

REPORT FROM IRELAND

Presented by

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INTRODUCTION

1. The Constitution of Ireland provides (Article 34, section 1) that "justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution and, save in such special and limited cases as may be prescribed by law, shall be administered in public." Section 2 provides that the courts shall comprise Courts of First Instance and a Court of Final Appeal. The article also provides that Courts of First Instance shall include a High Court invested with "full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal." The Article goes on to provide that the Courts of First Instance shall "also include courts of local and limited jurisdiction with a right of appeal as determined by law." The jurisdiction of the High Court extends to the question of the validity of any law having regard to the provisions of the Constitution. The Supreme Court, which is at the summit of the judicial pyramid, is the court of final appeal in the State.

For the purpose of the Constitution it may be taken that the jurisdiction of the courts extends to all controversies of a judicial nature and for that purpose the courts exercise the authority of the State over persons and property. The controversies which fall to be determined are divided into two main categories, criminal and civil. The civil category includes all proceedings related to administrative matters. In the civil category the judicial power is exercised in determining in a final manner, by definitive adjudication according to law, rights or obligations in dispute between citizen and citizen, or between citizens and the State, or between any parties whoever they may be and in binding the parties by such determination which will be enforced if necessary with the authority of the State. Its characteristic public good in its civil aspect is finality and authority, the decisive ending of disputes and quarrels, and the avoidance of private methods of violence in ascertaining or resisting claims alleged or denied.

At first sight it might appear to follow from these constitutional provisions that the judicial power can be exercised only by a court and cannot be delegated to any other person or body. Strictly speaking that is correct. However, Article 37 of the Constitution introduces an important provision which while it might appear to be a modification of the position as already stated it is not quite so. It provides: "Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or body of persons is not a judge or a court appointed or established as such under the Constitution." This Article refers to "functions and powers of a judicial nature", which is not quite the same as the "judicial power" of the State but is sufficient to expressly justify the assignment of certain functions of a judicial nature to administrative tribunals. However, this Article of the Constitution contains two important qualifications: the matter must not be a criminal matter, and the functions and powers must be of a limited nature. With regard to the latter the test as to whether a power is or is not "limited" lies in the effect of the assigned power when exercised. If the exercise of the assigned powers and functions is calculated ordinarily to affect in the most profound and far-reaching way the lives, liberties, fortunes or reputations of those against whom they are exercised they cannot properly be described as "limited". Each "power and function" must be limited in its character and effect. The limitation is qualitative.

In Ireland, tribunals exercising powers and functions of a judicial nature are comparatively few and fall within one or other of four categories:

- (a) those from which an appeal from fact and law is given to a court;
- (b) those from which an appeal lies on law only;
- (c) those from which no appeal is prescribed; and
- (d) those whose decisions are expressed in various terms to be final and unappealable.

As no such tribunal as at present constituted has any power to award damages against anybody consideration of the subject matter of this report does not require any further mention of such tribunals or their functions.

2. The Constitution of Ireland enunciates the doctrine of the separation of powers, entrusting the legislative, executive and judicial powers in principle to three different organs of State, namely, the national parliament, the government and the courts. All claims for damages must be taken in the courts for whatever reason the damages arise. In Irish jurisprudence an action for damages would not come within the term "administrative action", although the claim for damages might well arise out of the result of or the consequence of some type of action in the courts which could more properly be called an administrative action, such as an action which seeks to compel the administrative organ to carry out its functions or seeks to quash some order of some such body or to vary such an order. The claim for damages might be founded upon an obligation arising from a breach of duty on the part of the administrative organ, whether it be a breach of a contractual obligation or breach of a duty of a non-contractual nature. Where the description "administrative action" could also refer to proceedings instituted by an administrative organ or authority any claim for damages would be treated in the manner mentioned above and would not be strictly speaking an administrative action.

The lowest level in the court structure is the District Court which has jurisdiction in both tort and contract cases confined by monetary limits which from time to time are raised by statute. The next tier of courts above that is the Circuit Court which, so far as actions for damages are concerned, has a jurisdiction in both tort and contract also determined by monetary limits but considerably higher than the District Court. This Court also acts as a court of final appeal from the District Court. The High Court, which is a court of first instance, is also a court of final appeal for cases instituted in the first instance in the Circuit Court. As a court of first instance the High Court has, as set out in the constitutional provision above quoted, an absolutely unlimited jurisdiction and power to determine all matters whether of law or fact, civil or criminal. Therefore there is no jurisdictional limit in claims for damages.

3. Virtually all forms of judicial review of administrative actions are instituted in the High Court in the first instance. The vast majority of these actions seek remedies other than the remedy of damages.

As in every other modern State, in Ireland the State intervenes to a very considerable degree in the lives of its citizens. The law provides for controls over prices, restrictive practices and planning. Certain types of business such as banking, employment agencies, livestock marts may not be carried on without a licence and that licence may be subject to such conditions as the licensing authority sees fit to impose. A variety of discretionary financial benefits, most notably in the area of industrial development, is available as is a wide range of benefits in the spheres of health, social welfare, education and redundancy. The administration of these controls and services brings many persons and institutions into contact with administrative agencies and naturally provides a fertile source of grievances. In most of these the courts have no direct concern and it is not their function to entertain appeals from decisions of administrative bodies unless expressly conferred by statute. However, it is the business of the courts to ensure that administrative actions and decisions are taken in accordance with law. Hence the aggrieved citizen who contests the legality of an administrative decision must have access to the courts to litigate his claim. Indeed access to the High Court is one of the unspecified personal rights guaranteed by the Constitution.

In many recent decisions the courts have demonstrated their ability to intervene for the protection of the citizen. To take but a few examples, limits have been placed on administrative discretion; a judicial power to compel disclosure of administrative files has been established; and the right to fair procedures and a fair hearing has been vindicated in several different contexts, including the context of constitutional rights. The substantive law is adequate to the needs of those affected by administrative actions but the problem in the system lies in the multiplicity of the remedies available. Apart from damages, what the aggrieved citizen wants from the court is relief under one or more of the following headings:

- (a) an order invalidating the administrative decision,
- (b) an order to desist from or to discontinue some course of action, and
- (c) an order to compel the fulfilment of a legal obligation.

So far as the forms of relief listed at (a), (b) and (c) above are concerned they are usually available only in the High Court and there are particular rules of procedure applicable to these forms of relief. However, actions for damages can be brought only in the ordinary courts. They may be brought in any of the courts of first instance, the District Court, the Circuit Court or the High Court depending on the amount claimed.

LIABILITY OF PUBLIC AUTHORITIES AND THEIR SERVANTS OR AGENTS IN TORT

4. Since the decision of the Supreme Court in *Byrne v. Ireland* [1972] I.R. 241 all public authorities, including the State itself, are liable to pay damages for injuries caused by their torts, or breaches of statutory duty, or, in the case of the State, failure to fulfil obligations created by the Constitution. It is doubtful whether the parliament could bestow immunity from such liability in tort or for breach of statutory duty without infringing the Constitution. The decision in that case swept away completely the former view that the State was not liable for the negligent acts of its officials or employees. Up to the date of that decision the only remedy in such a case lay against the official or the employee concerned. Since that decision the State and all the public authorities etc are held to be liable for any such tort on the basis of vicarious liability or the application of the principle of *respondeat superior*. In Irish constitutional theory the State is not the sovereign authority. The people constitute the sovereign authority and the State, being but the creation of the people by virtue of the provisions of the Constitution, is answerable for the wrongful acts of the State or of its servants or agents.

(a) The general principles of the law of torts apply to such liability. While the most usual wrong in this field is that of negligence, the liability also extends to defamation, nuisance, trespass or the liability which arises from the possession or keeping of dangerous things.

(b) Public authorities are liable to pay damages for torts committed by their servants and agents provided that the wrong was committed in the course of the servant's or agent's employment.

(c) The servant or officer always remains personally liable as well as the public authority employing him. The injured party has a choice of proceeding against either or both. There is no legal barrier to the public authority instituting proceedings against its own servant or agent to recoup the damages which it may have to pay but that is solely a matter between the servant and the public authority and is not in any way the direct concern of the injured party. If the public authority is guilty of the wrongful act in the course of carrying out a statutory duty it will be liable to pay damages for injury caused. However, if the very act itself has been authorised by statute then it ceases to be a wrong and the public authority will not be liable to pay damages subject to the statute not being invalid having regard to the provisions of the Constitution which does not permit wrongs to be inflicted on anyone without compensation. Therefore, in certain forms of legislation where the act causing the damage is expressly authorised by statute, the statute will most usually

provide for a scheme of compensation. The amount of compensation may not be a matter for the courts because the law in question may set up its own machinery in the form of a board of assessors or some other such tribunal to assess the amount of compensation. However, the operation of any such assessment of compensation is itself subject to scrutiny by the courts in the same manner as any administrative action.

(d) If a public authority fails to carry out its legal obligations, particularly those imposed by statute, it may be compelled to carry them out by an order from the courts directing it so to do. If injury has been caused or damage occasioned by the failure of the authority to carry out its legal duties until compelled to do so by the court then damages may be awarded for any injury caused by the failure to do so. So far as the failure of a public authority to exercise powers which are conferred upon it and which it is not compelled to exercise and the non-exercise of which may occasion injury or damage is concerned there has been no case in Ireland dealing with this matter. This relates only to powers, the exercise of which may be purely discretionary, as distinct from any duty, expressed or implied, imposed by statute or otherwise to exercise the powers or powers coupled with a duty, express or implied.

(e) Subject to the distinction between powers and duties already dealt with in paragraph (d) above there appears to be no reason why a public authority could not be made liable for damages occasioned by its delay in carrying out its obligations where the empowering legislation clearly indicated the circumstances which would require the obligation to be carried out or damages occasioned by the failure to fulfil these obligations at the appropriate time.

(f) Bad faith will invalidate any administrative act in the sense that it will provide a ground for the annulment of the administrative decision already taken and be a ground for making an order by the court compelling the proper exercise of its statutory power even where the decision is a discretionary one. By acting in bad faith an administrative authority is in law acting *ultra vires* and if such an action causes injury which is quantifiable in money terms then there will be a liability in damages.

(g) A public authority can be made liable for the negligent carrying out of its duties as distinct from its bare powers.

(i) The general principles are that negligence by definition amounts to a failure of duty and if injury is caused by that failure to the person or persons to whom the duty is owed then an action for damages will lie. Therefore, notwithstanding the distinction which can exist between bare powers and duties, if an authority chooses to exercise discretionary power it is bound to do so without negligence. As a public authority in virtually all cases will have to exercise its duty or its power through its officials, agents or servants its liability will be based on the maxim *qui facit per alium facit per se*.

(ii) So far as the negligent exercise of discretionary power is concerned the position is as stated in the reply to (i). If the alleged negligence lies in the mere failure to exercise a discretionary power where no duty can be spelled out compelling the exercise of the discretionary power in any particular circumstances, then such failure cannot constitute negligence.

(iii) There are no cases peculiar only to local authorities in which they can be made liable for the acts or omissions of itself or of their servants, save where powers are exercised pursuant to some statute which provides that damage caused is to be subject to compensation even without proof of negligence or other wrong. However, such a provision may not be peculiar to public authorities only. In some cases public utilities which may be owned by private concerns may be in a similar position by virtue of any particular statutory provisions authorising them to carry on their operations.

(h) A public authority does not by reason of its being a public authority enjoy any immunity from actions for damages or compensation for wrongful acts committed by itself or its servants. However, see the answer to question (4) above.

LIABILITY OF PUBLIC AUTHORITIES IN CONTRACT

5. (a) In general the rules governing public authorities' contracts are the same as those which govern private contracts. However, circumstances may arise where the validity of the very contract itself may be called into question and if it is invalid damages may not be payable. For example, a public officer or the government or any member thereof cannot make a binding contract to pay out public monies without the authority of Parliament, that is to say an authority already to be found in the statute law already in existence or introduced for the purpose of the payment. This reply, of course, is subject to the effect of European Community law upon the domestic law. It is possible to envisage circumstances where a public authority or the government, or its officials acting on its behalf, might on contract agree to pay out public monies without the direct authority of the national legislation if the authority flows from a Community Act.

(b) It is extremely doubtful if a public authority could constitutionally have any immunity of a type which will enable it to break valid contracts without incurring any liability in damages. It would appear that even a contract of employment in the State which purports to be held "at the will and pleasure of the Government" cannot be terminated without affording the person affected a proper hearing and following whatever procedure may be prescribed for dealing with the matter. It has already been decided in such a case that any such failure will render the State or the public authority liable to damages. Public authorities could not, for example, withhold monies from its officials unless such course of action was expressly authorised by statute or statutory regulations duly made. Generally speaking it is difficult to envisage any circumstances in which it could be held that the State would be entitled to act with impunity in breach of contract with its own servants or employees. So far as the armed forces are concerned, their position is determined by statute rather than by contract but if it were determined by contract the same principles would apply.

IMMUNITY OF PUBLIC AUTHORITIES FOR ACTS OF STATE

6. There does not appear to be any authority in Irish case law dealing with this matter. Having regard to the protections offered by the Constitution to all persons residing in the State or having property in the State, be they citizens or otherwise, it is extremely doubtful if the State could ever successfully plead the argument of State necessity as such form of reasoning would appear to be contrary to the provisions of the Constitution. It is not possible to surmise what would be the result in a situation not covered by the Constitution as, for example, damage occasioned outside the national territory to property or a person who has no connection with the national territory.

LIABILITY WHERE ALL ACTS OR OMISSIONS ARE "LAWFUL"

7. On the assumption that the act complained of does not violate any law or any constitutional provision then by definition it is not unlawful and is not capable of constituting a breach of any duty or give rise to any liability.

8. For the reasons already stated in paragraph 4 above the State enjoys no special position.

9. The liability of public authorities to pay damages or compensation where their acts or omissions are brought before courts for judicial review will depend upon the result of the review. If, for the reasons already set out above at paragraph 4(f) and (g), there has been an activity which is *ultra vires* or there has been negligence in the performance of an administrative action, or a complete failure to do it where there is an obligation to act, and such conduct on the part of the public authority causes damage then a claim for damages may lie.

10. Where a public authority is ordered by the court to pay damages or compensation *prima facie* the ordinary procedure of execution of the judgment by way of levy upon the goods or chattels or the property of the public authority or enforcement by direct order of the court such as *mandamus* are both appropriate. Failure to pay following an order of *mandamus* would amount to contempt of court with the consequent penalties, including imprisonment, which will fall upon those responsible for the failure to comply.