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Utilizing Tort Law to Deter Misconduct in the Public Sector

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ABSTRACT

This article analyzes tort law's ability to effectively guide the actions of public officials and agencies and proposes separating tort judgments into two components: the imposition of accountability and the imposition of liability. This separation leads, in turn, to the conclusion that it is sufficient to impose accountability—and to label the public official and agency negligent—in order to effectively guide their conduct. An important perspective is thereby added to the discourse on the deterrent power of tort law. To date, tort law discourse has been largely dominated by the paradigm of the economic analysis of law, thereby focusing on the financial sanction component and ignoring to some extent the imposition of accountability.

According to the theory of public choice, public officials do not always act optimally to maximize the public interest. That is why the need arises to guide their conduct. This article opens by analyzing the fundamental difficulties in the approach that views tort law as an effective deterrent tool in the public sector. These difficulties mainly refer to the fact that public-sector tortfeasors do not personally bear the compensation costs, and consequently, respond less to market incentives and more to political ones. Therefore, tort law is inappropriate in a field where the players belong to the public sector and it will have a hard time deterring them and effectively guiding their conduct.

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While accepting this criticism of the deterrent approach and adopting the assumption that public officials, in contrast to private agents, are unlikely to be responsive to the risk of the imposition of financial compensation, this article demonstrates that, from the deterrence perspective, tort law can still be used for the purpose of guiding the conduct of public officials. The reason for this is the heavy price that the imposition of accountability by a court of law is likely to exact from the public official as a social actor. Phrased differently, being liable is insufficient to guide the conduct of public officials when the deterrent power ascribed to tort law only relates to the ***imposition of liability****. However, when the deterrent power of tort law is examined with respect to the* ***imposition of accountability****, a different conclusion may be reached.*

This conclusion—that the rules of accountability effectively guide the conduct of public officials—derives from recognition that public officials attribute great importance to their public reputations and, consequently, are likely to be deterred by the thought of being under court investigation (even if the financial compensation is not directly incurred by them). Furthermore, this conclusion derives from recognition that public agencies function as social actors, to which "external attribution" and "intentionality" can be ascribed. These two characteristics make them susceptible to the external approval of the public and guides their conduct accordingly. In this manner, the threat of being labeled negligent deters public agencies and their desire to avoid such labeling guides their conduct, leading them to internalize the public price of their negligent conduct. Moreover, the desire of public agencies to avoid negative labeling and their capacity to intentionally act optimally remedy the failures of the public official seeking to act otherwise. Therefore, the imposition of tortious accountability on public officials is an important tool, the goal being to guide their conduct and create effective deterrence.

This article concludes that it is the Damoclean sword of tort ***accountability****—rather than tort* ***liability****—that keeps public agencies and*

their employees on their toes, incentivizing them to act optimally to maximize the public interest.

I. INTRODUCTION

This article argues that, in order to answer the question of how to hold public actors (officials and agencies) accountable for their actions, a distinction must be drawn between two separate components that act in conjunction in tort rulings. In the first stage, tort law functions as **accountability law**, and focuses on the defendant, the tortfeasor; in the second, it functions as **compensation law**, where the compensation is paid to the injured party, the plaintiff. The professional literature largely fails to distinguish sufficiently between these two components, although each is deserving of a separate analysis.

Availing oneself of the rich literature in the field of organizational research, this article proposes viewing the public agency as a "social actor" and demonstrates that two important characteristics can be ascribed to it—external attribution and intentionality. The characteristic of **external attribution** means the agency attributes the utmost importance to the matter of its external reflection and its public image; the characteristic of **intentionality** assumes the agency can be ascribed with intentions and aspirations with respect to its political survival and bureaucratic autonomy, along with the ability to act accordingly.[1] A potential tort judgment determining that an agency failed in fulfilling its role serves as a tool for guiding its conduct and is capable of causing it to act optimally due to its sensitivity to its public image (external attribution) and to its aspirations, which are directed towards political survival and bureaucratic autonomy (intentionality). In this context, this article maintains that the agency's

[1] Brayden G. King, Teppo Felin & David A. Whetten, *Perspective—Finding the Organization in*
Organizational Theory: A Meta-Theory of the Organization as a Social Actor, 21 ORG. SCI. 290, 293 (2010).

intentionality directly leads to the correction of the public official's acts. Consequently, this article concludes that the Damoclean sword of tort **accountability**—to be distinguished from that of tort **liability**—keeps agencies and their employees on their toes, constituting an important incentive for them to act optimally to maximize the public interest. An important angle is thereby added to the discourse on the deterrent power of tort law over public agencies and their employees. To date, tort law discourse has been largely dominated by the paradigm of the economic analysis of the law, focusing on the component of financial sanctions and, in so doing, has neglected the imposition of accountability.[2]

Accordingly, the sections of this article—and the overall argument—will unfold as follows: **Section B** presents the deterrence theory, which asserts that tort law can be used to guide the conduct of public agencies by means of a cost-internalization mechanism, using the tool of financial compensation. This section also examines the criticism of the deterrent power of tort law, according to which the imposition of compensation on public agencies in order to guide their conduct is ineffective due to the absence of a correlation between the agent committing the tort and the agent internalizing the cost. Next, **Section C** argues that deterrence considerations justify the utilization of tort law to guide the conduct of public officials, in spite of acceptance of the criticism against this proposition. It does so by stressing the impact of an additional component of tort law besides that of compensation, the component of accountability. **Section D** winds down the Article with an overall summary.

[2] For example, sources on the discourse focusing on the compensation mechanism, see *infra* note 8.

II. Criticism Leveled Against Tort Law as Not Deterring Misconduct in the Public Sector

A. Presentation of the Deterrence Theory

The theory of public choice[3] proposes the assumption that public officials act to further some private, not (or not exclusively) public, interest when making decisions.[4] Once it is understood that government decisions are not always optimal for the public good and do not necessarily further public interests, it can be argued that the losses resulting from these decisions should be imposed on the government. However, from the deterrence perspective, this argument only holds if it can be assumed the State will indeed change its conduct due to the State having to bear these losses. The assumption that the imposition of tort liability will influence the potential tortfeasors' conduct is problematic when it is a question of a public agency as opposed to a privately-owned company. In spite of these difficulties, the law aspires to prevent the State from violating rights by coercing it, when acting tortiously, to take into consideration the costs liable to be incurred by so doing.[5]

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[3] To review the chronicling of the theory of public choice, see Robert D. Tollison, The Theory of Public Choice – II, 3–7 (James M. Buchanan & Robert D. Tollison eds., 1984).

[4] *See* Jerry L. Mashaw, *Public Law and Public Choice: Critique and Rapprochement*, *in* Research Handbook on Public Choice and Public Law 19 (Daniel A. Farber & Anne J. O'Connell eds., 2010); Jerry L. Mashaw, Greed, Chaos and Governance: Using Public Choice to Improve Public Law 10–11 (1997).

[5] In this immediate context, the cost-effectiveness approach to public sector tortfeasors stresses the importance of adopting policies designed to maximize the value of social resources, as reflected in the preferences of all the members of a specific society. Thus, the guiding principle remains the maximization of social welfare. *See* Louis Kaplow & Steven Shavell, Fairness Versus Welfare (2006); Louis Kaplow, *Transition Policy: A Conceptual Framework*, 13 J. Contemp. Legal Issues 161 (2003). The question of when government policies are optimal is beyond the scope of this Article. Suffice it for me to briefly note that, according to the Kaldor-Hicks approach, optimization is achieved when, due to a specific step adopted by a public agency, the situation of a given society improves, and those benefitting from the change are in a position to compensate the losers, who may then be indifferent to it, while the winners remain winners even after covering the outlay. It should be stressed that, according to this theory, compensation is not paid to actual losers. Rather, the extent of the benefit for the winners is compared with

Thus, the remedies of public law, whose purpose is to prevent public actors from violating constitutional rights, aspire to coerce the State to take into account the potential costs of its problematic acts.[6] In the United States, for example, public agencies are required to compensate those who are injured by the violation of their constitutional rights. An example of this in the U.S. is the prohibition against expropriating privately owned property for public use without appropriate compensation.[7] Certain scholars view the deterrence theory model as the most direct ascription of market behavior to public actors. Thus, in their view, the compensation liable to be imposed for expropriation (and for constitutional torts in general) is designed to guide the actions of public actors. This argument is based on the perception that state conduct is rational and profit-based, and the potential obligation to pay compensation prevents it from misusing its power, constraining it to attach considerable weight to the interest of the property owner who would be harmed by the expropriation.

The concept of optimality underlying the obligation to pay compensation is accepted by many scholars as a powerful explanation for State behavior.[8]

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that of the loss for the losers, and if the former exceeds the latter, the change of policy is deemed optimal. It might be advisable to demand that governments actually compensate the losers—an approach closer to Pareto optimality, which requires that a step only be taken by a public agency if it benefits at least one individual without worsening the situation of any other individual. *See* MICHAEL J. TREBILCOCK, DEALING WITH LOSERS: THE POLITICAL ECONOMY OF POLICY TRANSITIONS 13–14 (reprt. ed. 2014).

[6] *See* Richard H. Jr. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247 (1988).

[7] In the U.S., practically no provisions are in place authorizing public agencies to expropriate land without compensation, at either the state or federal level. Such a provision would represent a taking without compensation. It would be contrary to the Constitution and, as a result, would be null and void. *See* U.S. CONST. amend. V.

[8] For Posner, coercing the State to pay compensation "prevents the government from overusing the taking power." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 64 (9th ed. 2014). Posner is a prominent supporter of the idea of compensation in connection with state activity and recommends its implementation in diverse contexts. *See* Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49 (1981); Richard A.

These scholars believe the State is willing to internalize such social costs when these costs translate into budgetary losses, the State in this context being perceived as acting similarly to a private actor in a market environment. This compensation mechanism creates a mirror image of similar cases where the tortfeasors are private actors. Just as the law coerces private actor tortfeasors to internalize costs, it forces the State to do so, which consequently is compelled to take overall social costs into account when adopting one decision or the other. In short, there is a resemblance between private actors and the State with regard to both purpose and means. The purpose is deterrence, the mechanisms—internalization of costs by means of the financial compensation tool.

B. Problems of the Deterrence Theory

The purpose of this subsection is to examine the criticism appearing in the professional literature of tort law's ability to guide the actions of public officials. From the deterrence perspective, the application of tort law to the public sector is reasonable if one assumes governments respond to the incentives created by the provisions for compensation in tort law in the same way as private actors do. In contrast, the rule of "absence of accountability" is likely to turn out to be preferable if governments are assumed to be nonresponsive to these incentives. Thus, the deterrence argument can be countered by maintaining that public officials do not respond to costs and

Posner, *Excessive Sanctions of Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635 (1982); *see also* Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955); Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997 (1999); Thomas J. Miceli & Kathleen Segerson, *Regulatory Takings: When Should Compensation Be Paid*? 23 J. LEGAL STUD. 749 (1994); Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 580 (1984); Lawrence Blume, Daniel L. Rubinfeld & Perry Shapiro, *The Taking of Land: When Should Compensation Be Paid*? 99 Q.J. Econ. 71, 71–92 (1984); THOMAS J. MICELI, THE ECONOMIC THEORY OF EMINENT DOMAIN: PRIVATE PROPERTY, PUBLIC USE (2011).

profits in the same way as privately owned companies do. Consequently, the State and its agencies cannot be compared with privately owned companies.

It is customary to refer to privately owned companies as rational actors aspiring to maximize profits and minimize costs. From an economic perspective, one would expect individuals—not companies—to act that way in order to realize private interests. Rationality is ascribable to private companies when they are owned by investors, and it is the latter who aspire to maximize their personal profits by maximizing company profits. In contrast, the State acts in an entirely different manner because public actors respond less to market incentives and more to political ones.[9] When it is a question of public officials, three reasons can be enumerated to explain why deterrence is ineffective, the common denominator being the absence of a correlation between the agent committing the tort and the agent paying the compensation money. The first reason is the negation of the personal accountability of the public official and its replacement by the institutional accountability of the public agency. The second reason is the source of payment of the financial compensation. This compensation is derived from the taxes of the public as a whole. The third reason is that the tortfeasor does not bear the legal defense costs.

The first reason that deterrence is ineffective relates to the distinction between the personal accountability of the employee and the institutional accountability of the public agency. It can be argued that compensation claims do not constitute an effective deterrence tool for public officials because they do not personally incur the payment. When tortious liability is not personal, its deterrence effectiveness, as well as the concern about over-deterrence, is questionable. In the U.S., the law confers absolute immunity on federal employees for common law torts. American law provides for the

[9] "Because government actors respond to political, not market, incentives, we should not assume that government will internalize social costs just because it is forced to make a budgetary outlay." Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 348 (2000).

substitution by the government of employees against whom a tort claim has been filed. This is not limited exclusively to employees officiating in government positions or situations where the public official was in contempt or intentionally committed a tort.[10] That being the case, the question arises whether tort law is capable of guiding the conduct of public officials when their personal accountability shelters under the institutional accountability of the agency.

The second reason relates to the fact that when accountability is imposed on the State, it is the tax-paying public that compensates the injured party. If the State were to respond to tort rules in the same manner as privately owned companies, it could be argued that these rules have the power to guide conduct. However, if the State merely deflects the losses caused by it to the public, then these laws are incapable of exacting from it a cost that will serve as a deterrent against suboptimal conduct.[11] Put simply, the government deflects costs imposed on it by courts to the community (subject to costs related to lost voters) and, consequently, tort rules do not effectively guide its conduct. Accordingly, tort law in this category transfers capital from one group to another. This, of course, can be supported by considerations such as distributive justice and dispersion of damage. However, the deterrence purpose, in itself, is harmed.

Thus far, we have analyzed the split between the agent committing the tort and the agent paying the compensation. For the third reason, an additional type of cost—borne by tortfeasors in the private sector—not specifically deducted from the public sector tortfeasor's budget is legal defense costs. Public agencies often maintain their own legal advisors, whose role is similar to that of attorneys employed by privately owned companies. At the same time, a large percentage of court cases involving federal public officials are

[10] Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679.

[11] *See* David S. Cohen, *Regulating Regulators: The Legal Environment of the State*, 40 U. TORONTO L.J. 213, 253–54 (1990).

handled by attorneys from the Department of Justice, which funds them. In this manner, other departmental budgets are not affected by the costs of these services. This mechanism, whereby the public sector tortfeasor's legal defense costs are passed on to the Department of Justice, creates a very different reality than that faced by privately owned companies, which bear these costs directly.

C. Summary

In this section, this article presented the deterrence theory argument that tort law can be utilized to guide the conduct of public agencies, using the cost-internalization mechanism by means of the financial compensation tool to create a deterrent. Next, it presented theoretical criticism of the deterrent capacity of tort law, according to which the imposition of compensation on public agencies in order to guide their conduct is ineffective, due to the absence of a correlation between the agent committing the tort and the agent paying the compensation.

Public officials have two important characteristics: one, they respond less to market incentives, and more to political ones; two, they are protected by the absence of a correlation between the agent committing the tort and the agent paying the compensation. Thus, the criticism voiced in the professional literature, that the power of tort law to guide conduct in the public sector is damaged and questionable, comes as no surprise. This raises concern that public officials will continue to function sub-optimally, even if the law at times allows private injured parties to file tort claims against agencies.[12] In the discussion below, it will be made clear that this conclusion is not inevitable, as public sector tortfeasors suffer extensive damage when labeled negligent.

[12] On the problems deriving from a similar attitude towards costs and profits in the world of markets and politics, see Levinson, *supra* note 9, at 416–17.

III. Utilizing Tort Law to Achieve Optimal Conduct

This section deals with the way tort law effectively guides governmental conduct. It comes as a response to the critical positions on the utilization of tort law to guide the conduct of potential tortfeasors in the public sector discussed in Section B above. This article now establishes the advantages of tort law for guiding conduct in the public sector, arguing that holding public officials accountable for their negligent conduct is vital in order to set government discretion on the right path so it is exercised for the maximization of public interest. Tort claims are an effective means of signaling suboptimal government activity, and tort claims guide the conduct of public officials and agencies, incentivizing them to function appropriately. To ground this argument, this section distinguishes between two reference levels that both, simultaneously, establish the underlying value of tort law: the **public official as a private personality** (whose deterrence will is referred to as "private guidance") and **public agencies as social actor**s (whose deterrence is referred to as "central guidance"). This distinction is important because the argument in this context is that the ability of tort law to guide the actions of agencies, by means of their characteristics as social actors, is also of great significance in situations where public officials cannot be effectively deterred. This is because the desire of agencies to avoid negative labeling and their ability to intentionally act optimally (the solution) may remedy the failures of public officials aspiring to act sub-optimally (the problem).

A. Level of the Public Official as a Private Personality: Private Guidance

The argument about the suboptimality of government activity is essentially based on the failures and biases in the motives and actions of public officials. Government suboptimality does not derive solely from failures in the actions of the agencies themselves but rather, and perhaps mainly, from the *modus operandi* of their officials. This article argues that it is best to use tort law to achieve private guidance—that is, to guide the activity of public officials. On

its face, because public officials are not liable to be personally sued for compensation and will at least not pay the cost out of their own pocket, tort law would appear to have no influence on their correcting their failures. These assertions do not account for the effect of the very prospect of a tort proceeding—focusing on the public official— which suffices to deter them, thereby creating private guidance. The main reason for this deterrence is public officials' concern about damage to their reputation, which often is their most prized asset. A damaged reputation is enough to impact their social standing and future occupation.

Public officials do not derive much comfort from the agency bearing the burden of paying the compensation adjudged against them, and the imposition of tortious accountability on the agency—due to the actions or shortcomings of their employees—also has the power to guide the conduct of the latter.[13] The main reason for this accountability is that public approval is a basic interest of public officials. It is vital for their public existence and for the furthering of their status. Such approval is one of their most prized resources—indeed, their legitimation to hold public office derives from it. Therefore, tort proceedings are capable of deterring public officials when they know they are liable to be the focus, in the course of which the court will disclose their negligent conduct to the public.

Naturally, it is desirable that public approval of public officials is in line with their qualifications and deeds. The public cannot be expected to hold its agents and representatives in higher social and professional regard than is due to them.[14] A tort court's labeling of a public official as negligent helps the public to adjust its level of approval of them accordingly. Thus, this labeling furthers the public interest, according to which there should be a correlation

[13] *But see* Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 560–61 (1985) (explaining tort law is incapable of guiding the conduct of potential tortfeasors in the public sector, who would prefer to avoid the negative publicity generated by the imposition of tortious accountability on them).

[14] For related literature, see R.F.V. HEUSTON & RICHARD A. BUCKLEY, SALMOND AND HEUSTON ON THE LAW OF TORTS 157 (21st ed., 1996).

between actual and desirable approval. Thus, the public has a high stake in the disclosure of the professional and social approval due to public officials, and it is here that the tort court enters the picture, labeling them, if that is the case.

It follows that in order to properly appreciate the power of the tool of tortious labeling, one must first understand that the extent of the damage caused by labeling a person negligent is especially great when the latter is a public sector tortfeasor. Public officials are better known than private individuals and are held in high regard by a wider public. It is this public that is liable to exact political costs if it becomes apparent that public officials were negligent and aspired to maximize a private, rather than a public, interest. Consequently, a drop in the approvals has considerably wider and deeper repercussions for public officials. Their discrediting and labeling as negligent is liable to harm their post, their profession, and their occupation as a result of their dismissal, their non-reelection, downsizing of their position or, at least, their future non-promotion.[15] These harms are liable to lead to capital loss, expressed in financial damage, as well as to considerable emotional trauma.[16] Consequently, the harm caused by discrediting is more severe than that caused to private individuals.[17]

The above uncovers and clarifies the deterrent power already rooted in the laws of tortious accountability. Public officials aspire to hold onto their government positions, which imbue them with influence and power. They are interested in promotion, which also comes with financial benefits. All of this

[15] For a range of potential harms, see THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 518 (1970).

[16] *See* Note, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 809–18 (1979); Mark G. Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 S. CAL. L. REV. 1322, 1390 (1976).

[17] De Mot & Faure, too, note that while financial sanctions have weak deterrent power, as in the case of potential tortfeasors in the public sector, the risk of reputational damage, as a result of the very imposition of tort accountability, may be effective in guiding conduct. *See* Jef De Mot & Michael Faure, *Public Authority Liability and the Chilling Effect*, 22 TORT L. REV. 120, 127 (2014).

generates private guidance, motivating public officials to strive to avoid being labeled negligent.[18] A court declaration that a public official is negligent damages the public's trust in them as well as their ability to carry out their duties. Such a declaration testifies to their conduct being incompatible with public consciousness and values. The desire of public officials to avoid these costs guides their conduct, incentivizing them to act optimally to maximize the public interest.

Consequently, the arguments against applying tort law to public sector tortfeasors—based on the distinction between the tortfeasor and between the agency actually paying the costs—hold when the **stage of the imposition of liability** is isolated and is the sole focus. However, at the **stage of the**

[18] For similar arguments on the deterrence of potential public sector tortfeasors by the risk of reputational damage as a result of the imposition of tortious accountability, see CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 22 (John M. Conley & Lynn Mather eds., 2009); Kishanthi Parella, *Reputational Regulation*, 67 DUKE L.J. 907, 923 (2018); Robert Dijkstra, Essays on Financial Supervisory Liability 1, 129 (Oct. 13, 2015) (Ph.D. dissertation, Tilburg University) (on file with author). *See also* Robert Cooter & Ariel Porat, *Should Courts Deduct Nonlegal Sanctions from Damages?* 30 J. LEGAL STUD. 401, 401 (2001) (asserting that the tortfeasors' overall liability equals the compensation amount with the addition of nonlegal sanctions). In this immediate context, Shapira demonstrates that the law and personal reputation are not independent, but rather complementary systems. *See* Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193, 1203–04 (2016). Theoretically, Shapira's position can be identified with a theoretical movement that adopts reputation-based arguments in order to explain why—in spite of short-term personal biases and interests (according to the theory of public choice)—government continues to function. *See* David Zaring, *Regulating by Repute*, 110 MICH. L. REV. 1003–05 (2012). For example, Guzman maintains that fear of a bad reputation is what makes states obey international law, even when disobedience suits their political interests better. *See* ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 71–72 (2008). In this context, Lax asserts that considerations of reputation explain part of the strategic votes of U.S. Supreme Court justices on whether to grant a writ of *certiorari*. *See* Jeffrey R. Lax, *Certiorari and Compliance in the Judicial Hierarchy: Discretion, Reputation, and the Rule of Four*, 15 J. THEORETICAL POL. 61 (2003). Rose found that the U.S. Securities and Exchange Commission viewed considerations of reputation to be a key factor influencing obeyance of its regulations. *See* Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2222 (2010).

investigation of accountability—even if it should be imposed on the agency—is the action of the public official that will be under court investigation, and the public will hear of the conduct. The stage of the imposition of accountability—that of the court declaration that a public official was negligent, and their labeling as such—is extremely personal, and the political (compared with the financial) price that the public official will be forced to pay as a result is also personal. In other words, the institutional setting within which public officials function supplies a good security net at the stage of the imposition of liability in that it is the former, not the latter, that pays the injured party. However, it only extends partial protection prior to this, at the stage of the imposition of accountability. This protection does not prevent the official's conduct from being publicly exposed. Nor is it capable of nullifying the public criticism that will follow fast on the heels of a negligent label. It is a financial, not a political, shield and, as noted, is powerless to nullify the political price that the public official will have to pay. Thus, although traditional tortious accountability is the institutional responsibility of the agency, it is the employee's action that will be the focus of the legal proceeding investigating the issue of accountability. This suffices to generate private guidance and to create effective incentives to act optimally.

B. Level of the Agency as a Social Actor: Central Guidance

Why devote a separate subsection to the level of the public agency as a social actor, isolating it from the discussion on the public official as a private person? First, a separate establishment of the arguments relating to each makes it possible to disconnect them. Thus, non-acceptance of my conclusions with respect to the deterrence of public officials will not influence the establishment of my argument with respect to the deterrence of agencies. Moreover, this article strengthens the relationship between the two. In this subsection, this article argues that the intentionality of the agency leads directly to the correction of the acts of the public official and,

consequently, the analysis of the agency as a social actor—and establishment of my argument with respect to central guidance—has an independent, important purpose. This article's intention is to emphasize that the capacity of tort law to yield central guidance, and thus guide the agency's actions—by means of its characteristics as a social actor—is of enormous significance in situations where private guidance cannot be generated to effectively deter the public official. The deterred agency, striving to act optimally (to maximize the public interest), will not allow the public official to realize their suboptimal aspirations (which are motivated by personal interest, according to the theory of public choice).

In order to create effective private guidance, the public official must have been elected to their position and be motivated by political incentives. In addition, they must be center stage, under court investigation. For example, there are two major situations where there is concern that effective private guidance is unattainable. In the first, the public official is not an elected official and is not motivated by political incentives (even if liable to be under court investigation should they act sub-optimally). In the second situation, the public official is not under court investigation (even if motivated by political incentives). This article will expand a little on each situation.

In the **first situation**, the public official does not have great political aspirations and, therefore, the risk of being under court investigation would not deter them. They were not elected to their position and are not motivated by political incentives—the voices of the voters. Indeed, most of the various government systems are not comprised of elected officials but of bureaucrats appointed by the government. It is difficult to predict the impact of tortious labeling on the conduct of such clerks, bureaucrats, and those acting on behalf of the State who are not elected officials, while it is the conduct of the elected officials that such labeling purports to guide.

In the **second situation**, it is frequently the case that the public official is not the only one liable under court investigation. A familiar phenomenon is that the entity that produced the tortious conduct is an intricate, branched-out

system that cannot be easily broken down or separated. A large part of government activity is the product of such a complex system of numerous public officials, none of whom would be liable to stand alone under court investigation. Such a scenario is more common and conspicuous the larger and more intricate the structure of the public agency in question.

In view of these situations where, presumably, effective private deterrence would be unattainable, the need arises for central guidance, that is, the deterrence of the agency as a social actor that, in turn, would forestall the public official's suboptimal aspirations. To understand how tort law is capable of measuring up to the task of effectively deterring the agency, the ensuing discussion will be based on two intertwined levels. In the first, this article proposes viewing the public agency as a social actor aspiring for a good reputation, political survival, and bureaucratic autonomy. In the second, this article analyzes the importance of breaking down the effects of the application of tort law into two—that of the imposition of accountability and that of the imposition of liability. These two levels will be discussed separately, ultimately combining into one overall argument, whose essence is that public agencies, as social actors, attach great importance to not being found or labeled negligent, and this Damoclean sword that hangs over them serves to deter them and effectively guide their conduct. As a result, the intentional aspiration of public agencies to act optimally can forestall the intentional aspiration of public officials to act sub-optimally. This article will broaden the scope of the discussion on this fundamental argument.

There is no disputing the fact that it is possible to guide the conduct of profit-maximizing privately owned corporations by means of tort law through the **provisions for compensation**. In this subsection, this article maintains that tort law is also capable of guiding the conduct of "public corporations"— through **the rules of accountability**. The perception of the agency as a social actor is crucial with regard to the question of how decision-making processes are shaped by the agency.

The perception of the agency as a social actor assumes that it is self-sufficient. This article refers to "self-sufficiency" as the characteristic that enables the agency to function as an autonomous social actor. The agency is invested with self-sufficiency and has the power to make its own decisions.[19] It is able to determine the composition of its workforce, determine what measures they adopt, and is authorized to act without the consent of its whole workforce even when these actions do not fall in line with the personal interest of the public official.[20] As Coleman argues, an agency's self-sufficiency is created by means of collective concessions by its members, who sacrifice part of their rights in favor of the organizational actor. By relinquishing their personal self-sufficiency for the sake of organizational self-sufficiency, individuals force constraints on their own personal freedom, empowering the organization to act as an autonomous social actor.[21] Therefore the agency's self-sufficiency can be viewed in terms of power. The agency is empowered to determine the characteristics of its employees and has the ability to reward certain types of conduct and punish others. In addition, it has the power to determine which positions will be filled by its employees and how they perform them. The focus on positions—and not on the persons staffing them—is an important element in the make-up of the agency.[22] In organizational environments, the personal preferences of individuals are, or should be, put aside, and the collective considers what "we" as a public agency must do.[23] This characteristic of organizational self-

[19] *See* JAMES S. COLEMAN, THE ASYMMETRIC SOCIETY 161–71 (1982) (discussing a fundamental approach to decision-making).
[20] *See* EDWARD O. LAUMANN & DAVID KNOKE, THE ORGANIZATIONAL STATE: SOCIAL CHOICE IN NATIONAL POLICY DOMAINS (1987).
[21] *See* Coleman, *supra* note 19, at 165–71.
[22] Brayden G. King, Teppo Felin & David A. Whetten, *Perspective—Finding the Organization in Organizational Theory: A Meta-Theory of the Organization as a Social Actor*, 21 ORG. SCI. 290, 293 (2010).
[23] Natalie Gold & Robert Sugden, *Collective Intentions and Team Agency*, 104 J. PHIL. 109, 128–37 (2007).

sufficiency enables the agency to coordinate the conduct of its workforce and to produce the intended results.[24]

It follows that the agency's self-sufficiency is reflected in its decision-making and in its ability to control the actions of its members (in both theory and practice). This self-sufficiency results from its ability to guide its members' conduct and to cause them to act in certain ways, even if they would not act like that under different circumstances. The tasks and goals of the agency, the practices, and the authority it extends to its team generate modes of conduct that can be ascribed to the agency and not to a single member.[25] Consequently, it can, and should, be viewed as accountable by law for the outcome of this conduct.[26] Moreover, organizational research views the self-sufficient agency as a social actor that is deterred by the very possibility of the court declaring and labeling it negligent.

Organizational research proposes viewing self-sufficient organizations as social actors, arguing that two important characteristics are attributable to them:[27] (1) external attribution, which seeks to explain the motivations of organizations and the way they act on the basis of factors external to them; and (2) intentionality, according to which organizations have their own unique intentions and the ability to act in line with them. Therefore, the public can perceive an organization as a type of social actor that is influenced by factors external to it and is capable of processing these data and of acting in

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[24] *See* King et al., *supra* note 22, at 293–95.

[25] The imposition of accountability on the agency testifies to the belief that it possesses the ability to take the initiative, and consequently, is the one that could and should have acted differently. *See* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOCIO. REV. 147 (1983).

[26] The theory of social actors refers to three kinds of actors in modern society: individuals, organizations, and state. *See* King et al., *supra* note 22, at 297; John W. Meyer & Ronald L. Jepperson, *The "Actors" of Modern Society: The Cultural Construction of Social Agency*, 18 SOCIO. THEORY 100–02 (2000). Therefore, the application of this theory—originally only with respect to the state itself, as noted— is also imperative in the case of public agencies.

[27] King et al., *supra* note 21, at 290.

a deliberate, intentional manner.[28] As previously indicated, since public agencies can be viewed as self-sufficient organizations, these characteristics are attributable to them, too, and they can be acknowledged as "social actors."

Additionally, this article examines the significance of defining agencies as social actors. For this inquiry, this article will focus on two important characteristics of self-sufficient organizations—external attribution and intentionality.

The characteristic of external attribution assumes the agency has constant interaction with the external world and that it attributes great importance to the question of how the world perceives it.[29] Self-sufficient social actors are capable of making independent decisions; therefore, society views them as accountable for those decisions.[30] According to the characteristic of external attribution, actors must perceive other social actors as acting autonomously and as being accountable for their decisions and actions.[31] Indeed, our language reflects a reality where agencies are perceived by third parties as acting and being accountable for their actions. In everyday language, we tend to say, "so-and-so signed an agreement with the manager," "such-and-such government office let dozens of employees go," and "the agency acted irresponsibly." This linguistic reality corresponds with the concept in organizational identity theory that organizations have a unique "behavioral signature" and clear decision-making patterns.[32] This is also

[28] *See* Paul Ingram & Karen Clay, *The Choice-Within-Constraints New Institutionalism and Implications for Sociology*, 26 ANN. REV. SOC. 525 (2000), http://www.columbia.edu/~pi17/525.pdf [https://perma.cc/HCS5-B26T]; David A. Whetten, *Albert and Whetten Revisited: Strengthening the Concept of Organizational Identity,* 15 J. MGMT. INQUIRY 219 (2006).

[29] King, Felin & Whetten, *supra* note 22, at 297.

[30] *Id*. at 292.

[31] *Id*.

[32] *Id*. Although it can be argued that the more closely the agency is tied to a political factor— due to hierarchical subordination, by being subject to policy or by appointment procedures—the less autonomous it will be perceived to be, and vice versa. Its definition as a "social actor" will be weakened or strengthened accordingly. Therefore, caution must

Coleman's logic, according to which organizations are social actors because society bestows this status on them.[33] The agency's status derives largely from the expectations of the public, which views it as accountable for its actions.[34] Concepts such as image and reputation, which in common usage are in connection with public agencies, also attest to the fact that the public perceives them as accountable for their actions—a situation that, according to the organizational research literature, they are sensitive to.[35] Since agencies are responsible for the realization of the goals for which they were established, third parties hold them accountable when they fail in this respect.[36] A declaration that an agency failed or was negligent is no trivial matter. Research conducted on the course of life of organizations determined that agencies go through maturation stages similar to "natural persons,"[37] while various theoretical models define organizations as unique actors that experience birth and are particularly concerned that, should they fail to act optimally, they are destined for extinction.[38]

The understanding that organizations acknowledge the environment's expectations of them and aspire to survive and maintain bureaucratic autonomy has led organizational theory to determine that social actors are capable of intentional conduct. This is the **characteristic of intentionality**,

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be exercised, and the relationship between it and its superiors must be weighed when applying to it the characteristics of a "social actor."

[33] JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY (2019). *See also* BARBARA CZARNIAWSKA, NARRATING THE ORGANIZATION: DRAMAS OF INSTITUTIONAL IDENTITY (1997).

[34] ZYGMUNT BAUMAN & TIM MAY, THINKING SOCIOLOGICALLY (2d ed. 2001).

[35] *See* CHARLES J. FOMBRUN, REPUTATION: REALIZING VALUE FROM THE CORPORATE IMAGE (1996); Charles J. Fombrun & Mark Shanley, *What's in a Name? Reputation Building and Corporate Strategy*, 33 ACAD. MGMT. J. 233, 234–35, (1990).

[36] Barbara S. Romzek & Melvin J. Dubnick, *Accountability in the Public Sector: Lessons from the Challenger Tragedy*, 47 PUB. ADMIN. REV. 227, 233–34, (1987).

[37] Andrew H. Van de Van & Marshal S. Poole, *Explaining Change and Development in Organizations*, 20 ACAD. MGMT REV. 510 (1995).

[38] MICHAEL T. HANNAH & JOHN FREEMAN, ORGANIZATIONAL ECOLOGY 36 (1989) (ebook). See also the course of life of agencies in MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION, 163–64 (1955).

according to which agencies have some form of intention on which their decision-making is based.[39] Researchers postulate that organizations have intentions that are independent of the beliefs, preferences, goals, and personal values of the individuals constituting them[40] and have a unique self-vision[41] and self-discipline.[42] It also follows that public agencies have unique identities that define them and legitimize their existence.[43] The goals the organization is responsible for achieving and the values it is designed to instill are what consolidate its identity and delineate its intentions.[44] In this context, organizational theories maintain that the actions of the organization stem from their "self-vision," that is, from that same perspective that directs the actions and guides the conduct of its members. The organization's self-vision is reflected in its tendency towards goal-directed action, its official public goals serving as a conduct guide for its members.[45] These goals provide the members of the organization with criteria for judging the appropriateness of the agency's conduct and of their strategies. These goals also provide them with a justification for their conduct and enable individuals within the organization to evaluate its performance. Individuals outside the organization can use this method to evaluate its performance as well. Failure to realize these goals, and a declaration that the organization was negligent in its mission to realize them, is liable to endanger its survival. Consequently,

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[39] King et al., *supra* note 22, at 292.
[40] *Id*. at 294.
[41] Whetten, *supra* note 28.
[42] Peter J. Burke, *The Self: Measurement Requirements from an Interactionist Perspective*, 43 SOC. PSYCH. Q. 18 (1980).
[43] *See* David A. Whetten & Alison Mackey, *A Social Actor Conception of Organizational Identity and its Implications for the Study of Organizational Reputation*, 41 BUS. SOC. 393 (2002).
[44] See also the fundamental argument in PHILIP SELZNICK, LEADERSHIP IN ADMINISTRATION: A SOCIOLOGICAL INTERPRETATION (1957).
[45] *See*, *e.g.*, Charles Perrow, *The Analysis of Goals in Complex Organization*, 26 AM. SOCIO. REV. 854 (1961).

the threat of a court declaration that the organization was negligent serves as a highly powerful tool for guiding the conduct of its members.[46]

What are the implications of the perception of agencies as social actors characterized by external attribution and intentionality? The answer to this question is connected to the need to break down the tortious effect.[47] This step is essential in order to correctly evaluate the deterrent power of tort law. Most of the relevant professional literature to date has related and continues to relate tort law as a homogenous whole and has devoted insufficient attention to the importance of distinguishing between the stage of the imposition of accountability and that of the imposition of liability.[48] This article has presented the criticism voiced in the professional literature, questioning the deterrent power of **the provisions for compensation in tort law**. According to this criticism, the imposition of liability does not effectively guide the conduct of potential public sector tortfeasors because the latter have abundant financial resources, are not in any case paying out of their own pockets the compensation adjudged, are incentivized by political rather than by financial considerations, and so forth. However, **the rules of tort accountability**—the stage prior to the application of the provisions for compensation, where the defendant is found to be negligent and labeled accordingly—is all-powerful in guiding conduct when it is a matter of potential tortfeasors in the public sector. Tort law is not only "compensation law"—it is also "labeling law".

This is the point where the first level (the public agency, as a social actor, characterized by aspirations for a good reputation, political survival, and bureaucratic autonomy, and capable of goal-directed action) and the second

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[46] *See, e.g.*, John Freeman, Glenn R. Carroll & Michael T. Hannan, *The Liability of Newness: Age Dependence in Organizational Death Rates*, 48 AM. SOCIO. REV. 692 (1983).

[47] *See* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 859 (2001).

[48] *See* Levinson, *supra* note 9 (focusing on the problematic nature of the compensation tool in deterring the state, not on the labeling tool, which are the rules of accountability).

level (the tortious effect broken down into two components, the imposition of accountability and the imposition of liability) are intertwined, forming one basic argument whose essence is as follows: Public agencies, as social actors, attribute great importance to not being found negligent or labeled as such, and it is this Damoclean sword that deters them, guides their conduct effectively, and may remedy the failures of the public official. In instances where the public official is indeed likely to aspire to act sub-optimally, the deterred agency will not allow it, and they will be incapable of realizing their aspirations. In fact, scholars have found that public agencies aspire to maximize their status and increase their power,[49] government decisions are influenced by motives of department enhancement,[50] and agencies attach the utmost importance to their public image.[51] Consequently, the agency's reputation plays a decisive role in its conduct. Public and political criticism is likely to follow in the wake of a court ruling that an agency was negligent. This damage, in turn, is liable to lead to a diminishment of its powers, to a cut in its resources and, in extreme cases—to its elimination. These explanations are likely to make a crucial contribution to appreciating the fact that the avoidance of being labeled negligent by a tort court is of the utmost importance to agencies due to their aspirations to maintain their status, continue to survive politically, and gain a positive reputation. This deterrence of public agencies by means of tort law makes it very difficult for public

[49] *See* WILLIAM A. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971); *see also* William A. Niskanen, *Bureaucrats and Politicians*, 18 J.L. & ECON. 617 (1975); Jean-Luc Migue & Gerard Belanger, *Toward a General Theory of Managerial Discretion,* 17 PUB. CHOICE 27, 28 (1974).

[50] *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

[51] See also the findings in Daniel P. Carpenter*, State Building Through Reputation Building: Coalitions of Esteem and Program Innovation in National Postal System*, 1883–1913, 14 STUD. AM. POL. DEV. 121 (2001); DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928 (2001).

officials within a public agency to act sub-optimally and can be expected to remedy their failures.

There are clear advantages to the agency's liability as a social actor, particularly with respect how its properties influence various processes, and more importantly, its decision-making. Organizational decision-making is a process that is shaped by the source from which the organization's self-sufficiency derives and to which it is accountable.[52] In the case of public agencies, it is the general public. They are accountable to it and meant to serve it. Moreover, the goals set are an important mechanism according to the decisions made.[53] The perception of the agency as a social actor is crucial, since it contributes to our understanding of public actors' decision-making process.[54] A court declaration that an agency was negligent spotlights its failure to realize its goals. It can be presumed that this is invaluable in guiding conduct, influencing the decision-making process. The perception of the public agency as a social actor, and the latter's understanding, stress the fact that it is aware of the purpose for which it was created and aspires not to be defeated in the legal, public, and mass media spheres. This fact underlies its decision-making processes and guides its conduct. Indeed, public agencies are capable of acting purposefully and intentionally, independent of the beliefs, preferences, and personal goals of the individuals constituting them.

C. Summary

In tort law, it is customary to identify the term "deterrence" with a sanction imposed on tortfeasors that reduces or prevents the damage risks created or liable to be created by them. Although criticisms relating to issues with the imposition of damages serving as a conduct guide in the public sector are valid, the utilization of tort law to that end is justifiable on the grounds of

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[52] King et al., *supra* note 22, at 300.
[53] *Id*.
[54] *See, e.g.*, Chip Heath & Sim B. Sitkin, *Big-B Versus Big-O: What Is Organizational About Organizational Behavior*? 22 J. ORG. BEHAV. 43 (2001).

deterrence. This is justifiable due to the component of accountability, which is a component of tort law, in addition to damages. Thus, the threat of the imposition of tort accountability serves to correct the potential sub-optimal acts of public officials, since they are deterred by the very possibility of being center stage under court investigation, even should damages not be imposed on them, due to the importance they attribute to their public status.

Moreover, even when the public officials cannot be deterred because they do not attribute much importance to their public status or are not liable to be alone and center stage, the agency itself is likely to be deterred by the threat of the imposition of accountability. Consequently, the agency can be expected to take measures to prevent the public officials from acting sub-optimally. Since agencies attribute the utmost importance to their public image, and given their continuous aspiration to survive and maintain their bureaucratic autonomy, it can be assumed that their response to the risks of being held accountable would generate an internal system for drawing conclusions and adopting decision-making procedures more sensitive to the extent of the potential for harm generated by the activity of its functionaries. Agencies facing the risk of being held accountable can be expected to implement risk management procedures, to adopt supervisory measures, to identify possible exposure to accidents, and to take action to minimize the probability of their existence. Such responses are likely to include, for example, best-practice programs for the selection and training of employees and the implementation of procedures that link their salary and promotion options to the costs created by them. Thus, it emerges from the findings of organizational theory that public agencies, which can be ascribed the characteristics of social actors and accordingly attribute the utmost importance to their public image (external attribution) and are capable of self-guidance (intentionality)— will be deterred by the risk of being held accountable and will adopt measures to correct the failures of the public official.

IV. Conclusion

This article analyzed tort law's ability to effectively guide the actions of public officials and agencies. The proposal of separating tort judgments into two components, the imposition of accountability and the imposition of liability, leads to the conclusion that the threat of the imposition of accountability and of the public official being accordingly labeled negligent suffices to effectively guide their conduct. An important perspective is thereby added to the discourse on the deterrent power of tort law. Until now, this discourse was dominated mainly by the paradigm of the economic analysis of the litigation process and focused on the component of financial sanctions, which ignored, to some extent, the imposition of accountability.

This discussion began by arguing that the proposal to utilize tort law to guide government conduct is attractive when suboptimal conduct is uncovered. This article explained that, according to the theory of public choice, public officials do not always act optimally. This conclusion led to recognition of the need to guide their conduct. Next, this article analyzed the major issues of a theory that views tort law as an effective deterrence tool in such an environment. This relates to the fact that tortfeasors in the public sector do not personally incur the payment of damages imposed on them and respond less to market incentives than to political incentives. Therefore, according to this argument, tort law is unsuitable in a field in which actors are employees in the public sector, and it will have a hard time deterring them and effectively guiding their conduct.

Although this article accepted the criticism of deterrence theory and adopted the assumption that potential tortfeasors in the public sector are not likely to respond in the same manner to the risk of the imposition of damages as those in the private sector, this article demonstrated that, as a deterrent, tort law can still be used for the purpose of guiding their actions. This is due to the heavy price that the imposition of accountability by a court of law is likely to exact from the public official and agency as social actors. Phrased differently, when deterrent power is ascribed to tort law merely with respect

to the imposition of liability, it may indeed have a hard time guiding the conduct of employees in the public sector. However, when the deterrent power of tort law is examined from the aspect the imposition of accountability, different conclusions are likely to be reached.

At this point, this article has demonstrated that the declaration and labeling of an agency and its employees as negligent is indeed capable of exacting a heavy price from them in the public sphere. This is declaratory guidance, which minimizes harms without detracting from the benefit it holds, even should the liability of the public-sector tortfeasor be merely partial. Tort law enables parties injured by government activity to signal the harm caused to them and to bring it to the attention of public-sector tortfeasors. Thus, the latter are not indifferent to these signals. In this context, the capacity of tort law to guide the actions of agencies by way of their characteristics as social actors is of the utmost importance even when the public official cannot be effectively deterred. This is primarily because agencies desire to avoid negative labeling. As a result, their ability to intentionally act optimally remedies the failures of the public official.

My conclusion, stated above, derives from recognition that public officials attribute the utmost importance to their public reputation and, as a result, can be expected to be deterred by being center stage, under court investigation (even if not personally incurring the actual payment of the financial compensation). My conclusion also derives from recognition that public agencies function as social actors and that the characteristics of "external attribution" and "intentionality" can be ascribed to them. These two characteristics render them susceptible to the external approval of the public, leading them to direct their conduct accordingly. Thus, public agencies are deterred by the risk of being labeled negligent at the stage of the imposition of accountability and their desire to avoid this guides their conduct, motivating them to internalize the public costs of potentially negligent conduct. Moreover, the desire of agencies to avoid negative labeling and their ability to intentionally act optimally remedy the failures of the public official

aspiring to act sub-optimally. The imposition of tort accountability in the world of government "accidents" is an important tool when the goal is to guide government conduct and generate effective deterrence.

Therefore, the Damoclean sword of tort accountability must be distinguished from liability because it keeps agencies and their employees on their toes, incentivizing them to act optimally. Public agencies and their employees are entrusted with enormous power, and this must be constrained and monitored in order to protect the individuals exposed to it. Tort law serves the interests of the public and of the public agency alike. It makes a vital contribution to the deterrence of public officials and agencies, even if this goal is not easily achievable and even if it does not do so perfectly.