Civil Liability of Judges

Questionnaire 2. study- commission - 2002

Answers of the German Association

1. Under what circumstances may a judge be liable (in damages) for

a. errors contained in a judgement?

A judge is liable personally and without limitation for damages caused by a judicial wrongdoing only if he wilfully misapplied the law (bending the law). This is a consequence of § 839 section 2, 1st sentence of the BGB (German Civil Code). There it says: “If, on occasion of a judgement in judicial matters, a public servant violates his civil duty, he is responsible for the resulting damages only if the breach of duty consists of a criminal offence.” In this case, a judgement is understood as any kind of final judicial decision in legal matters. If the judge’s decision is caused by misconception, he does not deliberately misapply the law: Therefore, he is in this case not liable to the injured party. However, it is important to distinguish the question of whether the state is liable to the injured party for miscarriages of justice and whether the state is entitled to seek redress form the judge (see below 2).

b. defamatory utterances made in court, or defamatory statements contained in a judgement?

Defamatory utterances of a judge in the course of the proceedings entitle a party to challenge the judge on grounds of bias, who is as a consequence excluded from the corresponding proceedings. He can then be criminally prosecuted for defamation. The party is not entitled to claim damages from the judge. The case of a defamatory statement contained in the judgement itself is not known to us. It would, however, be a criminal offence (defamation/libel), if it is not considered as judicial evaluation of the deed. Defamatory statements made by a judge within his judicial function may as well lead to disciplinary measures being taken against him.

c. (undue) delays,

Primarily, disciplinary actions can be taken against the judge in case of default by his supervisor. The party that suffered financial loss is also entitled to claim damages from the judge. So far, the liability exclusion of § 839 section 2 BGB mentioned above is not valid here. The 2nd sentence of this paragraph says: “This rule is not to be applied to refusals or delays in office which are contrary to duty.” Of course, this does not apply to delays occurring if the judge for example considers the collection of new evidence as necessary or if a decision is turned down as being incorrect by the appellate court, and if the matter is referred back to the court for a new decision. These kinds of delay are subject to the so-called “Spruchrichterprivileg” (privilege of judicial decisions) of § 839 sect. 2 1st sentence (see below No. 2).

d. poor functioning of the court administration?

In this case, the judge is not liable personally.
e. other behaviour in the performance of his office?

In general, it can be stated that a judge is responsible to the state for financial losses he caused with intention or gross negligence.

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)?

According to German law, the state will usually be liable for damages to the injured party. In public law, this is stated in Article 34 GG (German Constitution). It says: “If someone in execution of his public office violates his or someone else’s official duties, the state is principally to be held responsible...” In private matters, the state is liable for actions of public servants according to §§ 89, 30 ff., 831 BGB.

In addition, the public servant is only liable within the limits of § 839 section 1, 2nd sentence BGB: if he is only charged with negligence, liability lies with the state alone; if he acted intentionally, liability lies with him and the state. The public servant does not have a claim to recover the sum.

This system is basically also valid for judicial activity, with the only exception mentioned above in the case that the action is subject to the Spruchrichterprivileg (privilege of judicial decisions), § 839 sect. 2, 2nd sentence BGB. The area of jurisdiction is subject to this privilege. This includes the content of judicial decisions and the formalities of judicial proceedings, starting from commencement of action until enforcement. Thus, in these cases the state is not liable as well. It is therefore not possible to succeed in claiming damages from the state on the grounds that the judge’s sentencing is wrong. The reason is not so much the principle of judicial independence – the object is, on the other hand, to avoid an indirect review of final and legally binding judicial decisions in the context of an action for damages, because by these means the principles of legal certainty and stability could be restricted.

3. If liability lies with the judge in person, is a liability insurance usual, compulsory, or provided by the government?

It is possible to provide security for oneself by means of a professional liability insurance. This is necessary for the judge, because not all judicial decisions are subject to the “Spruchrichterprivileg” mentioned above, for example the various tasks of a judge in the area of optional jurisdiction, the tasks of custodial judges, and also mistakes that do not occur during the actual decision but in advance, when preparing for the decision: for example forgetting to cancel the invitation of a witness who does not need to testify any more.

The conclusion of a liability insurance is optional. The state is not concerned with these matters.

4. In your opinion do the rules governing the liability of judges in any way jeopardise their independence? Are these rules otherwise satisfactory?

Because of the “Spruchrichterprivileg”, impending damage claims can have no influence on the actual decision-making process. Mistakes made in the context of the general execution of an office are hardly connected to questions of judicial independence. Problems arise only in borderline cases: when a judge does not make or prepare a final decision in legal matters, but still examines if the facts fit a certain paragraph, for example when issuing a certificate of inheritance or a civil arrest warrant for assets of a third person, or when ordering pre-trial confinement. In these cases, the judge is not liable unless he acted intentionally. The state can only seek redress if the judge acted with intention or gross negligence.

As a conclusion, I therefore consider the principle of judicial independence as not being impeded by liability regulations.

5. Are there any plans for reform?

No.
II.

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

Is judicial independence affected by the fact that a party or the state can claim damages from the judge because of actions connected with his official function?

In the case of a wrongdoing with the consequence of financial losses, should only the state be able to recover the sum from the judge (also in cases of intention and gross negligence), or should he be liable directly to the injured party?

III.

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

a. A civil liability for damages does not necessarily impair judicial independence. This principle is only endangered if the judge is liable for any kind of slight fault without being able to safeguard himself against liability risks by means of a personal liability insurance.

b. In order to protect an unimpaired execution of the judicial office, it is necessary not to hold a judge liable directly to the injured party for actions concerning his function as a judge. Only if the injured person has successfully taken action against the state by means of a liability suit, the state should be able to recover the sum from the judge.

c. The possibility to indirectly review final and binding judicial decisions (sentences, verdicts and resolutions of the court) by means of damage claims affects the confidence in the correctness of judicial decisions and therefore the principle of legal certainty itself. In the interest of the principle of legal certainty, damage claims against the judge and the state are to be restricted to cases of intention and gross negligence.

IV.

8. Ordered settlement of disputes outside of the court

9. By means of case examples, the issue may be put into concrete terms. I thereby hope for a more intense discussion. Whether many or only some question are posed should entirely depend on the subject that is dealt with.
CASE STUDIES

Example A

According to German law, AB would be entitled to claim compensation for custody from the state. The state is able to seek legal redress from the judge (§ 82 Bundesbeamten gesetz = Federal Public Servant Law / the corresponding regulations in the federal states are the same), because he acted with gross negligence. This may be assumed, because there is no kind of statute or rule in German law according to which the accused could be taken into custody on grounds of him not telling the truth.

In my opinion, the same is valid for AB’s additional costs which result from having to pay his lawyer. According to German law, however, there could be doubt about whether an order of custody serves for the preparation of a sentence in legal matters or whether it is only issued on occasion of the execution of the judicial office. In the first case, neither the state nor the judge can be liable for compensation of the additional lawyer’s payment (§ 839 Sect. 2, 1st sentence BGB). As far as compensation for custody is concerned, there is a special legal regulation which allows for claiming damages from the state because of custody which has been suffered wrongfully. In the case of gross negligence, the state can as a consequence seek legal redress from the judge.

AB has the possibility of challenging the judge on grounds of bias.

Example B

In this case, the same question as in example A arises: Did the judge cause the enterprise’s financial loss in the context of preparing a sentence in legal matters, or was it caused on occasion of the execution of a judicial office? In the first case, nobody is liable, neither judge nor state.

Example C

In Germany, the judge alone determines which and how many proceedings are to be tried a day. If he schedules more cases or summons definitely more witnesses than can probably be heard by a judge, and if someone suffers a damage because of this, the state is liable for compensation. The state can seek legal redress from the judge if he acted at least with gross negligence.