

*Allan F. Tatham\**

## **Liability of Public Authorities in England and France. Damages for Breach of EC law after Francovich and Brasserie**

### **1. Introduction**

The principle of administrative or state liability for breach of EC law is not stated in the EC Treaty but has rather been developed by the European Court of Justice (ECJ). With the establishment of the fundamental conditions of liability in a series of cases<sup>1</sup>, the emphasis has switched to the practical application of those conditions by national courts. This work will examine the requirement of national remedies for breach of EC law by public authorities, focusing on damages, and then turn to examine the grounds for administrative liability in France and England as exemplified by domestic cases. The analysis will also include a reflection on the Europeanisation of administrative liability.

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\* Assistant Professor, EU and International Law Department, Faculty of Law and Political Sciences, Pázmány Péter Catholic University, Budapest.

<sup>1</sup> See generally A. Biondi & M. Farley, *The Right to Damages in European Law*, Kluwer Law International, Alphen an den Rijn (2009).

## 2. Right to damages in national courts for breach of EC law

In the absence of any relevant Community provisions, the rights conferred upon individuals must be exercised before national courts<sup>2</sup> in accordance with the system of remedies, procedures and evidence under domestic law. This matter is subject to the principles of:

- (1) non-discrimination or equivalence according to which the remedy available depends on the provisions of national law and should be provided to protect Community rights on a non-discriminatory or equivalent basis to that provided for the protection of solely national legal rights<sup>3</sup>;
- (2) effectiveness, i.e., the remedy must be effective in protecting the infringed Community right: the Member State is accordingly under an obligation to afford real and effective protection for breach of EC law as well as providing a remedy having a real deterrent effect<sup>4</sup>.

Among these remedies, it has long been possible for parties to claim damages against EU Member State public authorities for breach of rights derived from Community law<sup>5</sup>. However, in the last 20 years, the ECJ has sought to give more guidance to national courts by laying down certain preconditions for founding a compensation claim against the domestic administration for infringing EC law.

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<sup>2</sup> Case 33/76 *Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989. National law also normally governs questions of evidence and procedure. These include such matters as the appropriate court or tribunal to hear the case, time-limits for commencing proceedings, and the burden of proof: Case 45/76 *Comet BV v. Produktshap voor Siergewassen* [1976] ECR 2043; Cases 205-215/82 *Deutsche Milchkontor v. Germany* [1983] ECR 2633. On the question of time-limits, however, see Case C-208/90 *Emmott v. Minister for Social Welfare* [1991] ECR I-4269.

<sup>3</sup> Case 158/80 *Rewe Handelsgesellschaft Nord mbH v. Hauptzollamt Kiel* [1981] ECR 1805; Case C-231/96 *Edilizia Industriale Siderurgica Srl (Edis) v. Ministero delle Finanze* [1998] ECR I-4951; Case C-326/96 *Levez v. T.H. Jennings (Harlow Pools) Ltd* [1998] ECR I-7835; Case C-78/98 *Preston v. Wolverhampton Healthcare NHS Trust* [2000] ECR I-3201.

<sup>4</sup> Case 79/83 *Harz v. Deutsche Tradax GmbH* [1984] ECR 1921; Case 14/83 *Von Colson v. Land Nordrhein-Westfalen* [1984] ECR 1891; Case 152/84 *Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723; Case C-271/91 *Marshall v. Southampton & South West Hampshire AHA* [1993] ECR I-4367.

<sup>5</sup> Case 60/75 *Russo v. ALMA* [1976] ECR 45, paras. 8–9.

In *Francovich*<sup>6</sup>, the case centred on the question as to whether the State was liable in damages for having failed to implement a Directive. Having recognized the principle of state liability as “inherent in the system of the Treaty”, the ECJ set out three specific criteria that governed the existence of liability for failure to implement – either partially or totally – an EC Directive: (1) the result prescribed by the Directive should entail the grant of rights to individuals; (2) it should be possible to identify the content of those rights on the basis of the provisions of the Directive; and (3) there existed a causal link between the breach of the State’s obligation and the loss and damage suffered by the injured parties. Once these conditions were met, EC law directly conferred on individuals the right to compensation and the action for damages in such a case was governed by national law.

In *Brasserie de Pêcheur and Factortame (No. 3)*<sup>7</sup>, the issue to be decided was whether or not the State could be liable in damages for loss caused to individuals by legislation adopted in contravention of directly effective Treaty Articles<sup>8</sup>. The ECJ established that a Member State would incur liability for breach of EC law whenever the following three substantive conditions were satisfied: (1) the legal rule infringed had to be intended to confer rights on individuals; (2) the breach had to be sufficiently serious; and (3) there had to be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

However, since these conditions were not sufficiently detailed to cover all issues arising from state liability claims before national courts then (as with *Francovich*) parties would have recourse to national substantive and procedural law to determine the nature and the content of the right. In principle, the compensation available had to be commensurate with the loss or damage sustained so as to ensure effective protection, but that the criteria which determined the extent of the compensation

<sup>6</sup> Joined Cases C-6 and C-9/90 *Francovich v. Italian Republic* [1991] ECR I-5357.

<sup>7</sup> Joined Cases C-46 and C-48/93 *Brasserie du Pêcheur SA v. Germany* and *R v. Secretary of State for Transport, ex parte Factortame Ltd* [1996] ECR I-1029.

<sup>8</sup> EC Art. 28 (on the prohibition between Member States of quantitative restrictions and all measures having equivalent effect on imported products) and EC Art. 43 (on the freedom of establishment).

available and the various heads of damage which might be claimed, were a matter for each Member State – again on condition that the relevant criteria were not less favourable than those applying to similar claims based on domestic law and did not make it impossible or excessively difficult to obtain reparation.

## 2.1. Damages against French public authorities

Since the 1873 *Blanco* judgment<sup>9</sup>, it has been accepted that the State may be held liable in damages but such liability is neither general nor absolute and is governed not by the principles which apply in private law (unlike in England), but by special rules which take account of the need to reconcile the rights of the State and of the citizens respectively. In general, *ultra vires* acts are held to be simultaneously illegal and wrongful and may therefore be declared void and give rise to a duty to pay compensation<sup>10</sup>.

There are two types of state liability recognized by French administrative courts: liability based on *faute* and liability *sans faute*<sup>11</sup>. Liability based on *faute* may either require *faute simple* or *faute lourde*, the latter being necessary when the task of the public service is particularly difficult or sensitive. The notion of *faute* is broad, encompassing any illegality on the part of the State, while liability *sans faute* is based on the twin principles of “*risque*” and “equality”<sup>12</sup>. The theory of *risque* is founded on the idea that the activities of the State – even when conducted without fault – may in certain circumstances constitute the creation of a risk which, if it materialises and causes injury or loss, the State should make good. The second key concept is that of the equality of citizens in respect of public burdens (*égalité des citoyens devant les charges publiques*). What is meant by this is that since the activities of the State are carried on in the interest of the entire community, the burdens that accrue

<sup>9</sup> *Blanco*, TC 8 février 1873, Rec. 1er Supp. 61.

<sup>10</sup> L. Neville Brown & J.S. Bell, *French Administrative Law*, 5<sup>th</sup> ed., OUP, Oxford (1998) at 181–212.

<sup>11</sup> M. Jarvis, *Remedies for Breach of EC Law before French Courts* [in] J. Lonbay & A. Biondi (eds.), *Remedies for Breach of EC Law*, John Wiley & Sons, Chichester (1997), chap. 17, 187 at 188.

<sup>12</sup> R. Errera, “The scope and meaning of no-fault liability in French administrative law” (1986) 39 *Current Legal Problems* 181.

should not weigh more heavily on some than on others. Thus, should state action result in individual damage to particular citizens, the State should make good that damage irrespective of whether or not there was a fault committed by the public officers concerned. Liability *sans faute* has been accepted by the French courts on the basis of *risque* or equality for damage suffered as a result of statutes<sup>13</sup>, administrative regulations<sup>14</sup> and international treaties<sup>15</sup>. Liability *sans faute* has only rarely been found to exist since the conditions regarding the level of seriousness are quite strict<sup>16</sup>.

## 2.2. Damages for breach of EC law by French authorities

It seemed initially that the administrative courts were going to found the liability of the French State for breach of EC law on the principle of liability *sans faute*<sup>17</sup>. However, partly due to fears that the *Conseil d'État* had unduly extended the concept of liability without fault which was only to be found exceptionally in cases of economic intervention of the State<sup>18</sup>, and partly due to the ECJ in *Francovich*, there has been a discernable shift towards accepting fault-based liability.

The leading authority of the *Conseil d'État* which confirmed this change is *Rothmans*<sup>19</sup> which concerned, on the one hand, domestic legal

<sup>13</sup> *Société des produits laitiers La Fleurette*: CE 14 janvier 1938, Rec. 25.

<sup>14</sup> *Ministre de l'intérieur c. Bovero*: CE 25 janvier 1963, Rec. 53.

<sup>15</sup> *Compagnie général d'énergie radioélectrique* CE Ass. 30 mars 1966, Rec. 257.

<sup>16</sup> The harm suffered must be shown to have been "abnormal" or "special": *Caucheteux et Desmont*: CE 21 janvier 1944, Rec. 22; and *Ministre de la Culture et de la Communication c. CAPRI*: CE 18 décembre 1981, Rec. 478.

<sup>17</sup> *SARL Les fils d'Henri Ramel v. Ministre de l'intérieur et Préfet de l'Hérault*: CE 7 décembre 1979, Rec. 456; and *Ministère du Commerce extérieur v. Société Alivar*: CE 23 mars 1984, Rec. 127. See Jarvis (1997) at 188–191.

<sup>18</sup> P. Roseren, "The application of Community law by the French Courts from 1980 to 1993" (1994) 31 CML Rev. 315, at 337; and N. Dantonel-Cor, "La mise en jeu de la responsabilité de l'Etat français pour violation du droit communautaire" (1995) 31 RTDE 471 at 500.

<sup>19</sup> *Rothmans International France SA and Philip Morris France SA*; and *Arizona Tobacco Products GmbH Export KG and Philip Morris France SA*: CE 28 février 1992, Rec. 78 et 81; [1993] 1 CMLR 253. Noted by R. Errera [1992] PL 340 and J. Dutheil de la Rochère (1993) 30 CML rev. 187.

provisions, namely (a) section 6 of the Tobacco Monopoly Act 1976 that provided for there to be a single retail price for each tobacco product in France; and (b) section 10 of a 1976 implementing decree that provided such prices would be fixed by the Minister for the Economy, Finance and the Budget. On the other hand, Directive 72/464/EEC (“the Tobacco Monopoly Directive”)<sup>20</sup> laid down a general rule that manufacturers and importers were entitled to set their own maximum retail prices, with a proviso to retain the implementation of national systems of laws on the control of price levels and the observance of imposed prices. The ECJ had ruled in two cases<sup>21</sup> that the proviso only applied to general national laws aimed at curbing price rises.

The applicant tobacco companies were refused ministerial permission to raise their prices and therefore sought annulment of the decisions to refuse as well as compensation. The *Conseil d'État* found that section 6 of the 1976 Act was incompatible with the Directive and that thus section 10 of the 1976 decree, adopted on the basis of section 6 of the 1976 Act, itself had no legal basis. Since there was no legal justification in implicitly refusing the applicants' requests, the ministerial decisions to refuse the applicants' requests had to be annulled.

In respect of the liability of the State, the *Conseil d'État* held that: “the ministerial decisions adopted pursuant to the Decree of 31 December 1976, refusing to fix the price of manufactured tobacco at the levels sought by the applicant companies for the period from 1 November 1982 to 31 December 1983, are illegal. Their illegality is such as to render the State liable”. This finding of State liability on the basis of “illegality” thus established that *faute* was the correct legal basis for finding liability for breaches by French public authorities of EC law.

### 2.3. Damages against English public authorities

Public authorities enjoy no dispensation from the ordinary law of tort and contract except to the extent provided for by statute. Unless acting

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<sup>20</sup> 1972 JO L303/1; OJ English Spec. Ed., Series 1, Chapter 1972 (31.12), L303/3.

<sup>21</sup> Case 90/82 *Commission v. France* [1983] ECR 2011; and Case 169/87 *Commission v. France* [1988] ECR 4093.

within their powers, they are liable like any other person for wrongful civil acts<sup>22</sup>. Likewise they are subject to the ordinary law of master and servant, by which the employer is liable for torts committed by the employee in the course of his employment, the employee also being personally liable<sup>23</sup>. Since it is necessary to bring a claim for damages for breach of EC law within one of the existing categories of tort, for present purposes one particular cause of action giving rise to a remedy in damages appeared – at least until *Brasserie* – to be most relevant and is known as “breach of statutory duty”.

The general rule governing the liability of public bodies or public officers for breach of statutory duty is defined in general terms<sup>24</sup>, viz. where a public body has a duty imposed on it by statute, a private action to recover damages may lie at the suit of anyone<sup>25</sup> injured by a breach thereof.

Although, even today, it is not clear where the limits of this liability lie<sup>26</sup>, it is generally accepted that these are to be ascertained by determining the legislative intention behind the particular statute. Consequently, where Parliament has stated or clearly implied its intention in the wording of the Act, no problem arises<sup>27</sup> and where a duty is imposed by statute but no sanction of any kind is provided, there is a presumption

<sup>22</sup> H.W.R. Wade, *Administrative Law*, 6<sup>th</sup> ed., OUP, Oxford (1988) at 751–753.

<sup>23</sup> But there are situations in which an officer of central or local government has an independent statutory liability by virtue of his office, imposing duties upon him as a designated officer rather than on the public authority who appoints him. Where there is a breach of such a duty only the employee will be liable: see Wade (1988) at 752–753.

<sup>24</sup> Wade (1988), at 772–776. *Ferguson v. Earl of Kinnoull* (1842) 9 Cl & F 251 at 279; 9 ER 412 at 523. See also *Pickering v. James* (1873) LR 8 CP 489 at 503, per Bovill CJ.

<sup>25</sup> Towards the end of the 19<sup>th</sup> century the courts sought to narrow the scope of the duty on the grounds that with the vast increase in legislative activity, the old rule might lead to liabilities wider than the legislature could possibly have contemplated: *Atkinson v. Newcastle Waterworks Co* (1877) 2 Ex D 441. Although distinguished in *Dawson & Co v. Bingley UDC* [1911] 2 KB 149, the courts have in the main applied the now more restrictive criteria which govern breach of statutory duty.

<sup>26</sup> Wade (1988) at 775: “almost all administrative duties are statutory, but not every default entails liability in damages”.

<sup>27</sup> Occasionally the statute will confer that right, e.g., Sex Discrimination Act 1975 (c 65), s. 65(1)(b) and Race Relations Act 1976 (c 74), s. 56(1)(b); and sometimes it will exclude it.

that a person injured by its breach has a right of action<sup>28</sup>. But where the statute provides a sanction in the form of a penalty or administrative action and yet remains silent on the question whether a civil remedy is also available, it is then a matter of construction whether or not a civil remedy may be awarded.

In such circumstances the plaintiff must prove that: (1) the statute imposes a clear and precise duty that is owed to him, i.e., he has *locus standi* in that he is a member of a “class” sought to be protected by the statute and not a member of the public at large<sup>29</sup>; (2) the damage suffered is of a species which the statute is intended to protect<sup>30</sup>; (3) the defendant infringed his statutory obligations<sup>31</sup>; and (4) the infringement caused the plaintiff’s loss<sup>32</sup>. Such considerations are subject to the proviso that if the enactment itself provides an alternative remedy or an adequate common law remedy exists, the court will be reluctant to permit the cause of action<sup>33</sup>.

#### 2.4. Damages for breach of EC law by English authorities

In *Garden Cottage Foods v. Milk Marketing Board*<sup>B4</sup>, an alleged breach of (now) EC Art. 82 (abuse of dominant position) by the defendant Board – considered to be acting as an undertaking in competition terms rather than as a public body in the exercise of its public powers – which had caused damage to a private party, gave rise to a cause of action for breach

<sup>28</sup> *Doe v. Bridges* (1831) 1 B & Ad 847 at 849, per Lord Tenterden CJ; *Cutler v. Wandsworth Stadium Ltd* [1949] AC 398 at 407, per Lord Simonds; *Thornton v. Kirklees* [1979] QB 626.

<sup>29</sup> *Clegg, Parkinson & Co v. Earby Gas Co* [1896] QB 592; *Groves v. Wimbourne* [1896] 2 QB 402; but cf. *Phillips v. Britannia Hygienic Laundry Co* [1923] 2 KB 832.

<sup>30</sup> *Gorris v. Scott* (1874) LR 9 Exch 125. It has been said that this second condition is in practical effect the same as the first condition: see R.A. Buckley, “Liability in Tort for Breach of Statutory Duty” (1984) 100 LQR 204 at 210-213 and at 232.

<sup>31</sup> *Chipcase v. British Titan Productions Co* [1956] 1 QB 545; *John Summers & Sons Ltd v. Frost* [1955] AC 740.

<sup>32</sup> *Bomington Castings Ltd v. Wardlaw* [1956] AC 613; *Wigley v. British Vinegars Ltd* [1964] AC 307; *Lineker v. Raleigh Industries* [1980] ICR 83.

<sup>33</sup> *Phillips v. Britannia Hygienic Laundry Co* [1923] 2 KB 832; *Monk v. Warbey* [1935] 1 KB 75; *McCall v. Abelesz* [1976] QB 585.

<sup>34</sup> [1984] AC 130.



of statutory duty. Lord Diplock delivering the judgment of the majority of the House of Lords, stated that EC Art. 82 had been declared by the ECJ to be of direct effect<sup>35</sup> and created direct rights in respect of the individuals concerned which national courts had to protect<sup>36</sup>:

This decision of the European Court of Justice as to the effect of article [82] is one which section 3(1) of the European Communities Act 1972 requires your Lordships to follow. The rights which the article confers upon citizens in the United Kingdom accordingly fall within section 2(1) of the Act. They are without further enactment to be given legal effect in the United Kingdom and enforced accordingly.

A breach of the duty imposed by article [82] not to abuse a dominant position in the common market or a substantial part of it, can thus be categorised in English law as a breach of statutory duty that is imposed (...) for the benefit of private individuals to whom loss or damage is caused by a breach of that duty.

In *Bourgoin v. Ministry of Agriculture, Fisheries and Food*<sup>37</sup>, the case was concerned with the revocation of a licence to import frozen turkeys from France which the ECJ had held to be a breach of EC Art. 30. In the High Court, Mann, J. said: “Accordingly, I hold that a contravention of Article 30 which causes damages to a person gives to that person an action for damages for breach of statutory duty, the duty being one composed by Article 30 (as interpreted by the European Court) and s. 2(1) of the Act of 1972 when read in conjunction.” Although the Court of Appeal (by a majority) decided that damages in this case should be claimed on the basis of misfeasance in a public office<sup>38</sup>, breach of statutory duty

<sup>35</sup> Case 127/73 *BRT v. SABAM* [1974] ECR 51.

<sup>36</sup> [1984] AC 130 at 141.

<sup>37</sup> [1986] QB 716.

<sup>38</sup> Misfeasance in public office is the only specifically “public law” tort (*Bourgoin SA v. MAFF* [1986] QB 716 at 776; *Dunlop v. Woollahra Municipal Council* [1982] AC 158 at 172) and provides a remedy for citizens who have suffered loss due to the abuse of power by a public officer acting in bad faith. The specificity of the tort derives from the fact that to make out misfeasance, it must be shown that the defendant is a public officer, and that the claim relates to the defendant’s exercise of power as a public officer: *Three Rivers DC v. Bank of England (No. 3)* [2003] 2 AC 1 at 191.

has been recently revived as the main cause of action for damages for administrative liability *vis-à-vis* EC law particularly since the ECJ stated in *Brasserie*<sup>39</sup> that the preconditions for basing a claim on misfeasance would make it in practice impossible to obtain damages.

Thus in 1997 a three-judge Divisional Court delivered a judgment in *R. v. Secretary of State for Transport, ex parte Factortame Ltd*<sup>40</sup> in which it indicated that the appropriate cause of action should be breach of statutory duty. The main issue in the case was the assessment of whether the UK Government had committed a sufficiently serious breach of law to give rise to liability in damages by enacting the Merchant Shipping Act 1988. The Divisional Court found that it had. In relation to the appropriate cause of action the Court held that:

210. In Community law, the liability of a State for a breach of Community law is described as non-contractual. In English law there has been some debate as to the correct nature of the liability for a breach of Community law. In our judgment it is best understood as a breach of statutory duty [...].

212. Thus, whilst it can be said that the cause of action is *sui generis*, it is of the character of a breach of statutory duty. The United Kingdom and its organs and agencies have not performed a duty which they were statutorily required to perform [by the European Communities Act 1972].

Nevertheless, this reasoning has not been subject to universal acceptance: the notion that a breach of EC law gives rise to a right in damages in the English courts because there has been a breach of the European Communities Act 1972 is a fiction, albeit a convenient one<sup>41</sup>.

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<sup>39</sup> Joined Cases C-46 and C-48/93 *Brasserie du Pêcheur SA v. Germany* [1996] ECR I-1029 at para. 73.

<sup>40</sup> [1997] EWHCC 755, 31 July 1997.

<sup>41</sup> M. Hoskins, *Rebirth of the Innominate Tort?* [in] J. Beatson and T. Tridimas (eds.), *New Directions in European Public Law*, Hart Publishing, Oxford (1998), chap. 7, 91 at 97.

### 3. Impact of Europeanisation of administrative/state liability

More recent cases have given rise to speculation of a fundamental sea-change in national judicial attitudes. In France, the *Conseil d'État* in *Gardedieu*<sup>42</sup> created a new cause of action to engage state liability for state legislative acts in breach of international treaties. Despite no direct connection to EC law, this case was nonetheless of significant importance for the relationship between French and EC law since it went beyond what was required by the ECJ's case-law on state liability. It held:

[S]tate responsibility for legislative acts can be engaged, on the one hand, on the basis of the equality of citizens before public burdens [...] on the other hand, by reason of its obligations to guarantee the respect of international conventions by public authorities, to compensate for all damage resulting from the intervention of a statute adopted in violation of France's international commitments.

The *Conseil d'État* thus refrained from expressly classifying such violation as falling under the regime of liability *pour/sans faute*<sup>43</sup>. It thus opened a new ground for liability *du fait des lois* (for legislative acts), based on a violation of an international treaty. Unlike the regime of breach of equality before public burdens, this new regime allowed full compensation and did not require a special and unusual damage. Although it could be argued that this new regime is a fault-based regime "without the name", commentators seem to agree that the new regime remains a no-fault one<sup>44</sup>. What is important for present purposes is that the *Conseil d'État* adopted a solution which went further than that adopted by the ECJ, since it neither required that the international law provision intended to confer rights on individuals nor imposed to demonstrate the

<sup>42</sup> *Gardedieu*: CE Ass., 8 février 2007, RFDA.2007.361.

<sup>43</sup> F. Lenica & J. Boucher, "Chronique générale de jurisprudence administrative française: Hiérarchie des normes et contentieux de la responsabilité" (2007) 63 AJDA 11 at 585 et seq.

<sup>44</sup> C. Broycelle, "La responsabilité de l'Etat du fait de la loi non conventionnelle: une nouvelle hypothèse de responsabilité sans faute de l'Etat législateur" (2007) 14 *La Semaine Juridique Administrations et Collectivités territoriales* 2083.

existence of a sufficiently serious breach as required by the *Francovich-Brasserie* case-law.

In England this was occasioned by the decisions of two High Court judges. First, Clark J. in *Three Rivers District Council v. Bank of England (No. 3)*<sup>45</sup> commented on the ECJ's recent case-law on state liability and noted: "In such a case the claim should not be regarded as a claim for damages for the tort of misfeasance in public office, but rather as a claim of a different type not known to the common law, namely a claim for damages for breach of duty imposed by Community law or for the infringement of a right conferred by Community law".

Secondly, Toumlin J. in another round of the *Factortame* litigation<sup>46</sup> in which he concluded that although the nature of the breaches of Community law could be characterised as breaches of duty or obligations, the assessment of those breaches was undertaken in a way which was novel under English law. He defined a tort as<sup>47</sup> "a breach of non-contractual duty which gives a private law right to the party injured to recover compensatory damages at common law from the party causing the injury". His conclusion was that action by an individual against a government for breach of EC law was an action founded on tort within the meaning of the Limitation Act 1980 and that the term "Eurotort" might be apt.<sup>48</sup>

Soon after Clark J.'s *Three Rivers* decision, the Court of Appeal in *R. v. Secretary of State for the Home Department, ex parte Gallagher*<sup>49</sup> directly applied the ECJ's *Brasserie* test without reference to breach

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<sup>45</sup> [1996] 3 All ER 558 at 624.

<sup>46</sup> *R. v. Secretary of State for Transport, ex parte Factortame Ltd* [2001] 1 WLR 942 at 958.

<sup>47</sup> *Ibidem* at 965.

<sup>48</sup> This concept of a "Eurotort" had already been proposed in 1974 by Lord Denning MR in the case of *Application des Gaz SA v. Falks Veritas Ltd* ([1974] 3 All ER 51 at 58) when he held that (current) EC Arts. 81 and 82 were part of national law and created "new wrongs or torts" for which the English courts could remedy any breach. Such suggestion (echoed by Lord Wilberforce in *Garden Cottage Foods* ([1983] 3 All ER 777 at 783) was based on the fact that under the European Communities Act 1972, rights arising under EC law were referred to as "enforceable Community rights" and not as rights arising under UK law: C. Boch, *EC Law in the UK*, Longman, Harlow (2000) at 148.

<sup>49</sup> [1996] 2 CMLR 951.

of statutory duty. The House of Lords followed accordingly in *Factortame (No. 5)*<sup>50</sup> and made no reference to a breach of statutory duty. It did however apply the *Brasserie* formula to the case before it and directed its judgment to determining whether or not there had been “a breach of Community law” or a “breach of a Community obligation”.

#### 4. Conclusion

The ECJ decisions in *Francovich* and *Brasserie* have already had (and will continue to have) an important effect on administrative liability in France and England. From the courts of both countries and the way in which they have considered administrative or state liability cases *vis-à-vis* EC law, there appears to be an implied recognition of a revolutionary change in remedies provision that the ECJ case-law has provoked. The ECJ has thus occasioned a fundamental rethink in how rights (not just under Community law) should be protected within the field of administrative liability. It is not that the problem has centred on the question of whether or not damages should be awarded for a public authority’s breach of EC law but rather on the question as to what should be the appropriate basis of that liability in the national system: the problem of “how to make actions suit the case”<sup>51</sup>.

*Francovich* and *Brasserie* have proved important steps in the development of the armoury of fundamental EC rights to underpin the principle of effective protection. In relation to both French and English law, they highlight some of the current shortcomings in the system of domestic damages remedies and point to further changes in the availability of such remedies against the public administration. With the French and English courts finding new ways to allow damages against the public authorities, they are assisting in the development of a “principle of homogeneity in the field of legal remedies”<sup>52</sup> in the legal systems of the Member States.

<sup>50</sup> [2000] 1 AC 524.

<sup>51</sup> J. Steiner, “How to make the action suit the case: domestic remedies for breach of EC law” (1987) 12 EL Rev. 102.

<sup>52</sup> W. Van Gerven, “Bridging the gap between Community and national laws: towards a principle of homogeneity in the field of legal remedies” (1995) 32 CML Rev. 679.

Accordingly, EC law will continue to prove to be a most welcome catalyst in bringing change to French and English administrative law<sup>53</sup>.

## Bibliography

Biondi A. & Farley M., *The Right to Damages in European Law*, Kluwer Law International, Alphen an den Rijn (2009).

Broyelle C., "La responsabilité de l'Etat du fait de la loi non conventionnelle: une nouvelle hypothèse de responsabilité sans faute de l'Etat législateur" (2007) 14 *La Semaine Juridique Administrations et Collectivités territoriales* 2083.

Dantanel-Cor N., "La mise en jeu de la responsabilité de l'Etat français pour violation du droit communautaire" (1995) 31 *RTDE* 471.

Errera R., "The scope and meaning of no-fault liability in French administrative law" (1986) 39 *Current Legal Problems* 181.

Gerven W. Van, "Bridging the gap between Community and national laws: towards a principle of homogeneity in the field of legal remedies" (1995) 32 *CML Rev.* 679.

Hoskins M., *Rebirth of the Innominate Tort?* [in] J. Beatson and T. Trimmas (eds.), *New Directions in European Public Law*, Hart Publishing, Oxford (1998), chap. 7.

Jarvis M., *Remedies for Breach of EC Law before French Courts* [in] J. Lonbay & A. Biondi (eds.), *Remedies for Breach of EC Law*, John Wiley & Sons, Chichester (1997), chap. 17.

Lenica F. & Boucher J., "Chronique générale de jurisprudence administrative française: Hiérarchie des normes et contentieux de la responsabilité" (2007) 63 *AJDA* 11 at 585 et seq.

Neville Brown L. & Bell J.S., *French Administrative Law*, 5<sup>th</sup> ed., OUP, Oxford (1998).

Oliver P., "Enforcing Community Rights in the English Courts" (1987) 50 *MLR* 881.

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<sup>53</sup> P. Oliver, "Enforcing Community Rights in the English Courts" (1987) 50 *MLR* 881 at 906.

Roseren P., "The application of Community law by the French Courts from 1980 to 1993" (1994) 31 CML Rev. 315.

Steiner J., "How to make the action suit the case: domestic remedies for breach of EC law" (1987) 12 EL Rev. 102.

Wade H.W.R., *Administrative Law*, 6<sup>th</sup> ed., OUP, Oxford (1988).

### ABSTRAKT

Tematem opracowania jest problem odpowiedzialności odszkodowawczej władz publicznych w Anglii i Francji, ale dotyczący odszkodowań za naruszenie prawa wspólnotowego. Ponieważ zasada odpowiedzialności odszkodowawczej za działania władzy administracyjnej i państwowej za naruszenie prawa wspólnotowego nie została wyartykułowana w prawie traktatowym, jej wyrażeniem zajmował się Europejski Trybunał Sprawiedliwości, dopracowując jej zakres w licznych orzeczeniach. Określając podstawowe warunki odpowiedzialności wpływał na zmianę zastosowania tej zasady przez sądy państw członkowskich. Przedstawione rozważania dotyczą praktyki realizacji odpowiedzialności odszkodowawczej za działania władzy publicznej w Anglii i Francji po wydaniu przełomowych orzeczeń przez Europejski Trybunał Sprawiedliwości w sprawie *Francovich* (1991 ECR I-5357) i w sprawie *Brasserie* (1996 ECR I-1029). W ramach tego opracowania przedstawiam również uwagi i refleksje na temat europeizacji odpowiedzialności administracyjnej.