

QUESTIONNAIRE
on the subject
CIVIL LIABILITY OF JUDGES

My dear Colleagues,

I am pleased to send you a copy of the questionnaire for the preparation of the subject which will be discussed by the 2nd Study Commission at its next meeting. As decided in Madrid some case studies for the discussion are added. I also add a list of the subjects discussed in this commission since 1980 and a list of the delegates' addresses as corrected in Madrid. Would you please indicate further corrections in that list and, if possible, add your e-mail address ?

For the answers to the questionnaire please refer to the Secretary-General's letter.

Yours sincerely,

Ton Pos

I

1. Under what circumstances may a judge be liable (in damages) for
 - a. errors contained in a judgment,
 - b. defamatory utterances made in court, or defamatory statements contained in a judgment,
 - c. (undue) delays,
 - d. poor functioning of the court administration,
 - e. other behaviour in the performance of his office?
2. Does liability in these cases lie with the judge in person or with the State? Could the judge, if held liable, recover the sum for which he is liable from the government (or *vice versa*)?
3. If liability lies with the judge in person, is a liability insurance usual, compulsory, or provided by the government?
4. In your opinion do the rules governing the liability of judges in any way jeopardize their independence? Are these rules otherwise satisfactory?
5. Are there any plans for reform?

II

6. Which subjects would you like to discuss in detail?

III

(to prepare the conclusions)

7. What changes in the law on this subject do you suggest?

IV

(next year)

8. Proposed subjects for next year.
9. What is your opinion on the present experiment of including cases for discussion, with a shorter questionnaire? Would you prefer to return to the former practice of a longer questionnaire without a case, or do you have other suggestions?

January 2002

Ton Pos

(See page 2 for case studies)

CASE STUDIES

CASE A

A motorist, AB, is charged with a criminal offence under the Road Traffic Legislation, for which the maximum penalty is a monetary fine of a particular amount. He disputes the allegation that he has committed the offence and engages PQ as his lawyer to defend him.

PQ regularly appears to argue cases before the Court in question. His relationship with one of the judges - JJ - is not a good one. JJ regards PQ as an incompetent lawyer and in the past has publicly criticised PQ in very strong terms. On occasions his criticism has involved personal insults directed towards PQ.

At the hearing of the case against AB, a heated argument develops between the Judge JJ and the lawyer PQ during which the Judge suddenly announces that because of both the lawyer's behaviour in Court and what the Judge regards as AB's untruthfulness, the hearing cannot continue and must be adjourned. The Judge then orders that until the next adjourned hearing, AB must be detained in custody. AB is accordingly removed to prison.

The Judge believed that he had power to order the detention in custody of AB. He was wrong. Having been committed to prison AB appealed to a higher Court, which declared that the Judge had no such power and even if he had such a power, the actions of JJ would have been an improper use of that power. AB was released from prison, but only after having been imprisoned for some five days, pending the time involved in making the appeal.

CASE B

A Judge is required to decide a dispute between a consumer, backed by a consumer's association and a large commercial undertaking.

In the course of giving judgment in favour of the consumer, the Judge makes a number of very highly critical and colourfully expressed comments on some of the business practices of the commercial undertaking, including the assertion that he regards its board of directors as being dishonest and corrupt. None of these remarks are relevant to the questions which he has to decide. Those comments are widely publicised in the press, radio and television and result in substantial commercial losses to the defending undertaking. At a subsequent appeal, by the undertaking, it is held that the comments were not only unnecessary for the purposes of the judgment given by the Judge, but were also made without evidential or factual basis and reflected a personal and biased view.

CASE C

A civil action is set down for a hearing on a specified date. In the expectation that the case will be heard on that date both parties to the action instruct their lawyers to be present and cite witnesses.

When the date set down arrives it is clear that far more cases have been put out for hearing than can be dealt with by the judges available. The parties, their lawyers, and the witnesses are sent away and told to come back another day, as are many others.

Part of the reason why there were not enough judges was that one judge had suddenly been taken ill. But the principal reason was that, relying on a new computer system, a major administrative error had been made and even had the judges all been in good health, some cases could not have been heard.