Subject: Civil Liability of Judges

Under what circumstances may a judge be liable (in damages) for
a) errors contained in a judgment?

A judge is only liable for an interpretation of the law in a judgment if this interpretation was wrong and based on an unsupportable interpretation of the law, i.e. based on an interpretation or application of the law which is unsupportable by careful consideration. There is no liability if the same damage would have occurred if the judge had acted correctly.

As to the weighing of the evidence in a judgment, a judge can only be held liable if it was incorrect in the sense that essential results of the proceeding were ignored without apparent reason and thus the weighing of the evidence has to be judged as arbitrary. Again, it is not decisive if the result achieved by the judge was correct, but if it can reasonably be supported. This is also true for unsupportable contradictions to the contents of the file or violations of the rules of thinking.

b) defamatory utterances made in court, or defamatory statements contained in a judgment?
In this case a judge may be exposed to liability under penal law (the crime of libel which had to prosecuted by the defamed individual himself), civil law (damage to a person’s credit), and in any case under disciplinary law.

c) (undue) delays?
Also delays may lead to a judge being liable if their consequences cannot be avoided by an appeal and if they are the result of a violation of procedural rules.

d) poor functioning of the court administration
Here the judge is generally not liable. Since the administration of justice serves the sole purpose of providing the necessary requirements for the judiciary (materials, personnel, organisation) and for the implementation of court decisions, it is a governmental function. For such acts only the Republic of Austria is the responsible entity which can be sued according to the principles of government liability (see infra 2).

e) other behaviour in the performance of his office?
See 1b above.

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)?

Art 23 of the Austrian Federal Constitution provides that, inter alia, the federal government is liable to anyone for the damage inflicted culpably by persons acting as its organs (which includes judges) in the execution of the laws.

According to section 1 of the Austrian Government Liability Act the federal government, inter alia, is liable to anyone according to the provisions of the civil law for damages to the property or to a person, which was inflicted negligently or intentionally by persons acting as its organs in the execution of the laws through unlawful conduct. Even if an omission generally does not give rise to liability, an omission is unlawful and may result in liability if there was a duty to act. Legal entities, according to the prevailing view, are liable not only for gross negligence of their organs, but also for simple negligence. However, not every unlawful conduct also includes a culpable element giving rise to government liability. In government liability proceedings, unlike in an appellate proceeding, it has not to be examined whether the decision complained of was correct, but whether – in case it is held to have been incorrect – it was also based on a supportable interpretation of the law, i.e. on an interpretation or application which can be supported in careful consideration.
According to section 3 of the Austrian Official Liability Act, the legal entity if it has refunded the damage to the victim, can claim a refund of this damage from the persons who acted as its organs if the violation of the law was committed intentionally or with gross negligence. The claim for indemnity thus requires intent or gross negligence on the part of the official when the damaging act was committed. For this, the legal entity has the burden of proof, whereas the official has to assert and prove all facts tending to stall or limit the claim, such as, *e.g.*, an alleged violation of the duty to hinder or reduce the damage.

Thus, a personal liability of the judge would only lie according to the provisions of the Official Liability Act if the above requirements are met.

3. If liability lies with the judge in person, is a liability insurance usual, compulsory, or provided by the government?
The judge is free to obtain a so-called official liability insurance policy on his own expense, according to which the insurer has to indemnify him if he is held liable for damages inflicting in his official capacity to a third party during the validity of the policy. Such an insurance is not compulsory, but the majority of judges have it.

4. In your opinion, do the rules governing the liability of judges in any way jeopardise their independence?
No.

Are these rules otherwise satisfactory?
Yes.

Are there any plans for reform?
No.

II.

6. Which subjects would you like to discuss in detail?
Item 1. – What kind of incorrect conduct most frequently gives rise to civil liability in each country?

III. (to prepare the conclusions)

7. What changes in the law do you suggest?
There should be uniform rules about the civil liability of judges which ensure that a judge acting in the execution of laws generally is liable only in truly exceptional cases. In any case restrictive rules must not jeopardise judicial independence.

IV.

8. What subject do you suggest for next year?
The consequences of unfair trade practices.

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?
The length of the questionnaire should depend on the subject, and the number of cases to be discussed should vary accordingly. Generally the discussion of cases and the comparison of their result in the various countries is welcome and thus – provided that this is of interest to the majority of participants – this practice should be retained.

Ronald Kunst
Case Studies

Case A
In Austria a criminal conviction for wrongful imprisonment were possible if the imprisonment was based on an unsupportable interpretation of the law. In this case, the person arrested would be entitled to damages for the 5 days of wrongful imprisonment according to the Criminal Law Indemnification Act, if he is acquitted or if he is convicted, but the 5 days of imprisonment are not counted for the actual sentence imposed.

Case B
In Austria the federal government could be held liable because the conduct of the judge was based on an unsupportable interpretation of the law or an unsupportable view of the evidence, particularly because the judge apparently also committed the crime and tort of libel or damage of credit.

Case C
This case is not possible under Austrian law. It is the responsibility of the judge to whom the case is assigned according to the Case Distribution Plan, to schedule the hearing. If the hearing cannot take place because of an illness of the judge and a substitute judge is not available on short notice, there is not government liability. The parties and their representatives can claim the frustrated costs of the hearing; these costs have to be borne by the party losing the case.

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