Journal of Dispute Resolution

Volume 1991 | Issue 1 Article 10

1991

Quasi-Judicial Immunity: The Arbitrator's Shield or Sword

Robert M. Carroll

NOTES

QUASI-JUDICIAL IMMUNITY: THE ARBITRATOR'S SHIELD OR SWORD?

Howard v. Drapkin[1]

I. INTRODUCTION

With the rising number of divorces in today's society[2] and with the national emphasis to resolve child custody disputes through alternative forms of dispute resolution,[3] the ability to hold arbitrators accountable for their actions within settlement conferences is becoming a prevalent issue. Arbitrators and mediators, commonly outside of the court's supervision, are now determining the best interests of the child, a role traditionally reserved to the courts.[4] This increase of out-of-court settlements creates a need for certain standards which hold these quasi-judicial officers responsible for their decisions and liable for their actions. The court in *Howard v. Drapkin* addressed the latter concern and extended absolute quasi-judicial immunity to an arbitrator involved in a child custody dispute.[5]

II. FACTS AND HOLDING

The situation giving rise to this case was a family law dispute over custody and visitation rights with respect to the minor son of plaintiff Vickie Howard and her former husband, Robert.[6] In response to her son's allegations that he was physically and sexually abused by the father, plaintiff initiated family law proceedings in which she sought to have the father's visitation rights terminated.[7]

---

1. 222 Cal. App. 3d 843, 271 Cal. Rptr. 893 (1990).

2. *See* Comment, *Child Custody Mediation: A Proposed Alternative to Litigation*, 1989 J. DISP. RESOL. 139 n.1.

3. Schepard, Philbrick & Rabino, *Ground Rules for Custody Mediation and Modification*, 48 ALB. L. REV. 616, 663 (1984).

4. Philbrick, *Agreements to Arbitrate Post-Divorce Custody Disputes*, 18 COLUM. J.L. & SOC. PROBS. 419 (1985); Schepard, *supra* note 3, at 624.

5. *Howard*, 222 Cal. App. 3d at 859, 271 Cal. Rptr. at 903.

6. *Id.* at 848, 271 Cal. Rptr. at 894.

7. *Id.*

In order to determine the best interest of their child, Ms. Howard and Robert decided to hire defendant, Robin Drapkin, to arbitrate the dispute.

Vickie Howard and Robert hired defendant, a psychologist licensed by the state of California, to evaluate Ms. Howard, Robert, and their nine-year-old child.[8] Such an evaluation was thought to be necessary due to the seriousness of the child's allegations of physical, emotional, and sexual abuse.[9] The purpose of the evaluation was to determine what future contact Robert would have with the child, if any.[10]

Prior to any judicial proceeding, the mother and father stipulated that defendant would evaluate the facts and circumstances and subsequently render non-binding findings and recommendations.[11] The stipulation agreement was signed by Ms. Howard and Robert and by their respective attorneys in the underlying action.[12] The family law judge did not require the stipulation, participate in its drafting, or supervise defendant's work.[13] However, the court eventually signed this stipulation and converted it into an order.[14] The purpose of this order was to allow defendant adequate time to evaluate the feasibility of terminating the father's visitation rights before the hearing to show cause was held.[15]

After defendant held meetings in which she evaluated the child and the father, a final evaluation meeting between plaintiff and defendant was scheduled for the evening before the order to show cause hearing.[16] The meeting, which defendant said would only last for an hour and a half, lasted over six hours—from 5:30 p.m. to 11:50 p.m.[17] During this meeting, plaintiff alleged that for five of those six hours defendant personally attacked her, screamed at her, ridiculed her, accused her of lying and fabricating evidence, threatened she would lose custody of her son if she persisted in the custody dispute, and misrepresented that the child's doctors and other experts involved in the case did not believe the child had been abused.[18] Plaintiff claimed that defendant's purpose for the meeting was to induce plaintiff to abandon her belief that Robert had abused their child.[19]

After the meetings, defendant prepared a report that plaintiff claimed to be negligently prepared.[20] In this report, plaintiff alleged that defendant neglected to state that a hospital examination of the child showed evidence of irritation of

8. *Id.* at 849, 271 Cal. Rptr. at 895.
9. *Id.*
10. *Id.*
11. *Id.* at 848, 271 Cal. Rptr. at 894.
12. *Id.* at 849, 271 Cal. Rptr. at 895.
13. *Id.*
14. *Id.* at 848, 271 Cal. Rptr. at 894.
15. *Id.* at 849, 271 Cal. Rptr. at 895.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*

the child's genitalia, and the examining doctor's opinion that "[i]t seemed like somebody had been chomping on his penis."[21] In addition to omitting material information, plaintiff claimed that defendant also failed to investigate certain other relevant matters.[22]

Finally, plaintiff asserted that defendant failed to disclose her lack of expertise in the area of child abuse as well as sexual abuse, and also failed to divulge that she and Robert had a prior professional relationship which consisted of participation in professional seminars.[23] Plaintiff also claimed that defendant failed to disclose that she was a close personal friend of the wife of one of the partners in the law firm which represented Robert in the underlying action.[24] As a result of these accusations, plaintiff's pleading set forth causes of action for professional negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, and fraud.[25]

In response to plaintiff's second amended complaint, defendant filed a general demurrer contending that she had quasi-judicial, quasi-arbitral and/or arbitral immunity, as well as immunity as an expert witness.[26] Defendant also claimed entitlement to the "judicial proceeding" or litigation privilege set out in California's Code of Civil Procedure section 47(2).[27] The Superior Court of Los Angeles County sustained the demurrer and dismissed the action.[28]

On appeal, the California Court of Appeals for the Second District held that absolute quasi-judicial immunity is properly extended to neutral third-parties, such as family law arbitrators, for their conduct in performing dispute resolution services which are connected to the judicial process and involve either (1) the making of binding decisions, (2) the making of findings to the court, or (3) the arbitration, mediation, conciliation, evaluation or other similar resolution of pending disputes.[29]

---

21. *Id.*

22. *Id.* The court did not address defendant's failure to investigate these relevant matters and therefore did not include them in the opinion.

23. *Id.*

24. *Id.*

25. *Id.* at 848, 271 Cal. Rptr. at 895.

26. *Id.* at 849, 271 Cal. Rptr. at 896.

27. *Id.*

28. *Id.*

29. *Id.* at 859, 271 Cal. Rptr. at 903.

III. LEGAL BACKGROUND

Judicial immunity[30] from civil liability is deeply rooted in English common law.[31] Judicial immunity has been "the settled doctrine of the English courts for many centuries, and has never been denied . . . in the courts of this country."[32] English courts have held, beyond all controversy, "that a judge of any court, whether of limited or general jurisdiction, is not liable in a civil action for acts done in his judicial capacity, and within his jurisdiction, even though it be alleged that the acts complained of were done maliciously and corruptly."[33]

In 1869, the United States Supreme Court addressed the issue of judicial immunity for the first time in *Randall v. Brigham*.[34] In *Randall*, the Court held that judges of general jurisdiction courts were immune from civil suits, absent the presence of corruption or malice, even when they acted outside their jurisdiction.[35] The reasoning of the Court rested upon public policy considerations which sought to "preserve the integrity and independence of the judiciary and to insure that judges will act upon their convictions free from the apprehensions of possible consequences."[36]

Three years later in *Bradley v. Fisher*,[37] the Supreme Court refined the language used in *Randall* by enumerating five reasons for granting immunity to judges: first, a judge must be free to act upon his own convictions, without apprehension of personal consequences; second, the controversiality and importance of the competing interests in contest before a court make it likely that the losing party will blame the judge for making the wrong decision under the influence of improper motives; third, judges faced with the prospect of a law suit would be driven to wasteful and inefficient self-protection measures, such as excessive record keeping; fourth, alternative means of redress such as appeal and impeachment replace the need of an action against the judge; fifth, the ease of alleging "bad faith" would make qualified immunity based on "good faith" virtually worthless.[38] A sixth reason, the need for judgments to be final, can be added to this list.[39]

---

30. "Immunity exists for 'judicial' actions; those relating to a function normally performed by a judge and where the parties understood they were dealing with the judge in his official capacity." Olney v. Sacramento County Bar Ass'n, 212 Cal. App. 3d 807, 811, 260 Cal. Rptr. 842, 844 (1989). "Here, immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches." Forrester v. White, 484 U.S. 219, 227 (1988).

31. *See* Floyd v. Barker, 12 Co. Rep. 23, 15 Eng. R.C. 37; Scott v. Stansfield, L.R. 3 Ex. 220, 15 Eng. R.C. 42.

32. Bradley v. Fisher, 80 U.S. (1 Wall.) 335, 347 (1872). For a more thorough review of the historical roots of judicial immunity, see Pulliam v. Allen, 466 U.S. 522, 529-36 (1984).

33. Jones v. Brown, 6 N.W. 140, 142 (Iowa 1880).

34. 74 U.S. (7 Wall.) 523 (1869).

35. *Id.* at 536.

36. Gammel v. Ernst & Ernst, 245 Minn. 249, 254, 72 N.W.2d 364, 368 (Minn. 1955).

37. 80 U.S. (13 Wall.) 335.

38. *Id.* at 347-54.

39. Holloway v. Walker, 765 F.2d 517, 522 (5th Cir. 1985), *cert. denied*, 479 U.S. 984 (1986).

Originally, judicial immunity extended only to judges to assure their freedom to execute their duties with independence and without fear of consequences.[40] However, the federal courts have granted quasi-judicial immunity to various other public officials who are entitled to the same type of immunity from liability for those acts performed while acting in their official capacities.[41] These courts have extended quasi-judicial immunity to such public officials as the President,[42] legislators,[43] legislative aides,[44] prison administrators,[45] prosecutors,[46] hospital superintendents,[47] school administrators,[48] child protective services workers,[49] psychologists and attorneys for children in child abuse actions,[50] and certain state executive officials.[51] Additionally, in *Butz v. Economou*,[52] the Supreme Court extended judicial immunity to those who perform quasi-judicial functions or those whose powers and purpose are "functionally comparable to that of a judge."[53] This grant of immunity "extends to quasi-judicial officials and those so closely associated with the judicial process that their protection from harassment is necessary in order to protect the judicial process."[54]

Courts recognized early on that the role of an arbitrator can be construed to be quasi-judicial in nature.[55] Since arbitrators by definition are neutral parties and therefore have no interest in the outcome of the matter under consideration, their purpose is "functionally comparable to a judge and, consequently, they are clothed with an immunity that is analogous to judicial immunity."[56] Therefore, arbitrators have been protected from civil suit under the doctrine of "arbitral immunity."[57] "The principle underlying the doctrine of arbitral immunity is the same as that giving rise to the doctrine of judicial immunity: the protection of the integrity of the decision-making process from reprisals by dissatisfied litigants."[58]

---

40. International Union, United Auto. Workers v. Greyhound Lines, 701 F.2d 1181 (6th Cir. 1983).
41. *Id.* at 1185.
42. Nixon v. Fitzgerald, 457 U.S. 731 (1982).
43. Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).
44. Gravel v. United States, 408 U.S. 606 (1972).
45. Procunier v. Navarette, 434 U.S. 555 (1978).
46. Imbler v. Pachtman, 424 U.S. 409 (1976).
47. O'Conner v. Donaldson, 422 U.S. 563 (1975).
48. Wood v. Strickland, 420 U.S. 308 (1975).
49. Coverdell v. Department of Social & Health Servs., 834 F.2d 758, 764-65 (9th Cir. 1987).
50. Myers v. Morris, 810 F.2d 1437, 1465-68 (8th Cir. 1987), *cert. denied*, 484 U.S. 828 (1987).
51. Scheur v. Rhodes, 416 U.S. 232 (1974).
52. 438 U.S. 478 (1977).
53. *Id.* at 513.
54. Cahn v. International Ladies' Garment Union, 203 F. Supp. 191, 193 (E.D. Pa. 1962).
55. Burchell v. Marsh, 58 U.S. 344 (1854).
56. *United Auto. Workers*, 701 F.2d at 1185.
57. Corey v. New York Stock Exch., 493 F. Supp. 51, 55 (W.D. Mich. 1980).
58. *Id.* at 56. *See* Tamari v. Conrad, 552 F.2d 778 (7th Cir. 1977).

IV. THE INSTANT DECISION

A. *Quasi-Judicial Immunity*

The critical part of the court's decision in *Howard* involved an extensive review of common law immunity in California. The court traces the concept of immunity from its roots in judicial immunity, as applied to judges, to the application of quasi-judicial immunity, as applied to arbitrators in the present case.[59] In explaining the rationale behind the doctrine of judicial immunity, the court provided two policy objectives: (1) "[to protect] the finality of judgments and discourage[] inappropriate collateral attacks,"[60] and (2) "[to protect] judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants."[61] The court reasoned that the public is best served when its judicial officers are free to discharge their duties without fear of personal liability for acts performed in their judicial capacity.[62]

After establishing the need for judicial immunity, the majority focused on applying the concept of quasi-judicial immunity to persons other than judges.[63] The court recognized that California courts have extended judicial immunity from civil suits to such persons as grand jurors,[64] administrative law hearing officers,[65] prosecutors,[66] officials on the Committee of Bar Examiners,[67] arbitrators,[68] and organizations sponsoring an arbitrator.[69] The *Howard* court agreed with these other courts that in determining if the officer is truly judicial and thus deserving of quasi-judicial immunity, then the appropriate focus is on the nature of the duty performed.[70] The court also agreed that when a duty is found to be quasi-judicial in nature, the granting of judicial immunity is necessary to promote uninhibited and independent decision making.[71]

After holding that it is the nature of the act, and not the name or classification of the officer who performs it, which determines if an officer is

---

59. *Howard*, 222 Cal. App. 3d at 850, 271 Cal. Rptr. at 896-903.

60. *Id.* at 851, 271 Cal. Rptr. at 897 (quoting Forrester v. White, 484 U.S. 219, 225 (1988)).

61. *Id.*

62. *Id.*

63. *Id.* at 852, 271 Cal. Rptr. at 898.

64. Turpen v. Booth, 56 Cal. 65, 69 (1880).

65. Taylor v. Mitzel, 82 Cal. App. 3d 665, 670-71, 147 Cal. Rptr. 323, 325-26 (Cal. Ct. App. 1978).

66. Pearson v. Reed, 6 Cal. App. 2d 277, 284, 44 P.2d 592, 596 (Cal. Dist. Ct. App. 1935).

67. Greene v. Zank, 158 Cal. App. 3d 497, 497, 204 Cal. Rptr. 770, 770 (Cal. Ct. App. 1984).

68. Baar v. Tigerman, 140 Cal. App. 3d 979, 985, 211 Cal. Rptr. 426, 430 (Cal. Ct. App. 1983); Coopers & Lybrand v. Superior Court, 212 Cal. App. 3d 524, 534, 260 Cal. Rptr. 713, 719-20 (Cal. Ct. App. 1989).

69. Olney v. Sacramento County Bar Ass'n, 212 Cal. App. 3d 807, 814-15, 260 Cal. Rptr. 842, 844 (Cal. Ct. App. 1989).

70. *Howard*, 222 Cal. App. 3d at 852, 271 Cal. Rptr. at 898.

71. *Id.*

deserving of judicial immunity, the court rationalized that the nature of the duty is defined by its connection to the judicial process.[72] This connection does not have to be direct, as in the case of a public official, but it must be an integral part of the judicial process so as to warrant protection from civil liability.[73] Thus, the majority found that nonjudicial persons who fulfill quasi-judicial functions intimately related to the judicial process should have absolute immunity from civil suits arising out of the performance of their duties in connection with the judicial process.[74] The court reasoned that absent such immunity, these persons would be reluctant to accept court appointments or provide work product for the court's use.[75]

With the majority reasoning that certain nonjudicial persons are entitled to quasi-judicial immunity, the last stage of the court's analysis turned to applying this immunity to persons engaged in neutral dispute resolution.[76] The court first noted the many benefits that alternative methods of dispute resolution convey upon the judicial process. These benefits include relieving court congestion and providing a less expensive and less stressful process of resolution.[77] The court found that since these methods of resolution are becoming more relied upon, they are critical to the proper functioning of our increasingly congested trial courts.[78]

The court also notes that the functions of third parties such as arbitrators, mediators, and evaluators involve impartiality and neutrality, very similar to that of a judge, and therefore third parties should be entitled to the same immunity given others who function as neutrals in an attempt to resolve disputes.[79] The court reasoned that "those persons are similar to a judge who is handling a voluntary or mandatory settlement conference, no matter whether they are (1) making a binding decision,[80] (2) making recommendations to the court,[81] or (3) privately attempting to settle disputes, such as the defendant here."[82]

Therefore, the California Court of Appeals for the Second District held that absolute quasi-judicial immunity is properly extended to neutral third-parties, such as arbitrators, for their conduct in performing dispute resolution services which are connected to the judicial process.[83] Activities that qualify arbitrators for this immunity are "(1) the making of binding decisions, (2) the making of findings or

---

72. *Id.*

73. *Id.* at 856, 271 Cal. Rptr. at 900.

74. *Id.* at 857, 271 Cal. Rptr. at 901.

75. *Id.*

76. *Id.* at 858, 271 Cal. Rptr. at 901.

77. *Id.* at 858, 271 Cal. Rptr. at 901-02.

78. *Id.*

79. *Id.*

80. An example of this would be a referee acting pursuant to CAL. CIV. PROC. CODE § 638(1) (West 1982).

81. An example of this would be a referee acting under CAL. CIV. PROC. CODE § 639 (West 1981) or a mediator acting under CAL. CIV. CODE § 4607 (West 1983).

82. *Howard*, 222 Cal. App. 3d at 859, 271 Cal. Rptr. at 903.

83. *Id.*

recommendations to the court or (3) the arbitration, mediation, conciliation, evaluation or other similar resolution of pending disputes."[84]

B. Statutory Privilege

Next, the court addressed the issue of whether defendant was protected from tort liability by section 47(2) of the Civil Code of California, which governs privilege.[85] In deciding whether the privilege applied to defendant, the court used a test outlined in *Silberg v. Anderson*.[86] The *Silberg* court explained the four-part test by stating "that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have [sic] some connection or logical relation to the action."[87] If all four of these elements are found to describe the communication between defendant and plaintiff, then defendant will be entitled to the statutory privilege.[88]

In applying the test to the present case, the court found that plaintiff conceded the existence of the second and fourth elements.[89] The court concluded that since defendant was an invited, and ultimately court-approved, participant in the matter and that since her communications were obviously related to the issues in the dissolution action, namely custody and visitation, that the communications were made by a participant in the litigation and that the findings have some connection or logical relation to the case.[90]

With respect to the first element of the test, whether the alleged wrongful communications were made in a judicial or quasi-judicial proceeding, plaintiff argued that defendant's communications were "collateral" because they were not made during the course of and as a part of the judicial proceeding.[91] The court found no merit in this contention and relied on the *Silberg* court's analysis that the section 47(2) privilege applies "even though the publication is made outside the courtroom and no function of the court or its officers is involved."[92]

As for the third element of the test, whether the communication was made to achieve the objects of the litigation, the court found this element was clearly met.[93] The court held that "defendant's alleged wrongful communications, whether express or implied and whether screamed or simply stated, were 'not . .

84. *Id.* at 860, 271 Cal. Rptr. at 903.

85. CAL. CIV. CODE § 47(2) (West Supp. 1990).

86. 50 Cal. 3d 205, 266 Cal. Rptr. 638, 786 P.2d 365 (1990).

87. *Howard*, 222 Cal. App. 3d at 861, 271 Cal. Rptr. at 904.

88. *Silberg*, 50 Cal. 3d at 220, 266 Cal. Rptr. at 647, 786 P.2d at 374.

89. *Howard*, 222 Cal. App. 3d at 863, 271 Cal. Rptr. at 905.

90. *Id.*

91. *Id.*

92. *Id.* at 861, 271 Cal. Rptr. at 903-04 (quoting *Silberg*, 50 Cal. 3d at 212, 266 Cal. Rptr. at 642, 786 P.2d at 369).

93. *Id.* at 863, 217 Cal. Rptr. at 904.

. extraneous to the action' but rather had a 'logical relation' to it."[94] In addressing the issue of defendant's motives, morals, ethics and intent, the court found these traits not at issue when asking whether her acts were in furtherance of the objects of the dissolution proceedings.[95] Therefore, the court concluded that section 47(2)'s privilege protected defendant from her alleged wrongful conduct.[96]

C. *The Dissent*

In the concurring and dissenting opinion, Associate Justice Danielson concurred with the result reached in the decision, but rejected the majority's reasoning and holding.[97] Danielson stated that the majority opinion would "create, by judicial legislation, a 'quasi-judicial immunity' in persons whom it vaguely designates as 'neutral third party participants in the judicial process.'"[98] Justice Danielson's view is that the majority has usurped the legislature's power by extending judicial immunity to a person who would not otherwise enjoy it.[99] Justice Danielson reasoned that evidence that the California Legislature granted judicial immunity to arbitrators in 1985[100] is indicative that the legislature has properly addressed the issue and, that if there were a need to further extend judicial immunity, the legislature would have met that need by similar legislation.[101] Therefore the dissent held that "profound changes in our laws, such as the majority seek to make, should be forged in the proven and legitimate crucible of the legislative process."[102]

As mentioned above, Justice Danielson agrees with the result reached in the case. The rationale for this concurrence is found in the justice's approval of the majority's section 47(2) analysis.[103] According to Justice Danielson, the statutory privilege provided in section 47(2) disposes of the issue fully, and that disposition is based upon law enacted properly by the legislature.[104] However, Justice Danielson does remind the majority that "section 47(2) does not confer

94. *Id.* at 863-64, 271 Cal. Rptr. at 905 (quoting *Silberg*, 50 Cal.3d at 219-20, 266 Cal. Rptr. at 647, 786 P.2d at 374).

95. *Id.* at 864, 271 Cal. Rptr. 904.

96. *Id.*

97. *Id.* at 864, 271 Cal. Rptr. at 907.

98. *Id.*

99. *Id.* at 867, 271 Cal. Rptr. at 907.

100. CAL. CIV. PROC. CODE § 1280.1 (West 1982).

101. *Howard*, 222 Cal. App. 3d at 867, 271 Cal. Rptr. at 907.

102. *Id.* at 867, 271 Cal. Rptr. at 907-08.

103. *Id.* at 866, 271 Cal. Rptr. at 908.

104. *Id.* at 865-66, 271 Cal. Rptr. at 906.

immunity on any person or class of persons, it is limited to reaching and conferring a privilege on certain communications."[105]

V. DISCUSSION AND ANALYSIS

There are several policy reasons for bestowing upon arbitrators the shield of quasi-judicial immunity. In *Hoosac Tunnel Dock and Elevator Co. v. O'Brien*,[106] the Massachusetts Supreme Court held that the same policy reasons that protect judges through immunity are valid for arbitrators. The Court's reasoning has often been quoted in arbitral immunity cases:

> An arbitrator is a quasi judicial officer, under our laws, exercising judicial functions. There is as much reason in his case for protecting and insuring his impartiality, independence, and freedom from undue influences, as in the case of a judge or juror. The same considerations of public policy apply, and we are of opinion that the same immunity extends to him.[107]

In regard to insulating arbitrators from undue influences, especially from dissatisfied parties, the Seventh Circuit Court of Appeals in *Tamari v. Conrad*[108] reasoned that immunity was necessary because "individuals cannot be expected to volunteer to arbitrate disputes if they can be caught up in the struggle between the litigants and saddled with the burdens of defending a lawsuit."[109] This pronouncement was made earlier by a New York Superior court in *Babylon Milk & Cream Co. v. Horvitz*.[110] In this case, the court stated that arbitrators, like other judicial officers, "must be free from the fear of reprisals by an unsuccessful litigant. They must of necessity be uninfluenced by any fear of consequences for their acts."[111]

---

105. *Id.* at 908. The purpose of section 47(2) is to provide litigants and witnesses "the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." *Silberg*, 50 Cal. 3d. at 214-17, 266 Cal. Rptr. at 642, 786 P.2d at 369 (1990). This is accomplished by "encouraging 'open channels of communication and the presentation of evidence' in judicial proceedings." *Id.* (quoting McClatchy Newspapers, Inc. v. Superior Court, 189 Cal. App. 3d 961, 970, 234 Cal. Rptr. 702, 707 (1987)). Therefore, the focus of section 47(2) is on the communications between citizens and the public authorities who are responsible for the investigation and remedy of wrongdoing, not upon the public authorities themselves.

106. 137 Mass. 424 (1884).

107. *Id.* at 426.

108. 552 F.2d 778 (7th Cir. 1977).

109. *Id.* at 780-81.

110. 151 N.Y.S.2d 221 (N.Y. Sup. Ct. 1956), *aff'd*, 4 A.D.2d 777, 165 N.Y.S.2d 717 (1957).

111. *Id.* at 224.

The arbitrator's fear of civil liability has been important to the rationale behind granting quasi-judicial immunity.[112] But, it can be argued that quasi-judicial immunity is improperly applied to arbitrators. Of the six original reasons for granting judges immunity, only three could possibly be applied to arbitrators, those reasons concerning the fear of liability, the likelihood of blaming the judge for improper motives, and the ease of alleging "bad faith".[113] The other three reasons not only are improperly applied to arbitrators but they are possible reasons for not giving arbitrators immunity. The need to prevent judges faced with the prospect of a law suit from being driven to wasteful and inefficient record keeping is not applicable to arbitrators due to the desire that arbitrators should keep careful and complete records of their evaluations.[114] This desire is especially justified in child custody arbitrations where there is a need for careful determination of the child's best interest. The other reasons for granting judicial immunity, such as the existence of alternative means of redress which replace the need of an action against the judge, and the need for finality of judgments, are simply not present in the case of arbitrators.[115] Since many arbitrations are non-binding and not an official part of the legal process, the need for finality of judgments and the ability to appeal arbitral awards is non-existent.

Even if quasi-judicial immunity is properly applied to an arbitrator's actions, at the very least the importance of the arbitrator's impartiality should not fall prey to this immunity. The *Howard* court did not even address the competing interests of the arbitrator's immunity and the arbitrator's impartiality. Impartiality was included merely as just another function of an arbitrator that falls under the shield of immunity. The importance of impartiality is exemplified in the Uniform Arbitration Act, which provides for vacation of an arbitration award if a showing of impartiality by an arbitrator appointed as a neutral can be made, or if there is corruption on the part of an arbitrator, or if there is misconduct which serves to prejudice the rights of a party.[116]

Although defendant in *Howard* did not contest the arbitrator's award, she did contest the arbitrators's abuse of her rights during the evaluation conference.[117] Thus, the conflict between the arbitrator's immunity and the client's right to a neutral arbitrator is brought to the surface when the arbitrator's representation of impartiality is contested as virtual fraud.

The court in *Howard* could have focused on the alleged abuse of the arbitration process by defendant and thus come to the conclusion that defendant was liable due to a violation of the client's right to an impartial arbitrator.

---

112. *See generally* Forrester v. White, 484 U.S. 219, 225 (1988); Kurzawa v. Mueller, 732 F.2d 1456 (6th Cir. 1984); Baar v. Tigerman, 140 Call. App. 3d 979, 189 Cal. Rptr 834, 836 (Cal Ct. App. 1983).

113. *Bradley*, 80 U.S. at 354.

114. *Id.*

115. *Id.*

116. UNIF. ARBITRATION ACT § 12(a)(2), 7 U.L.A. 4 (1978).

117. *Howard*, 222 Cal. App. 3d at 849, 271 Cal. Rptr. at 895.

However, the court chose to focus on the broad granting of absolute immunity.[118] By allowing the defendant to avoid civil liability in the present case, the court has skirted the issue of whether the defendant actually qualified for quasi-judicial immunity. In order to qualify, the defendant must perform a duty which is an integral part of the judicial process.[119] The duties performed by arbitrators have been considered an integral part of the judicial process because arbitrators have been viewed as neutral, unbiased parties who have no interest in the outcome of the matter under consideration. This is exactly what plaintiff claimed defendant was not: a neutral, unbiased party. Therefore, the real issue that the *Howard* court needed to address was how an arbitrator accused of impartiality can be considered an integral part of the judicial process.[120]

Arbitration as a method of dispute resolution derives its value from providing the parties involved with a less expensive and less stressful alternative to litigation, while still maintaining the neutrality of a court of law.[121] Some of the more common reasons parties choose to arbitrate domestic relations disputes can be found in the parties' fear of the formal legal system.[122] This apprehension can be manifested as a fear that the judge does not have enough time for a thorough examination of the case, a fear that the judge may be unable to relate to the litigants, and a fear of the overall power of a judge, whom they have never met and over whose selection they had little or no control.[123] Therefore, some potential litigants may choose arbitration over litigation because it eliminates many of these fears. By allowing such a broad and absolute immunity to all arbitrators, regardless of possible abuses by an arbitrator, the court in *Howard* has created a new list of fears for future litigants which might persuade them to take their dispute to court where they perceive impartiality is more likely. As a result, the *Howard* court's rationale of giving immunity to arbitrators in order to encourage their participation[124] is completely without merit if in the end there are no clients for these arbitrators to serve.

VI. CONCLUSION

The court in *Howard* which placed so much value upon the benefits of alternative methods of dispute resolution, especially its ability to decongest a crowded court system,[125] has taken away much of arbitration's appeal to possible litigants. By giving arbitrators absolute immunity, the court has taken

118. *Id.* at 850, 271 Cal. Rptr. at 901.

119. *Id.* at 856, 271 Cal. Rptr. at 900.

120. *Id.* at 847-48, 271 Cal. Rptr. at 895.

121. Philbrick, *Agreements to Arbitrate Post-Divorce Custody Disputes*, 18 COLUM. J.L. & SOC. PROBS. 419, 443 (1985).

122. Meroney, *Mediation and Arbitration of Separation and Divorce Agreements*, 15 WAKE FOREST L. REV. 467, 469 (1979).

123. *Id.*

124. *Howard*, 222 Cal. App. 3d at 857, 271 Cal. Rptr. at 901.

125. *Id.* at 858, 271 Cal. Rptr. at 901.

away part of the arbitrator's incentive to be totally impartial and has replaced it with the ability to assert one party's claim over the other's. This result has created a policy of protecting biased arbitrators while discouraging the use of arbitration as an impartial dispute resolution alternative. In defending the arbitration process by giving arbitrators a shield from liability, the *Howard* court has, in fact, given arbitrators a sword with which to cut the bonds of impartiality, allowing arbitrators to free themselves from the constraints that bind even judges.

ROBERT M. CARROLL