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PREAMBLE*

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 com m on law et les dispositions législatives régissant l’immunité des juges et évalue leur fondem ent 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.

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 term s such as "jurisdiction", "pro per", "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, *aud 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.

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 draw n 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.

Footnotes

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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; *Welbndge 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 (FI 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 sec I). 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 <u>*Foran v. Talangello*</u> (1977), 14 O.R. (2d) 91 (Ont. H.C.).

[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 Ottawa 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 <u>*Sirros v. Moore*</u>, supra, footnote 7.