Answers to the questionnaire
on the subject
CIVIL LIABILITY OF JUDGES
(The Netherlands)

I
1. Under what circumstances may a judge be liable (in damages) for
   a. errors contained in a judgment
      Only in exceptional circumstances. In the beginning of the 19th century the French rule of
      personal liability for déni de justice, to be established in a special procedure, was adopted,
      but this procedure has seldom been applied. Apart from that the Supreme Court held in 1971
      that there is liability (of the State) for errors contained in a judgment only when in its
      preparation fundamental principles of fair trial have been neglected in such a way that there
      has not been trial by a fair and impartial tribunal as guaranteed by art.6 of the European
      Convention on Human Rights. In other cases, according to this decision, the limits inherent
      to the system of appeals imply that, when appeal is not or no longer possible, a party
      dissatisfied with a judicial decision may not have it reviewed by a court in other ways: “lites
      finiri oportet”.
      Detention on the basis of criminal convictions reversed or reviewed on appeal and arrests
      followed by acquittal do not lead to civil liability, but the former suspect may claim
      equitable compensation from the State in a special administrative procedure.
   b. defamatory utterances made in court, or defamatory statements contained in a
      judgment
      In Dutch procedure the emphasis lies on written judgments. The judge’s role during oral
      proceedings is more or less limited to questioning the parties and witnesses and supervising
      the parties’ debate. Oral statements containing a qualification of one of the parties or their
      behaviour are rare. Therefore the problem of defamatory utterances made in court is
      practically unknown. However, in theory the ordinary rules of liability for defamatory
      utterances would apply in such a case, i.e. liability of the State, not the judge (see 2). As for
      written statements contained in judgments, a claim that a statement is defamatory will
      usually imply that the decision is incorrect and in that case the rules set forth under 1.a
      apply. Otherwise the ordinary rules of liability for tort and negligence would apply.
   c. (undue) delays,
   d. poor functioning of the court administration
   e. other behaviour in the performance of his office?
      In these cases the ordinary rules of State liability for tort and negligence committed by
      public servants apply. These rules are rather strict: the State is liable also when no personal
      reproach can be made to the servant; thus the State is liable when a public servant fails to
      apply a new rule although the servant did not know the rule and this lack of knowledge was
      not unreasonable.

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)?
   Only in the ancient procedure in case of déni de justice (see 1.a) liability lies with the judge
   in person. Otherwise liability lies with the State and liability of the judge is expressly
   excluded in a statute on the position of judges (art.42). According to this provision the State
   may recover from the judge the sum for which it is held liable, but 1) not in case of damages
for errors contained in a judgment and 2) only in case of malice or gross negligence. A special administrative procedure was created for this recourse by the State against the judge, but it has never been used up till now.

3. If liability lies with the judge in person, is a liability insurance usual, compulsory, or provided by the government?
   See 2: for all practical purposes the judge is not liable in person. Insurance for the theoretically possible exceptions is not known.

4. In your opinion do the rules governing the liability of judges in any way jeopardize their independence?
   No.
   Are these rules otherwise satisfactory?
   Yes, as far as personal liability is concerned. However the present rules tend to restrict State liability in this field more than in other branches of government and, according to most of the authors on this subject, more than necessary: those restrictions are only partly justified by the principle that a judgment should not be reviewed indirectly. When irreparable damage is caused by a judgment annulled on appeal, no reason for excluding State liability can be found in that principle. Also the individual suffering damage caused by judicial conduct enjoys less protection by the law than in case of tort and negligence committed by (other) professionals, where the test of the reasonably capable professional is applied. Perhaps in some cases that test could be applied to State liability for judicial conduct.

5. Are there any plans for reform?
   No. The statute mentioned under 2 has been reviewed completely as of the beginning of this year, but at that occasion the present provision has not been altered nor even discussed.

II

6. Which subjects would you like to discuss in detail?
   Is it desirable to extend State liability for judicial conduct in accordance with the rules of State liability in other fields?

III

7. What changes in the law on this subject do you suggest?
   See 6.

IV

(next year)

   Compensation for pain and moral damage.

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?
   For the time being I prefer the present system, provided that the case studies need not be treated in the written answers to the questionnaire but are intended for discussion during the meeting.

July 2002
Ton Pos