JUDICIAL AND QUASI-JUDICIAL IMMUNITIES: A REMEDY DENIED

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[Mr Sadler in this article examines the scope of the common law principle of judicial immunity from civil liability as it applies to judges as well as to individuals in quasi-judicial positions. He also examines the adequacy of this common-law position and discusses the need for the legislature to act in the interests of public policy.]

The common law principle of judicial immunity from civil liability is deeply entrenched into the English legal system.[1] A primary policy of the law which requires that compensation be granted to wrongfully aggrieved individuals has been repressed by a second and supervening policy demanding that people in the position of judges be exempt from liability. But what is the nature and scope of this supervening policy; commonly mirrored as the doctrine of judicial immunity? The solution to this question is continuously marred by bland statements of a general rule which tends to hide an ominous and intertwining sub-strata of case law and legislation. For instance, *Halsbury's Laws of England*[2] states that 'judges are exempt from liability for all acts done in the exercise of their jurisdiction'; but what is a judge?; what is the meaning of jurisdiction?; and, equally important, what are the justifications for this principle? It is the primary aim of this paper to attempt to solve these problems. In particular the object of this work is threefold. First, to state the nature and limits of judicial immunity as it applies to judges of courts of record. Second, to examine the extension of the doctrine to persons exercising quasi-judicial functions and, lastly, to assess the policies upon which the doctrine purports to be based.

The origins of judicial immunity are unclear; its development riddled with conflicting authority and dispute amongst the commentators. Nevertheless, it is relatively clear that, prior to the fourteenth century, the procedure for questioning judicial determinations was to make a direct complaint of 'false judgement' against the judge.[3] Only justices of the King's Court had jurisdiction to entertain the suit. If the complainant succeeded the disputed judgement would be quashed and, in some anomalous cases, damages recovered.[4] It was not until late in the fourteenth century that a

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[1] Judicial immunities have also been extended by statute; for example, *Evidence Act* 1958 (Vic.) s. 21A; *Industries Assistance Commission Act* 1973 (Cth) s. 38; *Administrative Appeals Tribunal Act* 1975 (Cth) s. 60(1).

[2] Halsbury (4th ed.), para. 871.

[3] Pollock & Maitland, *History of English Law* ii, (2nd ed., 1959) 666-69. Holdswords, *A History of English Law* i, (7th ed., 1956) 213-14.

[4] Pollock & Maitland, *ibid.* 667.

distinction was drawn between the rectitude of a judge's conduct and complaints against his judgement.[5] One ramification of this distinction was that a complainant could succeed only by ascertaining the error in question from the court record.[6] The judge of a court of record, then, at least as early as the waning era of the Year Books, was immune from civil liability unless the error in question appeared on the court record. Conversely, judges in courts not of record remained fully liable.[7] The significance of this distinction was clearly apparent to Lord Coke in *Floyd v. Barker*[8] where, in now oft-quoted words, he stated:

> And records are of so high a nature, that for their sublimity they import verity in themselves; and none shall be received to aver any thing against the record itself.... But in an hundred-court, or other Court which is not of record, there averment may be taken against their proceedings, for that it is no other than matter *in pais*, and not of record. . . . But in a writ of false judgment, the plaintiff shall have a direct averment against that which the Judges in the Inferior Court have done as Judges, *quia recordum non habent*. . . .

Lord Coke clearly recognises the sanctity of the court record and has used this to found a distinction of some importance. Moreover, he has noted as significant a further distinction between inferior and superior courts. Taken together with recent observations by the Court of Appeal[9] it can now be regarded as settled that the common law has evolved, at least until the 1970s, in terms of courts of record and other courts and, within that categorisation, between superior and inferior courts. It is within this dichotomous structure that certain principles have emerged. The principles themselves remain as the direct result of nineteenth century, often conflicting, cases. To this end the substantive law has been crying out for legislative clarification. Unfortunately, even the limited 'reform' which has occurred is generally regarded, to echo Platt B., as being 'not very perspicuous; and I must say, that I do not well understand it'.[10] It is these principles and the surrounding structure on which attention must now be focused.

1. COURTS OF RECORD

Historically, the phrase 'courts of record' referred to those courts which kept a perpetual memorial and testimony of their proceedings.[11] Today,

[5] Holdsworth, *op. cit.* Vol. IV, 235.
[6] *Ibid.*
[7] *Ibid.* The existence of this distinction in modern times has been doubted. See Rubinstein A., 'Liability in Tort of Judicial Officers' (1963-64) 15 *University of Toronto Law Journal* 317, 330. *Contra* Thompson D., 'Judicial Immunity and the Protection of Justices' (1958) 21 *Modern Law Review* 517, 521 *et seq.*: *Sirros v. Moore* [1975] 1 Q.B. 118.
[8] (1608) 12 Co. Rep. 23, 24.
[9] *Sirros v. Moore* [1975] 1 Q.B. 118 *per* Lord Denning M.R. and Ormrod L.J. See also *Garnet v. Ferrand* (1827) 6 B & C 611; *Miller v. Seare* (1777) 2 Black W. 1141, 1145; *Mostyn v. Fabrigas* (1774) 1 Cowp. 161, 172.
[10] *Kirby v. Simpson* (1854) 10 Ex. 358, 367 commenting on the English equivalent to ss. 32 and 33 of the *Magistrates' Courts Act* 1971 (Vic.) which are discussed *infra.*
[11] Blackstone, *Commentaries* iii, 24.

certain courts are expressly declared by statute to be courts of record.[12] A court not so declared will nevertheless be regarded as a court of record if it has power 'to fine or imprison, by statute or otherwise, for contempt of itself or other substantive offences'.[13] According to this criteria all Victorian courts strictly so called are courts of record.[14]

1.(a)(i) *Superior Courts of Record — Pre 1974*

No judge of a superior court has even been held liable for damages whilst acting as a judge. History, therefore, seems to vindicate the assertion that a superior court judge cannot be held personally liable for his tortious acts; his immunity is absolute. He cannot be sued for errors of law or fact, or any corrupt, malicious or oppressive exercise of his judicial power.[15] The appropriate remedy is to appeal, invoke the criminal law or institute proceedings for his dismissal.

However, if a superior court judge acts without or in excess of jurisdiction the bestowal of absolute immunity is equivocal. It has been said that if he knew or ought to have known of the jurisdictional defect then no immunity will ensue.[16] Conversely, the orthodox view maintains that the 'protection, in regard to the Superior Courts, is absolute and universal . . .'.[17] In more recent times this latter perception of the authorities has come to be accepted.[18]

This rule, however, is subject to one qualification. A superior court judge must, in order to be accorded absolute immunity, be acting judicially: *quatenus* a judge.[19] This qualification appears to have been understood in two senses. Firstly, it seems to have been used to found a distinction, well worn in current day administrative law, between judicial and ministerial acts. In this context it has been held that immunity does not extend to a judge for wrongfully refusing to hear a case although he will be protected

[12] E.g. *Bankruptcy Act* 1966, 1973 (Cth) s. 21(2) (Federal Court of Bankruptcy).

[13] 10 *Halsbury* (4th ed.) para. 709. These characteristics have been accepted without question: e.g. *Groenvelt v. Burwell* (1699) 1 Ld. Raym. 454; *Cooper & Sons v. Dawson* [1916] V.L.R. 381, 392-3.

[14] Nash G., *Civil Procedures: Cases and Text* (1976) 349-50. The status of Magistrates' Courts is in some doubt. However, it can fine or imprison for substantive offences and certain contempts: e.g. *Magistrates' Courts Act* 1971 (Vic.) s. 46. On this basis it usually is regarded as a court of record. See *Nash on Magistrates' Courts* (3rd ed., 1975) 7; *Cooper & Sons v. Dawson* [1916] V.L.R. 381, 392-3; *Fallshaw Brothers v. Ryan* (1902) 28 V.L.R. 279, 284. See also *Gerard v. Hope* [1965] Tas.S.R. 15. *Contra Henderson v. O'Connell* [1937] V.L.R. 171, 174-5.

[15] *Hamond v. Howell* (1674) 1 Mod. 184; (1677) 2 Mod. 218; *Fray v. Blackburn* (1863) 3 B & S 576, 578; *Anderson v. Gorrie* [1895] 1 Q.B. 668; cf. *Everett v. Griffiths* [1921] 1 A.C. 631, 665-6.

[16] *Calder v. Halket* (1839) 3 Moo. P.C. 28, 75, 78.

[17] *Miller v. Seare* (1777) Black. W. 1141, 1145 *per* De Grey C.J. See also *Taafe v. Downes* (1812) 3 Moo. P.C. 35n; *Anderson v. Gorrie* [1895] 1 Q.B. 668; *Tughan v. Craig* [1918] 1 I.R. 245.

[18] *Sirros v. Moore* [1975] 1 Q.B. 118 *per* Lord Denning M.R. and Ormrod L.J. See also Heuston R. F. V. (ed.) *Salmond on the Law of Torts* (17th ed., 1977) 408-9.

[19] E.g. *Hamond v. Howell* (1677) 2 Mod. 218, 220; *Fray v. Blackburn* (1863) 3 B & S 576.

in giving judgement.[20] It is tautologous to add that immunity does not extend to judges acting extra-judicially.[21] Secondly, it has been said that a judge of a superior court has jurisdiction to determine the limits of his own jurisdiction.[22] In doing so such a judge can never act without jurisdiction and, therefore, never fail to act as a judge.[23]

The refusal by the High Court of Australia to accept this latter view is inherent in the definition of a superior court which has been mooted in this country. Whilst various statutes accord certain courts with superior court status,[24] at law the phrase has on numerous occasions been used in different senses.[25] Nevertheless, the High Court will probably regard as superior any court of which it can be said that no matter is deemed to be beyond its jurisdiction unless expressly shown so to be.[26] The court need not have an unlimited jurisdiction[27] and, albeit, unusual, mandamus or prohibition may issue against it if it can be shown to have acted without jurisdiction.[28]

1.(a)(ii) *Inferior Courts of Record — Pre 1974*

The definition of an inferior court is, like its opposite, subject to ambiguities. However, it is relatively clear that such courts are subject to the supervision and control of superior courts and that nothing will be assumed to be within their jurisdiction unless it is expressly shown so to be.[29]

Tht tortious liability of inferior court judges is subject to a mass of conflicting authority. By and large this is due to the persisting English debate as to whether justices of the peace exercise their functions as courts of record. It was noted previously that all Victorian courts, including Magistrates' Courts, are recognized as courts of record.[30] Given this

[20] *Ferguson v. Earl of Kinnoull* (1842) 9 Cl. & F. 251, 291, 312.

[21] *Floyd v. Barker* (1607) 12 Co. Rep. 23, 24.

[22] E.g. see *Nakhla v. McCarthy* [1978] 1 N.Z.L.R. 291, 304. See also Cooke R. B., 'Venire de Novo' (1955) 71 *Law Quarterly Review* 100; Holdsworth, *op. cit.* 239.

[23] The error in this reasoning derives from a misapplication of the rule in *Marshalsea's* case (1613) 10 Co. Rep. 68b (discussed *infra*) to superior courts.

[24] E.g. *Judiciary Act* 1903-1973 (Cth) s. 4. (High Court of Australia); *Bankruptcy Act* 1966-1973 (Cth) s. 21(2) (Federal Court of Bankruptcy).

[25] See generally *R. v. Chancellor of St. Edmundsbury and Ipswich Diocese; ex parte White* [1948] 1 K.B. 195.

[26] *Cameron v. Cole* (1944) 68 C.L.R. 571, 585; *R. v. Commonwealth Court of Conciliation and Arbitration; ex parte Ozone Theatres (Aust.) Ltd* (1949) 78 C.L.R. 389, 399; *R. v. Metal Trades Employers' Association; ex parte A.E.U.* (1951) A.L.R. 93, 100-1. In England see 10 *Halsbury* (4th ed.) para. 713 and cases cited therein.

[27] *Cameron v. Cole* (1944) 68 C.L.R. 571, 598, 605-7; *A.E.U. Case* (1951) A.L.R. 93, 100-1.

[28] *Cameron v. Cole* (1944) 68 C.L.R. 571, 598; *A.E.U. Case* (1951) A.L.R. 93, 101. See also *In re Judges of the Federal Court of Australia; ex parte Pilkington A.C.I. (Operations) Pty Ltd* (1979) 53 A.L.J.R. 230. *Contra Ozone Theatres Case* (1949) 78 C.L.R. 389, 399. The possible ramfications arising from a distinction between superior courts at common law and statutorily created superior courts will not be mooted here.

[29] *Peacock v. Bell* (1667) 1 Wms. Saund. 69; *London Corporation v. Cox* (1867) L.R. 2 H.L. 239; *R. v. Chancellor of St. Edmundsbury and Impswich Diocese; ex parte White* [1948] 1 K.B. 195.

[30] *Supra* n. 14. The immunity of magistrates is governed by statute. This is discussed *infra*.

foundation some semblance of consistency can be gleaned from the cases.

The foundation of immunity as it applies to judges of inferior courts lies in the words of Lord Coke who, in the *Case of Marshalsea*, stated that:

> . . . when a Court has jurisdiction of the cause, and proceeds *inverso ordine* or erroneously, there the party who sues, or the officer or minister of the Court who executes the precept or process of the Court, no action lies against them. But when the Court has not jurisdiction of the cause, there the whole proceeding is *coram non judice*, and actions will lie against them without any regard of the precept or process. . . .[31]

It should be noted that a court's jurisdiction in the context of judicial immunity is probably wider than the concept as it is understood in circumstances of judicial review. It is submitted that jurisdiction in the former sense means the court's power over the subject matter such that an irregularity of procedure as will found an excess or want of jurisdiction in circumstances of judicial review[32] will, for the purposes of liability, be regarded as a mere wrongful exercise or abuse of jurisdiction.[33] Examples of inferior court judges being held personally liable for acting without jurisdiction in this sense include where a county court judge committed a party for contempt who was outside that judge's territorial jurisdiction[34] and where a Court, with jurisdiction over the King's household, imprisoned someone who was not a member of it.[35]

The essence of the rule in *Marshalsea's case*[36] can be effectively reduced to the proposition that 'where there is no jurisdiction, there is no judge'.[37] Thus, legislation apart, by acting without jurisdiction an inferior court judge loses his cloak of judicial authority and damages will be recoverable against him for reprehensible acts causing injury. This general rule is subject to two qualifications. First, liability will ensue only if the judge's order, or acts done pursuant to that order, constitute a trespass against the plaintiff's person or property.[38] Second, he will not be liable if the error which either initiates the trespass or deprives him of jurisdiction is the result of an honest[39] and reasonable[40] mistake of fact. Conversely, if the judge acted

[31] (1613) 10 Co. Rep. 68b, 76a.

[32] E.g. *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 A.C. 147.

[33] *Cave v. Mountain* (1840) 1 M. & G. 257.

[34] *Houlden v. Smith* (1850) 14 Q.B. 841.

[35] *Marshalsea's Case* (1613) 10 Co. Rep. 68b.

[36] *Ibid.*

[37] Rubinstein A., *Jurisdiction and Illegality* (1965) 128. That this proposition is borne out by the cases is evidenced by the unremitting application of *Marshalsea* and Lord Denning's recent recognition of it as the 'root decision' in this area; *Sirros v. Moore* [1975] 1 Q.B. 118, 133.

[38] Rubinstein, *ibid.* 127-30. Note that if the judge acted within his jurisdiction the action was brought on the case and was akin to malicious prosecution. To this extent trespass was not required.

[39] *Pease v. Chaytor* (1863) 3 B. & S. 620, *London Corporation v. Cox* (1867) L.R. 2 H.L. 239.

[40] *Calder v. Halket* (1839) 3 Moo. P.C. 28, 77; *Pease v. Craytor* (1863) 3 B. & S. 620, 642-3; *Gwinne v. Poole* (1698) 2 Lutw. 935, 1560.

within jurisdiction his shield from civil liability is both absolute and immutable.[41]

The position of justices of the peace, however, must be distinguished as it was placed on a legislative footing as early as 1751.[42] This statutory delimitation of immunity is now found in ss. 1 and 2 of the *Justices Protection Act* 1848 (U.K.).[43] The conterminous Victorian provisions are embodied in ss. 32 and 33 of the *Magistrates' Courts Act* 1971 (Vic.). It should be noted that despite occasional assertions to the contrary[44] these provisions pertain to both the judicial and ministerial activities of justices.[45]

Section 32 is concerned with those acts done within the justice's jurisdiction. It provides that in such circumstances if the plaintiff is to succeed he must prove that the act in question 'was done maliciously and without reasonable and probable cause'. This section, it should be noted, is concerned with the justice's motive, not with the validity of his actions. Hence, provided the justice acts *bona fide* there can be no action in respect to any jurisdictional irregularity,[46] informality[47] or negligent exercise of powers.[48] It will be sufficient, however, if the plaintiff establishes that the justice, on the facts known to him in his judicial capacity, acted erroneously in point of law.[49] On the other hand, the concept of malice has purposely escaped precise definition. It seems that the force of the concept will depend upon the particular facts of each case.[50] It should also be noted that because no action can succeed unless malice and absence of reasonable and probable cause are proven, this does not by itself guarantee success if these elements are proven. They are, in effect, necessary but not sufficient pre-requisites to compensation.

Section 33(1) provides that in cases where the justice has acted without or in excess of his jurisdiction any person injured thereby, or by acts done pursuant thereto, can, without proof of malice and absence of reasonable

[41] E.g. *Green v. Buccle-Churches* (1589) 1 Leon. 323; *Mostyn v. Fabrigas* (1774) 1 Cowp. 161, 172.

[42] 24 Geo 2 c. 44.

[43] The history of these provisions is discussed in *O'Connor v. Isaacs* [1956] 2 Q.B. 288 *per* Diplock J. See also Thompson *loc. cit.*; Sheridan L. A., 'Protection of Justices' (1951) 14 *Modern Law Review* 267, 270 *et seq.*

[44] E.g. *Everett v. Griffiths* [1921] 1 A.C. 631, 666 *per* Lord Finlay. Lord Finlay regarded a justice as absolutely immune when he acts within his jurisdiction. Various commentators have adopted this approach, e.g. Wade E. C. S. & Bradley A. W., *Wade and Phillips: Constitutional Law* (8th ed., 1970) 331-2.

[45] *O'Connor v. Isaacs* [1956] 2 Q.B. 288, 312.

[46] *Bott v. Ackroyd* (1859) 28 L.J.M.C. 207.

[47] *Ratt v. Parkinson* (1851) 4 New. Sess. Cas. 651.

[48] *Everett v. Griffiths* [1921] 1 A.C. 631.

[49] *Palmer v. Crone* [1927] 1 K.B. 804. See also *Sammy Joe v. G.P.O. Mount Pleasant Office* [1966] 3 All E.R. 924.

[50] See *Burley v. Bethune* (1814) 5 Taunt. 580. 21 *Halsbury Statutes* (3rd ed.) 21 implies, by way of the cases cited therein, that malice and an absence of reasonable and probable cause in s. 32 should be treated similarly to the understanding of these concepts in the case of malicious prosecution. The concept of malice is further discussed in *Ferguson v. Earl of Kinnoull* (1842) 9 Cl. & F. 251; *Shackleton v. Swift* [1913] 2 K.B. 304.

and probable cause, bring an action in the same form as he may have done at common law. Sub-sections 33(2)-(4) ensure that no action shall be brought unless the now potential plaintiff appeared on summons at first instance and until the conviction or order at first instance has been quashed. The test of jurisdiction appears to be whether the justice had power to enter upon the inquiry.[51] Moreover, where jurisdiction depends upon the existence of a state of facts the existence of the same will be determined subjectively.[52] An error of law as to jurisdiction will provide no defence. If the plaintiff is to succeed his primary goal must be to show that the act complained of is itself made through want or excess of jurisdiction and that that same act bears a causal nexus with the resultant injury.[53]

The significance of these provisions has been zealously debated amongst the commentators.[54] The mass of conflicting English cases ensures no all encompassing solution. To this extent the discussion above provides merely an amalgam of the less arguable issues.

1.(b) *Post 1974*

Cardozo, writing in the early 1920s, warned that '[j]ustice is not be taken by storm. She is to be wooed by slow advances'.[55] The Court of Appeal in *Sirros v. Moore*,[56] faced with a century's absence of judicial authority on the question and apparently without heed to Cardozo's warning, swept away the seemingly entrenched distinction between inferior and superior courts of record. Whatever may have been the merits of this former distinction, a majority of the Court[57] made full use of a rare opportunity to re-vamp the doctrine of judicial immunity and expound the law in simpler terms.

Sirros, a Turkish citizen visiting the United Kingdom, had been fined and recommend for deportation by a magistrate for breach of a conditional entry permit under the Aliens Order 1953. The magistrate directed that Sirros was not to be detained in custody pending the Home Secretary's decision on the recommendation for deportation. Sirros then appealed unsuccessfully to the Crown Court. After giving judgment the Crown Court judge, under an honest mistake of law and a consequent procedural irregularity, ordered that Sirros be detained until the Home Secretary's decision had been made. Subsequently the Divisional Court made an order for habeas corpus. Sirros then issued a writ against the Crown Court judge, and the police officers who had acted pursuant to his order, claiming damages for assault and false imprisonment.

[51] See *Wood v. Fetherston* (1901) 27 V.L.R. 492; *Nash on Magistrates' Courts, op. cit.*, 44.

[52] *Houlden v. Smith* (1850) 14 Q.B. 841; *Cave v. Mountain* (1840) 1 M & G 257, 262.

[53] *Barton v. Bricknell* (1850) 13 Q.B. 393; *Sommerville v. Mirehouse* (1860) 1 B. & S. 652.

[54] E.g. Thompson, *loc. cit.*; Sheridan, *loc. cit.*

[55] Cardozo B. N., *The Growth of the Law* (1924) 133.

[56] [1975] 1 Q.B. 118.

[57] Lord Denning M.R., Ormrod L.J.; Buckley L.J. dissenting (on this point).

The Court of Appeal unanimously upheld the judge's immunity.[58] This result, however, was reached upon divergent reasoning. Whereas Lord Denning M.R. and Ormrod L.J. agreed that the archaic foundation of judicial immunity should no longer apply today, Buckley L.J. adopted a *prima facie* novel construction of the cases although, as will be shown below, the necessary result of his reasoning affirms the traditional line of authorities.

Lord Denning M.R. at first accepted a conventional interpretation of the cases but then went on to say:

> In this new age I would take my stand on this: as a matter of principle the judges of superior courts have no greater claim to immunity than the judges of the lower courts. Every judge of the courts of this land — from the highest to the lowest — should be protected to the same degree. . . . What he does may be outside his jurisdiction — in fact or in law — but so long as he honestly believes it to be within his jurisdiction, he should not be liable. . . . This principle should cover the justices of the peace also.
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> . . .
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> Not liable for acts done . . . in a judicial capacity. Only liable for acting in bad faith, knowing they had no jurisdiction to do it.[59]

Applying this new rule to the facts the defendant was entitled to immunity as the acts complained of were done whilst he was acting *qua* judge and in good faith.

Ormrod L.J. concurred with the view advocated by Lord Denning M.R. He too noted that there was no ground today for differentiating between judges and justices according to their status. Nevertheless, the Lord Justice was more cautious about sweeping aside the long line of precedent. He advocated alternative formulations by applying the old rules in an unmodified form. On any view, he suggested, the defendant was immune, having acted within his jurisdiction and in good faith.

In accordance with the view that there should be no difference between the principles applicable to superior and inferior courts. Lord Denning M.R. stated: 'Nothing will make him liable *except it be shown* that he was not acting judicially, knowing that he had no jurisdiction to do it'.[60] It has been suggested that Lord Denning M.R. is indicating that the onus is on the plaintiff to prove that the defendant acted knowingly without jurisdiction.[61] From the language of Ormrod L.J. it is unclear whether he supported Lord Denning M.R. on this point. Although he acquisced in the futility of maintaining 'double standards in so important a matter as the personal liability of judges'[62] no indication was given as to the onus of proof under the new standard. In light of this ambiguous majority on the point it is submitted that the divarication between superior and inferior courts has

[58] The police officers, having acted pursuant to the judges' instructions, were, therefore, not liable.

[59] *Sirros v. Moore* [1975] 1 Q.B. 118, 136.

[60] *Ibid.* 136. Emphasis added.

[61] Brazier M., 'Judicial Immunity and the Independence of the Judiciary' (1976) *Public Law* 397, 405.

[62] *Sirros v. Moore* [1975] 1 Q.B. 118, 149.

not yet been completely overturned. The principle enunciated by Lord Denning M.R. is confined to actions against judges of superior courts. In any other case it will be for the defendant to plead and prove a *bona fide* belief in jurisdiction as a defence.

Buckley L.J., on the other hand, asserted that

> . . . there is in truth no difference [arising from the cases] between the principle applicable in the case of a judge of a superior court and that applicable in the case of an inferior court.[63]

On this basis Brazier has suggested that:

> [a]ll that the application of the dissenting view of Buckley L.J. would require is that every judge exercise reasonable care to ensure that he does only that which he is empowered to do.[64]

It is unfortunate that Brazier does not clarify the reasoning of Buckley L.J. for, when analysed, it can be seen that he has effectively retained and applied the inferior-superior court dichotomy.

Buckley L.J. maintained that the sole question in every case is to ask whether the act complained of was an act *coram non judice*.[65] In effect, he said that in order to answer this question one must look to the limits of the defendant's jurisdiction.[66] He also indicated that any difference between superior and inferior courts is really one of jurisdiction.[67] A superior court judge, when asking himself whether or not he has jurisdiction is, according to Buckley L.J., exercising his own jurisdiction. However, it should be noted that on these foundations it is illogical to deny the existence of a court dichotomy. To make both immunity and status depend upon jurisdiction necessitates an implication that a superior court judge, acting judicially, is immune from personal liability. Once this is realised, the judgment of Buckley L.J. can be regarded, with one exception, as following traditional lines.

If the reasoning of Buckley L.J. implies that a superior court judge is absolutely immune whilst acting *coram judice* it then equally implies that a judge of an inferior court, acting in the exercise of his office and within his jurisdiction, is similarly immune. If he wrongly acts without jurisdiction he will nevertheless be liable if that erroneous belief was:

> . . . due to a careless ignorance or disregard of . . . fact . . . or due to a mistake of law relating to the extent of his jurisdiction.[68]

The deviance from authority lies in the absence of immunity for a careless ignorance or disregard of fact relating to jurisdiction. It will be remembered that the older cases suggest that damages would not be recoverable for acts done without jurisdiction if such absence of jurisdiction was due to an honest mistake of fact.

[63] *Ibid.* 139.
[64] *Op. cit.* 409.
[65] *Sirros v. Moore* [1975] 1 Q.B. 118, 139.
[66] *Ibid.*
[67] *Ibid.*
[68] *Ibid.* 141.

At this stage it may be useful to summarize the results of *Sirros v. Moore*.[69] The Court agreed that a judge, independent of status, is liable if the reprehensible act occurs whilst he is not acting *qua* judge. The majority view then focuses upon the subjective state of the defendant. It admits retribution only in those cases where the judge acted knowingly without jurisdiction.[70] Conversely, the dissenting view of Buckley L.J. indicates that a superior court judge is absolutely immune. An identical result is reached where a judge of an inferior court acts within his jurisdiction. However, if the act complained of is without jurisdiction and the defendant conscientiously believes that he was acting within jurisdiction then he will be immune only if that erroneous belief was due to a justifiable ignorance of some relevant fact.

Between the date when the Court of Appeal in *Sirros v. Moore*[71] handed down its judgment and the time of writing, two relevant cases, both initiated by allegations of unjudicial conduct, have been reported.[72] The first, a decision of the New Zealand Court of Appeal in *Nakhla v. McCarthy*,[73] was pleaded in terms obviously based on *Sirros*. The plaintiff alleged that McCarthy, a former President of the New Zealand Court of Appeal itself, had knowingly acted without jurisdiction and failed to act *bona fide* in the exercise of his office. The Court relied upon the older authorities to uphold the defendant's immunity. Despite a silent disregard of the majority in *Sirros* the real significance of the case lies in the Court's clarification of the concept of jurisdiction. Woodhouse J. delivering judgment for the Court, expressly adopted a broad construction of the concept. He concluded that:

> . . . we are in no doubt that when the principle of judicial immunity is discussed in the cases in relation to acts done within the jurisdiction of the judge that word must be regarded as referable to the broad and general authority conferred upon his court and upon himself to hear and determine issues . . . [Jurisdiction therefore means the] authority to decide [and not] the mode of decision nor the manner in which the powers . . . have been exercised or not exercised.[74]

The second case, *Maharaj v. Attorney-General of Trinidad and Tobago (No. 2)*[75] stemmed from, and was decided upon, a due process provision in the Constitution of Trinidad and Tobago. The Privy Council cited and silently approved *Sirros* although Lord Hailsham, a dissentient on the substantive question, succinctly indicated that he may not hold a superior court judge liable even if that judge had subjectively adverted to his absence

[69] [1975] 1 Q.B. 118.

[70] N. B. Lord Denning M.R. and Ormrod L.J. noted that this view should extend to justices of the peace. As indicated *supra* the position of justices of the peace is statutorily controlled. *Sirros*, therefore, conflicts with ss. 32 and 33 of the *Magistrates' Courts Act* 1971 (Vic.). To this end *Sirros* provides judicial cognizance of the inadequate protection accorded to justices under the Act.

[71] [1975] 1 Q.B. 118.

[72] For a brief summary of these cases, see Hodge W. C., 'The Citadel of Judicial Immunity' (1978) *New Zealand Law Journal* 207.

[73] [1978] 1 *N.Z.L.R.* 291.

[74] *Ibid.* 301.

[75] [1978] 2 All E.R. 670.

of jurisdiction.[76] Reservations similar to those of Lord Hailsham's had been expressed in *Nakhla's* case.[77] However, both Lord Hailsham, implicitly, and the New Zealand Court of Appeal, expressly, relied upon the proposition that a superior court judge cannot in practice act without jurisdiction. Since *Sirros* allows damages against any judge, including a superior court judge, only if he knowingly acts without jurisdiction, any doubts which may have been expressed in *Nakhla* and *Maharaj* are, for practical purposes, of little significance.

2. QUASI-JUDICIAL IMMUNITY

Brazier, writing in 1976, noted that:

> . . . [m]any men and women hold positions in public life which require them to administer justice outside the courts. . . . How secure are such officers from civil suit? Their main difficulty, and the real injustice to them, is that no answer to the question can be given for their position has not yet been clarified.[78]

To date this state of affairs remains unchanged.

The basic problem stems from the judiciary's reluctance to define those bodies or acts to which some form of immunity may attach. One common feature, however, of all the decided cases is that those bodies, persons or acts upon or for which immunity has been granted have all been regarded as 'judicial'. For instance, a vice-chancellor exercising disciplinary authority under the charter of a university,[79] a Chairman of the Board of Guardians[80] and a disciplinary committee of a law society[81] have all been accorded immunity. The most that can be gleaned from the many similar cases is that immunity will not extend to an administrative authority merely because its functions, or part thereof, are denominated as judicial or quasi-judicial for the purpose of the rules of natural justice[82] or for control by certiorari or prohibition.[83]

What, then, is a judicial act for the purpose of immunity? The starting point is a recognition by Lord Esher in *Partridge v. General Council of Medical Education and Registration etc.*[84] that if a body has a public duty reposed in it by statute and, in order to fulfil that duty, it must exercise discretion, then, for the purpose of immunity, it is a judicial act.

[76] *Ibid.* 678.
[77] [1978] 1 *N.Z.L.R.* 291.
[78] *Op. cit.* 398.
[79] *Kemp v. Neville* (1861) 10 C.B. (N.S.) 523.
[80] *Everett v. Griffiths* [1921] 1 A.C. 631.
[81] *Addis v. Crocker* [1961] 1 Q.B. 11.
[82] There is a growing recognition that natural justice merely requires the actor to act fairly. See generally Taylor G. D. D., 'Fairness and Natural Justice — Distinct Concepts or Mere Semantics ' (1976-1977) 3 *Monash University Law Review* 191: A duty to act fairly is inadequate to found immunity. See *Sutcliffe v. Thackrah* [1974] 2 W.L.R. 295, 300; *Arenson v. Casson Beckman Rutley & Co.* [1975] 3 W.L.R. 815.
[83] See generally Whitmore H. & Aronson M., *Review of Administrative Action* (1978) 426-42.
[84] (1890) 25 Q.B.D. 90, 96.

If one is to adopt this public duty-discretion criteria one must also confront and reconcile a recent line of cases dealing with the negligent exercise of statutory powers. To exemplify this problem consider the comments of Laskin J. when speaking for the Court in *Welbridge Holdings Ltd v. Metropolitan Corporation of Greater Winnipeg*,[85] the leading Canadian case in this area, where he said:

> A municipality at what may be called the operating level is different in kind from the same municipality at the legislative or *quasi*-judicial level where it is exercising discretionary statutory authority.[86]

Laskin J. concluded that there could be no liability for the negligent exercise of legislative or quasi-judicial functions. Similar cases, albeit espousing a less stringent level of liability, are now evolving in England. For instance, in *Anns v. Merton London Borough Council*[87] Lord Wilberforce observed that:

> [m]ost indeed probably all, statutes relating to public authorities or public bodies, contain in them a large area of policy. The courts call this 'discretion' . . .[88]

Here a policy-operational dichotomy was outlined, liability existing only for the latter and in certain circumstances the former if the act or omission to act was *ultra vires*. However, these cases are concerned with liability for negligence; a breach of a duty of care. This is a different case from public bodies exercising judicial functions which owe no private duty of care to the litigants.[89]

A second criteria stems from the famous case of *Everett v. Griffiths*[90] where Lord Moulton stated that:

> . . . if a man is required in the discharge of a public duty to make a decision which affects, by its legal consequences, the liberty or property of others, and he performs that duty and makes that decision honestly and in good faith, it is . . . . a fundamental principle of our law that he is protected.[91]

This solution looks very much like the suggestion that a qualified immunity will be granted to those bodies which are required to accord natural justice. It is, however, primarily concerned with negligent conduct which, as indicated above, effectively constitutes a separate strand of thought.

Nevertheless, the most recent Australian decision on the question may well lead to a result such that accordance of the rules of natural justice are a necessary, but not a sufficient, condition for judicial immunity to exist. The Supreme Court of Victoria in *Tampion v. Anderson*[92] was primarily

[85] (1972) 22 D.L.R. (3d) 470.
[86] *Ibid.* 478.
[87] [1978] A.C. 728; [1977] 2 W.L.R. 1024.
[88] *Ibid.* 1034 (in W.L.R.).
[89] *Arenson v. Casson Beckman Rutley & Co.* [1975] 3 W.L.R. 815, 832-33 *per* Lord Kilbrandon.
[90] [1921] 1 A.C. 631. Cf. *Richardson v. L.C.C.* [1957] 1 W.L.R. 751.
[91] *Ibid.* 695. S. A. de Smith accepts this view but suggests that it should be confined to those cases where there is an erroneous exercise of judgment. S. A. de Smith, *Judicial Review of Administrative Action* (3rd ed. 1973, Stevens & Sons Ltd, London) 295.
[92] [1973] V.R. 321.

concerned with the liability of an individual appointed by Order in Council to constitute a Board of Inquiry. The plaintiff sought damages for defamation arising out of a report prepared by the Board pursuant to its inquiry into Scientology. The defendant, like many other persons appointed pursuant to legislation to perform judicial duties, had been granted statutory immunity to the same extent as if he were a judge of the Supreme Court.[93] McInerney J. upheld the defendant's immunity both under the statute and at common law.[94] His analysis centred upon those precedents which were concerned with allegations of defamation against persons exercising public duties. It was in this context that he said:

> The authorities show that the immunity of judges . . . has been extended (by analogy) to persons presiding at or constituting a tribunal authorized by law to conduct an inquiry proceeding judicially, that is to say, in a manner as nearly as possible similar to that in which a court of justice acts in respect of an inquiry before it. . . .[95]

Subsequently, however, McInerney J. accepted that this immunity extended beyond defamation proceedings and encompassed '. . . all kinds of action, founded on the doctrine of public policy',[96] that is to say, acts done (as opposed to words written or spoken).

By equating defamation proceedings with other acts undertaken judicially McInerney J. has affirmed an equality which the commentators had regarded as unfounded.[97] Nevertheless by affirming this equality McInerney J. has clarified the criteria upon which a consideration of the concept of a 'judicial act or body' can be based.

The test as to what is a 'judicial act or body' in proceedings for defamation was originally stated in *Royal Aquarium etc. Society v. Parkinson*[98] where Lord Esher M.R. stated that privilege would attach to bodies 'acting judicially . . . in a manner . . . similar to that in which a Court of Justice acts'.[99] This test, however, should not be seen in a vacuum. One may also need to consider the constitution, functions and procedures of the body in question.[1] It is within the context of these considerations that McInerney J. in *Tampion's case*[2] added that:

> . . . the circumstance that a tribunal has power to examine witnesses assists towards the conclusion that it is a body acting judicially, as does the fact that it conducts its proceedings in a manner resembling that of a court of justice, but that neither of these tests is decisive. The fact that a tribunal has power to determine rights is a strong (though not conclusive) indication that it is a body acting judicially. On the other hand, the converse proposition is not necessarily valid.

The result is that there is no decisive test upon which one can rely in order to assess whether or not a body is acting judicially. The courts have adopted

[93] See *Evidence Act* 1958 (Vic.) s. 21A.
[94] *Tampion v. Anderson* [1973] V.R. 321, 332.
[95] *Ibid.* 332.
[96] *Ibid.* 334.
[97] See Thompson, *op. cit.*, 517-20; Brazier, *op. cit.*, 398; *contra* Sheridan, *loc. cit.*
[98] [1892] 1 Q.B. 431.
[99] *Ibid.* 442.
[1] *Copartnership Farms v. Harvey-Smith* [1918] 2 K.B. 405, 410.
[2] [1973] V.R. 321, 333.

a cynical and flexible set of indicia such that, at the end of the day, the accordance of immunity may well depend upon such allegedly extraneous factors as the personality of the body and the number of cases with which it must deal.

If an individual undertaking public duties or enforcing public rights can be regarded as quasi-judicial for the purpose of immunity what then is the level of protection with which he is to be accorded? Whatever standard is adopted it is agreed that it will be subject to one qualification, *viz.* immunity will only be granted if the officer is acting within the confines of his judicial office. For instance, the proffering of defamatory material on some matter completely irrelevant to the case in hand may take that officer out of his office and consequentially remove his cloak of immunity.[3]

Until the Court of Appeal's decision is *Sirros v. Moore*[4] a strong case for immunity could be mounted but only to the extent that an individual constituting, or a member of, a public body exercising quasi-judicial functions would be protected if he acted honestly and within his jurisdiction.[5] Malice would damn any claim to immunity. Viscount Finlay's lone assertion that immunity is absolute if the act can be characterised as judicial[6] is irreconcilable with the bulk of authority in this area.

The early case of *Tozer v. Child*[7] typifies the attitude of the courts when considering the problem of quasi-judicial immunity. A churchwarden whilst acting as a returning officer had denied the plaintiff his right to vote at a parish election. The Court upheld the churchwarden's immunity notwithstanding that if malice had been proven a contrary result would have ensued. It is noteworthy that the Court reasoned that liability may well result for a mistake of fact. Similarly, in *Partridge's case*[8] the General Council of Medical Education and Registration of the United Kingdom had wrongfully removed the plaintiff's name from the register of dentists. The Court emphasised that malice alone would render the defendant liable. The result, therefore, is that quasi-judicial officers had a common law claim to immunity analogous to that granted to justices under sections 32 and 33 of the *Magistrates' Courts Act* 1971 (Vic.).

Today, however, it can be strongly argued that the more clement *Sirros* standard should be applied to public officers exercising quasi-judicial functions. It will be remembered that Lord Denning M.R. stated that:

> [e]very judge of the courts of this land — from the highest to the lowest — should be protected to the same degree, and liable to the same degree.[9]

[3] Cf. *More v. Weaver* [1928] 2 K.B. 520, 525.
[4] [1975] 1 Q.B. 118.
[5] This is the view ultimately adopted by Brazier *op. cit.*, 412.
[6] *Everett v. Griffiths* [1921] 1 A.C. 631, 666.
[7] (1957) 7 E. & B. 377.
[8] (1890) 25 Q.B.D. 90.
[9] *Sirros v. Moore* [1975] 1 Q.B. 118, 136.

The standard enunciated in *Sirros* was envisaged as extending to justices of the peace. A rule which benefits justices ought also to benefit statutory bodies who, on the basis of *Tampion v. Anderson*,[10] act in a manner similar to courts, for instance, by finding facts and applying law. As will be seen below the general justifications for immunity apply no less and in some cases more forcibly to individuals required to administer justice outside the courts strictly so called.

Thus, to superimpose the *Sirros* level of liability upon the *Tampion* scope of immunity can be justified. The same cannot be said of an imposition of the *Sirros* standard upon bodies classified as judicial because they exercise a public duty and use discretion. This is primarily due to the fact that the public duty-discretion test of 'judicial' encompasses a wider array of bodies than does the *Tampion* test. To permit moral obliquy, as will in certain circumstances be the case under the *Sirros* standard, in bodies who are *prima facie* alien to the judiciary in appearance but nevertheless satisfy the public duty-discretion test cannot be so readily justified.

Alternative, and possibly enlightening indicia have been expounded in relation to arbitrators appointed by the parties to adjudicate in matters of private dispute. The position of private arbitrators on questions other than negligence has not been the subject of a great deal of litigation. Nevertheless, it is probable that immunity will extend to an arbitrator's trespassory acts when he is acting within his jurisdiction.[11] Indeed, it is relatively well settled that misconduct falling short of bad faith or fraud will not render an arbitrator liable in damages.[12]

It is also clear that an action will not lie against an arbitrator for want of skill or for negligence in making his award.[13] In two recent cases the House of Lords had cause to consider the limits of this principle.[14] In the first of these cases, *Sutcliffe v. Thackrah*,[15] the plaintiff had contracted with the defendant, an architect, to supervise and issue monthly interim certificates to a sub-contractor who was to build a luxurious dwelling house on the plaintiff's land. The defendant negligently certified the sub-contractor's defective work. The plaintiff sought damages for the loss caused by this negligent certification. The defendant alleged that in issuing the interim certificates, he was employed in a judicial capacity and therefore entitled to a quasi-arbitrator's immunity — his only duty was to act honestly. At the essence of this submission was the assertion that if an individual is required to act impartially he is therefore acting judicially. The House of Lords

[10] [1973] V.R. 321.

[11] *Kennedy v. Burness* (1957) 15 *Upper Canada Reports* 473, 487.

[12] *Penberthy v. Dymock* [1954] N.Z.L.R. 130.

[13] *Sutcliffe v. Thackrah* [1974] A.C. 727 [1974] 2 W.L.R. 295; *Arenson v. Casson Berckham Rutley & Co.* [1975] 3 W.L.R. 815.

[14] *Ibid.* See generally Parris J., 'The Demise of Quasi-Arbitrators' (1976) 126 *New Law Journal* 429; Banakas E. K., 'The Immunity of Arbitrators from Negligence' (1976) *Cambridge Law Journal* 41.

[15] [1974] A.C. 727, [1974] 2 W.L.R. 295.

unanimously rejected the defendant's allegations. Although the House agreed that an arbitrator enjoys immunity from negligence for much the same reasons as a judge, this did not mean that any person who is required to act impartially or fairly was, therefore, acting judicially and entitled to immunity.

The House of Lords was soon required to clarify the indicia which had been laid down in *Sutcliffe's case* as to when a person is acting judicially. In *Arenson v. Casson Beckman Rutley & Co.*,[16] the defendants — accountants and auditors — had been requested by the plaintiff's uncle to value shares which the plaintiff had agreed to sell to his uncle. The plaintiff subsequently sought damages for the loss he had sustained by the defendants' negligent valuation. Brightman J.,[17] and then the Court of Appeal,[18] accepted the defendants' claim to immunity. The House of Lords, however, relying on their recent decision in *Sutcliffe's case*, unanimously reversed the decision of the Court of Appeal. A majority of the Law Lords reaffirmed that an arbitrator's immunity exists only where an individual is appointed to perform a judicial function.[19] The Law Lords then went on to outline the various indicia which should be taken into account when determining if the arbitrator's task is a judicial one. Such indicia include:

(i) the remission of a formulated dispute between two parties to the adjudicator for resolution;
(ii) the fact that the individual's investigatory functions are minimal;
(iii) the fact that the parties have agreed to accept the adjudicator's decision as binding and final subject only to normal procedures of review;
(iv) the reception of rival evidence or contentions; and
(v) that, where appropriate, the rules of natural justice have been accorded.

These considerations, it seems, are not an exhaustive list of the factors essential to the conclusion that the individual is acting judicially.

The indicia, although stated in the context of the immunity of privately employed arbitrators, do, at least in part, clarify the direction in which the courts are moving. Taken together with the Victorian Supreme Court's decision in *Tampion v. Anderson*[20] one can perceive a gradual reduction in the scope of immunity. Those individuals, however, who do come within the ambit of these cases will be accorded immunity such that they will be personally liable only for knowingly acting without jurisdiction.[21]

[16] [1975] 3 W.L.R. 815.

[17] [1972] 1 W.L.R. 1196. See Lingren K., 'Arbitration — Negligence — Professional Person Acting as Quasi-Arbitrator — Not Liable' (1973) 47 *Australian Law Journal* 96.

[18] [1973] Ch. 346, Lord Denning M.R. dissenting.

[19] Lord Simon, Lord Wheatley and Lord Salmon. Lord Kilbrandon (832) and Lord Fraser (842) doubted whether an arbitrator would even be immune from negligence suits. The House indicated that the origin and nature of appointment would determine whether the individual was an arbitrator. Other considerations would determine if, as an arbitrator, the individual was acting judicially. See also *Jacka v. Lewis* (1944) 68 C.L.R. 455, 460-61 *per* Rich J.

[20] [1973] V.R. 321.

[21] *Sirros v. Moore* [1975] Q.B. 118.

But, it may well be asked, why have judicial immunity at all? If judges were fully liable would this not make them more careful in exercising their powers? Moreover, is not judicial immunity a rule made by judges to protect themselves? It is a response to such questions; the justifications for immunity, to which attention must now be focused.

3. POLICY: JUSTIFICATIONS AND CRITICISMS

Lord Simon in *Arenson's case*[22] remarked that 'The general judicial role in society is to resolve disputes which the parties themselves cannot resolve by conciliation, compromise or surrender'. In carrying out this role the relevant body takes into account three factors: doctrine, fact and policy.[23] Doctrine alone, for instance, the doctrine of judicial immunity, is singularly abstract merely serving to mirror a classification of the problem and the policy which should control its disposition. However, in conjunction with policy, that is, interests beyond the interests of the immediate litigants,[24] the doctrine can be explained and justified.

At least six viable policies have been proffered by the courts and commentators in order to justify judicial immunity.[25] Firstly, and most fundamentally, it is said that the public interest requires an independent judiciary free from the fear of vexatious personal actions.[26] To echo Lord Denning M.R.:

> . . . [each judge] 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?'[27]

That this justification exists in aid of the public interest is clear from the words of Woodhouse J. in *Nakhla v. McCarthy*:[28]

> It lies in the right of men and women to feel that when discharging his judicial responsibilities a judge will have no more reason to be affected by fear than he will allow himself to be subjected to influences of favour . . . [I]mmunity is in no sense a private right which [is conferred upon a judge] . . . and which he then

[22] [1975] 3 W.L.R. 815, 825.

[23] See generally Green L., 'Tort Law Public Policy in Disguise' (1959-60) 38 *Texas Law Review* 1, 257.

[24] 'Policy but denotes the protection that should be extended the litigants which at the same time best serves the interests of the rest of us.' *Ibid.* 265.

[25] N.B. The policies herein discussed are largely independent of those advocated in support of immunity from negligence. Immunity from negligence is best justified on the basis that it is incongruous to place an official:

> In a position the very significance of which is to require *his* opinion and accord it especial deference in the matter in hand, and yet at the same time to penalize him with personal consequences by reference to the opinion of another or others in regard to the same matter.

Jenning E. G., 'Tort Liability of Administrative Officers' (1936-37) 21 *Minnesota Law Review* 263, 273.

[26] This assertion mirrors the oath or affirmation taken by judges upon their appointment to office, e.g. see *Judiciary Act* 1903-73 (Cth) s. 9. On judicial independence generally see The Right Honourable The Lord Hailsham of St Marylebone, 'Democracy and Judicial Independence' (1979) *University of New Brunswick Law Journal* 7.

[27] *Sirros v. Moore* [1975] Q.B. 118, 136.

[28] [1978] 1 N.Z.L.R. 291, 294.

> might be said to enjoy. He is merely the repository of a public right which is designed to ensure that the administration of justice will be untrammelled by the collateral attacks of disappointed . . . litigants.

Nonetheless, the doctrine must not be applied in such a way as to 'cause injustice without in any way advancing justice'.[29] Whilst it is incontrovertible that the public will benefit to some extent from an independent judiciary this must be balanced against a fundamental policy which requires that an adequate remedy be provided to a wrongfully injured individual. The public interest, it seems, would require justice before judicial independence. Thus, in adopting the *Sirros* standard one must assume that in all cases other than where the defendant knowingly acts without jurisdiction the public need automatically outweighs the requirement of a private remedy. The propagation of a judicial system in which judges are free to act maliciously within their jurisdiction can be justified only by an appreciation of the fact that it is not that a judge has a private right to be malicious but rather than it is the public's right to preserve an independent judiciary.[30]

Secondly, it is often asserted that judicial immunity can be justified by the need for finality in judicial proceedings. As early as 1608 Lord Coke noted that:

> . . . for if . . . judicial matters . . . should be drawn in question, by partial and sinister supposals and averments of offenders, . . . there never will be an end of causes: but controversies will be infinite.[31]

Contrary to this assertion is the fact that for many years justices of the peace have been bestowed with only a qualified immunity. Nonetheless, mass litigation has not resulted. Moreover, the basic premise underlying this purported justification is questionable. In practice numerous suits would deplete the plaintiff's financial resources particularly if he instituted further suits consequent to adverse decisions in a lower court where costs had been awarded against him.[32] Again, it can be seen that the purported justification fails to go to the essence of immunity. Reference to certain civil law jurisdictions shows that procedure can be devised to prevent the institution of vexatious actions. In France, for instance, the procedure for bringing suit against a judge is purposely complex and, as a first step, requires the litigant to obtain permission to sue from a judge in a higher court than the one in which the defendant presided.[33]

Thirdly, it is argued that the availability of alternative remedies exist to protect the injured party and obviate the need for the tortious remedy of

[29] *Arenson v. Casson Beckman Rutley & Co.* [1975] 3 W.L.R. 815, 823 *per* Lord Simon.

[30] See generally Johnson J. E., Commentary (1970) 4 *Ottawa Law Review* 627; Barth D. K., 'Immunity of Federal and State Judges from Civil Suit — Time for Qualified Immunity?' (1977) 27 *Case Western Reserve Law Review* 727, 741-2, n. 88.

[31] *Floyd v. Barker* (1608) 12 Co. Rep. 23, 24.

[32] See Barth, *op. cit.*, 741.

[33] See Hink H. R., 'Service-Connected versus Personal Fault in the French Law of Government Tort Liability' (1963) 18 *Rutgers Law Review* 17; Johnson, *op. cit.*, 630-1.

damages. Proponents of this view include the New Zealand Court of Appeal which, in *Nakhla v. McCarthy*,[34] noted that:

> A judge can, of course, be made to answer . . . for any criminal misconduct . . . If the need arose steps could be taken in Parliament to have him dismissed from office. If in the course of his work he should fall into error the matter can become the subject of appeal.

Unfortunately, none of these alleged alternatives is, in fact, a true and adequate alternative for the injured party.

Any perversion of the course of justice is, according to Lord Denning M.R., properly punished in the criminal courts.[35] Public policy does not demand any further protection to the individual by way of recompense. The fact that criminal prosecution is not adequate to serve as an alternative to damages lies, first, in the difficulty of preferring the appropriate charge and, second, in having to prove 'beyond reasonable doubt' the criminal perversity of the defendant's mind.[36] Moreover, a successful criminal prosecution does not normally lead to compensation of the injured victim. Note, however, that in Victoria a court, pursuant to section 546 of the *Crimes Act* 1958 (Vic.), may order compensation to any person 'suffering loss or destruction of or damage to his property through or by means of the offence'. An injured plaintiff whose property is wrongfully seized and damaged pursuant to a criminally reprehensible judicial order may well be able to obtain compensation under section 546. Again, there is the possibility, albeit slight, of compensation under the *Criminal Injuries Compensation Act* 1972 (Vic.). Section 3(1) of that Act provides that compensation is available for injuries resulting from a criminal act or omission. Section 3(2) defines criminal act or omission to include 'any act or omission occurring in the course of arresting a suspected offender . . .'. Injury is defined in section 2(1) as including mental and nervous shock. Thus, in the unlikely event that an individual suffers shock or is assaulted pursuant to a criminally perverse judicial order he may be able to claim compensation.

The right to appeal or seek judicial review is also said to be an alternative to tortious liability. However, it should be noted that not everything done by a person acting judicially is appealable or subject to review. This aside, the granting of an appeal or issuance of a writ is, nonetheless, no alternative to damages. The matter under consideration is not the culpability of the judge's conduct but rather the fallibility of the case in which the aggrieved party was initially involved.

The availability of proceedings for removal of the judge is also, clearly, no true alternative to damages. The individual receives no monetary compensation. Indeed, there is likely to be a substantial amount of prohibitive expenditure of time and funds for an individual to incur in attempting to

[34] [1978] 1 N.Z.L.R. 291, 294.
[35] *Sirros v. Moore* [1975] Q.B. 118, 132.
[36] See Brazier, *op. cit.*, 399.

motivate the responsible authorities. In practice, the power of the Crown's representative on an address from both House of Parliament to remove a judge for misbehaviour or incapacity[37] has been very rarely invoked. Prior to 1689 judges generally held office during the King's pleasure.[38] Judicial security was given statutory foundation by the *Act of Settlement* 1701 (U.K.) whereby judges' commissions were made 'during good behaviour'. To date under that Act and its successors only one judge, Sir John Barrington, in 1830, has been removed from office. In Australia proceedings for removal have been rare, but more so today than in colonial times.[39] In 1843, for instance, Willis J. of the Supreme Court of N.S.W., the first resident judge in the District of Port Phillip, was dismissed by order of the Governor-in-Council for a continued course of misbehaviour.[40] Similarly, Montagu J. was amoved from the office of puisne judge of the Supreme Court of Tasmania (then Van Dieman's Land) in December 1847 for alleged misconduct although, as one commentator has suggested, the real reason for removal may well have been a judgment he delivered in November 1847 which had the potential to render *ultra vires* four-fifths of the colony's Revenue Acts.[41] Notwithstanding the past, judges are, today, well protected from removal or even public criticism of the impartiality of a decision.[42] Parliament has shown an inherent dislike of being accused of interfering with the independence of the judiciary. Moreover, not only are the procedural problems in founding a case for removal virtually insurmountable but also the English Parliament has indicated that anything less than moral delinquency will be inadequate to found a judge's dismissal.[43]

The fourth justification for judicial immunity was stated by Viscount Stair in the following words:

> . . . there is recourse to the King, but not for altering the sentences of judges-ordinary . . . unless there be corruption by bribe, or bias; otherwise no man but a beggar, or a fool, would be a judge.[44]

[37] See *Commonwealth of Australia Constitution* s. 72(ii); *Constitution Act* 1975 (Vic.) s. 77(i); *County Court Act* 1958 (Vic.) s. 9; *Magistrates' Courts Act* 1971 (Vic.) s. 19. N.B. The security of office which a justice enjoys is significantly less than that granted to judges.

[38] See *Dunn v. The Queen* (1896) 1 Q.B. 116, 119-20 for the reasons underlying this rule. It is noteworthy that Sir Edward Coke, in 1616, was dismissed from office under this rule due to his disallowance of the purported King's prerogative to stay proceedings and consult with the judiciary. See generally James C. W., *Chief Justice Coke* (1929) Ch. V.

[39] No federal judge has ever been dismissed. In the U.S.A., prior to 1960, only nineteen out of fifty-two impeachment proceedings had resulted in the judge's removal. See Johnson, *op. cit.*, 632.

[40] See Keon-Cohen B., 'John Walpole Willis: First Resident Judge in Victoria' (1971-72) 8 *M.U.L.R.* 703; Behan H. F., *Mr Justice Willis: First Resident Judge in Port Phillip* (1979).

[41] See Keon-Cohen B., 'Mad Judge Montagu: A Misnomer?' (1975-76) 2 *Monash University Law Review* 50, 75.

[42] See Brazier, *op. cit.*, 400-4.

[43] *Ibid.* 400-2; H.C. Deb. Vol. 22, Col. 366; H.C. Deb. Vol. 865, col. 1092.

[44] Stair, *The Institutions of the Law of Scotland* (4th ed., M.DCCCXXXII) Book *IV*, Tit. 1, 737, para. V.

That this justification extends to privately employed arbitrators is evident from a statement by Lord Hardwicke L.C. in *Lingood v. Croucher*,[45] where he noted that if harassment by disappointed litigants was permitted it 'would effectually discourage persons of worth from accepting of being arbitrators'. This purported justification is clearly unfounded. Other professions are burgeoning despite the continuous threat of liability if the individual does not maintain the standard of conduct required by the profession. In fact many professionals who are faced with this threat of liability either voluntarily or compulsorily acquire insurance. In principle there is no reason why judges also should not be able to insure themselves against damage suits. Alternatively, as is the case in France[46] and for justices of the peace in England,[47] the State could indemnify the successful litigant.[48] The relationship which exists between counsel and judge suggests that the liability of barristers for negligence may, in terms of judicial trend, bear some analogy with the liability of judges themselves. In this context it is noteworthy that the House of Lords recently thought fit to reduce the limits of a barrister's immunity such that he is now fully liable for negligent pre-trial work other than that which is:

> . . . so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing.[49]

It is also argued that to admit the judge as defendant in a suit for compensation would not only diminish respect for his subsequent judicial activities but would also have a negative affect on respect for judicial opinion generally.[50] Although the former is unassailable for want of empirical data, to conclude the latter from it is fallacious. Respect for the judiciary *in toto* will necessarily be undermined if a judge is not required to account for his culpable conduct. Moreover, respect for the judiciary is only one facet of respect for the law and, if in certain circumstances the two are incompatible, the latter should prevail. To calmly deny compensation to a wrongfully injured individual will, at least to the public, appear as little more than covert fatuosity.

Lastly, it has been said that immunity exists, and is perpetuated by the judges, for judicial self-protection.[51] That this is so, at least in part, may be gleaned from the words of Lord Denning M.R. in *Sirros' case*[52] where he said:

[45] (1742) 2 Atk. 395, 398, quoted by Lord Fraser in *Arenson's Case* [1953] 3 W.L.R. 815, 841.

[46] Johnson, *op. cit.*, 631.

[47] *Administration of Justice Act* 1964 (U.K.) s. 27.

[48] In France the State reserves the right to sue the judge to recover its loss. Johnson, *loc. cit.*

[49] *Saif Ali v. Sydney Mitchell & Co.* [1978] 3 W.L.R. 849 at 856, 864-5, 872. See generally Sutherland P., 'The Bar, Immunity and Saif Ali' (1978-79) 5 *Monash University Law Review* 271.

[50] See Cooley T., *Law of Torts* (2nd ed., 1888) 376.

[51] Jennings, *op. cit.*, 272.

[52] [1975] Q.B. 118, 133.

> The judges of the superior courts were very strict against the courts below them. They were particularly hard on justices of the peace.

It is arguable that Lord Denning M.R. is indicating that the judges of superior courts established absolute immunity, as applying to themselves, in order to safeguard their own offices and pockets. The fact that *Sirros* reduces, albeit marginally, the immunity of superior court judges by making them liable for culpable acts knowingly performed without jurisdiction suggests that whatever may have been the former merits of allegations of self-protection they are no longer forceful today. For practical purposes, however, *Sirros* does retain absolute immunity for superior court judges. Very rarely, if ever, will a plaintiff be able to prove that the judge knowingly acted without jurisdiction.

In light of the policies underlying judicial immunity what can be said of the *Sirros* standard? Clearly, it has two fundamental effects. First, it purports to apply 'across the board'; 'to judges of all ranks, high or low'.[53] Second, it adopts a new level of liability, *viz.*, knowingly acting without jurisdiction. Whereas Lord Denning M.R. and Ormrod L.J. hinted at justifications for the former, no specific reason was given to justify the latter.

The desired extension of the standard to justices of the peace was expressly noted by both Lord Denning M.R. and Ormrod L.J. The Master of the Rolls stated that:

> . . . [justices] should no longer be subject to 'strokes of the rodde, or spur'. Aided by their clerks, they do their work with the highest degree of responsibility and competence — to the satisfaction of the entire community.[54]

Ormrod L.J. stated that:

> . . . the old rules should be modified by giving judges of inferior courts (including magistrates) enhanced protection . . . With a fully developed appellate structure, supplemented [by the] prerogative writs, and made accessible to all, or nearly all, by the legal aid scheme, there is no longer any necessity to preserve . . . the remedy by way of personal actions against judges.[55]

Both Lord Denning M.R. and Ormrod L.J. pointed to the court in question: the Crown Court, as providing the *reductio ad absurdum*. Such a court is manned by judges of all ranks from erudite judges of the High Court to justices of the peace. However,

> [n]o distinction can or should be drawn between them. Each one shares responsibility for the decisions given by the court.[56]

The Court of Appeal in *Sirros v. Moore*[57] did not indicate any reason why it chose that a judge should only be liable for knowingly acting without jurisdiction. In order to justify this level of immunity one is required to balance two competing policies, namely the justifications for immunity and the need to compensate a wrongfully injured individual. It must be

[53] *Ibid.* 132.
[54] *Ibid.* 136.
[55] *Ibid.* 149.
[56] *Ibid.* 136 *per* Lord Denning M.R. See also 149 *per* Ormrod L.J.
[57] [1975] Q.B. 118.

emphasised that the object of damages in this context is primarily to provide monetary redress for the injury sustained. The provision of damages is not a sanction to punish the judge for his reprehensible conduct nor to deter him from future waywardly behaviour. This aspect of the remedial process is best left to the criminal law or proceedings for impeachment.

Society has reposed in the judiciary the function of resolving social malfunctions by fearless adjudication. To this end any judge or judicial officer who, with subjective advertance to his absence of jurisdiction, continues to adjudicate is acting outside his socially appointed position.[58] It is this which the *Sirros* standard will not tolerate.

However, a judge acting within but abusing his jurisdiction will nonetheless be immune from personal liability. On the other hand, public policy seems to require, in such circumstances, compensation for the wrongfully injured party. It is the writer's opinion that at this point the conflicting tenets of public policy are irreconcilable. It is submitted that it should be the public's responsibility to provide compensation for injuries caused by *bona fide* or malicious errors or irregularities. Such errors or irregularities are not caught by *Sirros* but, on policy grounds, the injury caused thereby cannot be disregarded as not justifying compensation. The tenor of the majority judgments in *Sirros* indicates that injury caused by an abuse of jurisdiction or an inadvertent excess of jurisdiction is the cost of providing a speedy administration of justice and an independent, fair and fearless judiciary. But, should it be? The institution of judicial insurance and/or indemnity schemes provide at least a partial solution to this problem. If compensation can be provided for a wrongfully injured party without the chance of impinging upon our independent judiciary or of a multitude of vexatious claims being instituted then, clearly, optimality is somewhat nearer — 'justice' is better served. To institute a check, for instance, by way of the Attorney-General's, or a similar body's fiat, is therefore desirable. Justice requires that judges do not abuse their powers to the detriment of another without that other being compensated for injuries sustained. The solution set out above goes some way toward, achieving this end.

4. CONCLUSION

The body of the common law of torts exists in a dynamic equilibrium. The facts of each particular case serve to temper the two equilibrating forces within this process, namely doctrine and policy. Unfortunately, in the area of judicial immunity this equilibration was remiss. Doctrine stagnated in the nineteenth century whilst public policy galloped ahead. The Court of Appeal in *Sirros v. Moore*[59] had to overcome 100 years of

[58] Such reasoning exemplifies the derogation of an apparent distinction between an act knowingly undertaken without jurisdiction and an act undertaken whilst not acting as a judge.

[59] [1975] Q.B. 118.

torpid doctrine and marry it with modern policies. Whilst it is the writer's opinion that society requires the meshing of inferior and superior courts it is not quite so unequivocal that, for all practical purposes, the optimal level of protection should be absolute. To accept absolute immunity without question is to accept that public policy requires that an individual aggrieved by a judge's wrongful conduct should nonetheless be left without a remedy. It is within this context that the viability of judicial insurance and/or statutory indemnification schemes should be strongly mooted. This is especially so because one cannot realistically expect the initiative in this matter to come from the judiciary itself.[60]

All that which has been said above applies equally to judicial officers other than members of courts of record. However, in this field generalizations tend to fray at the edges. This is primarily due to the width and diversity of bodies which, and individuals who, exercise quasi-judicial functions. The position of such bodies and individuals remains unclear. The solution to this problem must begin with precise statements of immunity limited in ambit to certain bodies or individuals who exhibit similar characteristics classified, for instance, by status or function. Unfortunately the common law has proven inadequate at performing such an exacting and individualised task. The new founded *Sirros* standard and consequent discussion can, therefore, do much good in prompting the legislature to take a careful and long awaited look at the need for and precise delimitation of quasi-judicial immunity.

[60] *Contra* Judge J. S., Schirott J. R. & Bliss J. I., 'Judicial Immunity under the Civil Rights Act: Here Come the Judges Defenses' (1974) 7 *The John Marshall Journal of Practice and Procedure* 213. These writers imply that if the defendant 'spreads the risk' the judiciary may, by analogy with other areas of the law, be more willing to take the initiative.