

VOLUME 29 | I | 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, PC. 41. n.

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.

It has, as Chancellor Kent observes, "a deep root in the common law." *Yates v. Lansing*, 5 Johns. 291.

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."



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 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.

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 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 lower among the judiciary than

among the general population, it would be naive to assume that it is nonexistent. There is, however, a sanction for this type of conduct through formal¹⁶ or informal¹⁷ 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 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 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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Footnotes

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

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

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.

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, e. 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.

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.

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.) 21 (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 & II Geo. 6, c. 44, s. 2(5).

²² **Administration of Justice Act 1964**, 12 8c 13 Eliz. II, c. 42, s. 27.

