MACCABAEAN LECTURE IN JURISPRUDENCE

THE 'NON-CONTRACTUAL' LIABILITY OF THE EUROPEAN ECONOMIC COMMUNITY

By LORD MACKENZIE STUART

Read 28 February 1975

IT is trite to say that the state has long since abandoned the restrictive role of 'policeman, tax-gatherer, and panoplied protector', to use a phrase which my memory ascribes to Sir Carleton Allen.

It is equally a commonplace for British jurists, for law reformers and, to a lesser extent, for politicians, to pose the question whether, in the face of the pervasive impact of administration, sufficient protection to the citizen is afforded by the law. The frequency with which the question is asked, however, both reflects its importance and implies that much yet remains before a satisfactory answer can be given.

A similar problem arises at Community level. The power of regulation possessed by the European Communities over major sectors of each national economy is enormous, as critics of the system are not slow to observe. Less frequently mentioned are the checks and balances built into the Community structure, particularly those provided by the Court of Justice, although as Professor Mitchell has rightly observed, 'One may ask whether there is not a risk of asking or expecting too much of the European Court or of being complacent because of its existence.'[1]

As is well known, Member States may seek annulment of Community regulations or decisions and the Commission may initiate proceedings to have a Member State declared in breach of its Treaty obligations. In certain circumstances individuals may have decisions affecting them set aside and, of course, individuals may, and frequently do, challenge the validity or the interpretation of a Community regulation or decision when such is in issue before a court of a Member State. In many such

[1] Reply given by Professor J. D. B. Mitchell on his promotion as Doctor *honoris causa* of the University of Amsterdam, 8 January 1975, unpublished.

cases referred to it under the procedure of Article 177 the Court of Justice has held that Community law creates in a citizen of the Member States a right which it is the duty of his national court to recognize and enforce.

From time to time one encounters the suggestion that the major occupation of the Court of Justice of the European Communities is that of imposing an alien and authoritarian rule on the gallant and freedom-loving British. Normally it is a mistake for those holding judicial office to descend into the arena or mount the hustings, to offer a choice of metaphor, and I do not propose to do so. I would only say this: that those who care to read the whole of the Treaties of Paris and Rome and the judgments of the Court of Justice during the last twenty years will see that Community law is as much concerned with the protection of rights as with the imposition of obligations.

That more can be done I have no doubt. For example, whether or not the Treaties allow to the individual adequate access to the Court of Justice and whether the remedies open to him are sufficient are current topics of debate, but this broader problem would far exceed the confines of a single lecture. One thing is plain, however. Unless provision had been made for non-contractual liability on the part of the Communities, that is to say liability founded in tort, or delict, or Aquillian responsibility, to mention but a few of the paraphrases which exist, the catalogue of remedies would be incomplete. Community responsibility for non-contractual damage is therefore of importance as part of the machinery of the Treaty for protecting individual interests although, as will be seen, liability can only arise in a relatively small number of cases.

In the Treaty of Rome—and for convenience I deal only with the Treaty establishing the European Economic Community—Article 215[1] deals with the liability of the European Economic Community, both contractual and non-contractual. Contractual liability presents little difficulty. It is governed by the law applicable to the contract in question. Should the Court of Justice purchase some stationery in Luxembourg from a Luxembourg supplier and then, to imagine the unimaginable, default on the purchase price, the supplier would have his remedy in the Luxembourg courts according to Luxembourg law. It is in the second paragraph that the problems and the interest begin:

> In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member

[1] Article 188 of the Euratom Treaty is in identical terms.

States, make good any damage caused by its institutions or by its servants in the performance of their duties.

The Treaty, moreover, provides that in disputes arising under this paragraph the Court of Justice alone has jurisdiction, which contrasts with the general rule that the Community is subject in respect of its other legal duties to the Courts or tribunals of the Member States.[1]

The words just quoted have been described by no less distinguished a person than the late M. Gand, then Advocate-General, as 'ambiguous and no doubt deliberately ambiguous',[2] words themselves an echo, conscious or unconscious, of the observation ascribed to Napoleon that a 'good constitution should be short and obscure'.

Maurice Baring once compared Ronsard's great alexandrine

Je te salue, heureuse et profitable Mort

to the call of a silver trumpet.[3] Ambiguity apart, I question whether even those most passionately concerned would accord to paragraph 2 of Article 215 of the Treaty of Rome the same quality of mellifluous clarity—even in any of the authorized linguistic versions.

Nevertheless I have used the word 'interest' deliberately. Why should it be claimed that this paragraph should be of interest to anyone other than the specialist in the obscurer crannies of Community law? What relevance has it to the general field of jurisprudence?

Two answers, at least, can be given. In the first place the very words 'non-contractual liability' are themselves nowhere defined in the Treaty, and require if not definition, elaboration. To a common lawyer accustomed to precise categories of legal relationship such as tort or quasi-contract the waste-paper basket phrase 'non-contractual' is itself puzzling.[4]

The terminology is explicable, however, if the twofold desire of the framers of the Treaty is understood. They wished to ensure that the Community should be responsible in law for all its actings and, if necessary, that recourse might always be had

[1] Articles 178 and 183.

[2] Cases 5, 7, and 13–24/66, *Firma Kampffmeyer and others* v. *Commission*, Rec. 1967, p. 317 at p. 343.

[3] D. B. Wyndham Lewis, *Ronsard* (London, 1944), p. 5.

[4] Although the Law Commissions have had to fall into line in their recent consultative document on the E.E.C. Preliminary Draft Convention on obligations.

to a competent court. Hence, if liability in contract was to be mentioned expressly, to ensure that no other category of legal obligation should be omitted the exhaustive term 'non-contractual' was employed. The same approach was adopted in Article 183 relating to jurisdiction. Except in so far as the Court of Justice was given specific competence, the jurisdiction of the national courts was to remain intact. The reason for this all-embracing approach lies in the *précédent regrettable* of the O.E.E.C. —the Marshall plan—headquarters at the Château de la Muette in Paris, an episode which was in everybody's mind when the Treaty of Rome was being drafted.

In that case an injunction was sought against the organization on the ground that a proposed new building offended against the servitude rights of a neighbouring proprietor. The injunction was granted. On review by the Cour de Cassation an objection to the jurisdiction of the French Courts was sustained.[1] When the interpretation of a Treaty raises matters of international *ordre public* French Courts are bound by the official interpretation which can only be given by the French Government. In its view the exceptionally wide clause of immunity contained in the Paris Convention of 1948—O.E.E.C.'s constituent document—extended to such a matter as the enforcement of a building restriction. Accordingly in drafting the Treaty of Rome it was felt strongly, so I am told, that the European Economic Community should be subject to legal control in respect of all its actings and clauses of immunity confined to the minimum.

When then, apart from contract, is the Community actionable in damages and to whom does it owe a duty? The Community, although in terms of the Treaty a legal *persona*, is a creature *sui generis*, a creature of treaty, unique in constitutional theory, neither federal nor con-federate, operating on supra-national and international levels, as well as in the internal structure of the Member States. Can analogies be drawn and comparisons made with existing theories of state responsibility? There are many variations on the theme of state responsibility. There is only one European Economic Community and therefore there must be one uniform standard of liability which applies to it.

The second point of wider interest that emerges from the words of Article 215 to some extent overlaps the first. It exists in the requirement that the Community shall make reparation for any damage 'in accordance with the general principles

[1] Decision of 6 July 1954: Recueil Dalloz, 1955, p. 633. Note by Professor Jean l'Huiller of the Law Faculty, Poitiers.

common to the laws of the Member States'. This formulation would at first sight suggest that there is, in this field, a body of general principle and that all that the Court has to do is to answer an examination problem in comparative law. But is this necessarily so? If there are differences between the laws of members, what are they and how are they to be resolved?

I make no claim to answer satisfactorily all or any of those questions, but I would emphasize that the arid title of this lecture—for which I apologize—conceals matters of real concern.

This is the moment where the practical lawyer—the solicitor on the Clapham omnibus—intervenes and says 'A plague on your theorizing' or words to that effect. 'I may not know the exact limits of Article 215 but one thing is quite clear. All civilized systems of law provide for vicarious liability by the master for wrongs done by the servant in the course of his employment. If a Community official in the course of his duties is driving his car from Brussels to Strasbourg and negligently collides with my car I can recover damages from the Community.' There is much to be said for this point of view. But, for once, the practical lawyer is wrong or, at least, not wholly right.

A few years ago an engineer employed by Euratom was instructed to take two official visitors round certain atomic installations. His *ordre de mission* clearly implied that he could use his own car. While driving in Belgium he was involved in an accident, injuring one of his passengers. Combined civil and criminal proceedings, as is normal in Belgium, followed and the engineer was found at fault on both counts. An application was made to the Cour de Cassation to have the conviction quashed on the ground that this was an action falling under the terms of Article 215 and thus exclusively within the competence of the European Court. As this raised a question of Community law the Cour de Cassation submitted certain questions to the Court of Justice.[1]

In the course of its reply the Court of Justice had this to say:[2]

> As regards non-contractual liability, the Treaty subjects the Community to rules forming part of the Community legal system and which impose on it a uniform system in compensating for damage caused by its institutions and by its servants in the performance of their duties.
>
> By referring at one and the same time to damage caused by the institutions and to that caused by the servants of the Community,

[1] Case 9/69, *Claude Sayag et S.A. Zürich* v. *Jean-Pierre Leduc etc.* 1969 Rec., p. 329.

[2] p. 336.

Article 215[1] indicates that the Community is only liable for those acts of its servants which, by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to the institutions.

The Court added that the use by an agent of his personal car to travel in the course of his employment did not measure up to this test. Even the mention of his private car in his *ordre de mission* did not involve the task of driving as a part of the exercise of his functions, but simply allowed him to claim the expenses of so doing as one of other alternative means of transport.

Now, I fully accept that this might initially seem strange to the solicitor on the Clapham omnibus, and even stranger to the rest of his fellow passengers. Perhaps it might even seem contrary to what I said a moment ago about the protection of the individual. I hasten to add, however, that in this case the individual most concerned, the victim of the accident, was already adequately protected by the driver's insurance and what was in issue was the question of the exclusive competence of the Court of Justice and the exclusive liability of the Community.

What that decision does emphasize is that responsibility for non-contractual damage in terms of Article 215 only relates to activities of the Community institutions as such, that is to say to the situation where the act in question arises out of the performance of an institutional task. It leaves untouched the question whether or not there may be non-contractual liability upon the Community as an employer by the law of a Member State in respect of acts by Community servants, that is to say non-contractual liability which does not fall within the terms of Article 215 and for which the Community must answer in the courts of that state.

In attempting to find the basis of liability of the Community for non-contractual damage it is accordingly easier to take first the second problem which I mentioned—what is the meaning to be given to the words 'according to the common principles of the Member States'. It has been said by M. Lagrange, who was one of the original Advocates-General when the Court of Justice was created in 1952 as part of the Coal and Steel Community, and whose contribution to the work of the Court has been of the utmost distinction, that these words

> cannot be understood as applying to (the) legal principles (of Member States), which they in no way hold in common: this is merely a diplomatic formula, such as is often to be found in international treaties,

[1] In fact Article 188 of the E.A.E.C. Treaty.

and which only makes sense in so far as it refers to certain equitable principles, which are indeed widespread and are normally to be met with in any *Rechtsstaat*.[1]

M. Lagrange illustrates his point by comparing two cases very similar on their facts. In the one, a French case, funds had been embezzled from a Municipal Loan organization—in this instance the *Caisse d'Assurances Sociales de Meurthe et Moselle*—over which the French State had a certain responsibility of supervision and in which duty they had failed. A depositor was held entitled to recover against the state. By contrast, in Italy, where the state has similar duties, the courts have said that such a duty of control is established in the general interest only and that the individual citizen whose savings have been lost has no remedy.

M. Lagrange's views were cited by M. Gand, as Advocate-General in the same case, *Sayag*, just mentioned, where he said:

> In fact, although it is universally accepted that the reference in the Treaty clearly cannot concern solutions of matters of positive law but rather the concepts on which these solutions are based, doubts may arise regarding its scope and its effectiveness. This concept cannot be understood as being the highest common factor[2] or even the synthesis of the fundamental principles accepted in the Member States. Mr. Advocate-General Lagrange used to observe that the only truly common legal principle is that which nowadays disapproves in all Member States of the doctrine of the non-liability of the State and that in other respects the systems are sometimes fundamentally different.

Accordingly, continued M. Gand, the task of definition fell to the Court of Justice. Addressing the Court, he said:

> The principal role finally reverts to you: it is for you to describe the limits of non-contractual liability by comparing the examples provided by the laws of the Member States with the characteristics and requirements of the Community.

That the Court has accepted the role which M. Gand cast for it is evident from the reports, but it is significant that as yet in no decision does the reasoning of the Court make express reference to any general principle common to the laws of the Member States—no doubt because as yet none is apparent—except the obvious statement that 'for the Community to incur liability there must be damage sustained, a causal link between the damage and behaviour complained of, and that that behaviour must

[1] *Common Market Law Review*, 3 (1965), p. 32.

[2] At p. 340. M. Gand in fact said 'highest common denominator', but that was no doubt a slip.

be illegal',[1] and even in this instance the word 'illegal' requires qualification.

This is not to say that the comparative law approach is without value. Time and time again in the arguments of the parties, in the opinion of the Advocate-General, and in the material made available to the Court by its own research department there is an abundance of comparative law scholarship which is of the greatest service. None the less it is the non-contractual liability of the Community with which the Court is concerned and any solution must be a Community one.

If, then, one puts aside the reference to 'general principles common to the laws of the Member States' as being, at the very highest, too uncertain to serve as a starting-point, how can one ascertain whether, in a particular case, liability exists? The common lawyer is so accustomed to the concept of fault that he would probably first approach the problem from this quarter. In this he would be correct.

In this connection, in so far as the wording of Article 215 is concerned, it is necessary to observe the contrast with the corresponding article[2] of the Treaty of Paris which established the Coal and Steel Community in 1952. This imposed upon the Community an obligation to make good any injury caused by a *wrongful* act or omission by the Community or by a personal *wrong* by a servant of the Community in the performance of his duties. In fact the French text[3] uses the word 'fault'; *faute de service* and *faute personnelle*, being terms of art in French administrative law. That the change of wording was deliberate can be seen by comparing the present text of Article 215 of the Treaty of Rome with the original proposal of the drafting Committee—'The Community shall make good damage caused by a non-contractual *fault* of its institutions'.[4]

The contrast is in many respects more apparent than real. If there has been, in fact, a *faute de service* liability will follow under Article 215. In *Kampffmeyer*[5] the Court had to consider a decision of the Commission authorizing the German government to take certain safeguard measures in the cereal market,

[1] e.g. case 4/69, *Alfons Lütticke GmbH* v. *Commission*, 1971 Rec., p. 325 at p. 338.

[2] Article 40.

[3] Which in the case of the Treaty of Paris is the only official language—see Article 100.

[4] See *Traité instituant la C.E.E., travaux préparatoires*, Luxembourg, 1960, p. 407.

[5] See above, p. 111.

which measures were only permissible if 'serious disturbances' in the market should be threatened. The Court had in the earlier case of *Toepfer*[1] examined this decision and had held that the Commission had had no grounds for anticipating serious disturbance. It therefore annulled the decision. In a subsequent action for damages against the Commission at the instance of a group of importers who had been affected by the decision, the conduct of the Commission was described by the Court as constituting 'a wrongful act or omission capable of giving rise to liability on the part of the Community'.

This accords with the normal common law rule that fault consists in conduct which falls short of that of the normal prudent person—I leave aside questions such as whether there must be an antecedent duty of care or whether the person injured is one to whom such a duty is owed, although as will be seen these have their counterpart in Community law. This approach also accords with the civil law of all the original Member States, each of which recognizes fault as a ground of state liability. In a number of cases brought under Article 40 of the Coal and Steel Treaty—which, as will be remembered, expressly used the word 'fault'—one finds reference to such phrases as 'lack of prudence', 'failure of vigilance', and absence of 'normal diligence'.[2]

Even where the Court in its judgment refrains from using the word 'fault', it is in fact fault as the common lawyer would understand it that is often in issue. In *Lütticke* v. *Commission*[3] the plaintiffs had to pay a tax known as 'turnover compensation tax' to the German Federal Republic in respect of powdered milk which they had imported, a tax which they maintained was at too high a rate. They had sought a number of ways to attack this imposition.[4] In the last of a series of litigation they maintained that in terms of Article 97, paragraph 2, of the Treaty of Rome the Commission had a duty, in the case of a turnover tax of the type in issue and where certain principles had not been complied with by the Member State, to address appropriate directives or decisions to the Senate concerned.

This, they alleged, the Commission had not done and so had failed in its duty of supervision of the German tax system. No,

[1] Cases 106 and 107/63, *Alfred Toepfer and Getreideimport Gesellschaft*, 1965 Rec., p. 525.

[2] See references collected by Goffin and Mahieu, *Cahiers de Droit européen*, 1972, pp. 79 and 80.

[3] Case 4/69, 1971 Rec., p. 325.

[4] Case 48/65, 1966 Rec., p. 27 (action of annulment); Case 57/65, 1966 Rec., p. 293 (request for preliminary ruling).

said the Court, not so. The Commission had all along been aware of the tax rate, had discussed with the German authorities the complex economic factors involved, and as a result of these discussions had in fact persuaded the German authorities to reduce the rate of tax to some extent. Given that the exercise of the power conferred upon the Commission under this article involved an element of discretion, it could not be said that the Commission had failed in its duty of overseeing the application of the tax. Accordingly, although the word 'fault' or 'absence of fault' is nowhere to be found in the reasoning of the Court, fault was alleged by the plaintiffs and the decision is easily read as one which considered the allegation but rejected it.

But what of liability without fault? The wording of Article 215, as I have emphasized, expressly avoids the word fault and, as has been pointed out by many commentators, this would permit liability to be founded on other bases, such as the doctrine of risk.

The latter can be explained by saying that when it is recognized that the state may legitimately engage in certain activities which by their very nature involve an element of risk it is accepted, in France at least, that should that risk materialize the State must bear the consequences. For example, where an innocent passer-by was shot by the police in the course of their pursuit of a dangerous criminal, the liability of the State was affirmed. So too, where young delinquents broke out from an institution and did damage, those who suffered were entitled to be indemnified.[1] Some authors have demonstrated the lesson for the common law when faced with situations such as existed in *Read* v. *Lyons*,[2] in which a wartime conscripted worker in a munitions factory was injured by an explosion, or in *Home Office* v. *Dorset Yacht Club*[3] where a group of Borstal boys forming an outside working party on an island escaped and damaged a moored yacht.[4] In each case, as will be remembered, it was held that proof of fault was essential before liability could be established.

The concept of liability based on risk of physical damage, however, is not in practical terms relevant to the activities of the Community except, perhaps, in the field of atomic power. The

[1] See cases collected by Professors Brown and Garner in *French Administrative Law*, 2nd edn., p. 106: also Labaudère, *Traité elémentaire du droit administratif*, 5th edn., vol. i, para. 1161, etc.

[2] [1947] A.C. 156.

[3] [1970] A.C. 1004.

[4] Brown and Garner, op. cit. Professor Hamson in 1969 C.L.J. 272.

Council of Ministers do not normally pursue with gun in hand escaping bandits; Commissioners do not manage explosive factories or own penal establishments. The Community function is a regulatory one operating either by means of directives addressed to Member States, or by regulations of general import or by decisions affecting individuals or groups of individuals. Almost invariably these Community 'acts' affect the pocket of those concerned for better or for worse. If the effect is to empty the pocket or slow the rate at which it fills can it ever be said that damage has arisen for which the Community is liable?

Actions which seek an affirmative answer to this question are being brought before the Court of Justice in increasing numbers. They are not in essence actions grounded on the culpable malfunctioning of the Community, although they are sometimes presented as such. What is in issue is the administrative action of the Commission or Council. Whether such action is properly to be described as 'legislative' or 'executive' is often hard to say and, in any case, for the purpose in hand, the dichotomy is probably irrelevant. What is essential is that the Community act prescribes an obligatory rule of conduct—what is often described as a 'normative act'. I dislike this phrase and I am tolerably sure that it will not be found in any of the classic English writers but, through translation from French and German sources it has, I fear, inescapably built itself into the fabric of our vocabulary.

At any rate all claims have this in common—an allegation by the plaintiffs that the Community Institution concerned chose an incorrect course of action, followed that choice by a regulatory act and thus caused the plaintiff financial loss. In each case of this type to date, however, the plaintiff has failed,[1] except where the incorrect course of action was due to negligence, and failed on a variety of grounds. That the emphasis of the Court in refusing a remedy should vary from case to case according to the special circumstances is inevitable, but this factor adds to the difficulty of attempting to define in a positive fashion the non-contractual liability of the European Economic Community for a normative act.

It is also worth adding the comment that in this area of judge-made law the Court has proceeded with caution and has generally refrained from saying more than the case itself required. This much is obvious from the reports and further development must await further litigation.

[1] But see Postscript.

None the less certain indications exist. The question whether the non-contractual liability of the Community could ever arise from a normative act first occurred in 1971. In *Aktien-Zuckerfabrik Schöppenstedt* v. *Council*[1] the problem was discussed at some length by Advocate-General Roemer in a survey of the law of the original six Member States. He concluded his opinion on this point by saying that:

> We may accept that despite the fact that not all the Member States acknowledge the principle of the responsibility of public authority for normative acts which they pass, it is permissible to recognize that this principle figures among the constituent elements of Community law since it has widespread existence and since, in certain cases, it extends even as far as laws in the formal sense.

Even this cautiously worded formulation has been strongly attacked. In a most scholarly memorial presented to the Court by Professor Ipsen of the University of Hamburg in the recent case of *Werhahn* v. *Council*,[2] it was maintained that it stated the position too broadly even in the systems of the six original members and that when the law of the three new members was considered such a result was exceptional indeed. The Advocate-General in the latter case, again Herr Roemer, dealt with Professor Ipsen's approach by saying that 'widespread existence' was to be understood in a geographical sense only and that 'cases of liability for legislative injustice ("legislatives Unrecht") are rarities and in practice only of minimal importance (a realization by the way which in the long run will also probably apply to Community law)'.

On the position of Ireland and the United Kingdom Herr Roemer agreed with the view of Professor Ipsen but made the point that the arguments against accepting the doctrine of liability for legislative injustice 'relate in the main to Acts of Parliament and sovereignty of Parliament, a field in which an affinity with Community law is less easily discernible than in the case of secondary legislation enacted by the executive'.

That is to say, in effect, that before a legislative act can form a basis for a claim to reparation the legislative act itself must be contrary to law. This proposition, in turn, presupposes that there is a yet higher body of rules against which the validity of the former can be judged. It has been made very clear by Professor Hogg[3] that it is only in common law countries where

[1] Case 5/71, 1971 Rec., pp. 990–1.
[2] [1973] E.C.R. 1229.
[3] *Liability of the Crown*, Australia, 1971, p. 85.

there is a constitution by which the validity of a principal legislative act may be judged that the question can arise. Even if such be the case the further problem of the appropriate remedy is present. As Professor Hogg has said[1]

> An *ultra vires* act by a Crown servant which causes damage to a private individual gives rise to no liability on the part of the servant or the Crown unless the act was also a tort. The lack of legal justification removes a shield, but it does not provide a sword.

How far this statement is true without qualification remains to be seen. As Lord Wilberforce has recently observed, the principle whereby an individual may either claim indemnification for an illegal administrative act or be entitled to have its operation suspended until its validity has been judicially tested 'has not been elucidated by English law, or even brought into the open'.[2]

The difficulty, however, does not arise on the Community plane. In the first place one starts, as always, with the Treaties themselves which may fairly be regarded as the equivalent of a Community constitution. No Treaty provision any more than an Act of Parliament can give rise to a claim for damages should interests be adversely affected,[3] although as treaties they lend themselves to a more broadly based interpretative process than the common lawyer would accept for his national legislation.[4]

In addition the Court has adopted a number of fundamental principles drawn from the systems of the Member States which can now be regarded as rules of Community law. For example, in the field of administrative and contractual relations the Community authorities are always expected to observe the principles of good faith[5] or to respect vested rights.[6] One could give many other examples and I venture to think that the list is by no means closed.

While breach of such basic rules as well as of those laid down

[1] Op. cit., p. 81.

[2] *Hoffmann–La Roche* v. *Trade Secretary*, [1974] 3 W.L.R. at 125.

[3] Case 169/73 *Compagnie Continentale France* v. *Council*, as yet unreported. (Judgment given 4 February 1975.)

[4] Norman Marsh, *Interpretation in a National and International context*, 1974: P. Pescatore, *Cahiers de Droit Européen*—forthcoming review of this work.

[5] Cases 43, 45, and 48/59, *Eva von Lachmüller and others* v. *Commission* and *Rudolf Pieter Marie Fiddelaar* v. *Commission*, Rec. 1960, p. 932 at p. 956 and p. 1077 at p. 1099.

[6] Case 15/60, *Gabriel Simon* v. *Court of Justice*, Rec. 1961, p. 222 at p. 242.

in the Treaties themselves may lead to the nullity of a Community act it is not necessary for the establishment of non-contractual liability that the normative act in question should have been declared null.

It is true that in 1962[1] the Court said that an administrative act which had not been annulled could not in itself constitute a wrong, but in a recent series of cases[2] the Court has affirmed that an action based on Article 215 has a different object to an action of annulment. The latter has in view the suppression of a particular measure; the former the reparation of damage caused by an institution in the exercise of its functions.

This does not mean that the act in question must not have been one capable of being annulled had a party with a proper interest at the appropriate time chosen to initiate such action. In other words the general rule would appear to be that the act must have been illegal. This, as I have indicated, coincides with the rule of English law that there can be no liability for damage caused by valid legislation.

In *Zuckerfabrik Schöppenstedt*, which I mentioned a moment ago, the plaintiffs claimed damages for the loss caused to them by the action of the Council in adopting a certain regulation designed to make up the difference between national sugar prices and Community prices. In its judgment the Court said that '*In the present case*, the non-contractual liability of the Community presupposes at least the *illegal* nature of the act which it is claimed originated the damage'.

The Court then elaborated this by saying, in a form of words which it has used a number of times since,[3] that in the case of a legislative act involving a choice of economic policy, there is no liability on the part of the Community for damage which individuals may have suffered unless there has been a sufficiently flagrant infringement of a superior rule of law protecting the individual. To this formula it is necessary to return.

It has been suggested[4] that in subsequent decisions of the Court the requirement of illegality has disappeared. This is certainly true in the sense that the Court has not repeated the

[1] Case 25/62, *Plaumann & Co.* v. *Commission*, [1963] E.C.R. 49.

[2] *Schöppenstedt*, above; *Compagnie d'Approvisionnement*, 1972 Rec., p. 391, case 59/72; *Wünsche* v. *Commission*, [1973] E.C.R. 791.

[3] Cases 9 and 11/71, *Compagnie d'Approvisionnement*, above, at p. 404; case 43/72 *Merkur*, 1973 E.C.R. 1055 at 1070; *Werhahn*, op. cit. at p. 1248.

[4] See opinion of the Advocate-General in *Compagnie Continentale France*, above.

affirmation that where damage has been caused by a normative Community act that act must have been illegal but the Court has frequently repeated the formula just quoted, to the effect that there must have been a sufficiently flagrant infringement of a superior rule of law.

This expression requires a little elaboration. We are in this country well accustomed to the concept of subordinate legislation being invalidated on the ground of *ultra vires*, a concept which always entails a comparison of the power given and the purported exercise of that power. The same exercise has to be performed in Community law but here it is worth emphasizing its hierarchic structure. As I have indicated, at the apex of the pyramid is the relevant Treaty and the basic rules to be derived from that Treaty or from the general legal philosophy of Member States which the Court has in the past applied or may yet deduce, such as the rules that good faith must be observed or that vested rights must be respected.

Acting under the powers conferred upon it by the Treaty, the Council may then create, by regulation or directive, a second level of law in a predetermined sector and which, in terms, may confer upon the Commission the power to make further implementing regulations which form yet another tier. The validity of these regulations, whether originating or implementing, can thus always be ascertained by the test of whether they conform to a superior rule of law.

Accordingly, when the Court has said that liability in the case of a normative act implying a choice of economic policy can be imposed only where there has been a violation of a superior rule of law, this is in truth an assertion that the act complained of is illegal in the sense that it is contrary to law.

The Court, however, has imposed another prerequisite to liability. Not only must there be illegality in the sense that there has been a violation of a superior rule of law but the Court goes further—there must be a 'sufficiently marked' violation. This phrase has not been fully explored by the Court[1] but presumably not every formal error will found an action in reparation.

If one were speaking in terms of culpability I suspect that one must begin to think again of gross negligence or *culpa lata*. I know that we are all taught that there is no such thing in the Common Law of negligence but the distinction persists in other branches of the law, particularly the criminal law, and I, for one, am yet

[1] See *Kampffmeyer*, p. 111, n. 2.

to be convinced that distinctions between ordinary, gross, and slight negligence are 'so vague and impracticable in their nature, so unfounded in principle and so clearly rooted in historical error as to the rules of Roman law as to form any genuine part'[1] of a reasonable system of law.

But it is, I think, important to notice that the formula used by the Court studiously avoids the word 'fault'. It confines itself to requiring a sufficiently marked violation of a superior rule of law. It may be that a common lawyer would recognize this as fault—were it necessary for him to do so. If fault is to be defined as failure in duty towards a person to whom that duty is owed one could reasonably say that the Community legislator, by violating a superior rule, was in breach of that duty. It is the duty of the administration to apply the law. It is its duty to respect it. Any misunderstanding of the law would appear in consequence to constitute a failure of good administration and therefore a fault.[2]

So might run the argument, but as early as 1957[3] the Court showed itself reluctant to affirm the proposition that every unwitting illegality on the part of a Community Institution should be regarded as culpable negligence.

Part of the difficulty may stem from national usage giving rise to linguistic misunderstanding. For example, if I am not mistaken, German civil law distinguishes between fault, viewed subjectively, and illegality or objective fault. Nevertheless should there be illegality the general proposition that this implies fault would seem to hold good.

'The hypothesis where illegality is not a basis for finding fault, by reason of its formal or secondary characteristic, must remain an exception.'[4] Given, however, that we are in the field of public law, it may be wise to avoid the concept of fault altogether, particularly when the word fault in the context of tort or delict still invokes certain undertones of culpable delinquency. In commonsense terms one can speak readily enough of fault where the improper exercise of a legitimate activity is in question; fault is a less happy term when it is the legitimacy of the activity which is in question. This was aptly recognized by Lord

[1] Salmond on Tort, 15th edn., p. 284.

[2] Cf. Goffin, *Cahiers de Droit Européen*, 1972, p. 77.

[3] Cases 7/56 and 3 to 7/57, *Algera* v. *Common Assembly*, 1957 Rec., p. 81 at p. 128.

[4] Goffin, op. cit. at p. 78.

Diplock in his speech in *Home Office* v. *Royal Dorset Yacht Club*, where he said that,

> Over the past century the public law concept of *ultra vires* has replaced the civil law concept of negligence as the test of the legality, and consequently of the actionability, of acts or omissions of government departments or public authorities done in the exercise of a discretion conferred upon them by Parliament as to the means by which they are to achieve a particular public purpose.[1]

This translates appropriately to the Community scene if *ultra vires* is understood in its modern sense of 'failure to comply with the requirement of "legality"—whether it be legality of subject matter, legality of purpose, or legality of method', as Lord Diplock himself recently observed.[2]

Accordingly, where, as under Article 215, fault is not expressly an essential element, it seems preferable to concentrate on the more objective question of whether there has been a breach of a superior rule designed to protect the individual interests of the citizen.

I do not claim that in this respect the Court of the Communities has been wholly consistent, either in its judgments or in the advice tendered by its Advocates-General, but, speaking as an individual, it seems to me that there can be detected in its more recent decisions a change of emphasis from the culpability of the administration to the protection of the legitimate interests of the administered.

It will also have been noticed that the formulation of the prerequisites to liability contains the critical phrase that the rule whose violation is in issue must be one designed to protect the interests of the plaintiff. This rule, in German law, goes by the name of the *Schutznormtheorie*, and has been recognized as part of Community law since 1961.[3]

This requirement, too, has produced its own literature, but whatever may be the exact limits of the rule it cannot surprise

[1] [1970] A.C., at p. 1067.

[2] Administrative Law: Judicial Review Reviewed, [1974] C.L.J. 233 at 242.

[3] Cases 9 and 12/60, *Société Commerciale Antoine Vloeberghs S.A.* v. *High Authority*, 1961 Rec., p. 391. In that case the plaintiffs' case was founded, as in *Lütticke*, on the failure of a Community institution, here the High Authority, to intervene in respect of the actings of a Member State. The Court considered that the High Authority had indeed failed in their duty but that this gave the plaintiffs no cause of action since the rule of law involved was not one designed to protect the interests of persons such as the plaintiffs.

the common lawyer. At least since *Gorris* v. *Scott*[1] he has known that he cannot found on a breach of statutory duty unless the damage sustained is of a kind which the statute intended should be guarded against. There, the shipowner had failed to provide on deck, as an Act of Parliament had ordained, certain pens and partitions for the accommodation of sheep. Due to their absence, sheep had been washed overboard. On an examination of the statute the Court held that the Act required the provision of pens in order to prevent the spread of contagious disease and not to protect sheep against the impact of heavy seas. Modern application of this approach is perhaps less rigid—provided the damage is within the risk the exact way in which it occurred is unimportant[2] and a similar approach may be detected in the decisions of the Court of Justice[3] in as much as the rule invoked need not be exclusively for the protection of the person wishing to invoke it.

But what of Community liability without fault and without illegality? Can a normative act competently made under the powers contained in the Treaties and justifiable in the Community interest form the basis of a claim for damages if injury has been sustained as its consequence?

Here one is on uncertain ground and the most that can be said is that such a claim is not excluded by Community law.

In *Compagnie d'Approvisionnement* v. *Commission*[4] the applicant alleged against the Commission that it had acted culpably in fixing the payments to be made by the French Government on the importation of certain types of cereal at too low a level. These payments had been made necessary as the result of the devaluation of the French franc in 1969. Once again the principal claim was that the regulations issued by the Commission resulted in discrimination against French importers and thus were illegal but this contention was in the end rejected by the Court. In addition, however, the plaintiffs tabled an argument based expressly on the existence of liability notwithstanding the absence of any illegality. This was said to arise because the plaintiffs had suffered 'abnormal and special loss' since they were at a disadvantage by comparison with Dutch and German importers. The Court dealt shortly with this argument by saying

[1] [1874] L.R. 9 Ex. 125.
[2] *Grant* v. *N.C.B.*, 1956 S.C. (H.L.) 48; [1956] A.C. 649.
[3] e.g. *Kampffmeyer*, op. cit.
[4] Cases 9 and 11/71, 1972 Rec., p. 391.

that the measures in question were taken in the general economic interest to reduce the consequences of devaluation for the whole body of French importers.

In order to appreciate what lies behind this brief notice one must, I think, have regard to the opinion of the Advocate-General, M. Mayras, who explained that the applicant's formulation was based on a breach of the principle of equality in the face of public burdens, a principle developed by the *Conseil d'Etat* in its case law and as an extension of the 'risk' doctrine which I mentioned earlier. In essence this means, as I comprehend it, that where the state in the general interest acts in virtue of its administrative and regulatory powers it has a duty to compensate when that exercise results in abnormally heavy burdens being thrown upon certain individuals or groups of individuals.

The Advocate-General did not exclude the possibility that such a rule might be applied in Community law pausing only to say that[1] 'Nothing in the present state of the Court's case law would allow one to affirm that the Community could incur liability independently of all illegality and all fault.' The rule of French law, he said, in any event required, firstly, that the damage should be special to one or a few people and, secondly, that by its gravity it should impose a burden in excess of that which each must bear as a member of a community. None of these criteria was fulfilled in that case—prejudice affecting an entire sector of commerce or industry does not have a special character, and in any case the Advocate-General did not think that the burdens cast upon the plaintiffs were abnormally heavy. While therefore the existence of such a ground of action cannot be denied, it is obvious that its application will be very restricted.[2]

The problem of damage caused by a legal act again appeared to arise in the recent case of the *Compagnie Continentale France* v. *Council*.[3] The plaintiffs were and are major exporters of cereals. In September 1972 they contracted to sell substantial amounts of denatured wheat to purchasers in Great Britain for delivery between February and June 1973. As exporters they were entitled to certain compensatory payments as provided for in the Treaty of Accession. These compensatory payments are of

[1] p. 425.

[2] Mention might also be made of an argument advanced unsuccessfully in *Werhahn*, op. cit, in which it was sought to equiparate loss to expropriation of a type forbidden by German law.

[3] See above, p. 122.

variable amount but in July 1972 the Council of Ministers had taken the unusual step of marking their accord to a resolution agreeing the text of a regulation fixing in advance the amount of these compensatory payments, and which would be adopted formally after the entry into force of the Treaty of Accession. This step had been taken, it was expressly said by the Council, so that those who dealt in the products covered by the proposed regulation should know where they would stand as regards these payments at the beginning of 1973.

When, however, the regulation itself was passed on 31 January 1973 it contained an important addition (as the Treaty of Accession itself provided), the effect of which, combined with the steep increase in world wheat prices which had taken place the previous autumn, substantially reduced the amount of compensatory payments available to the plaintiffs. According to the Advocate-General the resolution of July 1972 was not merely an act of information but a promise to all interested parties that the text would be applied and as such had consequence in law. In his words, 'The case law of this Court is clearly directed towards recognition of the effect in law, on the one hand, of acts of the Community executive, which even if they are only described as a "notice" announce in advance future conduct and, on the other, deliberations, whatever name may be given to them in law, which express the intention to define a line of future conduct. The "protection of confidence" is a principle recognized in the Community legal system.'[1] In his view a violation of that principle could, where it had caused damage, render the Community liable.

In the result the Court decided that the plaintiffs had failed to establish the necessary link between the actings of the Community and the damage suffered. The Court, however, held that potential liability on the part of the Community existed, not so much on the ground that there had been a failure to protect those who had properly relied on a clear representation as to future conduct by a Community Institution, but rather on the ground that the statement by the Council should have contained a warning that its future conduct was regulated by the terms of the Treaty of Accession itself and that their application in turn depended upon changes in world wheat prices. On one view, therefore, the case can be regarded as no more than one involving maladministration.

[1] See Case 81/72, *Commission* v. *Council*, [1973] E.C.R. 575.

On the other hand nothing said in that case, it seems to me, would prevent an award of damages in an appropriate case if, in fact, the damage had been caused by an Institution's failure to protect confidence properly placed in its future conduct, even if that failure was caused for sound administrative reasons and in due and legal form.

Should this proposition ever be accepted by the Court it would inevitably invite comparison with the much discussed and criticized decision in the *Amphitrite*.[1] It will be recalled that during the First World War the British legation at Stockholm gave the Swedish owners of a merchant ship an assurance that if she put into an English port she would not be impounded but would be free to sail again. In fact the vessel was seized. Rowlat J. said that 'This was not a commercial contract; it was an arrangement whereby the Government purported to give an assurance as to what its executive action would be in the future'—I would interpolate the comment that I have never understood this form of words. What the shipowners asked for and got was an assurance; there was nothing 'purported' about it. The heart of Rowlat J.'s reasoning, however, is in the sentence 'It is not competent for the Government to fetter its future executive action which must necessarily be determined by the needs of the community when the question arises.' This may indeed be so, and it may be that, from time to time, the needs of the European Community also require that assurances should not be honoured. None the less this is far short of saying that the Community should not have to compensate individuals if, in the wider interest, it changes its mind. Speaking personally, I would hope that the European Communities would not look upon the stand taken by the British Government in the *Amphitrite* as an example to be followed.

From what I have said it will be evident that in the field of non-contractual liability the Court of Justice has far from ended the exploration of the ground. Indeed in some respects the Community law reports dealing with this subject resemble an early nineteenth-century map of Africa. The coast is shown; we see the deltas of great rivers; but where they lead and where they have their sources are as yet uncharted. Certainly the avidity with which the reports of the decisions of the Court are devoured by certain writers would justify the legend 'Here be dragons'. None the less in this field of judge-made law a few beacons have been lit and a handful of clearings created in the

[1] [1921] 3 K.B. 500.

jungle. As ever, progress depends on the accident of litigation, but judge-made law has the advantage of being able to adapt itself to changing attitudes or even, without always acknowledging the deed, of being able to *reculer pour mieux sauter*. Certainly in a context where governmental action may, in the general interest, bear harshly on the individual all national courts must be vigilant. The same vigilance is incumbent upon the Court of the Communities.

Postscript

Since this lecture was in print the Court of Justice has given judgment (14th May 1975) in case 74/74, *Comptoir National Technique Agricole (CNTA) S.A.* v. *Commission.*

An exporter, in legitimate reliance on the fact that a community payment to offset the effects of the devaluation of the dollar would not be suppressed without due notice, entered into certain binding contracts. He claimed damages for the loss caused to him by the Commission's sudden suppression of the payment in question. The Court found for the exporter, holding that, if, in the absence of an overriding public interest, the Commission, without notice, abolishes such a right, it must either provide transitional measures or render itself liable in damages.

A. J. M. S.