

Resumé of the Colloquium

by

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On 28, 29 and 30 May, 1980 there was held in London the seventh Colloquium of the Councils of State and of the Supreme Courts of Justice of the member States of the European Community.

The subject matter for discussion was "The power of the Courts - both superior and inferior Courts and bodies exercising quasi-judicial functions- to award damages in administrative actions".

The Right Honourable Lord Diplock presided over the Colloquium, which was held in Church House, London. Reports were presented by the delegations from each of the member countries.

It was accepted that the term 'administrative action' had been adopted to include under one general heading a review of the laws governing the liability of administrative bodies to pay damages for torts committed by them or their officials, for breaches of contract entered into by them, and also their liability to pay compensation for injury caused by them without legal fault.

Liability in Tort

There was general agreement by all the delegations that liability in tort was based on 'fault', whether that fault was defined as negligence, culpability, intentional wrong-doing or imprudence. Before an administrative body could be made liable in damages, a claimant had to prove 'fault'. In France there is in process of development a further ground of liability based on 'risk'. In practice it is easier to establish liability based on 'risk' than on 'fault'. For this reason one must wait to see how far this new ground of liability will be developed, because it might prove financially too costly for the administration.

Understandably there was rather less agreement among the Member States as to the degree of fault necessary to establish liability. Recent decisions in England have tended to show that the test is: was the administrative decision one which no reasonable administrative authority could have come to. In Holland in a number of judgments the Courts have decided that a similar test should be applied, and throughout the various countries the test of what is reasonable seems to have been adopted. In Italy the basis of liability is: was the decision illegal. In Germany up to the present time liability is based on intentional wrong-doing or culpability. But there is a Bill before the Federal Parliament which would make the administration liable for damage caused by its officials irrespective of whether a misdemeanour had been committed or not. If this becomes law, it is possible that for financial reasons there may have to be imposed certain limitations.

The liability of administrative authorities for the acts and omissions of their officials

Again there was general agreement that in all member States administrative authorities were liable in damages for the wrongful acts and omissions of their officials acting within the scope of their authority. Although in certain cases the officials were also personally liable, yet in practice, and for obvious reasons it was the administrative body alone that was sued. The personal liability of the official was felt to be largely of purely academic interest, since the administrative body invariably accepted responsibility for the acts of its officials committed within the scope of their authority.

In a number of cases an administrative body, made liable in damages for the acts or omissions of its officials, has a right to recover such damages from the official responsible. Again this right is largely academic, and in a number of member States there are statutory limitations placed on such

right. Thus in Belgium an administrative body can only recover from its official, if the latter has been guilty of a serious misdemeanour, or in Germany if the official has been guilty of intentional wrong-doing or of really serious fault.

The extent to which Courts take into account the limited financial resources at the disposal of a public authority when deciding whether or not the authority has been guilty of tort

There the discussion showed a divergence of views.

In England unlike all other Member States, the financial resource at the disposal of an authority can be taken into account in deciding whether or not that authority has committed a tort.

Liability in Contract

In England, there being no separate system of administrative law, the administrative contract in the sense that it is known in certain continental countries does not exist, and the same laws apply to all contracts whether they are entered into between private individuals or between private individuals and the administration. The same rule applies in Ireland, but it was pointed out by the Irish Delegation that if a contract entered into was ultra vires the powers of the administration then that contract was completely void.

In Denmark and Italy no distinction is made between private and public contracts and the same rules applied to all.

The position is far different in France. Contracts between a private individual and the administration could fall into two classes (a) contracts which were governed by the civil law and which were justiciable before the civil courts and (b) administrative contracts. There was a marked difference between the laws applying to these two kinds of contracts. In the case of the administrative contract the interests of the State are always regarded as of the utmost importance and in theory at least the administration could terminate or modify the terms of the contract if the needs of the State so required compensation being paid to the other party. In practice, however, such contracts are seldom altered or modified by the administration because provision is made in the contract which obviates the necessity of such alterations and modifications.

In Germany, Belgium and Holland the Courts recognise the existence of administrative contracts.

Employment of Civil Servants

It would appear that in all the Member States civil servants are appointed under the provisions of various statutes and there exists no contract of employment between them and the State. Although there is no contract, yet it would appear that the rights of civil servants, as to salaries, pensions, terms of employment etc, are always adequately protected. This broad statement that civil servants are appointed under statute should be qualified by saying that in many of the countries, there are various categories of public servants who are employed under the terms of specific contracts and whose rights are decided by those contracts. In England public servants in the employment of local authorities are employed under contract. Public servants employed by nationalised industries also are employed by contract. But in the case of civil servants employed by organs of the central government, they are appointed and hold office at the pleasure of the Crown, and not under contract.

Judicial Immunity

This varies from country to country but in all Member States in order to preserve the independence of the judiciary a very large measure of immunity against being sued for damages for acts done in the courts in

the course of their judicial duties is granted. In England, Ireland and Holland that immunity is absolute. In France, Belgium and Luxembourg, under the doctrine of *prise à partie* judges can be made liable in cases of (a) fraud (b) if there is an express provision by the law that they can be made liable (c) if there is a denial of justice. In France a special law makes it possible for the State to be made liable for gross negligence by a judge and, also if there is a denial of justice. In Italy they can be made liable for gross negligence in carrying out their duties. In Germany a judge can only be made liable if there is a deliberate infringement of the law by him.

Enforcement of the award of damages against the administration

This question is largely academic because it was stressed by the delegates of all Member States that the administration would always honour the judgments of the courts.

There was a divergence of views as to whether, in the unlikely event of the administration refusing to honour the judgment of the courts, execution could be levied on its property.

In England if the administration refused to pay damages awarded against it or in any other way declined to carry out the terms of the judgment, execution could be levied in the normal way, except against the Crown which has absolute immunity from execution.

Execution can be levied in the normal way in Ireland, Holland and Denmark.

In France however, the administration cannot be compelled to obey the order of a court by the ordinary method of execution. In practice however, the real problem is not one of refusal to obey but in the delay of payment of damages. An administrative body which delayed the payment of damages, would have to pay interest on such damages, and if the delay was really substantial then a further action could be brought on the previous judgment. Steps are now being taken to accelerate the payment of damages.

In Luxembourg no execution is possible against an administrative body and in principle the same is true of Belgium.

In Germany execution can be levied against an administrative authority, but before this is done, the approval of the court must be obtained, and the authority is given a period of one month to obey the order of the court.

Compensation for the Appropriation of Land and other property by the State

This is allowed in all countries subject to suitable compensation being payable. In some countries, before land can be appropriated by the State an inquiry has to be held and in all countries there is laid down by statute rules to protect interests of the citizen. The procedure, and rules governing appropriation of property, and the amount of compensation payable varies from country to country and in a short resumé it is impossible to go into any details concerning this aspect of the question.

Compensation for Injury legally caused by the administration to the interests of others

This was the last subject discussed by the delegations and it was a very wide one. Numbers of specific cases were given by the various delegates into which it is impossible in this short resumé to go but broadly speaking if the administrative act was legal, then although injury might be caused, no compensation was payable. It does appear, however, under the broad principles of *égalité*, in a certain limited class of cases, compensation might be claimed. These cases vary from State to State.