

REPORT FROM THE NETHERLANDS

Presented by

J M POLAK
Member of the Conseil d'Etat

INTRODUCTION

As in the case of the report prepared for the Sixth Colloquium, it may be useful to provide by way of introduction some information on the organisation of the courts dealing with administrative disputes. For this purpose reference can be made in part to the previous report, which was drawn up by Mr P J Boukema. Also something needs to be said in this introduction about the important role which the ordinary courts have to play in awarding damages.

The following distinction is made with regard to the protection which the law affords against the executive:

(A) Legal protection within the administration, as a rule consisting of the right of appeal to an administrative authority or to a representative body. This is termed an "administrative appeal". The most important form of administrative appeal is to the Crown. The procedure, which is laid down in the Council of State Act 1962, is that the Administrative Disputes Section makes a recommendation in the form of a draft judgement; the Crown may disregard such a recommendation, but in practice rarely does so.

(B) Legal protection afforded by an administrative court especially established for the purpose and independent of the administration. This is known as "administrative jurisdiction", in other words judicial review of administrative acts. The most important of the bodies charged with judicial review are the following:

(i) The Section for jurisdiction of the Council of State

The Judicial Section hears appeals lodged against written orders of an administrative body. No appeal lies to the Judicial Section if any other "administrative-judicial" remedy is (or was) open to the person concerned.

(ii) The Central Board of Appeals

The Central Board of Appeals deals at last instance with:

(a) disputes involving government and other public sector employees;

(b) disputes involving social security legislation and pensions legislation.

Such cases are heard at first instance by the *Civil Service Tribunals* and the *Social Insurance Appeals Boards*.

(iii) The Trade and Industry Appeals Tribunal

The Tribunal hears appeals against the decisions and actions of bodies which have a public law function in the organization of trade and industry, and against the decisions of governmental bodies on matters affecting trade and industry.

(iv) The Courts of Appeal

The fiscal divisions of the Courts of Appeal hear appeals in tax cases. Appeals in "cassation" (ie on points of law) lie to the *Supreme Court*.

(C) Legal protection afforded by the ordinary courts, whether they exercise administrative jurisdiction or civil jurisdiction. In order to exercise administrative jurisdiction the ordinary courts must be specially empowered by Act of Parliament (as they are, for example by the Franchise Act). In addition, the ordinary courts have a general jurisdiction in matters to which the government is a party. As stated above, the ordinary courts, when giving judgment as civil courts, have an important role to play with regard to claims for damages. The basis on which such claims can be brought is:

Article 1401 of the Civil Code, which reads as follows:

"Any tortious act whereby damage is caused to another shall oblige the person who is responsible for causing such damage to make good the same".

The ordinary courts are as follows:

the Supreme Court
5 Courts of Appeal
19 District Courts
62 Cantonal Courts.

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

For the purpose of this report the term "administrative action" means a claim for damages. Actions against public authorities may be brought solely to claim damages, but claims for damages may also be combined with other claims. Sometimes the effect of combining claims in this way will be that if the other claim is rejected, the claim for damages will fail too. Claims for damages and other claims can also be linked more closely.

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

Are there specialized administrative Courts or Tribunals which alone have jurisdiction to hear and determine administrative actions, or are the ordinary Courts competent to hear such actions?

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

As stated in the introduction, three different types of bodies are empowered to hear claims against public authorities. Each of these different types is subject to a different set of statutory regulations which in turn incorporate different rules of procedure. Both the number of different bodies and the number of different rules of procedure can be criticized.

4. What is the liability of public authorities to pay damages for torts committed by them or their servants, causing injury?

a. What are the general principles governing such liability?

b. Are public authorities liable to pay damages for torts committed by their servants?

c. Are such servants personally liable?

d. If the public authority is acting under statutory authority, is it liable to pay damages or compensation for injury caused?

e. Can a public authority be made liable for the non-exercise of its powers and duties by itself or officials, and if so, in what circumstances?

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

g. Can a public authority be made liable for the mala fide exercise of its powers and duties?

h. Can a public authority be made liable for negligence in the carrying out of its powers and duties?

i. What are the general principles?

ii. Can it be made liable for the negligent exercise of discretionary powers?

iii. Are there any cases peculiar only to public authorities in which they can be made liable for the acts or omission by themselves or their servants?

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?

(a) Public authority liability is regulated primarily by Article 1401 of the Civil Code. The Dutch courts accept that the government can be held responsible if it commits tortious acts within the meaning of the Article and that it must then pay damages. This liability is not identical, however,

to that of natural persons. The courts have developed certain restrictions governing the liability of public authorities. This liability also differs from that of private legal entities such as limited liability companies, albeit in different respects.

Claims for damages for torts committed by public authorities must be brought before the ordinary courts. This is the assumption on which the statutory provisions governing the bodies responsible for administrative appeals and administrative jurisdiction are based. Only in exceptional cases can such bodies award damages for torts, and then only if they have received an application to that effect.

(b) In general, public authorities are liable for torts committed by their servants or agents.

(c) Only in exceptional cases can the servants and agents referred to under (b) above also be held liable personally and be required to pay damages. The possibility of personal liability is not excluded in the case law on the subject, but in practice the question does not arise as the public authorities concerned always accept responsibility for the damage.

(d) The courts have accepted that if a public authority is acting under statutory authority, this can constitute grounds of justification, so that it is not liable to pay damages or compensation for injuries caused.

(e) In certain circumstances a public authority can be made liable to pay damages for the non-exercise of its powers. These circumstances depend very largely on the particular situation. In general it can be said that damages or compensation must be paid if action on the part of the authority was required under either written or unwritten law.

(f) The answer to (e) above applies here *mutatis mutandis*.

(g) If a public authority exercises its powers *mala fide*, it can almost always be held liable to pay damages.

(h) The general rule is that public authorities are allowed a certain discretion in carrying out their powers and duties. This is particularly the case with regard to the government's primary duties: defence, police, flood protection and the like. In such cases the courts exercise only a very broad check.

(i) Opinions are divided, but there is a school of thought which holds that the immunity of members of representative bodies also applies to civil law liability.

LIABILITY OF PUBLIC AUTHORITIES IN CONTRACT

a. What are the general principles on which public authorities and/or their servants can be made liable in contract?

b. Are there special cases in which public authorities have immunity from actions or in which there are special rules, eg, actions by members of the armed forces or by public servants?

(a) Public authorities can conclude contracts. A distinction is made between public law contracts and private law contracts. The former, which are governed by public law, are rare. Most contracts are of a private law nature, and are governed accordingly by the provisions of the Civil Code. When implementing such contracts, public authorities sometimes try to claim that they occupy a special position and have a certain measure of discretion. Neither in the decisions of the court nor in the literature has this claim been recognized. By binding themselves contractually, public authorities lose the right to any discretionary powers which they might otherwise have had. If at some later stage this no longer suits them, they cannot then claim they still have such discretionary powers. To this extent, therefore, there is a difference between a public authority's liability in contract and its liability in tort.

(b) Public authorities can claim to occupy a special position in cases involving contracts governed by public law. They may also have a special position in the case of contracts governed by private law if there are statutory provisions to the effect. In such cases the other party to the contract has no grounds for complaint as it should have been aware of this special position.

IMMUNITY OF PUBLIC AUTHORITIES FOR 'ACTS OF STATE'

A distinction is made in Dutch law between damages for torts committed by public authorities and damages for the lawful acts of such authorities. Their liability in tort has been dealt with above; in principle they can always be held liable to pay damages for such torts.

The right to damages for the *lawful* acts of public authorities, on the other hand, exists only if the law contains an express provision to the effect. There is no general right to claim damages; such claims must be based on a special statutory provision. A well-known example is section 49 of the Physical Planning Act:

(1) If an interested party has suffered, or will suffer damage as the result of the provisions of a development plan, and such damage should not be borne by him, or by him alone, and it is not certain, or not sufficiently certain, that such damage will be made good by purchase or expropriation or in some other way, the municipal council shall at his request award him such damages as shall be equitable. The damages may be assessed in money or in some other way.

(2) Notice of appeal may be lodged with Us (the Crown) against a decision to refuse or to allow a claim for damages as referred to in the preceding subsection within one month of the day on which the copy of the decision was sent.

(3) The notice of appeal shall state the grounds on which the appeal is brought.

The provisions of this section are an example of the legal protection within the administration, as referred to under (a) in the introduction. The judicial bodies referred to under (b) and (c) also have the power in certain cases to award damages for lawful acts of public authorities. The most important class of cases is expropriation, as referred to in section 49 of the Physical Planning Act referred to above. The ordinary courts (ie the District Courts) determine the question of damages in cases of expropriation.

Claims for damages can be combined with other claims. Under the Council of State Act, for instance, the Crown (on an administrative appeal) or the Judicial Section of the Council of State may, when quashing a decision of a public authority, determine that "compensation shall be awarded against the body designated by the decision, without prejudice to the right of the interested party to claim damages under other statutory provisions" (section 58b in conjunction with section 73). The reference to other statutory provisions is a reference in particular to Article 1401 of the Civil Code. Claims for damages as discussed here in fact belong much more to the category of tortious acts committed by a public authority than to the category of lawful acts.

If damages are awarded, the public authority concerned will always pay. If this should not occur, however, the plaintiff would have to take the steps prescribed in the Code of Civil Procedure for the Execution of judgements. There are no special provisions governing the execution of judgements against public authorities.