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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 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

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 perm it, 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



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 cause 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.

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Footnotes

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 dose relationship between the knowing judicial error and malice which he does not consider.

¹²¹ Supra, at 88-91.

¹²² One author has suggested that the judicial definitions of the term fall into four distinct categories. (j.H I.. 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 *Ronearelli v. Duplessis*, [1959] S.C.R. 121, at 141.

¹²⁵ Supra, at 80 and 84.

¹²⁶ 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 plaintiffs 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 ISO 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 *Ronearelli's* liquor license, the Premier of Quebec was moved to stop the circulation of documents which he felt were detrimental to the public interest. I his 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 Brid Gland*, [1959] V.R. 286, at 293 (S.C.), where the judge discusses a nominate tort called "misfeasance in a public office", considers various definitions of malice, and defines this tort exactly as Rand J. defined malice, supra, footnote 124.

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 F.R. 908; Fleming, *supra*, footnote 123; Carpenter v. MacDonald (1978), 91 D.L.R. (3d) 743 (1st Ct.). The authority of Mitchell v. Jenkins was relied upon in Crawford v. Beattie (1876), 39 D.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 8c James. *The Law of Torts* (1956), at 1645.

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

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.