic way upon the competence, carefulness and judgement of the official; it is essential for his legal security that he can claim compensation in case of a wrongful decision or act by the agency. When the state or the municipality acts without this special power, for instance in the capacity of landlord, or exercises a purely informative or consulting activity, ordinary liability rules should apply.

It should be noticed that this particular liability rule is rather new. Until the coming into force of the TLA in 1972, the legal solution was quite different. The state and the municipalities were free from liability in exactly the same situations where now the liability is extended to purely financial loss, that is when damage was caused by a public agency in the exercise of its authority. Instead, claims for compensation could be directed against the negligent employee. To a certain extent, this rule was influenced by the same ideas as the well-known maxim "The King can do no wrong", but it was also upheld by economic considerations. It was argued that if the governmental immunity in such cases should be abolished, the courts might be flooded by claims that would lay considerable financial burdens upon the state and the municipalities.

However, this state of law was regarded as far from satisfactory. Even if certain public servants could insure themselves against their liability in that capacity, the victim who could direct his claims only against a negligent official had a very precarious right to compensation, and the consequences for officials without a liability insurance might be ruinous. After much hesitation, the decisive step to reform this much criticized law was taken at the same time as a general rule of vicarious liability in private relations was introduced by the TLA. Initially, the Act contained some particular exceptions aiming at mitigating the consequences of the reform, but they had limited practical importance, and in 1989 they were abolished; the cost of the reform has proved considerably less than the officials in the Ministry of Finance feared.

As for the negligent employee, his own liability is reduced to a remarkable extent; according to a particular rule in this Act (ch. 4 sec. 1) employees are liable for injury and damage in the course of their employment only in so far as there are particular reasons (for instance in case of intent or gross negligence). Of course, this rule did not aim at easing the burden of the public servant, whose popularity has never been particularly great in Sweden; however, in the 1970s there was a general trend of strengthening the legal position of employees in general, and after all, no exception was made for the officials of the state and the municipalities.

It appears from the above that the Swedish rules concerning the liability of public agencies are not very different from the law in most other Western states.

However, there are details in the system that are more original; some of them will be treated in the following.¹

2. The particular rule in ch. 3 sec. 2 TLA can be applied as soon as the fault has been committed by the public agency in connection with the exercise of its authority. To begin with, the limitation implied in this rule means that the negligent official must have acted in the course of his service; if, for instance, he commits a fault while pursuing some type of private consulting activity in his office, there is no liability for his employer.

A more important prerequisite is that there should be a connection with the particular power of public agencies; if damage is caused in another way, ordinary liability rules will be applied. As for injury to persons or damage to property, this does not make any great difference; in such cases, all employers are responsible for the negligent acts of their employees (ch. 3 sec. 1 TLA). Nor has the distinction any practical importance if a contractual relationship exists between the public body and the victim. However, in case of pure economic loss, the connection with the exercise of public authority will often be decisive as far as concerns liability in tort, as the liability of the negligent tort-feasor or his employer is restricted (see above). As mentioned before, the special liability in tort of the state and the municipalities goes only as far as the official makes decisions concerning the rights or duties of the citizens. Even if there is no kind of coercion implicated, he often exercises a kind of monopoly: if you want a passport, you must contact the passport authority without any possibility to get the same service elsewhere. In the same way, compulsory control of a product or a business activity is an exercise of public authority that falls under the same section of law, but not a control that the public utilizes voluntarily. The dependant position of the citizen in all these cases has been an essential reason for extending the liability.

When the activity can be regarded as some kind of service to the public, or when it concerns the administration of the property of the state or the municipalities, the superiority of the state or the municipality does not stand out in the same way. The same is true of such activities as medical care or education unless they imply a coercive or authoritative element; a compulsory commitment to a mental hospital will obviously be covered by the rule, as well as refusing to admit a student to a course.

However, the scope of the rule in ch. 3 sec. 2 is not restricted to acts in the very exercise of the authority of the agency. It covers also acts (and omissions) *in connection with* such exercise. Of course, only temporal connection is not enough; there must be a particular relationship between the act and the exercise of power that in some way or other concerns the victim. The line can be difficult to draw, especially in case of negligent information on the part of the agency. The reasons for the particular liability rule play an important part in the interpretation; courts have often constructed the rule in a very favourable way to the victim. Undoubtedly, the liability covers acts preparing the decision of an agency, e.g. notifying a party of a hearing, as well as recording a decision or

¹ As for the legislative material, see above all proposition 1972:5 and proposition 1989/90:83.

informing a party of the signification of the decision. The rule has also been applied when a parent calling the local insurance office was wrongly informed of her rights to insurance benefit in case she stayed at home in order to nurse her sick child; according to the Supreme Court, the information had such a connection with a future benefit claim that the rule in ch. 3 sec. 2 was applicable.² In another case, decided at the same time, the Court came to an opposite result. Here, a buyer of real property got some wrong information after calling a municipal officer to make sure that there were no problems with the communal water supply and the sewerage; acting upon the information he bought the property and suffered a considerable loss. However, there was no liability for the municipality, as the information had no connection whatever with any exercise of authority concerning the buyer.³ The point of these two different judgements will not be very easy to appreciate for the public at large.

Another decision by the Supreme Court concerning the same problem attracted considerable attention in media. Here, the National Consumer Office stated to the press that certain types of sealant products for cars were inferior to other types; this was clearly incorrect, but when a producer of such products claimed for compensation, the majority held that the statement should be regarded as part of the consumer information that is an essential task of the Office and, consequently, had no sufficient connection with any exercise of public authority. The action was dismissed.⁴ The judgement caused an indignant claim for a change in the law in media as well as among jurists. A parliamentary commission was appointed that proposed, among other less important reforms, that there should as a main rule be liability for faulty information from a public agency even if the information has no connection with the exercise of its authority.⁵ There was some hesitation on the part of the Government concerning such an extension of the liability; as usual, the Ministry of Finance was worried about the possible costs of the reform. At last, a new rule (Ch. 3 sec. 3) was added to the TLA prescribing that the state or the municipality can be liable for pure economic loss caused by such faulty information, but only if there are special reasons for such liability (above all when the information must have seemed particularly trustworthy to the person informed). The main rule is still that liability for pure economic loss presupposes exercise of public authority. Now, however, the courts can at least avoid certain decisions that would appear to be clearly inequitable to the judge as well to the public in general.

3. The governmental liability covers all types of authorities, including courts (with certain exceptions for the Supreme Court and the Supreme Administrative Court, see below). This may seem rather farreaching to some readers. In many European and other Western countries the principle of governmental liability has been applied in a restrictive way concerning the faulty decisions of the courts; generally, there are particular exceptions for such cases. A responsibility in tort

² Nytt juridiskt arkiv 1985 p. 696 I.

³ Nytt juridiskt arkiv 1985 p. 696 II.

⁴ Nytt juridiskt arkiv 1987 p. 535.

⁵ SOU 1993:55.

for judicial decisions may appear difficult to reconcile with such general constitutional principles as the separation of powers, the independence of the courts and the particular position of the judge. Even if it is recognized today that the King can do some wrong, it does not follow that a judge (least of all in the highest courts) can be treated as an ordinary tort-feasor when he has acted in good faith, though unwisely. It might be argued that such a development might lessen the distinction between judges and civil servants, with certain serious consequences for the standing of the courts.

The Swedish principle may be explained by two different considerations. In the first place, negligence on the part of a court may have equally serious consequences as the negligence of other public servants. The need for protection can be even greater when the court has made a mistake, as most citizens have a particular confidence in the judgement and carefulness of the judiciary. Thus, for instance, certain mistakes in the interpretation of a legal rule may be deemed excusable when committed by some local agency, while the same interpretation by a judge must be considered negligent. – Further, there is a traditional tendency in Swedish law to put various administrative authorities on the same level as the courts. Judges and other civil servants have often a similar background, as both have started their careers in the courts and received the particular training and education intended for future judges, and they have often a similar attitude to legal matters. An example of this tradition is that the present Instrument of Government (1974) gives an administrative body the same competence to set aside a clearly unconstitutional statute as a court (though as far as is known, it has never been used by an administrative authority). It is true that in municipal administrations, the tradition is not quite the same, and in recent years the general importance of efficiency in the exercise of public authority has been emphasized in a way that is not quite compatible with the idea of the rule of law; however, this development has not had any influence upon the attitude of the legislator nor on the practice of the courts.

In this way, the particular status of the courts is not a serious objection to the rule according to the Swedish outlook, provided that the liability for negligence is established by a higher court (ch. 3 sec. 10 TLA). As will be shown below, the courts take the particular problems of judicial decisions into consideration when establishing the concept of negligence in such cases.

A technical problem connected with the liability rule is the principle of *res judicata*. It may be objected that a liability towards the losing party in civil cases will be difficult to reconcile with this principle as it (partly) cancels the legal force of the decision. Another argument that can be raised against liability for all kinds of wrong decisions is that the liability rule may encourage the losing party to accept the decision without appealing against it and claim compensation instead. For such reason, it was proposed that the governmental liability for judicial decisions should only be applied if the decision was reversed or annulled. However, this was not deemed necessary. According to the government, there was no real breach against the principle mentioned, as the decision was still in force although the losing party was compensated; besides, such an exception might be hard against a party that has good reasons for not appealing, for instance when the fault at first has been difficult to discern or

when the damaging effect of the decision follows immediately, independently of appeal. Instead, the failure to appeal against a faulty decisions is regarded as a kind of contributory negligence; on such grounds, the compensation can be reduced or even refused altogether.

However, concerning the Supreme Court and the Supreme Administrative Court there is a restriction of the type discussed. Claims based on alleged fault by these courts must not be made unless the decision in question has been annulled (ch. 3, sec. 7 TLA). Consequently, there will be liability only in rather exceptional cases for faults by such instances. The rule is limited to cases judged upon their merits; when the Supreme Court has refused to review a decision by a lower court, it is possible to claim damages based on this decision.

Certain constitutional problems arise concerning liability for faulty decisions by the Government. It would be contrary to leading principles in the Swedish constitution if citizens that are dissatisfied with a political decision should be allowed to litigate in a general court concerning such questions. The Government is, according to the constitution, only politically responsible for decisions of this type, and the responsibility may only be tried according to a particular procedure. For such reasons, claims based upon faulty decisions of the Government can only be instituted if the decision is changed or annulled (ch. 3 sec. 7 TLA). This can be the case, *inter alia*, when the Supreme Administrative Court under a particular Act of 1988 annuls a decision that is contrary to statutory law.

4. According to the rule in ch. 3 sec. 2 TLA, the liability is not restricted to the acts of employees and representatives of the state and the municipality. It is extended to all exercise of authority for which the state and the municipality are responsible. This means that even if the activity that has caused the damage has been delegated to a private company, the state or the municipality is liable as far as the damage has had the connection required with the exercise of public power. The idea is that the state or the municipality must not escape their responsibility by transferring its authority to private firms or creating particular legal persons performing duties that by law are imposed upon the public body. Thus, for instance, the state is liable for the negligence of The Swedish Car-Testing Company, which manages the compulsory control of cars. Also when a particular task connected with the exercise of public authority is confined to a private company, the state or the municipality can be liable for the negligence of the company. When a boat seized by virtue of an order of attachment was deposited at a wharf, the state was deemed liable for damage caused by the negligence of the depositary.⁶ Further, it has been held that when a mistake by a municipal officer has contributed to a faulty decision by a state agency, it is no excuse that this agency has relied upon the wrong statement of that officer;⁷ in the exercise of power, one public body can be responsible in relation to the citizen for the faults of the other.

⁶ Nytt juridiskt arkiv 1989 p. 191.

⁷ Nytt juridiskt arkiv 1987 p. 954.

In this way, the liability of the state and the municipalities goes further than the ordinary liability for the fault of independent contractors; except in contractual relations, the principal is responsible only for the negligent performance of such important legal duties that cannot be delegated to another (“non-delegable duties”), for instance the responsibility for security measures concerning activities that involve considerable risks for personal injuries.

5. Of course, the problem that most often will confront the court is whether a decision or an act is faulty in the sense of the TLA. Here, the concept of fault is influenced by the particular character of the public activity in question. The conduct by the agency will be judged from the angle of the public; a decision or an act will be considered negligent if it does not come up to the standard that the citizen reasonably can demand in the dealings with that public body. The idea of legal security mentioned before is essential. The public is entitled to expect a lawful, judicious and careful handling, and if an official fails to reach that level the victim should be compensated, whatever the cause of the failure.

The attention will thus be focussed upon the victim instead of the tort-feasor. The important question is not whether the official is guilty of some kind of reprehensible behaviour but whether the victim should be protected against the consequences of a deviation from the correct line of conduct. Of course, this is a tendency that appears today in other tort cases, too, especially concerning vicarious liability. When the great majority of defendants are covered by liability insurance, it has been considered rather pointless to put the question if the tort-feasor had some personal excuses for behaving in a way that cannot be accepted from an objective point of view. However, the objective concept of negligence is particularly apt in case of governmental liability where the victim has had particular cause for expecting a certain lawful behaviour on the part of the defendant.

For such reasons, such excuses as the inexperience or the temporary illness of the official at fault will not be valid objections for the state or the municipality (though it might influence the result if for instance the official is charged personally with a breach of his duties). Further, the governmental liability also comprises anonymous negligence on the part of the agency; it may be impossible to establish the person who committed the fault, for instance when someone at the office has given a wrong answer by telephone, but the employer will still be liable if it must be assumed that one of the employees was at fault. In the same way, there will be liability for what is called cumulated fault. It is rather common that several employees have committed certain minor mistakes though none of them can be regarded as negligent in a strict sense; one official has for instance believed that another would control the content of a written decision or message that is incomplete because of the misunderstanding of a secretary. If the result of these rather innocent omissions or mistakes is an incorrect handling of the matter that the victim cannot reasonably tolerate, he is entitled to compensation.

Similar considerations will be important when judging the conduct of officials in other situations. Such common mistakes as when words are omitted or figures are incorrectly rendered in a written decision or a letter, often by some

misadventure in the handling of a computer, will generally bring about liability, as the public must expect that such documents are correct on the crucial points. In the same way, it is not always a serious fault to overlook a provision in a statute, especially not when it has been changed recently and consequently has not been inserted in the current edition of the statute-book; nevertheless, a citizen can always demand that he should be dealt with according to the statutes in force, and the state or the municipality will practically always be liable.

The problem is a little more complicated when a decision by a court or a public agency does not comply with a precedent that is evidently applicable in the matter at hand. In Swedish law, there does not exist any principle of *stare decisis*; precedents are not formally binding. On the other hand, they are almost always followed. For such reasons, a party must assume that courts and officials notice the precedent and act accordingly. Therefore, the state or the municipality is generally liable when a clear precedent has been overlooked.

However, it is also possible (although unusual) that a court or an official *consciously* departs from the precedent as an attempt to change the law on this point. In that case, there might be a chance for the state or the municipality to escape liability. In one such case, a local building board refused permission to demolish an old house of great cultural value though according to a rather old precedent it should be given unconditionally; according to the board, the precedent could not be reconciled with modern environmental ideas. After appeal, the decision of the board was reversed; the owner claimed compensation for loss caused by the delay, but the claim was dismissed by the Supreme Court.⁸ – According to a later decision the state escaped liability when a court, contrary to a precedent, refused a lawyer who was guilty of certain unscrupulous dealing to appear not only in the dispute at issue but also, for a certain period, in other cases in the same court; the court motivated its decision in a thorough way, pointing to the criticism of the precedent in the literature. The Supreme Court upheld the precedent but did not regard the State as liable, referring *inter alia* to the scope that must be left to the courts to create new law; they should be entitled to depart from a precedent if they gave a reasonable motivation for their decision.⁹

The result is that negligence by the public agency in certain cases will be dealt with more severely than intent. Here, considerations of legal security have not been decisive.

Of course, a court or an official can commit other legal mistakes than departing from a statutory provision or a precedent. Here, the victim has smaller chances of compensation, as he cannot rely in the same way on a definite state of law. According to a decision of the Supreme Court, negligence could only be established if the court has judged the legal question in an obviously erroneous way.¹⁰ This rather lenient statement may be explained by the particular type of the problem at issue, which concerned the evidence necessary for attachment. – It must also be assumed that the competence of the public agency also has an

⁸ Nytt juridiskt arkiv 1979 p. 180.

⁹ Nytt juridiskt arkiv 1994 p. 154.

¹⁰ Nytt juridiskt arkiv 1994 p. 654.

influence. The legal errors of a local board in an small municipality cannot be judged in the same way as the mistakes of a court or a county administration.

When the mistake is made in the exercise of reasonable discretion or when judging a question of evidence, the rule is even more lenient. Here, there will be governmental liability only when the damage is caused intentionally or with gross negligence. In this case, too, the competence of the official will probably be taken into account. Thus, for instance, a court will be expected to use its discretionary power with particular judgement, and it might be easier to establish gross negligence in such cases than otherwise.

As for other types of fault, a rather practical problem is the exercise of compulsory control, for instance concerning the safety of buildings and products. When the activity controlled proves dangerous to a third party, the victim sometimes prefers to sue the state or the municipality alleging negligent control instead of turning against the private company, which might have difficulties in paying compensation. In such cases, the Supreme Court has emphasized that the responsibility for the state of the object controlled must primarily rest upon the private company. The controlling agency can only be held liable when there have been particular reasons to take measures against the risks connected with the property or activity.¹¹ – Another rather common cause of claim is when according to the plaintiff an official has given wrong or misleading information in connection with the exercise of public authority. Even when such an information can be proved (which may be difficult, for instance when it is given by telephone) there will not always be liability, as the public cannot reasonably rely upon every oral statement on complicated legal matters given offhand and without any consideration. On the whole, only written statements or more precisely formulated oral information will bring down liability upon the employer. In such cases, there may even be special reasons for liability without any connection with the exercise of public authority (see 2 above).

6. The rules concerning governmental liability in the TLA only deal with liability for fault. In particular cases, there is a strict liability. Thus, an Act (1998:714) prescribes strict liability for the state, above all, in case of arrest or detention of persons suspected of crimes, if the person is acquitted of the crime or the charge is withdrawn; according to the same Act, such a liability is imposed when an administrative decision has deprived a person of his freedom (e.g. in a mental hospital), if the decision was clearly wrong, as well as when the police causes injury or damage to innocent third parties by using violence. According to several precedents, the state is also strictly liable for damage caused by dangerous military exercises.

The particular liability of the state for breach of the European Community law has not been dealt with here. It should be mentioned that a Swedish legislation concerning such liability is in preparation.

¹¹ See for instance *Nytt juridiskt arkiv* 1984 p. 360 I-III.