Judicial Immunity: In Search of an Appropriate Limiting Formula

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During the last half of the twentieth century the common law courts have consistently expanded the potential tort liability base of professional and occupational groups. In general, arguments about the adverse consequences of broader liability rules have been rejected in favour of the plaintiff's claims for relief. In sharp contract is the English Court of Appeal's confirmation, and perhaps extension, of the longstanding and restrictive principles of judicial immunity.

This article identifies the common law and statutory rules of judicial tort immunity, and discusses them in relation to their theoretical foundations. Are judges who sit in a court of law sufficiently distinguishable from other occupational groups to justify this special protection, or are judges simply more sensitive to the adverse consequences of tort liability within their own sphere? The article concludes that there is a valid case for a certain degree of immunity, but not the virtually total immunity suggested in the few modern cases on point.

Au cours de la deuxième moitié du vingtième siècle, les tribunaux de common law *n'ont cessé d'étendre les limites de la responsabilité civile des groupes professionnels. En règle générale, les arguments fondés sur les conséquences néfastes d'un élargissement de la responsabilité ont été rejetés en faveur du dédommagement de la victime. C'est toutefois clairement à rebours de cette tendance que s'inscrit une décision récente de la Cour d'appel de l'Angleterre qui confirme et peut-être même élargit la traditionnelle immunité des juges.*

Le présent article examine les principes de common law *et les dispositions législatives régissant l'immunité des juges et évalue leur fondement théorique. La fonction des juges est-elle si différente des autres professions pour justifier cette protection particulière ou bien se peut-il simplement que les juges soient plus sensibles aux répercussions d'une extension de la responsabilité dans leur domaine d'activité? L'auteur conclut que les juges devraient bénéficier d'une certaine immunité, mais non de l'immunité virtuellement complète que la jurisprudence récente semble consacrer.*

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INTRODUCTION

The principles which govern the liability of public authorities[1] for torts committed in the exercise or purported exercise of their statutory mandates are beginning to emerge in the latter half of the twentieth century, as the highest courts in Canada[2] and Great Britain[3] attempt to develop meaningful limiting formulas. The relevant principles are as yet far from clear, varying with the nebulous classification of the function in question,[4] and depending upon vaguely defined terms such as "jurisdiction", "proper", "good faith", "bona fide", and "malice". It is not surprising that this should be a subject of relatively recent interest, given the proliferation of public authorities and their increasingly wide powers. What is surprising is that the principles which govern the tort liability of judges[5] for the consequences of their judicial acts[6] have received so little recent attention, and remain as vague and difficult as those which govern other public authorities.

Sirros v. *Moore et al.*,[7] a decision of the English Court of Appeal, is one of the few modern decisions on point,[8] and certainly the only one to examine the issue of judicial liability in any depth. The great majority of the cases considered by the court in *Sirros* were decided in the seventeenth, eighteenth, and nineteenth centuries. This is perhaps a credit to the honesty and competence of the judiciary, and perhaps a credit to the rules of judicial immunity which were designed to limit the number of tort actions which might be brought against judges.

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[1]A public authority may be defined as an office, created by statute, which is empowered and/or directed to perform public functions.

[2]See, for example, *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121; *Welbridge Holdings Ltd.* v. *Winnipeg*, [1971] S.C.R. 957.

[3]See, for example, *Home Office* v. *Dorset Yacht Co.*, [1970] A.C. 1004 (H.L.); *Anns and Others* v. *London Borough of Merton*, [1977] 2 All E.R. 492 (H.L.).

[4]Judicial support exists for differentiating liability depending upon whether the function is legislative, quasi-judicial, administrative, or operational. *Supra*, footnotes 2 and 3.

[5]For the purposes of this article, the term "judge" will be used to include any judicial officer who presides over a court of law, superior or inferior, of, or not of, record. See *infra*, at 93-94. This definition includes magistrates and justices of the peace because it will be argued that the same immunity ought to apply to these officers as to judges of superior courts or courts of record. They may be distinguished from other quasi-judicial officers by virtue of their independent status: they are not civil servants in an employment relationship with the government. I wish to emphasize that this is a functional definition only, and that no opinion is offered whether the same immunity principles ought to be extended to other quasi-judicial officers; that issue is beyond the scope of this article. On that point see M. Brazier, "Judicial Immunity and the Independence of the judiciary", [1976] *Pub. Law* 397.

[6]This article is concerned only with immunity for judicial acts and not with immunity for words spoken in performance of the judicial function. For a discussion of the different basis and scope of these two immunity rules see D. Thompson, "Judicial Immunity and the Protection of Justices", (1958) 21 *Modern Law Review* 517.

[7][1975] 1 Q.B. 118 (C.A.).

[8]See also *Foran* v. *Tatangello* (1977), 14 O.R. (2d) 91 (Ont. H.C.).

Not only are the cases on point somewhat outdated, but they are also inconclusive. The judges in *Sirros* v. *Moore* could not agree upon the principles to be extracted from the cases, and academic writers have put forward still other views.[9] Even agreement upon the statement of a rule does not take one very far because the rules employ terms such as "jurisdiction" and "malice", upon the definition of which there is rarely agreement or certainty.

What do emerge from the older authorities are suggestions that judicial liability (perhaps more accurately phrased as judicial immunity, since most judicial acts are immunized from tort liability) may depend upon four different categories of variables. First, the scope of immunity might depend upon the status of the court — superior or inferior,[10] of, or not of, record.[11] Second, immunity might depend upon the type of error which the judge had committed, particularly as regards an action in trespass. The major issue was whether the error went to the judge's jurisdiction; to a lesser extent, distinctions were drawn between errors of law and fact. Third, relevant both to an action in trespass and to the less well-recognized action on the case, were considerations of the standard of care observed by the judge — intentional, reckless, or negligent error. Finally, closely related to the third category, but conceptually distinct, were considerations of the judge's purpose or motive in performing the impugned act, attracting liability for malice or other improper purpose. It is apparent that when the variables within each category are combined with one another in a variety of ways, as they have been,[12] the question of judicial immunity becomes potentially very complex.

This article does not attempt, except incidentally, to determine what the law of judicial immunity expressed in the older authorities actually was. Instead, as in the majority judgments in *Sirros* v. *Moore*, the focus is on what the scope of judicial immunity ought to be. The article begins with a general exploration of the arguments which support a special rule of judicial immunity. Next, the common law and statutory provisions on point are briefly summarized in order to provide a model for discussion. Then the various factors within each of the four categories identified above are examined to test their responsiveness to the rationales which support judicial immunity. Finally, there is a brief discussion of potential alternative compensation schemes which might co-exist with a fairly extensive rule of judicial immunity.

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[9]Thompson, *supra*, footnote 6; Brazier, *supra*, footnote 5; Rubinstein, "Liability in Tort of Judicial Officers", (1964) 15 *U of Toronto L.J.* 317; Sheridan "The Protection of Justices", (1951) 14 *Modern L. Rev.* 267; Johnson, "Comments", (1971) 4 *Ottawa L. Rev.* 627. The older common law in the United States is similar, and not much clearer. See Jennings, "Tort Liability of Administrative Officers", (1937) 21 *Minn. L. Rev.* 263; Comment, "Liability of Judicial Officers Under Section 1983", (1969) 79 *Yale L.J.* 322, at 326-327. In the latter article the author suggests that in 1871 thirteen states had an absolute immunity rule unless the act was totally without jurisdiction, six imposed liability for malicious acts, and in nine others the ruling on point was unclear.

[10]*Infra*, at 92-93.

[11]*Infra*, at 93-94.

[12]See, for example, the judgment of Buckley L.J. in *Sirros* v. *Moore*, *supra*, footnote 7.

THE ARGUMENTS IN SUPPORT OF JUDICIAL IMMUNITY

There is probably no more useful summary of the arguments in support of judicial immunity than that put forth a century ago by Mr. Justice Field of the Supreme Court of the United States.[13]

> For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility. *Taaffe* v. *Downes*, 3 Moore, P.C. 41, n.
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> The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country.
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> It has, as Chancellor Kent observes, "a deep root in the common law." *Yates* v. *Lansing*, 5 Johns. 291.
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> Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry. This was adjudged in the case of *Floyd and Barker*, reported by Coke, in 1608 (12 Coke, 25) where it was laid down that the judges of the realm could not be drawn in question for any supposed corruption impeaching the verity of their records, except before the King himself, and it was observed that if they were required to answer otherwise, it would "tend to the scandal and subversion of all justice, and those who are the most sincere, would not be free from continual calumniations."
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> The truth of this latter observation is manifest to all persons having much experience with judicial proceedings in the superior courts. Controversies involving not merely great pecuniary interests, but the liberty and character of the parties and, consequently, exciting the deepest feelings, are being constantly determined in those courts, in which there is a great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which imposes upon the judge the severest labor, and often create in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge. When the controversy involves questions affecting large amounts of property or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision, often finds vent in imputations of this character, and from the imperfection of human

[13] *Bradley* v. *Fisher* (1892), 80 U.S. at 649-50; 13 Wall, at 346.

> nature this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action.
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> If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party — and that judge perhaps one of an inferior jurisdiction — that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party.

One author has identified nine different rationales supporting judicial immunity,[14] but the most important reduce to three different, but closely related, points. First, and probably foremost, judicial immunity is necessary to protect the free and independent exercise of judgment in the public interest. Second, judicial immunity is necessary to preserve the dignity and respect of the judicial system as a whole. Third, without a rule of judicial immunity it may become increasingly difficult to attract men of the highest character and ability to judicial positions.

Like most public authorities, a judge performs his judicial functions for the benefit of the public at large; but unlike many public authorities, a judge adjudicates matters arising between private individuals on a regular basis. Theoretically, the private individual is entitled to nothing more than an adjudication according to law which is responsive to the public good, and the judge must resolve conflicts between the private interest and the public interest, by law, and in favour of the public interest. But rules of law which are protective of the public interest may often work hardship in a specific case, and sometimes the wisdom of the law as a statement of the public interest will seem questionable to the judge. Formally and informally, a judge is given some latitude to balance private interests and public interests in a particular case. This responsibility is institutionalized in our system of justice on the theory that such flexibility, within reasonable bounds, is in itself in the public interest. In other words, the judge's first responsibility is the public interest, while his day to day specific focus is the private interest; the law gives him some flexibility to balance these potential conflicts. Judges are not unique among public authorities in this respect, but their function illustrates particularly well the public and private demands which society quite deliberately places upon many public authorities. Moreover, they make more specific decisions, and the consequences of their specific

[14]Jennings, *supra*, footnote 8, at 271-2.

decisions — liberty of the subject, transfers of property and wealth — are often greater than those of other public authorities.

With these substantial and frequently exercised powers comes a great responsibility both to the general public and to the private individuals affected. Because the public interest is paramount, the generally acknowledged rationale for judicial immunity from tort liability is also rooted in the public interest. Society ultimately asks judges to exercise their judgment freely and independently, in the public interest. We do not ask that the judge be unsympathetic to the private plea, but we insist upon his being independent of private influences and pressure. It follows, then, that when a judge decides anything it is in the public interest that his decision not be influenced consciously or sub-consciously by the potential for personal liability. Otherwise, one would expect, at least in theory, that there would be a shift in judicial trends, to some degree, towards decisions which were less harmful to the parties and hence less likely to expose a judge to liability. Presumably, this would be a shift away from the optimum position where judgments would be made purely in the public interest.

Against this view is the theory that by sanctioning at least certain types of error with tort liability, there would be an incentive for the judge to take greater care to reach the correct decision, and hence a net benefit in the public interest. The strength of this view depends in part upon whether one believes that there is, without liability, less incentive for judges to take due care,[15] and in part, upon whether one believes that there is in the majority of cases such a thing as an objectively "correct" decision.

Society, for good reason, places judges on a pedestal, and generally regards them as competent, dedicated, and worthy of their high public office. Although it does not necessarily follow that the reality accords with the perception, there is no reason to doubt that it generally does, and the selection of persons of exemplary character and ability for judicial positions may be the best means of ensuring that judicial functions will be conscientiously performed. One also suspects that it would be a very unusual judge who was indifferent to the frequency with which his decisions were overturned on appeal, or who would be immune from the criticism which might accompany the appellate court's opinion or the disrespect which might accumulate within the legal community. A judge's good reputation is his principal professional asset and it is in his interest to develop and preserve it daily. Nevertheless, although the incidence of gross misconduct or incompetence may be

[15]By "optimal", I mean a procedure which balances the costs of perfection against the cost of error and adopts a goal responsive to social values and financial costs. For example, nine member panels might improve the accuracy of decision making in a minor traffic violation case, but the costs and delays would clearly outweigh the benefits. Similarly, a broadly phrased liability rule for judicial error might marginally increase the accuracy of judicial decision making, but again these accuracy gains must be weighed against the costs discussed below.

lower among the judiciary than among the general population, it would be naïve to assume that it is nonexistent. There is, however, a sanction for this type of conduct through formal[16] or informal[17] removal from office, which does serve a deterrent function, albeit not a compensatory one. Therefore, even in the absence of potential liability there are incentives for a judge to perform his functions carefully in the public interest, and the argument that potential liability would significantly improve performance is not convincing.

Moreover — leaving aside for the time being deliberate abuse of authority and gross errors in clear cases — one has to inquire whether there really is such a thing as a "correct" decision as opposed to a competent, fair, and honest exercise of judgment. The "correct" limits of a judge's jurisdiction may be determined after several levels of appeal and numerous different views, so in that sense there is a correct solution to the question. However, it is absurd to suppose that potential tort liability will increase the chances that the judge of first instance will arrive at that decision. Until the specific issue is ultimately resolved by a higher court, it is more accurate to think of a range of acceptable decisions rather than a correct decision, and it is within that range that immunity serves the positive function of allowing the judge to exercise his judgment independently of personal liability considerations.

It is, therefore, doubtful if potential liability would improve judicial performance, while there is at least a suggestion that it might decrease judicial efficiency in reaching decisions in accord with the public interest. That, then, is the general rationale for the immunity rule, and we shall defer for the moment the question whether certain types of decisions and certain types of errors could nevertheless be rendered subject to tort sanction without undermining this rationale.

There are other factors supporting a rule of judicial immunity which deserve consideration. One of the least discussed and most difficult to articulate is inherent in the institutional role of courts and judges in society. It is absolutely crucial to a well-functioning democracy that the courts, as the independent administrators of the general law of the land and as the exercisers of great power over individuals and over governments, be *perceived* as wise, fair, just, capable, responsible, or, generally, as above reproach. The perception is just as important as the reality and the two are related, although different. The narrower the scope of judicial immunity, the greater the number of challenges one would expect from private individuals, with a consequent erosion in the desired perception of the judiciary. The detrimental effect upon the

[16]See, for example, *The Judges Act*, R.S.C. 1970, c. J-1, s. 31, 32 (County Court Judges); *The Supreme Court Act*, R.S.C. 1970, c. S-19, s. 9 (Supreme Court Judges); *The Provincial Courts Act*, R.S.O. 1970, c. 369, s. 4 (Provincial Court Judges). See, also, Brazier, *supra*, footnote 5, at 399-404.

[17]One would expect that exposure of gross misconduct would culminate in more resignations than formal removal procedures.

public's confidence in the judiciary would probably occur whether or not the suits brought were justified and successful. Therefore, this negative effect must be balanced carefully against the anticipated benefits to the public in terms of improved judicial performance and to private citizens in terms of compensatory damage awards.

Ironically, although there is probably great symbolic value in limiting the number of circumstances where a private individual may sue a judge, there is also a great risk in offending the principle that no man should be above the law by virtue of his position in society.[18] Thus, in addition to the practical desirability of imposing personal sanctions upon judges who, for example, deliberately exceed or abuse their powers, there is also a symbolic benefit in preserving liability in some circumstances so as to emphasize to society as a whole that the men who develop and administer the law are not completely immunized from its penalties. The issue of where the boundaries of immunity ought to be drawn will be addressed herein, but at this point it should be emphasized that absolute immunity for all conduct in the purported performance of the judicial function may be quite undesirable.

Another factor which should be taken into account is the effect of potential liability upon the judges themselves. In *Sirros* v. *Moore,* Lord Denning seemed to emphasize the judge's personal interest in freedom and independence as much as the public's interest. He said: "Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: 'If I do this, shall I be liable in damages?' He is not to be plagued with allegations of malice or ill will or bias or anything of the kind."[19]

In response, it can be said that while precisely the same case can be made to support immunity for most other public authorities, and indeed for most private individuals, the deterrence and compensatory goals of tort law are thought to be more important. The role of a judge does, however, differ from most other occupations, public and private, in terms of its greater exposure to liability. From case to case, and within each case, a judge makes numerous decisions of a jurisdictional and non-jurisdictional nature which ultimately culminate in action likely to affect personal liberty, property rights, and economic interests. His powers are great and exercised frequently. Thus, one would expect a considerably higher risk of liability suits against judges than other professionals,[20] even with a relatively restrictive liability rule. The

[18]This is especially true in cases where judges develop the immunity rules which are to be applied to themselves.

[19]*Supra,* footnote 7, at 136.

[20]There are other professions and occupations with similarly high exposure: doctors are a particularly good example. However, there are other status differences which better able a doctor to protect himself from the liability risk.

recruitment of qualified and eminent men for judicial positions is of the utmost importance, so the effect of this risk upon recruitment must be considered. Suppose one wished to recruit a successful practitioner for a judicial appointment. Is the prestige of the position likely to compensate him for loss of income and for the financial risk and aggravation likely to accompany even a relatively restricted liability rule?

Related to the points already noted, but worthy of independent consideration, is the somewhat unusual occupational status of a judge. Although paid by government, a judge is not an employee or servant of the government, which means in very practical terms that the government is not vicariously liable for judicial torts, and hence that the judge personally bears all liability.[21] The same is true of independent contractors and professionals, but those people have relative freedom to choose which occupational tasks they wish to assume, and what fee they wish to charge to compensate them for a risk. A judge, like most other public authorities, is on salary, and under a public duty to perform a variety of functions, but unlike most public authorities, the public purse does not protect him from the consequences of civil liability.[22] Thus a judge lacks the traditional means of protecting himself from tort liability; this also suggests that fairly extensive immunity is desirable.

Finally, it should be emphasized that an immunity rule must also control the potential for liability, as well as its actual consequences. It is the scope of potential liability which will inhibit the free and independent exercise of the judicial function, and make recruitment more difficult. The initiation and trial of even unfounded suits will have a negative impact upon the particular judge, and the judicial system in general. Therefore a suitable immunity rule must be fairly broad in scope, and it must be worded as unambiguously as possible, so that exploratory or vexatious suits are discouraged and may, if necessary, be struck out at the first opportunity.

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[21]This is true of judges or justices who act as inferior courts or as courts not of record, and is the main reason why the term "judge" has been defined to include magistrates and justices of the peace, but to exclude quasi-judicial officers who are government employees. See *Thompson* v. *Williams* (1914), 32 W.N. (N.S.W.) 27 (S.C.N.S.W.). See also the legislative provisions denying the Crown's liability for the consequences of torts committed in the discharge or *purported* discharge of judicial functions. Note that these sections cannot be avoided by proving jurisdictional error, or probably even knowing error, which in Lord Denning's view would deprive an act of its judicial character. Note also that the term judicial is not defined in the legislation. *Proceedings Against the Crown Act,* R.S.N.S. 1967, c. 239, s. 4(6); *Proceedings Against the Crown Act,* R.S.M. 1970, c. P140, s. 5(6); *Proceedings Against the Crown Act,* R.S.O. 1970, c. 365, s. 5(6); *Proceedings Against the Crown Act,* R.S.S. 1965, c. 87, s. 5(6); *Crown Proceedings Act,* S.B.C. 1974, c. 24, s. 3(2)(a); *Proceedings Against the Crown Act,* R.S.N.B. 1973, c. P-18, s. 4(6); *Crown Proceedings Act,* R.S.P.E.I. 1974, c. C-31, s. 5(6); *Proceedings Against the Crown Act,* R.S.A. 1970, c. 285, s. 5(6); *Proceedings Against the Crown Act,* S.N. 1973, c. 59, s. 5(6); *Crown Proceedings Act 1947,* 10 & 11 Geo. 6, c. 44, s. 2(5).

[22]*Administration of Justice Act 1964,* 12 & 13 Eliz. II, c. 42, s. 27.

SUMMARY OF THE EXISTING SCOPE OF JUDICIAL IMMUNITY

The Common Law

Although tort actions against judges have been considered by the courts over a period of approximately four hundred years, prior to 1975 the English courts had failed to articulate any clear or generally accepted principles, and the Canadian courts had scarcely considered the matter at all.[23] The very age of the authorities cited by the modern courts would call for a reexamination of the underlying principles, but beyond that, the principles tend to be expressed in *obiter dicta,* often contradictory, and usually so imprecisely worded as to be of uncertain scope. So unhelpful are the older authorities that the judges of the English Court of Appeal in *Sirros* v. *Moore*[24] were unable to agree upon what the principles had been prior to their decision, let alone agree upon what they ought to be in the twentieth century. Several authors have attempted vigorous and detailed examinations of the cases on point, but, by their own admission, have had considerable difficulty in extracting any satisfactory set of governing principles. There is little to be gained from repeating that exercise here; instead it is proposed to limit the common law summary to an analysis of *Sirros* v. *Moore.* That approach has the advantage of revealing some of the conflicting interpretations of the older authorities. More importantly, the judgments provide a model of analysis for a variety of theories of judicial immunity in trespass. Although it is theoretically possible to maintain a non-trespass action against a superior court judge, there are no modern common law cases directly on point,[25] and actions on the case against inferior court judges will be discussed later with reference to the relevant statutory provisions.[26]

It is worthwhile to set out the facts in *Sirros* v. *Moore* in some detail, because they are essential to understanding the perpetually troublesome definition of the term "jurisdiction" which haunts any action involving public authorities. The plaintiff, an alien, had been fined by a magistrate who then recommended deportation, but ordered that the alien not be detained pending the Home Secretary's decision regarding deportation. The plaintiff appealed to the Crown Court, which in effect was empowered to conduct a rehearing and vary or affirm the order below

[23]See *Foran* v. *Tatangello, supra,* footnote 8; *Crawford* v. *Beattie* (1876), 39 U.C.Q.B. 13. See also the cases cited *infra,* footnote 11. For a summary of the common law as developed by state courts in the United States, see Comment, *supra,* footnote 9. Two recent interpretations of liability in the Federal jurisdiction are *Pierson* v. *Ray,* (1967) 87 S. Ct. 1213; 386 U.S. 843; *Stump* v. *Sparkman* (1978), 435 U.S. 439. These cases affirm a fairly broad immunity rule, imposing liability only for acts totally without jurisdiction which may then be characterized as non-judicial acts. The latter case in particular demonstrates how great the scope of immunity is.

[24]*Supra,* footnote 7.

[25]Rubinstein, *supra,* footnote 9, at 319-323.

[26]*Infra,* at 88-92.

in any respect. Specifically, the Crown Court was empowered to recommend deportation, and consequent upon that recommendation, to order, or not order, that the alien be detained. The judge of the Crown Court held — erroneously as it turned out — that he had no jurisdiction to hear the appeal against the recommendation for deportation. The judge announced that the appeal was dismissed, and then, seemingly as an afterthought, ordered that Sirros be detained. The effect of his dismissing the appeal was to leave the magistrate's order intact; hence the Crown Court made no deportation recommendation, as was a condition precedent to a detention order.[27] Whether this detention order, clearly invalid, was an error within or without the jurisdiction of the Crown Court, is a point of some nicety to which we shall return shortly.

An order of *habeas corpus* was granted on the ground that the judge was *functus officio.*[28] Upon his release Sirros issued a writ claiming damages for trespass and false imprisonment against the judge and police officers involved. In the Court of Appeal all three judges upheld the defendant's application to strike out the action on the ground that it disclosed no reasonable cause of action, but the reasons behind the decision differed. Lord Denning, with whom Ormrod L.J. essentially agreed, openly acknowledged that he was breaking from the rules established in the older cases, as he interpreted them. He held that any judge of any court should be immune from tort liability for any act done in his official capacity unless the judge knowingly exceeded his jurisdiction. Buckley L.J. interpreted the older authorities somewhat differently and arrived at a very complex set of immunity rules. His expression of these rules is *obiter dicta* because he decided the case on a relatively uncontroversial basis, holding that the judge had simply made a procedural error within his jurisdiction.

Their analysis of the older authorities, which was somewhat less detailed than that of Buckley L.J., led Lord Denning and Ormrod L.J. to conclude that the common law had always distinguished between superior and inferior courts for the purposes of special tort immunity.[29] They seemed to agree that a superior court judge was immune from civil liability for anything said or done while acting judicially. This immunity extended to acts done within or without jurisdiction, and indeed "[n]o matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness. . .".[30] Judges of inferior courts were personally liable for acts done outside their jurisdiction, except when they genuinely

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[27]*Supra*, footnote 7, at 131-2, *per* Lord Denning.

[28]*Ibid.*

[29]For a definition of a superior court, see *infra*, at 92-93.

[30]*Supra*, footnote 7, at 132, *per* Lord Denning.

believed on the facts that they had jurisdiction. This would seem to protect the judge from almost any error of fact committed in interpreting the evidence, provided there was some evidence on point for his consideration.[31] However, the judge of an inferior court was liable for innocent errors of law which caused him to exceed his jurisdiction. The cause of action arising from an order made outside jurisdiction would generally be trespass.[32]

In Lord Denning's view, inferior court judges were also liable "for acts done within their jurisdiction if done maliciously and without reasonable and probable cause".[33] The basis of this type of action would not be trespass but case, and will be discussed herein.[34] However, it is interesting to note that one author has argued most convincingly that it is not judges of inferior courts, but judges not acting as a court of record, who are potentially subject to this type of suit.[35]

After recognizing the dichotomy between superior and inferior courts, Lord Denning and Ormrod L.J. concluded that it ought to be abandoned for the purposes of tort law, and that the same liability rules ought to be applied to all judges and magistrates.[36] They adopted the broader immunity recognized as applying to superior court judges as the general rule — essentially absolute immunity for all acts done while performing a judicial function, within or without jurisdiction. Buckley L.J., in a sense, began where they concluded, because in his view the case law did not support a distinction between superior and inferior court judges.[37] Although agreeing that the same rules ought to apply to all judges, he disagreed significantly with the scope of that immunity. He expressed the possibilities, and their potential liability consequences as follows:[38]

> So the following questions may arise: (1) Was the act non-judicial? (2) If the act was, or purported to be, a judicial act, was it within the judge's

[31]The plaintiff is not permitted to establish a jurisdictional fact in the tort suit contrary to the record in the original case. See Rubinstein, *supra,* footnote 9, at 323-4.

[32]When the plaintiff's action is for pure economic loss or indirect damage the trespass action is of no use. It has been suggested that the plaintiff will have great difficulty in finding a useful cause of action in these circumstances. See Rubinstein, *supra,* footnote 9, at 229-230. However, in recent times there has been a considerable widening of the negligence action to permit recovery for pure economic losses. Recovery for an intentional tort has also been permitted in a number of cases, albeit the basis for recovery has not always been clear. See *Roncarelli* v. *Duplessis, supra,* footnote 2; *Gershman* v. *Manitoba Vegetable Producers' Marketing Board* (1977), 69 D.L.R. (3d) 114 (Man. C.A.).

[33]*Supra,* footnote 7, at 134.

[34]*Infra,* at 88-89.

[35]*Infra,* at 89.

[36]*Supra,* footnote 7, at 136, *per* Lord Denning; at 149, *per* Ormrod L.J.

[37]*Ibid.*, at 141-143.

[38]*Ibid.*, at 140-141.

> jurisdiction? (3) If the act purported to be a judicial act in the exercise of a jurisdiction which the judge possessed and about the extent of which he was under no misapprehension, did the judge act as he did upon an erroneous judgment that the circumstances were such as to bring the case within the ambit of that jurisdiction? (4) If the act was not in truth within the judge's jurisdiction, did he act in a conscientious belief that it was within his jurisdiction, and, if so, (a) was this belief due to a justifiable ignorance of some relevant fact or (b) due to a careless ignorance or disregard of some such facts, or (c) due to a mistake of law relating to the extent of his jurisdiction? He will, in my opinion, be immune in cases (2), (3) and (4) (a), but not otherwise.

Although Buckley L.J. avoided the term "jurisdiction" in addressing the issue of whether or not the term was a judicial act, his test seems to amount to asking whether or not the judge had "preliminary jurisdiction"[39] to perform the act in question, and he later uses the term jurisdiction in this context.[40] But he also uses the term jurisdiction in questions (2), (3), and (4), and the term is then being used in a different sense from its use in question (1). For want of a better term, this may be called "secondary jurisdiction" as opposed to "preliminary jurisdiction".

This slippery term has plagued administrative law for many years, and the distinction between jurisdictional and non-jurisdictional questions, as well as the distinction between the two types of jurisdictional questions, is extremely difficult to draw. Indeed, one of the advantages of the judgments of Lord Denning and Ormrod L.J. is that they make this difficult exercise unnecessary. However, these distinctions have been relied upon in tort cases involving other public authorities,[41] and it is necessary to come to grips with them in order to understand Lord Justice Buckley's views.

Using the facts in *Sirros* as an example, one might address the preliminary jurisdiction question by looking at the matter as it stood at the outset of the case, and asking whether the judge could (given certain findings of fact, conclusions of law, and procedural regularity) lawfully perform the act in issue. Buckley L.J. dealt with this issue simply by observing that the judge did have jurisdiction to detain the alien if the subsequent conditions were complied with.[42] The matter would also have to be within the territorial competence of the court, within the limitation period, properly instituted by the proper party, and, in a civil matter, within the monetary jurisdiction of the court.[43] Facts might also come to light during the course of the action which were relevant to preliminary jurisdiction; for example, the evidence might establish that an issue

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[39]See de Smith, *Judicial Review of Administration Action* (3rd ed.), at 99-101.

[40]*Supra*, footnote 7, at 143.

[41]*Supra*, footnotes 2 and 3.

[42]*Supra*, footnote 7, at 143.

[43]See de Smith, *supra*, footnote 41, at 100.

which initially appeared to be within the territorial competence of the court was upon further examination found to be beyond it.[44] In the view of Buckley L.J., any error of preliminary jurisdiction would deprive a judge's act of its judicial character, and hence deprive the judge of immunity.

Ormrod L.J. distinguished between the two meanings of the term jurisdiction as follows: "... a distinction must be drawn between questions which are strictly questions of jurisdiction [preliminary jurisdiction] and questions which relate to the powers which the court can exercise in the course of exercising its jurisdiction".[45] It is the latter type of jurisdictional question which Buckley L.J. refers to in (2), (3), and (4). It is tempting to use *Sirros* again as an example and say, as Lord Denning and Ormrod L.J. seem to,[46] that although the Crown Court judge had preliminary jurisdiction to detain Sirros, that power was only exercisable after a recommendation for deportation, and hence, that the judge lacked jurisdiction in the second sense to make the order, having failed to satisfy the necessary precondition. Unfortunately — and this is a perfect illustration of the futility of attempting to distinguish jurisdictional and non-jurisdictional questions — Buckley L.J. classified the judge's act as an error of procedure within his secondary jurisdiction, and hence immune.[47] He went on to say that even if the decision in such a case were particularly perverse or irrational, the judge would still be immune from civil liability, although perhaps subject to removal from office.

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[44]That case must surely be viewed as one where the court had jurisdiction to determine whether or not the matter was indeed within its jurisdiction. For an example of how confusing this type of jurisdictional question may be see *Bell* v. *The Ontario Human Rights Commission and Carl McKay*, [1971] S.C.R. 756, where prohibition was granted to prevent a Board of Inquiry from proceeding to enquire whether or not a complaint was within its jurisdiction.

[45]*Supra*, footnote 7, at 150. In *Anisminic Ltd.* v. *Foreign Compensation Commission*, [1969] 1 All E.R. 208, (H.L.), at 213-214, Lord Reid drew the following distinction between questions of preliminary jurisdiction, and other questions which would render a tribunal's decision a nullity, which correspond to questions of so-called secondary jurisdiction:

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.
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> The consequences of both categories of error are identical for purposes of judicial review, and perhaps for that reason the term jurisdiction is frequently used to include all the examples given by Lord Reid.

[46]*Supra*, footnote 7, at 137, *per* Lord Denning; at 150, *per* Ormrod L.J.

[47]*Ibid.*, at 143-4.

It is no easier to distinguish question (3) from question (4) than it is to distinguish both from questions (1) and (2). Question (3) seems to posit a situation where the judge knows his jurisdiction, in the second sense, but erroneously concludes that the circumstances of a case bring it within that jurisdiction. Since the judge knows his jurisdiction, this is an error of judgment rather than an error of jurisdiction. As an example, he cites *Hamond* v. *Howell*[48] where the judge knew he had jurisdiction to punish a misdemeanor, but made an error in judgment in concluding a misdemeanor had been committed. Question (4) appears to contemplate the situation where the judge is in error as to the scope of his power, or jurisdiction in the second sense. Questions (4)(a) and (c) are consistent with the rules which Lord Denning and Ormrod L.J. felt had applied previously to inferior courts, but (4)(b) seems to go somewhat furthur, suggesting that due care rather than genuine belief is the required standard.

Although the following chart will not resolve the classification difficulties, it may enable the reader to recognize the distinctions as seen by Buckley L.J.

(1) *Preliminary Jurisdiction*
(Strict Loss of Immunity For Any Excess)

(2), (3), (4) *Secondary Jurisdiction*

(2) *Error Within Jurisdiction*
(Immune)

(3) *Excess Of, But No Error About Jurisdiction*
(Immune)

(4) *Error About Jurisdiction*

(a), (b) Error of Fact
(No immunity for lack of reasonable and probable cause)

(c) Error of Law
(Strict Loss of Immunity)

Although the views of Lord Denning and Ormrod L.J. represent the law as it now stands in England, the House of Lords has not yet ruled upon this new direction, and it is certainly open to other courts in other jurisdictions to reach an entirely different solution. Lord Justice Buckley's views have been presented in detail mainly to illustrate the

[48](1674), 1 Mod. 119, 184; (1677), 2 Mod. 218 (K.B.).

possible distinctions in the scope of judicial immunity. After a review of the relevant statutory provisions these possible solutions will be tested against the factors which support judicial immunity.

Legislative Provisions

There are statutory provisions respecting the liability of certain judicial officers in all of the provinces of common law jurisdiction in Canada, as well as in England. In eight provinces the legislation governs provincial court judges, magistrates, and justices of the peace;[49] in Alberta justices of the peace are excluded;[50] in England the legislation specifically governs justices of the peace.[51] In addition, the British Columbia Supreme Court is expressly accorded the protection of a superior court of record,[52] and the Manitoba Court of Queen's Bench is given the same protection available to superior courts of record in England in 1870.[53] Although *Sirros* v. *Moore* might be adopted in British Columbia, in Manitoba the liability of a judge of the Court of Queen's Bench will depend upon which of the conflicting views of the older common law is adopted.

The Canadian statutes which deal with provincially appointed judicial officers are modelled upon the English *The Justice's Protection Act 1848.*[54] The full title of the Act (An Act to protect Justices of the Peace from vexatious actions for Acts done by them in execution of their Office) suggests that it was passed for the purpose of limiting groundless actions. As does most of the Canadian legislation, it distinguishes between acts done with and without jurisdiction. Jurisdiction is not defined, so the same definitional problems present in the common law are also present under the legislative schemes.

Consistent with the English legislation, when the act in issue was *within* the officer's jurisdiction six provinces specify no action will lie unless the act was done maliciously *and* without reasonable and probable

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[49]*The Provincial Courts Act,* R.S.O. 1970, c. 369, s. 1(*a*), s. 13; *The Public Authorities Protection Act,* R.S.O. 1970, c. 374, s. 1; *Provincial Court Act,* R.S.P.E.I. 1974, c. P-24, s. 1(*c*), s. 11, as. am. S.P.E.I. 1975, c. 78, s. 1; *The Justices and Other Public Authorities (Protection) Act,* R.S.N. 1970, c. 189, s. 2(*b*), s. 4; *The Provincial Court Act,* S.N. 1974, c. 77, s. 34(1); *The Provincial Judges Act,* S.M. 1972, c. 61, s. 1(*b*), s. 12; *The Provincial Court Act,* S.S. 1978, c. 42, s. 2(*c*), 5(3), s. 23; *The Provincial Court Act,* S.B.C. 1975, c. 57, s. 1, s. 31 (s. 31 renumbered by S.B.C. 1977, c. 60, s. 37); *The Justices' and Magistrates' Protection Act,* R.S.N.S. 1967, c. 157, s. 1, 2; *The Judges of the Provincial Magistrate's Court Act,* S.N.S. 1976, c. 13, s. 2(*b*); *Protection of Persons Acting Under Statute Act,* R.S.N.B. 1973, c. P-20.

[50]*The Provincial Court Act,* S.A. 1978, c. 70, s. 20(3); *The Justices of the Peace Act,* S.A. 1971, c. 57.

[51]*The Justices Protection Act 1848,* 11 & 12 Vict. c. 44.

[52]*The Supreme Court Act,* R.S.B.C. 1960, c. 374, s. 5, as. am.

[53]*The Queen's Bench Act,* R.S.M. 1970, c. 280, s. 6.

[54]*Supra,* footnote 51.

cause.[55] Neither "malice" nor the presumably equivalent term "bad faith" which appears in the British Columbia legislation,[56] is defined. Interestingly, in British Columbia and Prince Edward Island the legislation reads "malice *or* without reasonable and probable cause,"[57] and depending upon how that word is interpreted, those statutes may recognize a far narrower immunity rule than the others.[58] In New Brunswick, there is no specific statutory reference to an action on the case. Instead there is a prohibition against any action being brought against an officer acting within jurisdiction.[59] It is always possible to argue that a knowing or malicious error in itself takes the officer out of his jurisdiction, but the distinctive nature of the New Brunswick legislation suggests that this approach was not intended by the legislature.[60]

None of this legislation is as clear as it might be, because while at least eight provinces and England recognize an action on the case for errors committed within jurisdiction, none specifies clearly the elements of that action. Assuming one could determine the common law in the nineteenth century, were the Acts intended to change it or confirm it?[61] Moreover, the Acts are worded in the negative, raising the possibility that malice and want of reasonable and probable cause are necessary, but not always sufficient, criteria of liability. It has been argued that the absolute immunity in the common law for errors within jurisdiction committed by justices acting as courts of record would protect an English justice of the peace from an action of malicious conviction, notwithstanding the legislation.[62] Thus, much of the uncertainty of the common law remains with the legislation, and the same is true of the legislation governing errors of jurisdiction.

Dealing with errors committed *without or in excess of* jurisdiction, there are basically two different legislative schemes. In three provinces,

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[55]*The Public Authorities Protection Act*, R.S.O. 1970, c. 374, s. 2; *The Justices and Other Public Authorities (Protection) Act*, R.S.N. 1970, c. 189, s. 5; *The Justices' and Magistrates' Protection Act*, R.S.N.S. 1967, c. 157, s. 3; *The Provincial Court Act*, S.S. 1978, c. 42, s. 23; *The Provincial Court Act*, S.A. 1978, c. 70, s. 20(3); *The Provincial Judges Act*, S.M. 1972, c. 61, s. 12.

[56]*The Provincial Court Act*, S.B.C. 1975, c. 57, s. 31, as am. S.B.C. 1977, c. 60, s. 37.

[57]*Ibid.*, *Provincial Court Act*, R.S.P.E.I. 1974, c. P-24, s. 11.

[58]If the "or" is intended to be read disjunctively, the plaintiff could succeed by proving simple negligence. While there would seem to be some significance to the choice of "or" instead of "and", which appears in the English model, it is difficult to imagine the legislatures creating such a broad liability base, never recognized at common law.

[59]*Protection of Persons Acting Under Statute Act*, R.S.N.B. 1973, c. P-20.

[60]There is common law authority before 1848 in England which recognized the action on the case, most clearly when the judge was not acting as a court of record. See *Thompson, supra*, footnote 6, at 528. In view of the statute, it is difficult to argue that such authority has survived in New Brunswick.

[61]See Thompson, *supra*, footnote 6, at 528-533.

[62]*Ibid.*

the legislation requires proof of malice and reasonable and probable cause, just as for the error within jurisdiction.[63] Interestingly, this creates broader judicial immunity than that which Buckley L.J. felt was available to superior court judges, or that which Lord Denning felt was available to certain inferior courts at common law,[64] and may now be roughly similar to the immunity for all but knowing error expressed by Lord Denning and Ormrod L.J. in *Sirros* v. *Moore*.[65]

In three other provinces, the common law relating to jurisdictional error is affirmed and the legislation states that it is not necessary to prove malice or want of reasonable and probable cause.[66] Therefore, unless these provinces adopt the decision in *Sirros* v. *Moore*, there will be strict liability in trespass for jurisdictional error. In New Brunswick, there is simply a prohibition against suing a judge for an act performed within jurisdiction, and presumably the effect is the same as in the three provinces noted immediately above.[67] In Manitoba and Prince Edward Island the phrase "in the execution of his duties" appears in otherwise similar legislation.[68] If that phrase is interpreted as meaning "within jurisdiction" there would either be strict liability in trespass, or liability for knowing error, depending upon whether or not *Sirros* v. *Moore* were adopted. But it can also be argued that the phrase is meant to include the purported exercise of jurisdiction, in which case the legislatures may have contemplated liability only when the act loses its judicial character, as where the judge knowingly exceeds jurisdiction.

It is interesting to note that the federal *Criminal Code*, and legislation in several provinces permits the reviewing court, upon quashing a conviction, to issue an order immunizing the judge who made the error from tort liability.[69] For example, the Ontario legislation reads as follows:

> 7.(1) Where an order is made quashing a summary conviction, the court may provide that no action shall be brought against the justice of the peace who made the conviction or against the informant or any officer acting thereunder or under any warrant issued to enforce the conviction or order.

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[63]See *The Provincial Court Act*, S.S. 1978, c. 42, s. 23; *The Provincial Court Act*, S.B.C. 1975, c. 57, s. 31, as. am. S.B.C. 1977, c. 60, s. 37; *The Provincial Court Act*, S.A. 1978, c. 70, s. 20(3).

[64]*Supra*, at 84-88.

[65]*Infra*, at 102.

[66]See *The Public Authorities Protection Act*, R.S.O. 1970, c. 374, s. 3; *The Justices and Other Public Authorities (Protection) Act*, R.S.N. 1970, c. 189, s. 5; *The Justices' and Magistrates' Protection Act*, R.S.N.S. 1967, c. 157, s. 3.

[67]*Supra*, footnote 61. See also *supra*, at 88-89.

[68]See *Provincial Court Act*, R.S.P.E.I. 1974, c. P-24, s. 11; *The Provincial Judges Act*, S.M. 1972, c. 61, s. 12.

[69]See *The Public Authorities Protection Act*, R.S.O. 1970, c. 374, s. 7(1); *The Justices and Other Public Authorities (Protection) Act*, R.S.N. 1970, c. 189, s. 14(1); *The Criminal Code*, R.S.C. 1970, c. C-34, s. 717.

> (2) Such an order may be made conditional upon payment of the costs of the motion to quash or upon such other condition as may be considered proper.

It will be argued subsequently that the action on the case is preferable to the trespass basis of judicial liability. However, if trespass liability were to be maintained, then there is much to recommend such provisions whereby an action for an innocent error of jurisdiction may be precluded by the same judge who determines the error, hence eliminating the groundless suit at the earliest possible opportunity. The other advantage, which obtains equally if the trespass suit is abandoned altogether, is that the reviewing court may exercise its public duty without taking into account in any way the private liability which may otherwise flow from the decision to quash.[70]

Finally, in England there is statutory provision for indemnifying justices for costs and damages incurred in tort proceedings, with indemnity being mandatory if the justice acted reasonably and in good faith.[71] Since these elements would be fatal to an action upon the case, the utility of the provisions depends largely upon the continued recognition of the trespass action. The provisions are, however, responsive to one[72] but not all of the rationales for judicial immunity, and may reflect the government's desire to treat justices more as other public authorities than as superior court judges or courts of record.

In summary, the common law before *Sirros* v. *Moore* imposed strict liability in trespass for jurisdictional errors committed by any court in the view of Buckley L.J., or by inferior courts in Lord Denning's and Lord Justice Ormrod's view. The legislation in England, and in all but the three Canadian provinces which insist upon an action on the case, contemplates the application of the common law, with the precise interpretation of the common law being an open question at the moment in Canada. In England and all of the provinces except probably New Brunswick, the legislation appears to contemplate liability for any judicial error committed with malice and/or want of reasonable and probable cause. At common law it appears that superior court judges, or perhaps courts of record, were immune from this type of liability, although in Lord Justice Buckley's view an error of fact committed without reasonable and probable cause would not allow immunity. Thus,

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[70]*Infra*, at 100-101.

[71]*The Administration of Justice Act 1964*, c. 42, s. 27 (U.K.).

[72]The lack of financial backing for potential liability is one of the main reasons why the term "judge" was defined for the purposes of this article to include justices of the peace. *Supra*, footnote 5. Again, the desirability of treating officers who perform quasi-judicial functions differently from superior court judges or judges of courts of record, has not been considered in this article. If a distinction is justified, the indemnity provisions are one argument for treating justices similarly to quasi-judicial officers. In *Sirros* v. *Moore*, *supra*, footnote 7, and *Foran* v. *Tatangello*, *supra*, footnote 8, the courts took the view that no distinction between justices of the peace and higher court judges was justified.

although the legislation differs from the common law, the same factors — classification of court, classification or error, standard of care, and motive — are relevant to the determination of the scope of immunity.

ANALYSIS OF THE LIMITING FACTORS

Classification of the Court

As mentioned previously, there was ample judicial support prior to *Sirros* v. *Moore,*[73] and statutory authority in most jurisdictions, to the effect that the scope of judicial immunity would vary with the classification of the court. The predominant distinctions were those drawn between inferior and superior courts, and those drawn between courts of, and not of, record, with the latter distinction being particularly relevant to the action on the case.

In *Sirros* v. *Moore* all three judges concluded that judicial immunity should not depend upon whether a court were classified as superior or inferior.[74] Lord Denning and Ormrod L.J. took the position that the classification recognized at common law ought to be abandoned in modern times, and that the same protection afforded to superior court judges ought to be extended to judges of all courts.[75] It was the view of Buckley L.J. that the common law had never articulated a rule which distinguished between the two types of courts, but interestingly, he indicated that the rule was perhaps applied differently to judges of superior courts, by tending to classify their errors as errors of judgment rather than jurisdiction.[76] It is not clear whether Buckley L.J. agreed with this tendency which he recognized, but his actual classification of the error at issue in *Sirros* might be viewed as an example of it.[77] Surely, if a distinction in practice is justified it would be preferable to recognize it in theory rather than to disguise it in the classification maze.

The differing treatment of superior and inferior courts in the past again turns upon the elusive concept of jurisdiction. It has been said that a ". . . superior court is in one sense a court which is presumed to have jurisdiction until the contrary is established by evidence; in the other sense it is a court which cannot be restrained by prohibition from

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[73]*Supra,* footnote 7.

[74]These terms are defined *infra,* at 92-93.

[75]See also *Foran* v. *Tatangello, supra,* footnote 8. Note that Lord Denning indicates that he would treat all judges including justices of the peace alike, without reference to *The Justice's Protection Act 1848, supra,* footnote 51.

[76]*Supra,* footnote 7, at 141.

[77]Buckley L.J. classified the error as an error of procedure within jurisdiction.

exceeding its jurisdiction".[78] Although the author did not specify, it seems he intended the term jurisdiction to include preliminary jurisdiction, and probably secondary jurisdiction as well.[79] The argument would then be that as the arbiter of his own jurisdiction a judge of a superior court can never exceed it, but can only commit an error within it.[80] Technically this is a tenable position, but as a matter of common sense a superior court is as much bound by law as any other court, and the rejection of this argument on that basis by Lord Denning[81] and Ormrod L.J.[82] is far more convincing.

Once that technical distinction is put aside, there is little reason for distinguishing between the two levels of courts. Often the functions of and precise subject matter dealt with by superior and inferior courts are identical, and often judges of both types sit in the same court.[83] Even where the subject matters differ, as where an inferior court has a limited sentencing power or monetary jurisdiction, the difference is more of degree than of kind. Moreover, as *Sirros* indicates, the classification of certain courts as superior or inferior is by no means a simple and certain process,[84] and it seems absurd that liability should depend upon such an irrelevant and elusive criterion. It is submitted that the abandonment of this distinction in both theory and practice is a welcome development.

Whereas the distinction between superior and inferior courts may have determined trespass liability at common law, the distinction between courts of, and not of, record[85] may have fixed liability for malicious judicial acts. One author has argued convincingly from the older authorities that judges were absolutely immune from liability for malice when acting as a court of record.[86] Leaving aside for the time being the questions of whether, and when, malice ought to be an appropriate basis for an action, it is interesting to consider the author's rationale for the distinction. He argues that the common law has never extended immunity for malicious acts to officers, other than judges, who

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[78]*Supra*, footnote 6, at 520-521.

[79]These terms are defined *supra*, at 85-86.

[80]*Supra*, footnote 7, at 139-140.

[81]*Ibid.*, at 135.

[82]*Ibid.*, at 148-9.

[83]This was true in the case of the Crown Court discussed in *Sirros*. *Ibid.*, at 136.

[84]For example, Buckley L.J. thought the Crown Court was sitting as an inferior court in *Sirros;* Ormrod L.J. thought it a superior court; and Lord Denning noted the difficulty without resolving it. *Ibid.*, at 143, 150, and 136-7.

[85]A court of record ". . . is defined by reference to the functions it exercises. It is a court which has jurisdiction to fine and imprison or a court with jurisdiction to try civil causes according to the common law in matters involving forty shillings or more." *Supra*, footnote 6, at 521.

[86]*Ibid.*, at 520-533.

perform quasi-judicial functions,[87] and he then suggests that judges not acting as a court of record more closely resemble quasi-judicial authorities than they do judges acting as courts of record. It is probably true that a distinction based, for example, on the power to imprison and fine, poses more of a difference in kind than the distinction between superior and inferior courts, which often poses only a difference in degree of the same type of power. Therefore, if the scope of judicial immunity were to depend upon a classification of different types of courts of law, the distinction between courts of, and not of, record is preferable to the superior — inferior court distinction for both trespass and case liability. But the argument in support of that distinction depends upon whether quasi-judicial officers ought to be granted lesser immunity than judges, a matter of some debate.[88] Moreover, even if quasi-judicial officers are to be treated differently, Lord Denning's arguments for treating judges of both superior and inferior courts alike would seem also to apply to judges in courts of, and not of, record.[89]

Classification of the Error

The judgment of Buckley L.J. in *Sirros* v. *Moore*[90] presents a detailed system for the classification of error. The legislation governing most inferior court judges often differentiates between jurisdictional errors and others.[91] Lord Denning and Ormrod L.J. also distinguish between jurisdictional and non-jurisdictional errors, limiting liability to knowing errors of jurisdiction. However, the "knowing" element is more conveniently discussed as a standard of care concept,[92] so the view of Buckley L.J. is employed as the model of discussion below.

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[87]The distinction between quasi-judicial and administrative functions is a very difficult one to draw. A working definition of a quasi-judicial function may be arrived at by assuming the tribunal is exercising its function in the Province of Ontario, and then asking whether or not *The Statutory Powers Procedure Act*, S.O. 1971, c. 47 would apply. For these purposes the tribunals mentioned in section 2(*d*), (*e*), and (*f*), would also be included. This approach concentrates upon functions which so closely resemble courts of law that it is thought desirable to insist upon rather vigorous procedural safeguards similar to those available in a court of law.

[88]See Brazier, *supra*, footnote 5.

[89]Although the functions of judges and quasi-judicial officers, and the effects upon the individuals of their acts, *may* not differ in such a meaningful way as to support different liability principles, it may be socially undesirable to extend broad immunity to such a rapidly expanding class of civil servants. The classification line might then be drawn to separate independent judicial officers from civil servants; or, it might be drawn as Thompson suggests to separate courts of, and not of record; or, some other criteria might be adopted. While at the moment I confess to preferring the first distinction, I openly admit that the issues deserve further examination, particularly with reference to the quasi-judicial official. While I cannot categorically deny the utility of Thompson's distinction, in defence, I would suggest that he has not considered its full implications either.

[90]Buckley L.J.'s view are summarized *supra*, at 87.

[91]*Supra*, at 88-92.

[92]*Infra*, at 101-103.

The first and strongest criticism of a classification system similar to the one Buckley L.J. suggests is that it is tremendously complex and difficult to apply in practice. One wonders whether liability ought to depend upon such ambiguous distinctions; and, if the distinctions really are that difficult to draw, there is a risk that the classification of error will more likely be used to support the outcome in a case than to determine it. Buckley L.J. almost admits as much.[93] Consider his determination that the judge in *Sirros* must have put his mind to the question of whether to detain the alien, and then simply adopted the wrong procedure. It follows then that this was an error within jurisdiction, and immune. But he might have held that the judge lacked preliminary jurisdiction because he was *functus officio.* Or, he might have classified this as an error as to the extent of his jurisdiction, and then possibly have held the judge disentitled to immunity. Once the error is classified as jurisdictional of the second order, the further determination of whether the error was one of fact or law arises, and if of fact, whether justifiable or careless. It appears that the judge will be strictly liable for excess of preliminary jurisdiction and for excess of secondary jurisdiction produced by an error of law, but liable only for want of reasonable and probable cause with an excess of secondary jurisdiction produced by an error of fact. Surely there must be a more persuasive justification of these complex and uncertain formulas than the reasons in the judgment of Buckley L.J.

So the question which remains is whether, notwithstanding the complexity and uncertainty of the classification of error scheme, this classification is necessary in order to rationalize the degree of judicial immunity to be granted. Starting with the clearest situation first, consider the case where the judge has, and knows he has, preliminary jurisdiction to make an order, and knows what factual and legal determinations will support the order. The question before him is whether, *in his judgment,* he ought to make such an order. Clearly, if immunity is ever necessary to preserve free and independent judicial decision making, it is necessary in this case.

Next, consider the same situation, except assume that the judge, exercising his judgment within jurisdiction, commits a procedural error. This is how Buckley L.J. classified the judge's detention of the alien in *Sirros,* in granting the judge immunity. It is possible to regard these two examples simply as variations of judicial acts done within jurisdiction and to immunize them both on that basis. However, while it seems highly desirable to support the free and independent exercise of judicial judgment on a substantive matter, it is not so easy to argue that the same freedom and independence ought to govern a judge's choice of procedure. Nor is it accurate to classify an error of procedure as less important than an error of, for example, jurisdiction, *per se;* recall that the error which Buckley L.J. regarded as procedural was nevertheless

[93] *Supra,* footnote 7, at 141.

sufficient to support *habeas corpus.*[94] It might be preferable to deal with procedural errors within jurisdiction by arguing that such errors are not the cause of the plaintiff's loss. For example, the choice of the wrong procedure in *Sirros* was not the cause of the alien's detention; indeed it was the basis of his release. Had the judge in *Sirros* really put his mind to the issue of whether he ought to vary the magistrate's order and detain the alien, and had he then chosen the proper procedure, the alien would have suffered a longer detention than he in fact did. A party is entitled to procedural regularity, but it does not follow that irregularity will be the cause of actionable damage.[95]

It is beyond controversy, however one analyses the decisions on point, that provided a case can be classified as an error of judgment or procedure within jurisdiction, there will be immunity from tort liability. The extent to which this immunity ought to be extended to errors of jurisdiction, primary or secondary, is a more difficult issue to resolve. In *Sirros,* all three judges attached significance to the classification of an error as jurisdictional, arriving at two different propositions. Lord Denning would not immunize a judge who knowingly exceeded his jurisdiction, and he does not appear to distinguish between preliminary and secondary jurisdiction for this purpose.[96] Buckley L.J. would not immunize any act in excess of preliminary jurisdiction, regardless of how that error occurred; and he would not immunize negligent errors of fact, nor any errors of law, going to questions of secondary jurisdiction.[97] What is the reason for the distinction between jurisdictional and non-jurisdictional errors?

If questions of preliminary jurisdiction were always clear and easily resolved, the distinction might make sense,[98] but a jurisdictional question can be as difficult as any other. It is therefore meaningless to speak of the "correct" jurisdictional determination as an obvious absolute.[99] Potential liability is more likely to affect the accuracy of jurisdictional determinations adversely than positively.[100]

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[94]Although Buckley L.J. characterizes the case differently from Lord Denning and Ormrod L.J., his silence on point presumably indicates he agrees that *habeas corpus* was properly granted.

[95]In several provinces damages against provincial judges are limited to a nominal amount by statute, in the absence of a substantial as opposed to a technical harm. See *The Public Authorities Protection Act,* R.S.O. 1970, c. 374, s. 9; *The Justices and Other Public Authorities (Protection) Act,* R.S.N. 1970, c. 189, s. 15; *The Justices' and Magistrates' Protection Act,* R.S.N.S. 1967, c. 157, s. 16.

[96]*Supra,* footnote 7, at 136; *infra,* at 102.

[97]*Supra,* at 84-87.

[98]They would make sense with a standard of care approach rather than a trespass approach, however.

[99]*Supra,* at 79.

[100]The other rationales for judicial immunity, suggested *supra,* at 76-81, would also apply.

There is, however, a conceptual distinction between jurisdictional and non-jurisdictional questions which at first glance might seem to support a different liability rule. The exercise of judgment within jurisdiction is the very essence of a judge's function, and it is that free and independent exercise of judgment within legal bounds which society values. No public interest is served by giving a judge freedom and independence to determine his own jurisdiction.

The force of that argument is somewhat dissipated, however, when one considers that in the first instance, it falls upon the judge to exercise his judgment on factual and legal questions which determine whether or not he has jurisdiction to perform the act in question. Notwithstanding the admitted qualitative difference between jurisdictional and non-jurisdictional questions, there is the same public interest in having the judge determine both matters free and independent of potential personal liability. Moreover, although appeal and judicial review will not usually compensate the victim of the jurisdictional error, they do protect the public's interest in jurisdictional control.[101] It is, after all, this public interest which distinguishes jurisdictional and non-jurisdictional questions; the aggrieved individual is likely to be indifferent to whether the source of his damage was an error within or without jurisdiction.

The real significance of the jurisdictional error lies in its relationship with the trespass action. Any interference with the person or property of another is a *prima facie* trespass for which the defendant will be held strictly liable unless he establishes a defence. Liability is strict in the sense that any error as to the circumstances which give rise to the defence, however reasonable and innocent, will destroy the defence. The strength of the argument of Buckley L.J. in favour of strict liability for jurisdictional error is its consistency with the ordinary law of trespass as applied to private citizens: any error as to the scope of judicial authority is resolved strictly against the judge, and renders him liable in trespass. This is also the very weakness of the argument, because it entirely ignores the special judicial role.

Buckley L.J. reasoned that an act done without preliminary jurisdiction is not a judicial act, and therefore attracts no immunity. That proposition is more attractive as a matter of semantics than of logic or policy. Suppose counsel bring a case before a judge, argue at length over whether he has jurisdiction, and then the judge concludes after careful consideration of all the authorities on point that he does have jurisdiction. Should a higher court's determination that he was in error deprive this process of its judicial character, let alone expose the judge to personal liability in tort? Surely he is performing a judicial function in determining the jurisdictional point in the first instance.

[101] *Supra*, footnote 7, at 141, *per* Ormrod L.J.

Moreover, it is the very fact that the judge has a public duty to make the jurisdictional determination in any case which comes before him, as well as a further duty to interfere with the person or property of the subject, which distinguishes him from the private citizen. It is one thing to affirm the value of personal security by permitting a private citizen to interfere with another only in exceptional circumstances, and entirely at his peril. Peace in the realm, and the integrity of its subjects are best preserved by discouraging such action. But surely it is an entirely different matter to propose that the same principle govern judicial officers who are obligated by the public interest to interfere with the liberty of subjects.

Recall that in Lord Justice Buckley's view, liability for an error of law going to secondary jurisdiction would be strict, as with an error of preliminary jurisdiction, whereas an error of fact would be judged on the negligence standard. Although the distinction between errors of law and fact has been recognized in several older cases, there is no compelling reason for the distinction: it is nebulous at best, and there is no difference in the degree of potential difficulty of the issue or the severity of the consequences of error. It is desirable to eliminate the rehearing of all factual determinations in the subsequent tort suit, but it is equally desirable to eliminate the rehearing of legal issues of secondary jurisdiction.

Buckley L.J. does not attempt to rationalize the distinction between questions of preliminary and secondary jurisdiction, but Ormrod L.J. in *obiter dicta* indicates that, were inferior courts to be held liable for jurisdictional errors, then he would limit that liability to errors of preliminary jurisdiction in order to preserve some meaningful scope for judicial immunity.[102] This theory seems reminiscent of a view once prevalent in administrative law by which jurisdiction meant preliminary jurisdiction, and nothing more. The erroneous exercise of a power within that jurisdiction might be appealable, but would not be subject to judicial review. The theory was that preliminary jurisdiction granted the jurisdiction to exercise the given powers, rightly or wrongly. But the distinction has now lost all significance in administrative law, and virtually any error which a tribunal might make may now be regarded as jurisdictional. Indeed, the modern trend is perhaps entirely to dismiss the requirement that an error be jurisdictional as a precondition for judicial review.[103] In view of these developments in administrative law, the judge's desire to limit the definition of the term jurisdiction with regard to liability is quite understandable.

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[102]*Ibid.*, at 150.

[103]For a general summary of the development of the jurisdictional concept, and the erosion of its significance, see de Smith, *Judicial Review of Administrative Action* (3rd ed.) at 94-106. See also *Federal Court Act*, R.S.C. 1970, c. 10, s. 28; *Anisminic Ltd.* v. *Foreign Compensation Commission*, *supra*, footnote 45; *Pearlman* v. *Keepers and Governors of Harrow School*, [1979] 1 All E.R. 365, at 372 (C.A.) *per* Lord Denning.

This leads one to doubt whether the distinction suggested by Ormrod L.J. would be any more likely to survive in the law of torts than in the law of judicial review. Cynically, it might be pointed out that the courts' expansion of the jurisdiction concept in administrative law may have been motivated by their desire to increase their supervisory powers over a growing segment of governmental regulation of society. In contrast; it might be supposed that they would narrow the concept to minimize their own liability risk. Even were this an accurate prediction, it would be undesirable to define the elusive concept of jurisdiction differently in public and private law.

There is, however, a less cynical and more relevant explanation for the expansion of the concept of jurisdiction in administrative law. It is apparent that the determination of preliminary jurisdiction may be just as difficult, and the consequences of error just as severe, as the determination of errors going to secondary jurisdiction or substance. The distinction between the two types of jurisdictional question is not responsive to the policies underlying judicial immunity, nor to the private interest of the party aggrieved. The distinction in administrative law depends not so much upon the inherent nature of jurisdiction as it does upon the intent of the legislative body which created the public authority: were the courts, or the authority itself, intended to have the final word upon a particular issue?[104] This is a far less relevant consideration when the courts' supervision of one another is in issue. Within this context, the distinction between preliminary and secondary jurisdiction is neither certain, nor meaningful.

In summary, most of the distinctions suggested by Buckley L.J. are not supportable, either with reference to the potential plaintiff or to the rationales for judicial immunity. The significance of the classification of an error as jurisdictional, even assuming the term may be defined with certainty, lies in its relationship to the trespass action. But the trespass action itself is objectionable on two counts. First, it seems entirely inappropriate to impose strict liability for jurisdictional error, however *bona fide* and careful, upon officers who are under a public duty to commit *prima facie* trespasses. Secondly, jurisdictional errors are not uncommon, so the trespass action, properly interpreted, creates a disproportionately wide ambit of actual liability.

Actual liability has been controlled in the past by distinguishing between inferior and superior courts, and either immunizing superior courts for jurisdictional error, or classifying their errors as within jurisdiction.[105] But neither the classification of the court, nor the elastic use of the concept of jurisdiction, can be supported on any other

[104]The jurisdictional question is crucial, for example, in cases where the courts interpret privative clauses. See, for example, *Anisminic Ltd.* v. *Foreign Compensation Commission, supra,* footnote 45.

[105]These two views are put forth by Lord Denning and Buckley L.J. respectively in *Sirros* v. *Moore, supra,* footnote 7.

ground beyond its function as a crude limiting factor. If possible, it would be desirable to develop limiting formulas with more rational bases than these.[106]

It is interesting to note the legislative provisions in some jurisdictions whereby a judge in quashing a decision of an inferior court may grant an order protecting the judge in error from civil liability.[107] These provisions serve a function in public law because they free the reviewing judge from considering the liability consequences to the judge below, should he determine a jurisdictional error had been committed. However, the provisions would be entirely unnecessary if the trespass basis of the action were abandoned. Moreover, these provisions appear to reflect an open acknowledgment that strict liability in trespass is an inappropriate basis for judicial liability. There is very little jurisprudence indicating when the protection order should be granted, but what there is demonstrates that the courts consider the standard of care and motive of the judge in error.[108] There is one advantage to approaching improper motive or breach of standard in this manner, rather than directly through a specified action on the case: that groundless suits may be precluded at the earliest possible stage.[109] But ironically, the trespass suit as defined without reference to this legislation will only be groundless if the judge has not committed a jurisdictional error, and provided the jurisdictional determination is a precondition of the tort suit, the protection order is unnecessary. Although in theory the basis of the trespass action based upon jurisdictional error is far wider than the basis of liability in case, in practice the effect of these protection order provisions is to make the basis of liability identical to that for errors within jurisdiction. The potential for numerous groundless suits is far larger in the latter case, where the protection order is of no assistance. Therefore, when the argument against the protection order is substantially the same as that for liability for improper motive or breach of standard, and the essence of both is really an action upon the case, it seems foolish to have a special procedure to govern jurisdictional errors when the legislation itself appears to recognize the irrelevance of the

[106]The decision to fix upon knowing jurisdictional error in *Sirros* v. *Moore, supra,* footnote 7, was in response to the same criticisms made here, but without modification it too is unsatisfactory.

[107]*Supra,* footnote 104.

[108]No clear governing principles appear to have emerged in this area. In *Re Royal Canadian Legion (Branch 177) and Mount Pleasant Branch 177 Savings Credit Union* (1964), 3 C.C.C. 381 (B.C.S.C.), the judge appeared to consider the merits of the possible tort action. In *Re Yoner's Certiorari Application* (1969) 69 W.W.R. 222 (B.C.S.C.), the judge seemed to take the view that no protection order should issue if there is any reasonable basis for the suit. The order was denied because it appeared the magistrate had been negligent. See also *R.* v. *Hackam* (1919), 44 O.L.R. 224 (Ont. S.C.). In *R.* v. *Webb* (1921), 21 O.W.N. 162 (Ont. H.C.), where the magistrate was involved in attempting to enforce the civil law through the criminal process, the protection order was denied and the magistrate's conduct was termed "outrageous" and "wilful". In *Okrey* v. *Spangler,* [1925] 1 W.W.R. 518 (Sask. K.B.) the order was refused and the magistrate's conduct was termed "arbitrary" and "oppressive".

[109]There may also be an advantage to having the public law remedy and the private law remedy determined at the same time, but provision could be made to have both issues heard in the ordinary manner by the same court.

characterization. Instead, might it not be preferable to define carefully an action based upon breach of standard or improper motive, regardless of the classification of the court or the error?

Standards of Care

In view of the decision in *Sirros* v. *Moore* restricting trespass liability to knowing judicial error,[110] and in view of the possibility of a protection order issuing in many cases,[111] the trespass liability of judicial officers has been greatly circumscribed. Recent attention has moved somewhat surreptitiously towards a liability theory which focuses upon the standard of care observed, and/or the motive of the judicial officer. It is desirable, therefore, to examine the possibility of imposing liability, irrespective of classification of the court or the error, for the negligent, reckless, or knowing error.

Liability for negligent judicial decision making is easily rejected as an inroad upon judicial immunity, if for no other reason than that the potential for liability would be so great as seriously to impair judicial freedom and recruitment. It would be virtually impossible to determine the issue without practically retrying the original action, and there would be little or no deterrence of the groundless suit. There would also be a fairly large basis of actual liability. Judges routinely make decisions which adversely affect one party or another, and human nature is such that sooner or later even the most competent judge will make an error which could be classified as negligent in the sense that term is used in other contexts. The simple breach of the reasonable man standard is not the type of conduct which provokes moral outrage requiring an institutionalized legal outlet for appeasement, and the deterrent value of negligence law is highly questionable.[112] If compensation for the victims of judicial negligence is thought to be a worthwhile goal, it ought to be effected otherwise than by negligence liability.[113]

In *Sirros* v. *Moore* Lord Denning suggested that an act would lose its judicial character, and therefore its judicial immunity, if a judge knowingly exceeded his jurisdiction.[114] That was a trespass case, and the idea was put forward as a basis for liability in trespass, but there is no reason to restrict it to a trespass theory, nor to suppose Lord Denning would have done so had he been faced with a pure economic loss claim.

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[110]*Supra*, footnote 7, at 136.

[111]*Supra*, footnote 69.

[112]See Craig Brown, "Deterrence and Accident Compensation Schemes", (1979) 17 *U.W.O. L. Rev.* 111, 111-123.

[113]*Infra*, at 108-110.

[114]*Supra*, footnote 7.

Lord Denning draws no distinction between errors of preliminary and secondary jurisdiction for this purpose, and there is no reason why he should. There may be a reason for distinguishing between jurisdictional and non-jurisdictional errors in trespass theory by considering that an act within jurisdiction, erroneous or not, is always a judicial act. But this line of reasoning does not take us very far, because one can argue — and indeed the courts might very well so interpret Lord Denning — that no judge has jurisdiction to err intentionally in law or fact, within or without his stated powers. In principle, there is no reason to distinguish among different types of intentional error, and it would be far less complex to remove judicial immunity for any knowing error, jurisdictional or not.

The difficulty with a cause of action based upon knowing error is the converse of the difficulty with one based upon negligence: in the latter case the ambit of liability could be too wide, whereas in the former, the element of knowledge might be so difficult to prove as to render the action nugatory. Therefore, it is necessary to seek some middle ground between the two standards.

This suggests the possibility of basing liability upon a standard of gross negligence, or reckless error. In the United States it has been suggested that there is a distinction between acts in excess of jurisdiction and those wholly without jurisdiction. Liability in the latter case seems to correspond to a standard of gross negligence.[115] The gist of the matter seems to be that some errors are so gross that no reasonable person acting judicially could possibly have made them. There is no reason why the same approach could not be employed in an action on the case, imposing liability where a judge "has knowingly erred as to law or fact, or both, or erred with reckless disregard of making the proper decision".[116]

There are two difficulties with the recklessness standard. First, the term has no precise meaning, so there is a risk that it will create, as the negligence standard, too broad a basis of actual liability.[117] However, judges, who are after all most familiar with the process, ought to be able

[115]For a summary and criticism see McCormack and Kirkpatrick, "Immunities of State Officials Under Section 1983", (1976) 8 *Rutgers Camden L.J.* 65, at 71-73. But see *Stump* v. *Sparkman* (1978), 435 U.S. 439, which illustrates how very difficult it is to establish liability.

[116]Kates, Jr., "Immunity of State Judges Under the Federal Civil Rights Acts: *Pierson* v. *Ray* Reconsidered", (1970) 65 *Nev. U.L. Rev.* 615, at 624. That author suggests that in addition the plaintiff be required to prove a specified improper purpose, but see "Liability of Judicial Officers Under Section 1983", Comment, (1970) 79 *Yale L.J.* 322, (1970) where the author suggests a cause of action based upon malice, defining malice as a reckless disregard of the proper determination.

[117]For example, a trial judge's findings of fact ". . . are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error . . ." *Stein* v. *The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at 808 *per* Ritchie J. Palpable errors are not greatly different from gross or reckless errors, yet findings of fact are overturned more frequently than desirable where this is the basis for tort liability.

to employ the standard in such a way as to distinguish it meaningfully from simple negligence. If necessary, liability could be further controlled by employing recklessness as an indicator of knowing error rather than as a basis of liability itself. The greater difficulty is with the groundless suit which might be invited by the vagueness of the term reckless. By its very nature, an allegation of reckless error cannot easily be struck down at the pleading stage, and it may not, therefore, provide a sufficient deterrent to potential suits. One possible solution would be to discourage suits through procedural provisions, perhaps by insisting upon the plaintiff's posting security for costs,[118] and perhaps by imposing cost penalties upon the unsuccessful plaintiff. The breadth of liability can also be contracted by insisting, in addition, upon proof of improper judicial motive, but that approach also has its disadvantages.

Improper Motive

As an alternative to focusing upon the standard of care *per se*, a cause of action which focuses upon improper judicial motive should be considered. Judges are given enormous power, and it seems entirely appropriate to sanction them when they abuse it. In a cause of action based upon improper motive alone, the standard of care observed would be strictly speaking irrelevant, but it would still be necessary to prove a judicial error to satisfy the causation element of the suit. Improper motive without demonstrable error is more appropriately dealt with by removal from office and/or public law sanctions.

Improper motive has been discussed primarily as the question of liability for malicious error. It seems clear that the common law granted absolute immunity for malicious acts within the jurisdiction of any judge of a superior court, and probably this immunity extended to any judge acting as a court of record.[119] Errors of jurisdiction were actionable without proof of malice prior to *Sirros* v. *Moore*.[120] Malice is also an essential element in some of the statutory provisions governing the liability of other judges.[121]

Unfortunately, malice is a term which rivals jurisdiction for definitional uncertainty, and despite frequent reference to the term in

[118]*The Public Authorities Protection Act*, R.S.O. 1970, c. 374, s. 14. See also the sophisticated cost provisions employed in France, summarized in J. E. Johnson, (1971) 4 *Ottawa L.R.* 627, at 630-1.

[119]*Supra*, footnote 6, at 520-30.

[120]Lord Denning expressly indicates a desire to immunize both simple errors of jurisdiction and malicious conduct, for all judges, *supra*, footnote 7, at 126. However, there is a close relationship between the knowing judicial error and malice which he does not consider.

[121]*Supra*, at 88-91.

the context of judicial immunity, no clear meaning has emerged.[122] Malice does mean something more than mere spite or ill will as the term is often used in common English. In a general sense, at law malice is a term used to denote some improper motive, and this in turn suggests two possible approaches. The first is to define certain specific motives as improper, and to make judicial errors so motivated actionable in tort.[123] For example, any judicial error motivated by a desire to secure a private advantage, such as a bribe, might be classified as improper and actionable in tort. If this approach is preferred, the term malice can be avoided altogether and replaced by a list of specified objectionable conduct. Alternatively, malice has been defined more generally by Mr. Justice Rand as ". . . acting for a reason and purpose knowingly foreign to the administration . . ."[124] of the judicial function. This definition corresponds almost exactly to Lord Denning's concept of knowing jurisdictional error in *Sirros* v. *Moore,* yet Lord Denning expressly affirmed the desirability of maintaining judicial immunity for malice.[125] One can only speculate that he was referring to malice in some other sense, such as, perhaps, ill will or bias towards the party.[126] Although it is possible to make value choices about degrees of impropriety, sanctioning some and not others,[127] it seems preferable that all knowing errors, or malicious acts, as defined by Rand J.,[128] be treated alike. In that case, the basis of the action might with less confusion be called misfeasance of public office rather than malice.[129]

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[122]One author has suggested that the judicial definitions of the term fall into four distinct categories. G.H.L. Fridman, "Malice In the Law of Torts", (1958) 21 *Modern L. Rev.* 484.

[123]Kates, Jr., *supra,* footnote 116, at 624; Comment, *supra,* footnote 116, at 322, fn. 3; Fridman, *supra,* footnote 122; Fleming, *The Law of Torts,* (5th ed), at 608-610.

[124]*Roncarelli* v. *Duplessis,* [1959] S.C.R. 121, at 141.

[125]*Supra,* at 80 and 84.

[126]If one adopts Mr. Justice Rand's definition of malice, *supra,* footnote 124, the term is exactly equivalent to Lord Denning's notion of knowing error, except that the former may not be restricted to jurisdictional errors. In either event, the plaintiff's motive is irrelevant. See *infra,* footnote 127. With other definitions of malice, improper motive is the very essence of the definition. See *supra,* footnote 122. In that case, the error, be it knowing, negligent, or innocent, is not an element of the definition of malice, although proof of a certain type of error in addition to proof of malice may be required to substantiate a cause of action. See, for example, the statutory provisions, cited *supra,* footnote 55. Malice as defined *infra,* footnote 130 is probably being employed as a conclusive indicator of either of the definitional approaches discussed above.

[127]For example, it was admitted in *Roncarelli* v. *Duplessis, supra,* footnote 124, that in effectively cancelling Roncarelli's liquor license, the Premier of Quebec was moved to stop the circulation of documents which he felt were detrimental to the public interest. This is arguably less objectionable conduct than acts motivated by, for example, the prospect of private gain. The Supreme Court of Canada drew no such distinction and imposed liability.

[128]*Supra,* footnote 123.

[129]See *Farrington* v. *Thomson and Bridgland,* [1959] V.R. 286, at 293 (S.C.), where the judge discusses a nominate tort called "misefeasance in a public office", considers various definitions of malice, and defines this tort exactly as Rand J. defined malice, *supra,* footnote 124.

However one defines malice, the question next comes, how is the plaintiff to prove it. Malice might be conclusively proven by demonstrating a reckless error,[130] in which case the term adds nothing to the recklessness test and may be avoided altogether. At the other extreme, the plaintiff might be required to prove malice independently of the error itself;[131] whereas an intermediate position would permit, but not compel, the drawing of an inference of malice from the grossness of the error.[132]

If the latter approach were adopted, then it is questionable whether anything would be gained by phrasing the action in terms of malice rather than simply in terms of recklessness, employed either as the standard itself or as an indicator of knowing error. The case for immunizing malicious judicial acts rests largely upon the particularly unsavoury nature of the allegation, which, however groundless, is likely to ignore the policies which support judicial immunity. In addition to being a more straightforward basis of liability, the recklessness standard alone makes an accusation of malice technically unnecessary.[133] Since not all reckless errors will necessarily support an inference of improper motive, the advantage to approaching the issue from the direction of malice is that fewer suits will actually succeed. But actual cases of either reckless error or malice are likely to be very rare, and there would seem to be no advantage to one approach over the other as to the more realistic concern with groundless suits. For those reasons, the less offensive recklessness standard is preferable.

If, on the other hand, the basis of the action is the independent proof of improper purpose, the arguments are somewhat different. Such conduct, independently proven, is sufficiently reprehensible that it may well outweigh the arguments in support of immunity.[134] The requirement of independent proof of the specific malicious intent may also help to limit the number of groundless suits commenced, or at the very least make it easier to strike down the action at an early stage. But the disadvantage is that this is such an onerous burden on the plaintiff that those wronged by gross errors which would support an inference of malice may fail to establish liability.[135]

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[130]Sometimes malice is simply defined in terms of a reckless error without further reference to motive. See *New York Times* v. *Sullivan*, (1964) 376 U.S. 254, at 280; Comment, *supra*, footnote 116. This use of the term malice adds little, whether it means recklessness as a breach of standard *per se*, or as conclusive indicator of some improper motive.

[131]There is *obiter dicta* in *Hamilton* v. *Anderson* (1858), XX Session Cases 16 (H.L. Scot.) suggesting that independent proof is required.

[132]In the similar action for malicious prosecution where want of reasonable and probable cause and malice must be proven, malice may be inferred. See *Mitchell* v. *Jenkins* (1833), 110 E.R. 908; Fleming, *supra*, footnote 123; *Carpenter* v. *MacDonald* (1978), 91 D.L.R. (3d) 743 (Dist. Ct.). The authority of *Mitchell* v. *Jenkins* was relied upon in *Crawford* v. *Beattie* (1876), 39 U.C.Q.B. 13, at 33 in an action against a magistrate.

[133]In practice one would expect a plaintiff to offer independent evidence of malice were it available.

[134]Harper & James, *The Law of Torts* (1956), at 1645.

[135]See Kates, Jr., *supra*, footnote 116.

Improper motive may also be combined with the breach of the relevant standard as the basis for a cause of action. As such, malice can be used to limit liability based upon reckless or negligent conduct. However, the basic difficulties remain. It has, for example, been suggested in the United States that a cause of action based upon knowing or reckless error, *and* express malice, would be appropriate.[136] But, as already suggested, independent proof of knowing error *or* express malice ought to be sufficient ground for liability, although perhaps not a necessary basis in view of the onerous burden it would place upon the plaintiff. The recklessness standard alone may provide an invitation to groundless suits, but if malice is to be inferred from the reckless error itself, then there would seem to be no advantage to incorporating the term into the definition of the case of action. A cause of action based upon the negligence standard plus malice has the same disadvantages: independent proof of malice is very difficult, and if the inference of malice is to be drawn largely from the error itself, it will be necessary to focus upon the reckless error in practice.[137]

Therefore, the only advantage to founding judicial liability exclusively upon improper judicial motive is that the insistence upon independent proof of malice may curtail groundless suits, but in so doing it may also render the cause of action impotent. By requiring malice, but permitting the inference to be drawn from the error itself, the recklessness standard may be better distinguished from a simple negligence standard, but the practical effect upon the judicial definition of the recklessness standard is questionable. On the whole, the simple recklessness standard which renders an inquiry into unsavoury judicial motives strictly unnecessary will probably serve equally well.

SUMMARY AND CONCLUSIONS

There is a strong public interest in having a highly respected judicial system, staffed by competent persons, free to exercise their judicial functions without fear of private liability. This public interest is best protected by devising a rule of judicial immunity which both limits the tort liability of judicial officers and also controls the number of groundless suits which may be instituted. It is, however, symbolically undesirable to confer absolute immunity upon a social group, and especially undesirable for that group to confer absolute immunity upon itself. Moreover, in cases of gross judicial misconduct, the general

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[136] *Supra*, footnote 116.

[137] The statutory provisions which recognize want of reasonable and probable cause plus malice as necessary elements of the cause of action are subject to the same observations. Although want of reasonable and probable cause has a subjective, as well as an objective element (see Fleming, *supra*, footnote 123, at 603-606) provided malice may be inferred from the error, the plaintiff either has the option of proving bad faith independently, or taking the more likely route of relying upon a recklessness standard.

rationales of tort liability may be more important than the rationales which support judicial immunity. The problem is then to define a limiting formula which best strikes the balance between these several objections.

The distinction between superior and inferior courts rests upon the mildly offensive notion that superior court judges are the absolute arbitrators of their own jurisdiction. Jurisdiction, in turn, is significant only to the action in trespass, which in itself has many shortcomings. The distinction between courts of, and not of, record does distinguish between judges somewhat on the basis of the powers which they exercise, but not sufficiently to justify different liability rules.

The essence of the trespass action is interference with the person or property; ordinarily one is *prima facie* liable for such interference and must establish an affirmative defence. Liability is strict in the sense that it matters not whether the error was committed with the utmost care and good faith. When one considers the numerous *prima facie* trespasses which a judge is required to commit in the course of his duties, and the numerous difficult jurisdictional questions which he must face, there is much to recommend absolute immunity for trespass. But this reasoning does not necessarily preclude liability in an action on the case, where the action requires proof of a certain intention or want of care on the judge's part. Damage must occur and be assessed in this type of action, but beyond that the judge's conduct, and not its result, is the basis of the action.

Deferring for a moment the question of what intention or want of care ought to attract liability, the general advantages of the action on the case over trespass should be noted. One can imagine cases of gross misconduct where the balance between the reasons for judicial immunity and the traditional goals of tort law might shift in favour of the latter. An action which focuses upon the judge's conduct, carefully defined, can respond to these points while at the same time preserving absolute immunity for honest error which might otherwise be sanctioned in trespass under some of the formulations of the immunity rule discussed earlier. This approach also renders the nebulous distinctions between various types of equally harmful error unnecessary. Although an action based upon some standard of judicial conduct would provide a much narrower basis of liability, it would support a broader range of damages. The action in trespass is responsive to interferences with the person and property of the plaintiff, but not to his purely economic losses. If, for example, the basis of the action were gross judicial misconduct, then there is no reason in logic or common sense why the plaintiff should not recover his business losses and legal expenses so caused. There is ample judicial support for the proposition that an otherwise tortious act does

not lose its tortious character simply because the loss is purely economic.[138]

Strictly speaking, the action on the case has been thus far confined to actions against judges acting as inferior courts, or more probably courts not of record, for errors committed within their jurisdiction. But the actual basis of liability proposed in *Sirros* v. *Moore,* and the effect of statutory protection orders granted by reviewing courts, reflects a trend towards the action on the case in practice.[139] The choice is between focusing upon breach of a defined standard of care, and upon improper judicial motive. Independent proof of improper judicial motive is such an onerous obligation that the action will be virtually useless, and the same can be said of the similar requirement of independent proof of knowing error. These might be adopted as sufficient bases of liability, but should not be the sole or necessary criteria. The negligence standard creates too broad an ambit of liability, so a recklessness standard is the appropriate middle ground. There is some concern that such a standard will not sufficiently discourage the vexatious suit, but perhaps that problem has been overrated,[140] and in any event perhaps it ought to be accepted as a lesser evil than virtually absolute judicial immunity. If necessary, the vexatious suit may be controlled with provisions for cost security and/or penalty. Although it is always difficult to balance perfectly a number of competing interests, the recklessness standard seems superior to the other options as the appropriate basis of judicial liability.

A NOTE ON COMPENSATION WITHOUT LIABILITY

Thus far this analysis has concentrated almost exclusively upon the public's interest in judicial immunity, and ignored almost entirely the private interest in compensation. Once one accepts a certain degree of judicial immunity, the question next comes, whether it is possible and desirable to devise a government-funded scheme to compensate for at least some of the losses which will not support a liability suit against the judge who caused them.

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[138]The clearest statement to this effect is that of Salmon L.J. in *Ministry of Housing and Local Government* v. *Sharp,* [1970] 2 Q.B. 223, 278 (C.A.), approved in *Rivtow Marine Ltd.* v. *Washington Iron Works* (1973), 40 D.L.R. (3d) 530, at 547 (S.C.C.).

[139]The same trend has been observed in the courts' approach to the liability of other public authorities. See M. G. Bridge, "Government Liability, the Tort of Negligence and the House of Lords decision in *Anns* v. *Merton London Borough Council*", (1978) 24 *McGill L.J.* 277, at 287.

[140]Perhaps society could place the same confidence in the judiciary that Lord Reid placed in the public servants of England. See *Home Office* v. *Dorset Yacht Co. Ltd.,* [1970] A.C.1004, at 1033 (H.L.). See also de Smith, *supra,* footnote 103, at 97; M. Brazier, *supra,* footnote 5.

If compensation is the only goal, the scheme should be indifferent to whether the judicial error was factual, legal, jurisdictional or substantial; and indifferent to whether it was caused intentionally, negligently, or innocently — the party's loss may be the same in any event. Whether or not a person "should" be compensated for any loss incurred in any of these circumstances is a value choice, but it is obviously unrealistic to provide compensation for every loss in a society where universal medicare exists only precariously, and where most non-tortiously caused personal injuries are not compensated by the public purse. It is simply a question of social priorities, and the more realistic question is whether society ought to devise some more limited compensation scheme.

The first alternative is a fault-based compensation scheme, such as, for example, one which compensated victims of negligent judicial error. There are both costs and benefits associated with determining fault. The aggrieved party might find solace and appeasement, and, in a roundabout way, the principle that no man is by virtue of his office above the ordinary law of the land would be symbolically affirmed. Such a scheme might also have a deterrent effect by singling out a particularly inefficient judge. It is, however, debatable whether such benefits are sufficient to justify compensating some, and not others, for precisely the same loss.

Moreover, a fault-based compensation scheme for judicial error may be prejudicial to the public interest which supports judicial immunity. Although a judge would not be personally liable, his conduct and his reputation would nonetheless be at issue. Presumably, he would be called upon — formally or informally — to justify his conduct before the tribunal which determined fault. There would be little disincentive to a person making a claim for compensation, many cases would be re-litigated, and the efficiency of the judicial process would commonly be questioned in an institutionalized forum. Finally, the notion of a tribunal, probably employed by the government, adjudicating upon judicial fault, is offensive to the notion of an independent judicial system.

Given the problems of a fault-based plan and the expense of a comprehensive no-fault framework, the reasonable compromise is to consider a no-fault scheme designed to compensate only particularly serious losses. The erroneously caused incarceration of a party for a substantial time is a type of damage which can be distinguished from technical batteries and false imprisonments, property damage, and pure economic loss. It is, of course, a matter of political choice and financial priorities whether the scheme ought to go further, but it seems unrealistic to set higher goals in the foreseeable future. Several jurisdictions have compensation schemes for this type of injury, and even they set monetary limits far below what a court would probably

calculate as adequate compensation.[141] The general issue is deserving of far more detailed consideration than is possible here, but it seems certain that only limited steps towards compensating victims of judicial error may be expected at the present.

[141]For examples of U.S. statutory provisions authorizing payments to persons wrongly convicted see: *The California Penal Code*, Part 3, Title 6, Chapter 5, s. 4904 (West 1970); *The Court of Claims Act* Ill. Ann. Stat. c. 37 s. 439.8 (Smith-Hurd Supp. 1979); *The Judicial Code and Judiciary* 28 U.S.C.A. s. 2513(e) (West 1965).