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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 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 m any 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 com m it 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 com m on 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.

Footnotes

[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 *Rivtone Marine Ltd. V. Washington Iron Works* (1973), 40 D.L.R. (3d) 530, at 547 (S.C.C.)

[139] The same trend has 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.