

REPORT FROM DENMARK

Presented by

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1. INTRODUCTION

The Danish statute book contains no general provision on liability in damages of public authorities. Only within specific fields of law do we find statutory rules on such liability. As for example in the provisions of the Judicial Registration Act under which, inter alia, public authorities will be liable for errors and omissions occurring in entries made in the Judicial Registration Books; - in the provisions of the Administration of Justice Act on compensation for wrongful arrest and detention, and (according to circumstances) for other measures taken in criminal proceedings; - and in the provisions of the Road Traffic Act on compensation for wrongful cancellation of driving licences. The general presumption has always been that such specific provisions shall not be taken to be an exhaustive enumeration of instances where public authorities may be held liable in damages.

The Danish rules on public liability in damages for tortious acts and omissions originate from - and do still in every essential follow - the general principles on (civil law) liability in damages. Of particular significance in this respect is the provision contained in the "Danish Law" dating from 1683, D.L. 3-19-2, under which an employer is liable to the extent that his servant may be held liable for a tort committed in the course of his employment.

In the case of activities of a civil law character undertaken by public authorities, Danish law has always acknowledged that such authorities (including central government) are liable in tort in the same manner as private individuals. On the other hand, until the middle of the twentieth century, decided cases and writers on law assumed - on the basis of an Order in Council dated 1828 - that central government could not be held liable for damage caused in the exercise of its public law functions (its exercise of statutory powers). In 1943, however, it was held in a Supreme Court judgment that central government is in principle liable also in such cases. In that judgment, central government was held liable for damage negligently caused by a factory inspector during his testing of a printing machine.

2. WHAT IS MEANT BY THE TERM 'ADMINISTRATIVE ACTION'?

The question of awarding of damages against public authorities because of their tortious acts or omissions will usually be raised during legal proceedings brought by the aggrieved party against the competent authority. (The text below deals exclusively with administrative authorities). The action may be brought solely on the question of damages, but not infrequently - in respect of tortious decisions - the question will be raised as an alternative submission in an action that primarily seeks to avoid a decision made. This has been the case in a number of actions brought in respect of wrongful dismissal of public employees. Here the plaintiffs have principally claimed avoidance of dismissal (contending they were still employed), and only in the alternative have they claimed damages (ie if avoidance of dismissal could not be obtained).

Also where, through legal action brought against a private individual, a public authority seeks to enforce an administrative decision, a claim for damages may possibly be set up.

On the character of the (*administrative*) activity that possibly may cause public authorities to be liable in damages, the following should be noted:

Firstly, a public authority may be liable in tort for *acts (physically) done or omitted*. Not only in the cases where public authorities act in the same way as private individuals (as for instance when driving a motorcar or overseeing the state of repairs of a building) but also where the act physically done indicates exercise of statutory powers and thus has no parallel in civil law. An example would be the use of force by the police.

Secondly, case law has established that administrative authorities may be held liable in damages for the making of tortious *decisions* (cf. re 4(a) and (b) below), and presumably according to the circumstances also for omitting to make a decision (cf. re 4(e) below).

An intermediate situation would be where an administrative authority gives *advance notice* of how a specific matter may be expected to be decided (eg in reply to an enquiry as to the consequences for taxation purposes of a specific transaction or as to possible planning permission for an intended housing project). Under Danish law, the administrative authorities are presumed to be liable - under the rules discussed under 're 4' below - for errors and omissions in respect of the giving of advance notices. Conversely, it is not clear if the authorities will also - for reasons of credibility - be liable in instances where the contents of an advance notice given are not adopted as the basis of the final administrative decision.

Also errors and omissions connected with public authorities' exercise of *service activities* may cause liability in damages.

3. IN WHAT COURTS OR TRIBUNALS EXERCISING QUASI-JUDICIAL FUNCTIONS CAN ADMINISTRATIVE ACTIONS BE BROUGHT?

Are there specialised administrative courts or tribunals which alone have jurisdiction to hear and determine actions, or are the ordinary courts competent to hear such actions?

Are there any special rules of procedure which are applicable only in administrative actions?

In Denmark, it is the ordinary courts that exercise judicial control and review of acts and decisions made by the administrative authorities. Thus, Denmark has not - irrespective of the Constitutional possibility - set up special administrative courts for the hearing and determination of such actions. This means that generally speaking it is the ordinary courts that will determine claims for damages brought against public authorities on account of their activities. Within specific fields of the law, however, the possibility exists to have the question of public authorities' liability in damages heard by independent administrative boards, but awards made by such boards will usually be subject to review by the ordinary courts. As an illustration of such special cases may be mentioned the valuation boards and valuation review boards (broadly 'Land Tribunals') operated in connection with compulsory purchases.

The adjectival rules on hearings of claims for compensation brought against public authorities are the same as for civil law actions generally, ie the ordinary rules of procedure as laid down by the Administration of Justice Act. However, special rules apply to the hearing of *inter alia*, claims for compensation connected with false imprisonment.

4. WHAT IS THE LIABILITY OF A PUBLIC AUTHORITY TO PAY DAMAGES FOR TORTS COMMITTED BY IT OR BY ITS SERVANTS CAUSING INJURY?

(a) What are the general principles governing such liability?

(b) Will a public authority be liable for torts committed by its servants?

(i) As mentioned in the introduction, liability in damages of public authorities for tortious acts is founded on the principle of vicarious liability that also under civil law rules has developed on the basis of the provision of D.L. 3-19-2. This liability is based on *culpability*, ie it presupposes the occurrence of errors or omissions in connection with performance of activities by public authorities. The requirement of culpability and the fact that in principle it is a question of liability,

does not, however, mean that the public authority will be liable in damages only where one of its servants would himself be liable under the ordinary rules on compensation. A public authority may thus be held liable for torts committed jointly by several of its servants ('cumulative tort') irrespective of whether any single servant could be held individually liable, and also for errors and omissions where liability could not be placed with any individual servant at all ('anonymous tort'). Further, a public authority may be held liable for damage caused by failure of the administrative machinery even where no mistake of error made by an individual servant can be shown. In 1956, a Supreme Court judgment ordered central government to pay compensation for such part of a damage caused by fire as could have been avoided, had the fire alarm system operated effectively.

While further reference is made to the answers given to the next following questions, the below remarks on assessment of culpability should be noted:

The subject matter of assessment of culpability - taken in its above-mentioned strict sense - cannot be given in general terms but have to be established within each particular field of law on the basis of an assessment of the character of and the basis for the acts and omissions of public authorities. Errors made in connection with restrictive measures taken against the public at large (such as prohibitory or mandatory regulations, restrictions on personal freedom) will usually not presuppose any strict demand to assessment of culpability, for them to be found to cause liability in damages. Conversely, where the public authority exercises a controlling or overseeing function (eg legal inspection of motorcars, overseeing of development works), normally only more serious errors will be held to cause liability (to the extent that proper execution of the controlling or overseeing functions may at all be relied on by the private individuals for the purpose of compensation, cf. (iv) below).

Cases so far decided on tortious decisions seem to indicate that for a tort to lead to avoidance of a decision there must be a presumption of *culpability*, - which may however, in the circumstances, be rebutted by the authority. When for instance the tort is due to an excusable mistake of law - eg where interpretation has been doubtful - the courts have been reluctant to find liability, though perhaps in certain circumstances they will attach importance to the degree of disturbance and amount of loss caused by the administrative decision. In some instances the sanction of damages seems to be applied as an alternative to avoidance. We have thus seen several judgments where it has been held that wrongful dismissals of public employees are not invalid but entitle to compensation. Invalidity would mean continued employment.

(ii) Danish law presumes that the courts are not debarred from establishing liability purely on a *strict* basis, but hitherto the courts seem to have been somewhat reluctant, where there is no specific statutory power, to apply this basis of liability. A High Court judgment from 1948 held that the (lawful) use of a machine-gun by a policeman made the State liable for damage to a motorcar, regard being had to 'the policeman's dangerous and extraordinary action'. This judgment will, however, hardly make it possible to lay down a general rule on public liability for 'dangerous' and/or 'extraordinary' actions. As to damage caused by vaccination, Act No. 234 of 7 June 1972 laid down rules on strict liability in damages. The debate leading to passing of the Act indicated that under current law compensation could be awarded only where culpability was proved. On strict liability in damages, see further re 7 below.

(iii) Liability is furthermore subject to the existence of sufficient causal connection between the wrong done and the damage caused. This is of particular importance where procedural rules on the making of a decision have been violated. Normally, a decision suffering from such defect will not entitle to damages if otherwise it is lawful according to its substance.

(iv) A condition for liability is that the wrong done is 'relevant' in relation to the person aggrieved, meaning that regulations or unwritten rules existing for the protection of his interests have been set aside, - as opposed to directions that are exclusively for the protection of public interests. This is illustrated by a Supreme Court judgment given in 1956, which held that the Ministry of Justice was not liable where two policemen, when dealing with a suicide by gas, had omitted - counter to orders given - to warn people living in the flat above. Also, a Supreme Court judgment from 1975 held that a contractor was not entitled to compensation (for loss of income) where a Local Government Authority - acting counter to the provisions of a public invitation for tenders - did not place the contract with the lowest bidder.

The question whether public authorities' non-compliance with rules and regulations entitles private individuals to compensation, seems to have caused difficulty particularly in respect of delimitation of administrative controlling and overseeing functions, cf. under (F) above.

(v) In accordance with general principles on liability, compensation will be payable only for financial loss, and only where culpability is not found in the person aggrieved, cf. re 9 below.

(c) Are servants employed by public authorities personally liable?

Like other employees, public servants are personally liable for their tortious acts and omissions. In relation to the person aggrieved, this liability seems however to be of no practical significance since the principal authority is primarily liable. But the personal liability of the employee may materialize where central or local government authorities take recourse against the employee. Such recourse will rarely be instituted, or will be instituted only for a limited amount, where the tort committed is of a less serious character.

(d) Is a public authority acting under statutory duty liable in damages for injury caused?

In replying to this question, it is taken that it concerns cases where a public authority decides or physically acts under existing statutory provisions but makes a mistake in its decision or physical act. This question seems to be of practical significance where a decision is lawful according to its substance but the authority has violated some direction as to procedure. In such cases, liability will as a rule be precluded because of lack of causal connection between wrong and injury, cf. replies given under re (a) and (b) above.

In as far as the question relates to the effects of an act resulting from exercise of powers as such, reference is made to what has been said above re 1 (Introduction) and re 4(a) and (b).

(e) Can a public authority be held liable for the non-exercise of its powers and duties by itself or its employees, and if so, in what circumstances?

On the basis of decided cases, it is difficult with any certainty to establish under what circumstances non-exercise by an authority of its powers can be the cause of liability. Presumably, a condition precedent for this would be that non-exercise is tantamount to the setting aside of a duty to act established (also) in the interest of the person aggrieved. To illustrate this problem, the following case from 1970 is referred to:

Under a provision of the Rent (Restriction) Act, the Rent Control Boards were to decide within eight weeks on amounts of rent submitted for approval. Where no decision was made within the statutory time limit, the amount of rent was taken to have been approved. Then a case was brought where a Board had only after expiry of the time limit informed the landlord that only a lower rate of rent could be approved, - but delay beyond the time limit meant that the rate sought for was held to have been approved.

In a unanimous judgment the Supreme Court found the Board to have defaulted in not making the decision within the eight-week time limit. The plaintiff tenant was awarded damages by a majority of four judges who stressed in particular the fact that the Board had omitted to provide guidance as to the possibility of seeking relief through the Rent Tribunal. A minority of three judges would have found for the Rent Control Board.

On cases where omission by an authority to make a decision is actually tantamount to an (unlawful) rejection, see under (f) below.

(f) Can a public authority be held liable for delay in exercise of its powers and duties, and if so, in what circumstances?

Under Danish law it must be presumed that omission by a public authority to decide a matter within reasonable time may - at least in certain circumstances - cause it to be liable, provided the delay has caused a private individual to suffer a loss. In a judgment from 1948, the Supreme Court awarded damages for loss suffered (as a consequence of falling prices) because of a central government grain agency's delay in deciding whether to exercise an option to buy a quantity of grain.

Where an authority deliberately procrastinates in making a decision so as to be able to decide the matter in a particular manner, judicial precedents seem clearly to hold the authority liable for loss caused by the delay. The problem has been met with in practice where local government authorities have protracted considerations of an application for planning permission with a view to prior creation of a local plan that would provide a basis for rejection of the application.

(g) Can a public authority be held liable for the *mala fide* exercise of its powers and duties?

From what is said above under re (a) and (b), it follows that under Danish law a fundamental condition for liability - also in the case of exercise of public powers - is culpability. The answer must therefore be given in the affirmative.

A *mala fide* element underlying an administrative decision may in certain circumstances in itself affect the question of liability: Under re (a) and (b) above it was stated that where damages are claimed for a decision unlawfully made, the courts will presume culpability, which will however be voidable. But where the unlawful decision must be characterized as made *mala fide* - often in cases of breach of the principle of equality or of abuse of powers - there the basis for liability is clear. In the same manner, *mala fide* omission of exercise of power may provide a clear basis for liability, cf. re (e) and (f) above.

(h) Can a public authority be held liable for negligent exercise of its powers and duties?

(i) *What are the general principles?*

As already stated, culpability is a fundamental condition also for liability in damages under public law rules. Reference is made to re (a) and (b) above.

(ii) *Can a public authority be held liable for negligent exercise of discretionary powers?*

In principle the question of liability is not affected by an unlawful decision made under discretionary powers. However, as stated under re (a) and (b) above, a general condition for liability is that causal connection exists between the wrong and the injury suffered. In the case of discretionary decisions, this condition seems to imply that errors or omissions can lead to liability only if the wrong has decisively affected the decision made. There are only few precedents to illustrate this point.

(iii) *Are there cases peculiar to public authorities only, where liability may be caused by the acts or omissions of such authorities or of their servants?*

As stated under re (a) and (b) above, the liability of public authorities comprises in principle all branches of public activity. Therefore, public authorities are liable also for acts or omissions - typically in connection with exercise of statutory powers - that have no parallel in the rules applying to private individuals. For specific examples, reference is made to what is said above.

(i) Has a public authority any immunity from actions for damages or compensation for tortious acts committed by itself or its servants. If so, what are such limits?

In certain areas of law, legislation provides that public authorities are not liable for tortious acts or omissions, or liable only to a limited extent. This applies for instance under the Postal Services Act. In cases where central government is strictly liable, its liability may in certain circumstances be limited, as for example under the Nuclear Damage Compensation Act.

Decided cases do not seem to provide any basis for rules exempting public authorities from liability to any extent over and above the general limitations mentioned re (a) and (b) above.

5. PUBLIC AUTHORITIES' LIABILITY IN CONTRACT.

(a) What are the general principles of liability in contract of public authorities and/or their servants?

(b) Are there special cases where public authorities are immune from actions or where special rules apply, eg where actions are brought by members of the armed forces or by public servants?

Under Danish law public authorities are liable in contract on the principles that apply under civil law rules. This means that liability is primarily founded on the doctrine of culpability, but that liability may be founded also on other doctrines applicable in contract, as for example on a guarantee given. As to the extent of the liability, statutory provisions are to be found that apply to particular types of contract. An example is the liability in damages applying to transportation of goods by rail by the Danish State Railways, cf. The Danish State Railways Act, 8 June 1977, Part V.

Special provisions on compensation are laid down in an Act of 8 March 1978 that applies to military personnel and other persons who during national service are injured in accidents or who contract some disease that may reasonably be said to be caused by their in-service activities. For others in public employ, there are no comparable provisions on compensation covering injuries suffered in the course of execution of their duties, but the general rules on liability in damages are applied.

6. PUBLIC AUTHORITIES' IMMUNITY IN THE CASE OF STATE PREROGATIVES.

Danish law does not seem to have considered in principle the question of whether a private individual may turn to the courts for review of the legality of central government's exercise of its special prerogatives as laid down in the Danish Constitution Act, nor, if the answer is affirmative, whether in a given case the citizen may be awarded compensation in tort. Danish legal writers seem to be predominantly of the opinion that the powers of courts of law to review acts done by the public administration generally do in principle apply also to acts done by central government under its special prerogatives.

In respect of the particular duty of Danish authorities to provide diplomatic protection to Danish citizens against foreign authorities, the legal writers assume that any unreasonable withholding by the Danish Foreign Service of assistance to a Danish citizen will cause liability in damages.

There seems to be no decided case on such matters.

7. PUBLIC AUTHORITIES' LIABILITY TO PAY DAMAGES OR COMPENSATION WHERE NO TORT OR BREACH OF CONTRACT HAS BEEN COMMITTED, AND WHERE ALL ACTS OR OMISSIONS ARE LAWFUL.

As stated under (ii) re 4(a) and (b), the courts have been loath to hold public authorities strictly liable for (unintentional) torts, - while on the other hand in certain circumstances the courts are very strict in their weighing of the question of culpability, so that their reluctance on the first issue is of only slight significance. The courts have also - because of lack of statutory authority - been reluctant to award damages for loss caused by lawful restrictive measures taken intentionally by public authorities.

To some extent express powers exist to award damages for torts lawfully done. Under Section 73 of the Danish Constitution Act, full and complete compensation shall be awarded in cases of compulsory acquisition. We cannot exclude absolutely the possibility that the courts may in certain circumstances award damages on the basis of considerations similar to those applying to compulsory acquisition, whether or not the issue is formally one of such acquisition. In 1975, a Supreme Court judgment held that prolonged nuisance caused by roadwork (resulting in substantial loss to neighbourhood trade) was to be compensated for out of public funds. The judgment does not, however, state with any certainty if the basis for awarding compensation does to any particular degree depend on the rules applying to compulsory acquisition. Under current law it is hardly possible to formulate any general principle on such basis for liability.

It must further be presumed that liability can be imposed under the doctrine of necessity in cases where no fault has been made. In a Supreme Court judgment from 1978, dismissal of an assistant nurse (for refusal to contribute to an unemployment fund) was held to be without lawful justification and necessitated by an emergency situation, as the nurse's refusal to contribute had caused a multitude of work stoppages at the County hospital. The assistant nurse was awarded compensation under the doctrine of necessity.

8. SPECIAL POSITION OF THE CROWN.

Section 13 of the Danish Constitution Act provides that the King shall not be held liable. This means that the King is immune to actions in court, eg in damages, and this immunity is assumed to apply to his acts in government (whether general or specific) and to his private activities.

9. PUBLIC AUTHORITIES' LIABILITY TO PAY DAMAGES OR COMPENSATION WHERE THEIR ACTS OR OMISSIONS ARE BROUGHT BEFORE THE COURTS FOR JUDICIAL REVIEW.

It is a general doctrine of liability that damages can be reduced or lifted in cases where the person aggrieved is a contributory, for instance where he has made no attempt at preventing the tort or has failed to keep within bounds the consequences of the tortious act.

In the case of unlawful decisions, the person aggrieved will normally be held to be a 'contributory' if - notwithstanding notice of the illegality - he has omitted to use an existing remedy that might have resulted in cancellation or modification of the decision. However, this rule applies

with certainty only to cases where administrative recourse or remonstrance is possible, and (presumably) in cases where as of right the lawfulness of a decision may be tried before courts of law simply by way of filing an application. The person aggrieved can hardly be required to institute actual proceedings before the courts. Failure to use an existing means of redress can, however, lead to the reduction or lifting of damages only where the assumption is that lodging of a complaint would have caused cancellation or modification of the decision, the legality of which was at issue.

As stated under re 4(a) and (b) above, a prerequisite for awarding of damages for an unlawful decision will often be that the decision in question is characterized by such defects as will make it voidable. Invalidity of a decision does not, however, mean that damages will automatically be awarded, for in principle such awarding of damages - apart from requiring a financial loss to have been suffered - depends also on the existence of culpability in the decision-maker. In some cases, awarding of damages may be an alternative to avoidance. The question has been met with in particular in judgments where dismissal of public employees has been at issue.

10. IN THE EVENT OF PUBLIC AUTHORITIES BEING ORDERED BY THE COURTS TO PAY DAMAGES OR COMPENSATION, WHAT STEPS (IF ANY) ARE AVAILABLE TO ENFORCE THE ORDER, IF NECESSARY?

Writers on the law are not agreed as to whether recovery of damages judicially awarded against central government can be enforced. The disagreement seems in particular to depend on whether enforcement is subject to payment being provided for within the scope of general financial grants. In any event, there is a presumption that execution can be levied only against certain parts of central government funds. A corresponding problem may arise in respect of local government funds.

There seem to be no reported decisions on this problem.