

VOLUME 29 | VI | 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.

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.

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Footnotes

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 III*. 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).