

ODŠKODNINSKA ODGOVORNOST DRŽAVE

Urednik

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IUS SOFTWARE®



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Odškodninska odgovornost države igra v praksi slovenskih sodišč pomembno vlogo. Zahtevki za povrnitev škode proti državi so raznovrstni, njihovo število in obseg pa se povečujeta. Za javnopravno odškodninsko odgovornost se – poleg čl. 26 Ustave – uporablja predvsem civilno odškodninsko pravo, pri tem pa je treba upoštevati posebnosti razmerij med državo in posamezniki. Gre za dinamično pravno področje, saj se sodna praksa na tem področju zlasti v zadnjih letih precej spreminja.

V literaturi odškodninska odgovornost države ni bila pogosto predmet obravnav. Knjiga, ki je pred nami, želi zapolniti del te vrzeli. V njej so združeni prispevki več avtorjev, ki vsak na svoj način obravnavajo posamezne vidike tega kompleksnega instituta. Pri tem se ni mogoče popolnoma izogniti prekrivanju tem. Tako se npr. tako rekoč vsi avtorji ukvarjamo z vprašanjem dolžnosti države nasproti posamezniku, za kršitev katerih država odgovarja, torej s predpostavko protipravnosti. V nekaterih primerih nas več obravnava isto sodno odločbo. Vsi avtorji o vseh vprašanjih tudi nimamo enakega mnenja.

Knjiga je namenjena sodnikom, pravobranilcem, odvetnikom in drugim pravnikom, ki se srečujejo z vprašanji odškodninske odgovornosti države. Prispevki še zdaleč ne zajamejo vseh relevantnih pravnih vprašanj v zvezi z odgovornostjo države za škodo. Avtorji obravnavamo le nekatere pomembnejše problemske sklope. Ob prepletanju teoretičnega in praktičnega pristopa želimo osvetliti zakonodajo in sodno prakso ter opozoriti na dobre in tudi slabše rešitve. Ponuditi želimo nekaj konkretnih predlogov za izboljšave. Spodbudili pa bi radi tudi širši premislek o tem, kakšne so naloge države, v katerih primerih in do katere meje naj odškodninsko odgovarja in katera škodna tveganja morajo nositi posamezniki sami.

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Damjan Možina

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Liability of the state for damage

Abstracts

Liability of the state for damage

Damjan Možina

The paper attempts to provide an overview of the institute of state liability for damage (public law liability for damage) in Slovenian law. At the roots, this is a public law institute, its legal foundation being Art. 26 of the Constitution. For all issues not regulated by public law, the private law on non-contractual liability for damage is being applied, sometimes with modifications. The basic principle is that the state (or local community) is liable for loss, caused wrongfully and culpably in connection with the exercise of authority by the government agent (state liability in narrow sense). On the other hand there are cases, where the state, for different reasons, assumes the risk of certain losses, which are not consequence of wrongful exercise of power. These are other compensation schemes, such as the liability towards victims of violent crimes, liability arising from mandatory vaccination and liability of the state for damage caused by wild animals. The author is critical of excessive growth of state liability.

Wrongfulness as a condition of liability of the state in the recent case law

Mile Dolenc

State liability is governed by the Constitution of the Republic of Slovenia. According to the first paragraph of Article 26, everyone has the right to compensation for damage caused to them in connection with the performance of services or any other activity of a state body, local community body or holder of public powers by the unlawful acts of a person or body performing such function or activity performs. The first question that arises is whether the provision is self-sufficient. The answer is in the negative case law. The provision must be applied together with the provisions on general tort.

For the part of the case law is not enough to conduct an objective illegality of the state, but also takes into account the care the person who causes damage to (his fault). It is essential for this position is that the care seen as an integral part of the unlawful conduct. The second part of the case law of the two elements taken separately. In some Supreme Court decisions, the position of the capability of violation of the country in terms of intentional or knowingly incorrect substantive interpretation of the provision.

Jurisprudence has shaped the doctrine of conduct in the context of decision-making powers. It was created on the basis of a legal opinion from 1995. The Supreme Court is clear from the nature of the judge's work is such that in each case be legal norms or facts interpreted differently. Accordingly, it should also be considered his fault. In recognition of the view that a judge can not be held responsible for damages to interpret the law within the boundaries of the given mandate. This position has been extended also to decide in administrative proceedings. Liability for damages due to the long duration of court proceedings is based on the case law of the Constitutional Court, which permits State liability for system errors, although specific cause of the damage has not been established.

Everyone has the right to compensation for damage caused through unlawful actions in connection with the performance of any function or other activity by a person or authority performing such function or activity within a state or local community authority or as a bearer of public authority.

(In)applicability of the general rules of tort law for liability of public institutions

Martina Bukovec

Discussions about questions of state (public institutions) liability have shown that this area is developing quite rapidly in three main ways: constitutionalisation, depersonalisation and objectification. In Slovenia the rules of state liability law does not represent a coherent legal system united in one code. They are scattered in different statutes or have been developed by the courts. Besides public liability in Article 26 in the Constitution, they deal with compensation for other (relationship between master and servant), which is a part of law of torts in Slovenia's Civil Code. These provisions jointly constitute the foundation of the claim for damages against public bodies. They are interrelated and influence each other. Although they are laid down in statutes, their elements have been interpreted, refined and adapted by the courts. As a result, the present Slovenian law concerning public liability has basically

been developed through case law. A parallel development has taken place in state liability law that still has its roots in private law. The perspective shifted from the individual public servant to the governmental body itself. The public authority is in cases held vicariously liable for its civil servants and employees. The applicable provisions in the Civil Code are Articles 147 and 148 for acts of employees or for torts of organs, which in fact represent a type of direct liability of the State. The status quo is a diffuse mixture of traditional vicarious liability of the state and elements of quasi-strict state liability for organizational fault. The trend is towards no-fault liability.

Three main features which characterize modern legal status liability of public institutions (constitutionalisation, depersonalisation, objectification), speak to the fact that the constitutional rule (as contained in the Article 26 of our Constitution) must be understood not as a complete departure from the general rules of tort law, but as a norm which requires that the general rules are applied, interpreted and adapted to the relevance of the public institutions as a responsible entity.

The liability of judges and liability of the state for judicial mistakes

Jan Zobec

Since judges are only humans, it holds for them as well: to err is human (thus judicial). And where the error is, there (mostly) is harm. However, the question arises, whether is there also a liability - and if it is, who should be held liable. The author seeks the answer to the question, which errors entail tort liability, which subject is held liable and on which ground. He argues that the damage committed by judicial misconduct constitutes a public-law relationship between the state (which has caused the damage by its authoritative act) and the civil subject as the impaired person. According to the general (and self-evident) prohibition on the unlawful exercise of the state's power, the author argues for the ex-personification of the state's tort liability. As fault has always been ascribed to an individual and particular tortfeasor, it should, in the cases of judicial misconduct, be absorbed by the unlawfulness of the state body's act. What essential here is the mere fact that the damage has been caused by an unlawful act of the judicial power. Since judicial misconduct is at stake, the focus should be paid on the proper exercise of the state's power rather than on the particular individual who has been exercising this power. The attention is thus focused not on particular judge and his conduct but on the question how the state authority should (in that particular case) act and exercise its jurisdiction.

The author discusses the question of causation (foremost from the view of two cases of the Supreme Court of Slovenia) and the significance of the jurisprudence of the CJEU. He points out that the CJEU's main goal is the assurance and the establishment of the uniform application of the EU law, rather than safeguarding of the individuals' rights.

Liability of the state for administrative decisions

Erik Kerševan

The issue of tort liability of public officers, exercising their powers to decide in administrative matters is in the present time quite interesting and combines legal rules and principles of two large fields of law: administrative and civil law. The absence of special legal provisions regulating the liability of state authorities results in general rules of civil law to be applied in these cases. This is also supported by recent developments in jurisprudence, which has addressed the questions of legal basis for liability in damages resulting from illegal actions by judges and state prosecutors, both being bodies of the State itself. Using the same criteria these conclusions made by the courts can also be used to resolve difficult questions of liability of holders of executive powers. However, with the use of general rules of civil law regulating tort liability for administrative decision-making several difficulties appear that have to be further discussed and resolved, in both legal theory and practice.

Liability of the state for damage arising from the activity of the police

Mateja Senih

There is a wide variety of factual circumstances which may give rise to the State's liability for damages. Liability may be based on fault or strict liability, but it may also be derived from a so-called compensation scheme, i.e. statutory provisions setting forth a special type of liability. As regards damage liability arising out of the actions (or omissions) of the police, the State's responsibility is based on the fault liability of its organs and institutions for their unlawful actions (or omissions).

Effective legal protection of the right to compensation for damage caused by unlawful action of the State is to be regarded as an achievement of civilisation; nevertheless there remains plenty of room for improvement. The right to obtain compensation should be elevated to a standard in all areas where the

State interferes with the private sphere of its citizens, and in particular in cases of unlawful police action, this being one of the clearest manifestations of the powers of the State. At the same time, damage liability of the State for the actions of police officers is a classic example of the State's liability under Article 26 of the Constitution. In this connection, it is apparent from the case-law that many questions pertaining to this issue remain to date unanswered.

Liability of the state for criminal acts of dangerous individuals

Damjan Možina

In cases where evidently dangerous individual commits a violent crime, damages claims against the State based on liability for omitting the duty to protect the victims are not uncommon. The Supreme Court of Slovenia has, in its judgement from 26. February 2012, held the State liable for a murder, committed by an ill-reputed criminal Silvo Plut. According to the Court, the State was not active enough in persecuting him for a previous murder, committed in another country. Had he been in preventive custody, the (second) murder would not have taken place. The judgement is problematic, especially with regard to the duties of the State and their breaches (wrongfulness) and the causation with regard to omission. The article, based upon the analysis of the judgement, explores the duties of the State to protect the individuals from criminal acts of other (dangerous) individuals. The Court understands the duties of the State much too broad. The judgement implies, that the State guarantees to reimburse the loss, caused by a dangerous individual. The State can fight against the danger arising from dangerous individuals by persecuting them for the committed crimes. The persecution may end with a conviction, followed by imprisonment or other measures. Another possibility is a detention in psychiatric hospital which is supervised by court. However, if there is not enough evidence or if other substantive and procedural conditions are not met, the individual is free. The State cannot be deemed responsible for neutralizing dangerous individuals or to be liable for the loss (harm) they cause. The state's duty to protect applies only if the state is aware, that a particular (or identifiable) person is concretely threatened. The State is liable for the actions of its bodies and officials. Only if they had knowledge that a concrete individual is threatened, and hadn't taken any reasonable measures to avert the threat, it may be said that the State has caused or contributed to the harm.

Damages for non-pecuniary loss due to the infringement of the right to a healthy environment: liability of the state for road noise

Damjan Možina

The paper presents the jurisprudence of the courts in Slovenia about liability of the state for loss due to the noise from public roads. The courts have upheld thousands of individual claims for the recovery of non-pecuniary loss for mental suffering due to infringement of the constitutional right to healthy environment (art. 72 of the Slovenian Constitution) which is considered a personality right. Particular aspects of this case law are presented together with the relevant case law of the ECHR. The author is critical about Slovenian case law. In his view the automatic transfer of the principles of private law (such as with regard to imissions) to the relations with the state is not appropriate. A balance between the public and individual interests should be sought. The economic capability of the state to pay massive damages should be considered as well. Upholding claims in full amount to the individuals who did nothing to prevent the noise (e.g. instalment of sound proof windows) is not appropriate. The problem should be dealt with by way of analogy to the (partial) expropriation in public interest. A state should not be overburdened with damages claims.

Liability of the state for breach of EU law

Ana Vlahek, Žiga Urankar

Liability of the Member States for breaches of European Union law is a distinctly broad and complex subject. The complexity partially stems from the fact that the principle of Member State liability is not governed by the Treaties or EU secondary legislation, but has been developed in 1990s in the case law of the Court of Justice of the EU. Such judicial activism has provided foundations for private protection of individuals in cases of breaches of EU law by the Member States, and has importantly broadened the arsenal of individuals' legal remedies. The paper presents the historical background of Member State liability for breaches of EC/EU law and its position in the structure of judicial remedies in the EU. It analyses in detail all relevant case-law of the Court of Justice of the EU and comments on the relevant elements of Member State liability that are to be addressed by national courts when dealing with damages actions against Member States breaching EU law. It focuses also on the delimitation of the elements of Member State liability for breaches of EU

law that are set out in EU law from those that are set out in national law and have to accord to the principles of equivalence and effectiveness. Case-law of national courts, including relevant Slovenian cases, is also analysed where emphasis is put on the pending damages case *Nemec v Slovenia* in which the Slovenian Supreme Court stayed its proceedings and asked Luxembourg for a preliminary ruling.

Liability of the state for damage caused by animals

Damjan Možina, Valerija Šter

The authors try to present the system of »liability of the state for damage« caused by wild animals in Slovenia. Although the terminology of civil liability for damage is used in the legislation, this is not a case of liability of the state for loss, wrongfully and culpably caused while exercising authority (Art. 26 of the Slovenian Constitution). Rather, this is a case of the so called »other compensation schemes«: the state assumes obligation to compensate certain losses caused by wild animals to certain individuals because it deems it appropriate. The regulation is divided in two parts: firstly, the Act on Nature protection assumes liability of the state for protected animal species. The authors question the purpose and usefulness of the compensation scheme. In their view it does not contribute to the preservation of these species, causes an arbitrary distribution of risks and enables abuse. Secondly, the Wild game and hunting Act assumes the liability of the State for loss caused by wild game outside hunting areas insofar as the operator of the hunting grounds is not liable. This compensation scheme, too, is based on unclear considerations. In the view of the authors, both compensation schemes could be abolished without any significant damage.