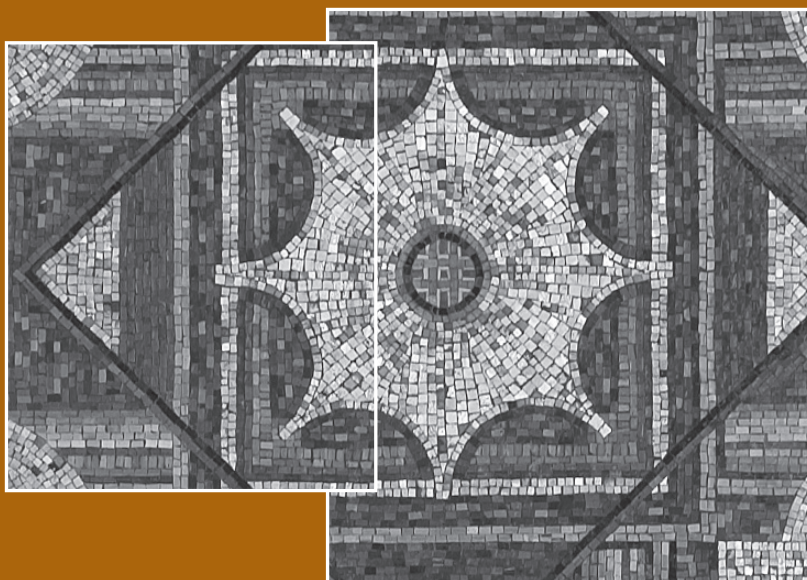




THE SUPREME COURT *of* OHIO

REPORT *of*
THE SUPREME COURT OF OHIO
Joint Task Force on
Judicial Liability & Immunity



November 2006

REPORT OF

THE SUPREME COURT *of* OHIO

JOINT TASK FORCE ON JUDICIAL LIABILITY & IMMUNITY



To the Supreme Court of Ohio and
Ohio Judicial Conference
November 2006

The Ohio Court of Appeals Fifth District

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October 16, 2006

Honorable Thomas J. Moyer
Chief Justice
Supreme Court of Ohio
65 South Front Street
Columbus, Ohio 43215-3431

Honorable John R. Adkins
Chair
Ohio Judicial Conference
65 South Front Street
Columbus, Ohio 43215-3431

Dear Chief Justice Moyer and Judge Adkins:

Enclosed please find the report of the Joint Task Force on Judicial Liability and Immunity. The Task Force was appointed by Chief Justice Moyer and former Judicial Conference chair, Judge Cheryl Karner, in October 2004.

As requested, the Task Force conducted a thorough review of issues associated with judicial liability and immunity and considered alternatives to the judicial liability insurance coverage that has been maintained by the Supreme Court for approximately twenty years. Based on its review, the Task Force submits recommendations that, if adopted by the Supreme Court and Judicial Conference, would clarify the application of judicial immunity to quasi-judicial activities, ensure that judges are properly represented in original actions related to their official duties, and provide for an independent, expert analysis of alternatives to procuring and maintaining costly judicial liability insurance for Ohio judges.

On behalf of the Task Force, I thank you for the opportunity to assist the Supreme Court and Judicial Conference in the consideration of these issues. We are available to respond to any questions that you may have regarding the findings and recommendations contained in this report.

Sincerely,

A handwritten signature in black ink that reads "W. Scott Gwin". The signature is stylized and cursive.

W. Scott Gwin
Vice-Chair of the Task Force

Enclosure

ASHLAND, COSHOCTON, DELAWARE, FAIRFIELD, GUERNSEY, HOLMES, KNOX, LICKING,
MORGAN, MORROW, MUSKINGUM, PERRY, RICHLAND, STARK, TUSCARAWAS

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THE SUPREME COURT *of* OHIO

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INTRODUCTION

For more than 20 years, the Supreme Court of Ohio has maintained a policy of professional liability insurance on behalf of all Ohio judges. This policy insures against the potential award of damages arising from actions taken by the judge in his or her official capacity, provides for the defense of civil actions in which a judge is named as a defendant and is alleged to have acted in his or her official capacity, and provides for the defense of disciplinary claims brought against a judge. The insurance coverage extends to sitting judges as well as retired judges who are eligible for assignment to active duty by the Chief Justice pursuant to Article IV, Section 6, of the Ohio Constitution.

The rising costs of procuring judicial liability insurance, the adoption of policy limitations in order to maintain the affordability of such insurance, and the uncertainty of the scope and extent of judicial immunity prompted the Supreme Court of Ohio and the Ohio Judicial Conference to form a joint task force in July 2004. Each organization appointed five representatives to serve on the task force, and Judge Jon Spahr was named to chair the task force. In appointing the task force, Supreme Court Chief Justice Thomas J. Moyer and Judicial Conference Chair Judge Cheryl S. Karner charged the task force as follows:

* * * conduct a thorough review of issues associated with judicial liability and immunity, including alternatives to the manner in which the Supreme Court currently provides legal representation and insurance coverage to judges who are the subject of civil and disciplinary actions * * * [and provide] a comprehensive set of recommendations for consideration by the Supreme Court and Ohio Judicial Conference.

The task force began its work in October 2004 and met on six occasions through May 2006. The task force conducted research on several fronts and gathered supporting materials. Task force member Judge Scott Gwin researched and prepared a memorandum on the current state of judicial immunity. This memorandum, which is attached to this report as Appendix A, provided the task force with a clear understanding of the parameters of existing judicial immunity and identified areas in which judges are at risk for liability.

The task force also surveyed other state supreme courts to ascertain the manner in which those courts provide representation to judges in official capacity law suits and disciplinary actions. The survey responses indicated that in the majority of states, judges are represented in official capacity law suits by the state attorney general and that very few states provide any representation of judges in disciplinary actions. A chart that summarizes the responses is attached to this report as Appendix B.

The task force reviewed the claims made under the Ohio judges liability insurance policy dating back to September 1999. The purpose of the review was to ascertain the number and types of claims made under the policy, the aggregate cost of defending different types of claims, and the cost of paying claims under the policy. The review of claims history revealed the following:

- Nearly three-fourths of the claims made were the result of civil actions, other than employment-related claims, filed against judges. Although these claims represent a substantial majority of the claims made, the expenses incurred in defending the claims are 45 percent of the total expenses paid.
- Employment-related civil actions are a small, but growing percentage of claims made under the policy and are very expensive to defend. Approximately 8 percent of the claims made involved employment-related law suits. However, one-third of the moneys paid under this policy were paid in the defense of these actions.
- Disciplinary complaints make-up approximately 13 percent of the claims made under the insurance policy. The majority of disciplinary claims are dismissed upon initial review and thus minimal defense costs are incurred. However, a small number of claims that have proceeded to hearing before the Board of Commissioners on Grievances & Discipline and review by the Supreme Court have been costly to defend.

In addition to reviewing the claims history, the task force met with representatives of the current judges liability insurance provider. From this meeting, the task force obtained a better understanding of the coverage available under the policy, the impact that changes to the scope of judicial immunity would have on the policy cost, and efforts that can be undertaken to potentially reduce the number of claims and impact favorably on the cost of the insurance.

The task force also (1) met with Disciplinary Counsel and the secretary of the Board of Commissioners on Grievances & Discipline to discuss the representation provided to judges in disciplinary actions; (2) reviewed a list of state and local entities on which judicial service is mandated by law; and (3) reviewed employment law materials that are provided to newly elected judges at the annual New Judges Orientation Programs and regular Judicial College employment law seminars.

FINDINGS AND RECOMMENDATIONS

Based on its examination of issues related to judicial liability and immunity, the task force makes the following findings and submits the following recommendations to the Supreme Court and Judicial Conference:

RECOMMENDATION ONE. THE SUPREME COURT OF OHIO AND OHIO JUDICIAL CONFERENCE SHOULD PURSUE LEGISLATION THAT WOULD PROVIDE JUDGES WITH A QUALIFIED IMMUNITY FOR ENGAGING IN QUASI-JUDICIAL FUNCTIONS THAT ARE MANDATED BY STATUTE OR OTHER LAW.

As noted in Appendix A, Ohio judges have absolute immunity for the performance of acts that are considered judicial in nature, so long as the judge is acting within the scope of his or her jurisdiction. However, judicial immunity does not extend to the performance of quasi-judicial or administrative functions.

The limited nature of judicial immunity is of increasing concern given the trend toward imposing responsibilities and obligations on judges that go well beyond their traditional adjudicative role. State law either mandates or strongly implies that judges serve on a variety of entities such as commissions that oversee community-based correctional facilities (R.C. 2301.51), children's trust fund board (R.C. 3109.15), and county family and children first councils (R.C. 121.37). Although judges can be insured against the risks of liability associated with service on these entities, the task force concludes that it is unclear, at best, whether judicial immunity extends to a judge's performance of duties that are outside the adjudicatory function.

The task force recommends that the Supreme Court and Judicial Conference pursue the enactment of legislation that affords judges a qualified immunity from liability

when engaged in nonadjudicatory functions that are mandated by state statute or other law. The qualified immunity would apply in situations where the judge, while serving pursuant to statutory or other legal designation, performs acts that are within the scope of his or her authority or responsibility. Immunity would not extend to actions that are outside the scope of legal authority or that are malicious in nature.

The task force considered but did not adopt recommendations that the extension of judicial immunity be absolute or that immunity be extended to employment and other administrative actions. The task force believes it is unlikely that the General Assembly would grant judges absolute immunity, thus excusing conduct that is malicious or outside the scope of a judge's authority, or that judges would receive immunity from liability for employment-related decisions when such immunity is not available to other public officers.

As an alternative to seeking the broader grant of immunity outlined above, the Judicial Conference should ask each judicial association to identify the various quasi-judicial functions in which its members are required or expected to undertake and determine whether judges should continue to perform those functions. The Judicial Conference can then pursue legislation to divest judges of those quasi-judicial functions that individual judicial associations no longer believe are necessary or appropriate for their members to perform.

RECOMMENDATION TWO. THE SUPREME COURT SHOULD UNDERTAKE A COMPREHENSIVE STUDY OF THE LIABILITY RISKS FACED BY JUDGES IN THE PERFORMANCE OF THEIR MANDATED DUTIES AND THE MEANS OF PROTECTING JUDGES FROM THE RISKS OF LIABILITY.

The task force devoted a considerable amount of time to examining the liability insurance coverage provided for judges by the Supreme Court, reviewing the claims history under that policy since 1999, and discussing alternatives to providing representation other than through the liability insurance policy. Although the existing insurance policy adequately protects judges against an award of monetary damages and provides an excellent defense of civil and disciplinary actions brought against judges in their official capacity, the cost of such insurance has risen appreciably in the last several

years. As recently as August 2002, the Supreme Court paid an annual premium of \$420 per judge for judicial liability insurance. The annual premium under the existing policy is \$1,008 per judge. In light of these increases and in order to maintain the protections contained in the liability insurance policy, the Supreme Court has been forced to accept some limits on the coverage afforded under the policy, such as the sublimits that now apply to employment-related claims and disciplinary actions. Since there is no indication that premiums will stabilize or decline, even with the extended grant of immunity recommended by the task force, the task force believes it is reasonable to expect that it will be necessary to consider further limitations on coverage in future insurance contracts.

As noted above, Ohio appears to be one of only a few states that procure liability insurance both to provide judges with a defense against civil and disciplinary claims arising from official conduct and to protect judges against an award of monetary damages arising from such claims. Although the task force believes it would be less costly to provide judges with legal representation through means other than a liability insurance policy, it is uncertain as to the exact cost of providing alternative representation. Moreover, the task force has significant concern with any diminution in the quality and responsiveness of representation now provided to judges and the availability of funds to pay any monetary damages that might be awarded to a plaintiff who prevails in an official capacity law suit against a defendant-judge.

Because of the many uncertainties associated with continuing insurance coverage or implementing alternatives to the traditional coverage, as well as the factors that must be considered in making such a decision, the task force recommends that the Supreme Court undertake a study of the Ohio Judiciary's claims history and the various alternatives available to address the issues of representation and potential liability. The task force believes that such a study is best undertaken by an independent entity that has the experience to ascertain the risks associated with performing judicial functions and the means and attendant costs of protecting judges against those risks.

One task force member recommends that this study examine whether the Supreme Court, through insurance or otherwise, should continue to provide coverage and representation for trial court judges who are named as defendants in employment-related claims. Because trial court employees are paid exclusively from local funds

and because these employees often are subject to county or municipal employment policies, this member believes that a trial judge should look to the county prosecutor or municipal law director for counsel and representation when the judge is faced with an actual or potential employment-related claim. Such an arrangement would reduce the cost of providing statewide, comprehensive coverage for employment-related matters, avoid duplicate coverage under state and local insurance policies, and place the responsibility for providing counsel and representation with the governmental entity that compensates the local court employees.

RECOMMENDATION THREE. THE SUPREME COURT AND JUDICIAL CONFERENCE SHOULD SEEK THE ENACTMENT OF LEGISLATION TO MAKE THE ATTORNEY GENERAL RESPONSIBLE FOR REPRESENTING APPELLATE JUDGES WHO ARE NAMED AS RESPONDENTS IN ORIGINAL ACTIONS ARISING FROM THEIR OFFICIAL DUTIES.

Judges frequently are named as respondents in original actions that seek writs of mandamus, procedendo or habeas corpus. Trial judges named in such actions are usually represented by the county prosecutor or municipal law director. However, it is unclear who bears the responsibility for representing appellate judges, especially those in multi-county districts, in original actions. The task force learned of instances in which the attorney general has declined requests for representation because the attorney general considered appellate judges to be county, and not state, officers. Appellate judges in multi-county districts have encountered difficulty in securing representation from a county prosecutor. Although representation is most often provided by the prosecutor of the county in which the court is headquartered, there have been situations in which these prosecutors have declined to represent the judges where the original action relates to conduct or an event that occurred in another county in the district. Where the prosecutor of that county has refused to represent the appellate judges, the court of appeals has had to secure outside counsel, perhaps at additional expense to the funding authority, or, in at least one instance, was forced to rely on the court's administrator to file a timely answer on behalf of the court in order to avoid default judgment.

The task force believes that responsibility for representation can be addressed easily by a statutory provision that would vest this responsibility with the attorney general. Because appellate judges are compensated entirely by the state of Ohio and often preside in districts that include multiple counties, the attorney general is the logical choice to serve as counsel for these public officials. Representation by the attorney general will ensure that all appellate judges are represented in these matters, provide uniformity in the quality of representation, and avoid situations in which courts have incurred additional costs in retaining private counsel to represent the judges in law suits that relate to the performance of judicial duties.

RECOMMENDATION FOUR. REGARDLESS OF THE MEANS BY WHICH JUDGES ARE AFFORDED REPRESENTATION IN “OFFICIAL CAPACITY” LAWSUITS, THE SUPREME COURT SHOULD ENSURE THAT JUDGES ARE PROVIDED NO-COST REPRESENTATION IN RESPONDING TO DISCIPLINARY ALLEGATIONS THROUGH THE PROBABLE CAUSE STAGE OF THE PROCEEDINGS.

In 2005, Ohio judges were the subject of 608 disciplinary grievances filed with the Office of Disciplinary Counsel or the Ohio State Bar Association. Of this number, the Board of Commissioners on Grievances & Discipline certified four matters for formal proceedings before the Board. These numbers make it apparent that the majority of grievances filed against judges are dismissed following an initial investigation and do not contain sufficient evidence of judicial misconduct that warrants formal disciplinary action. Experience suggests that the vast majority of these dismissed grievances are filed by dissatisfied litigants who are invoking the grievance process as a substitute for an appeal.

Since its inception, the judges liability insurance program has provided judges with representation in disciplinary matters from the time a grievance is filed through disposition of the matter, whether the disposition occurs after investigation by the disciplinary authority with whom the grievance is filed, before the board, or before the Supreme Court. In the late 1990s, as the cost of liability insurance began to climb, the Supreme Court and its insurer instituted policy provisions that maintained the affordability of insurance and continued to provide coverage for all disciplinary

matters. In September 1999, coverage in disciplinary matters was made contingent on the judge being exonerated from all allegations of misconduct. A judge accused of professional misconduct continued to be entitled to a defense against those charges. However, if misconduct occurred and discipline imposed, the judge was then held responsible for all costs incurred in defending the action. Beginning in September 2002, the contingent disciplinary coverage was abandoned in favor of a \$20,000 cap on individual disciplinary claims. The existing policy provision affords judges legal representation in all disciplinary matters but places an outside limit of \$25,000 on the insurer's potential payments.

The task force believes that it is necessary to shield judges from the financial costs associated with responding to grievances but also recognizes that the Supreme Court should not be responsible for the costs of defending a judge who is the subject of serious or potentially serious disciplinary allegations. Therefore, the task force recommends that the Supreme Court continue its policy of providing judges with the assistance of counsel in addressing disciplinary grievances at least through probable cause proceedings before the Board of Commissioners on Grievances & Discipline. The study proposed in Recommendation Two, above, should include a review of the various costs and expenses associated with defending judges at different stages of disciplinary proceedings. This review will aid the Supreme Court in determining the appropriate stage at which the respondent-judge should assume responsibility for the cost of defending professional misconduct allegations.

This recommendation assumes the Supreme Court will continue to procure liability insurance and use counsel assigned by the insurer to represent judges. If the Court decides to implement an alternative means of providing representation to judges, the alternative should include a means of continuing representation in disciplinary matters through the probable cause stage of the proceedings.

CONCLUSION

Independence is integral to the fair and impartial performance of judicial functions. A crucial component of judicial independence is providing judges with the assurance that they can appropriately exercise judicial authority without fear of personal liability. The

doctrine of judicial immunity, together with providing judges with a proper defense in official capacity law suits, has afforded Ohio judges with the independence that is essential to the proper performance of traditional judicial duties. However, as this report notes, the traditional role of state court judges has evolved to include functions that did not exist and were not contemplated when judicial immunity was last examined and liability insurance was first procured in the mid-1980s. The cost of insuring against these risks has more than doubled in the last four years and reached the point where more cost effective alternatives must be considered to maintain the protections afforded to judges. This report contains recommendations that, if implemented, will address gaps in existing judicial immunity, allow for consideration of alternative means of defending judges who are the subject of official capacity claims and disciplinary grievances, and potentially reduce the expenses incurred by the Supreme Court in providing these essential protections for the Ohio Judiciary.

The task force stands ready to assist the Supreme Court and Judicial Conference in the consideration and implementation of the recommendations contained in this report.

APPENDIX A

MEMORANDUM SUMMARIZING THE CURRENT STATE OF
JUDICIAL IMMUNITY AVAILABLE TO OHIO JUDGES
Prepared by Hon. W. Scott Gwin
For the Joint Task Force on Judicial Liability & Immunity
May 2006

INTRODUCTION

The question for our consideration is whether judicial malpractice insurance to indemnify judges against liability for damages and the attorney's fees required for the defense of lawsuits is the most cost effective solution to the potential risk of civil liability facing a judge.

Before we can formulate an answer to that question it is helpful to review the circumstances under which a judge may be personally liable for damages and/or attorney fees. We will then review the six categories of potential risk under the current judicial immunity doctrine. Finally, we will look at the various ways in which the judiciary can manage the risk with an eye toward whether the price of judicial malpractice insurance is an appropriate response to the potential for liability.

BACKGROUND - NARROWING THE RANGE OF JUDICIAL IMMUNITY

While it is true that no attorney will prevail against a judge for having ruled incorrectly if the judge has proper jurisdiction, lawsuits against judges for actions undertaken in their role as judges have been increasingly successful. This increase results from rulings limiting the traditional scope of absolute judicial immunity. Judicial malpractice insurance to indemnify judges against liability for damages and the attorney's fees required for the defense of such lawsuits has emerged as one response to such suits.

Today it is generally recognized that the most important purpose of judicial immunity is to protect judicial independence. As the Supreme Court has said, judicial immunity is needed because judges, who often are called upon to decide controversial, difficult, and emotion-

laden cases, should not have to fear that disgruntled litigants will hound them with litigation charging improper judicial behavior. To impose this burden on judges would constitute a real threat to judicial independence. The question that remains, however, is whether absolute, as distinguished from qualified, immunity is necessary to protect judicial independence. Absolute immunity is strong medicine, justified only by a grave threat to the effective administration of justice. As Justice Douglas suggested in his dissenting opinion in *Pierson v. Ray*, [(1967) 386 U.S. 547] perhaps immunity should not extend to all judges, under all circumstances, no matter how outrageous their conduct. [Id. 558-559].

In *Bradley v. Fisher*, [80 U.S. (13 Wall.) 335 (1871)] an attorney alleged that a judge, with malicious and corrupt motivation, had blacklisted him from practicing in certain courts. [Id. at 338]. Although the Court agreed with the attorney that the judge had improperly blacklisted him, the Court ruled that the judge could not be held liable for damages: “Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts . . . are alleged to have been done maliciously or corruptly.” [Id. at 351]. Addressing Randall’s suggestion that malicious judicial acts might carry civil liability, the *Bradley* Court stated, “Those qualifying words . . . were not intended as an expression of opinion that in the cases supposed such liability would exist.. .” [Id. at 351].

While the *Bradley* Court broadened the scope of judicial immunity on one front by immunizing judges even when their rulings were clearly based on improper motives, it adopted two rules that served to narrow the range of judicial immunity on other fronts. First, the *Bradley* Court drew an important distinction between judges acting “in excess of their jurisdiction” [Id.] and judges acting “where there is clearly no jurisdiction over the subject-matter . . .” [Id. at 351-52]. The Court ruled that judges acting in clear absence of jurisdiction could be held liable for damages, regardless of whether their actions were malicious or corrupt. For instance, if a probate court judge tried and sentenced a party for a criminal offense, the judge could not assert judicial immunity. [Id. at 352]. However, if a judge in a criminal court of general jurisdiction tried and sentenced a party for conduct not proscribed by law, judicial immunity would protect the judge from personal liability. [Id. at 352] Hence the *Bradley* Court established the parameters of judicial immunity by looking first to judicial subject matter jurisdiction. No judicial act, even a malicious one, performed within the jurisdiction of the court could form the basis of a judge’s personal liability. [Id. at 351] However, if the court

acted without subject matter jurisdiction, an honest mistake or an otherwise valid ruling could be grounds for a lawsuit. [Id. at 351-52].

The second important limitation which the *Bradley* Court adopted was the restriction of judicial immunity to “judicial acts.” [Id. at 350]. An exact definition of the term “judicial act” was not attempted by the Supreme Court until over 100 years later, [See *Stump v. Sparkman*(1978), 435 U.S. 349, 360-62)] and this attempt received much criticism. Put simply, a judicial act is one that particularly requires judicial power and discretion; it is an act that only a judge may perform.

Expanding on the factors articulated in *Stump* to decide if an act is judicial in nature, lower courts have focused on: (1) Whether the precise act is a normal judicial function; (2) whether the events occurred in court or an adjunct area such as the judge’s chambers; (3) whether the controversy centered around a case then pending before the judge; and (4) whether the events at issue arose directly and immediately out of a confrontation with the judge in his or her official capacity. These considerations are to be construed generously in support of judicial immunity, keeping in mind the policies that underlie it, [Id. at 351 n.1.] and immunity may be granted even though one of the factors is not met. [Id. at 360]. Moreover, a judge’s motivation to act against someone because of personal malice does not turn a judicial act into a nonjudicial one. [Id. at 353].

Administrative acts performed by a judge are not regarded as judicial in nature and, therefore, are not within the scope of judicial immunity. [*Allen v. Burke*, (4th Cir. 1982), 690 F.2d 376, 377 aff’d sub nom., *Pulliam v. Allen* (1984), 466 U.S. 522]. Even when essential to the functioning of a court, administrative acts performed by judges are not entitled to the cloak of immunity, because holding judges liable for such acts does not threaten judicial independence in the adjudicative process. [Id. at 380]. That an administrative act is performed by a judge is irrelevant for purposes of immunity; it is the nature of the act in question, not the office of the person performing it, that makes it judicial or nonjudicial. It should be noted, though, that the administrative chores of a judge might be within the ambit of another form of immunity, either qualified or absolute. [*Pulliam*, 466 U.S. at 527].

Under the law, judicial liability for criminal activity is treated quite differently than judicial liability for tortious or other noncriminal wrongful conduct. With one minor exception for malfeasance or misfeasance in office, judges possess no immunity for their criminal behavior.

The principle is well settled in Ohio that no civil action can be maintained against a judge for the recovery of damages by one claiming to have been injured by judicial action within the scope of the judge's jurisdiction. [*State ex rel. Fisher v. Burkhardt* (1993) 66 Ohio St. 3d 189, 610 N.E.2d 999;] Likewise, a judge cannot be held liable for actions taken that are within the judge's discretion.

The immunity applies even when the judge is accused of acting maliciously. [*Kelly v. Whiting* (1985), 17 Ohio St. 3d 91, 477 N.E.2d 1123]. Conversely, in order to be subject to civil liability, the judge must lack jurisdiction, either personal or subject matter, and take some action in a judicial capacity violating the rights of a party to the lawsuit, and if he or she has requisite jurisdiction over the controversy, the judge is immune from liability even though the judge's acts are voidable as taken in excess of jurisdiction.

"Excess of jurisdiction" as distinguished from the entire absence of jurisdiction, means that the act, although within the general power of the judge, is not authorized and therefore void, because conditions which alone authorize the exercise of judicial power in the particular case are wanting and judicial power is not lawfully invoked. If, on the facts before him, a judge has no competence to deal with the matter at all and nevertheless does so, the judge acts without jurisdiction, but if, having authority to deal with it on one footing, the judge deals with it on another, the judge acts in excess of jurisdiction. An excess of jurisdiction is simply an absence of jurisdiction as to part of the proceedings. [*Stahl v. Currey*, (1939) 135 Ohio St. 253, 14 Ohio Op. 112, 20 N.E.2d 529]. Where a judge of a court of either general or limited jurisdiction acts in a judicial capacity and has jurisdiction of the person and the subject matter, an act or judgment in excess of such jurisdiction is voidable only and not void, and while it may constitute reversible error, the judge or magistrate is not required to respond in damages for the error. [Id.]. A judge will not lose immunity because of a mere error in judgment, even though the resultant act is in excess of the court's jurisdiction. Thus, judges of municipal or mayors' courts are not liable to civil actions for their judicial acts where jurisdiction exists over the subject matter and the defendant, even though such acts are in excess of their jurisdiction and are alleged to have been done maliciously or corruptly.

The little-noticed provision of the Federal Courts Improvement Act of 1996 now prohibits the assessment of attorney fees and costs against judges in civil rights cases for actions taken in their judicial capacity "unless such action was clearly in excess of such officer's jurisdiction." It also prohibits prospective injunctive relief against judges "unless a declaratory decree is

violated or declaratory relief was unavailable.” [Immunity Still Not Absolute, Judges Lament, Jean Guccione, Daily Journal Senior Writer, Los Angeles Daily Journal, 05-15-97, P. 1].

CATEGORIES OF RISK UNDER THE DOCTRINE OF JUDICIAL IMMUNITY

Since the scope of judicial immunity does not absolutely preclude the risk of civil liability, a judge might pursue four options to manage the residual risk: “risk avoidance, risk retention . . . [risk] control and risk transfer.”

Choosing among these options requires a judge to first perform an analysis of the residual risk. Judges face six categories of risk under current judicial immunity doctrine:

1) “Nonjudicial Act Peril”: damage awards or settlement amounts arising from any official but nonjudicial act, such as improperly firing a court clerk;

2) “Unofficial Act Peril”: damage awards or settlement amounts arising from wholly unofficial acts undertaken while on the job, such as assaulting a witness during trial;

3) “Criminal Act Peril”: damage awards or settlement amounts arising from criminal acts undertaken while on the job, such as conspiring to accept bribes in return for favorable holdings;

4) “Defense Fees Peril”: attorney’s fees incurred to defend against both valid and spurious allegations connected with the Nonjudicial, Unofficial, and Criminal Act Perils, as well as attorney’s fees still necessarily incurred to defend against easily dismissed claims stemming from an immunized judicial act;

5) “Misconduct Investigation Peril”: attorney’s fees incurred to defend against any claims of judicial misconduct brought by a judicial conduct review board or disciplinary commission; and,

6) “Attorney’s Fees Award Peril”: attorney’s fees awards to plaintiffs bringing successful equitable actions under the Civil Rights Act, as in *Pulliam*.

Several arguments can be made in favor of and in opposition to state indemnification of the judge against each peril.

Defense Fees Peril. This peril represents little risk for most judges, since nearly all jurisdictions provide legal representation to judges when they are sued in their official capacities. Thus, the only risk under the Defense Fees Peril would be legal defense fees incurred when a judge is sued for unofficial misconduct; that is, for alleged criminal or tortious acts committed while on the job. Non-trivial allegations of this sort of judicial behavior are unusual, as one would hope. Since the vast majority of judges do not engage in the conduct that might cause such lawsuits, the Defense Fees Peril represents little risk to the typical judge.

Nonjudicial Act Peril and Attorney's Fees Award Peril. These two risks have both represented little danger historically. Just as most jurisdictions provide resources to relieve judges from paying defense fees, states have indemnified their judges, even in the absence of a legal obligation, from liability for damages or attorney's fees awards arising from their official acts. States have either paid for such awards against judges because of tort claims statutes or other judicial indemnification statutes, or simply as a matter of unwritten policy. Furthermore, it is not unusual for courts to simply find judges totally immune from liability even though the judge's act was official but not judicial. Consequently, both the Nonjudicial Act Peril and the Attorney's Fees Award Peril represent virtually no risk of civil liability to the average judge.

Unofficial Act Peril, Criminal Act Peril, and Misconduct Investigation Peril. State indemnification normally does not alleviate these risks. Where damages or settlement amounts for assaulting a witness or accepting a bribe are awarded against a judge, the judge will normally have to bear the cost personally. Similarly, the state is not apt to offer to pay the fees of the defense attorney for a judge who is the subject of disciplinary proceedings. Therefore, the risks attending these three perils ultimately remain with the judge.

The Misconduct Investigation Peril to some extent reiterates the risk represented by the Defense Fees Peril, however, because an unsuccessful defense against allegations of criminal behavior will normally make unnecessary any misconduct investigation. More importantly, the vast majority of judges will not behave in such a way that a misconduct investigation by a disciplinary body will occur. Likewise, few judges will ever pay damages because of misconduct in office. To most judges the Unofficial Act Peril, Criminal Act Peril, and Misconduct Investigation Peril represent a fairly insignificant risk of civil liability.

SUMMARY

Due to judicial immunity protections and voluntary or statutory state risk absorption, the risk of civil liability retained by judges is deceptively low. This suggests that the choice of risk avoidance is inappropriate; judges managing their risk intelligently should not leave office due to fears about their exposure to civil liability. This leaves the options of risk transfer and risk retention. A reasonable judge might choose to insure against the risk of incurring civil liability, or instead choose to accept the risk and pay for any liability that might arise. The determination depends on how the cost of judicial malpractice insurance compares with the civil liability that a typical judge incurs.

The price of judicial malpractice insurance determines whether its purchase is an appropriate response to the potential for liability. An efficient price for judicial malpractice insurance directly reflects the sum of three elements: the average cost of the risk insured against, the expense involved in administering the insurance, and a reasonable profit.

An argument can be made, however, that the state should absorb the Defense Fees Peril from its judges only through the use of state-appointed counsel, not state-paid insurance. Counsel provided by the insurance company will not have “the effect of providing greater state supervision over judicial conduct in state courts . . . [which] would . . . provide greater assurances that judges exercise their judicial offices with propriety.” Thus, employing private sector attorneys instead of state employees to defend state judges could lead to inappropriate attempts at risk control. The insurance company will be more concerned with teaching judges to avoid any conduct that might lead to a lawsuit, while the state would more properly be concerned only with teaching judges to avoid unconstitutional conduct. In sum, the use of public funds to relieve judges from the burden of defending against mostly frivolous claims may be a valid expenditure, but buying insurance is not an appropriate means of relieving this burden.

Nonjudicial Act Peril. Like criminal acts or unofficial misconduct, little justification exists for the state to pay to insure against a judge’s liability for improper official acts. Racial, sexual, or religious discrimination in hiring or firing is the archetypal nonjudicial act. The state can properly supply legal defense costs against this type of claim. If the claim is proved valid, however, no public policy argument supports protecting the judge from liability. The existing parameters of judicial immunity allow the liability of a judge for improper official acts. To

hold judges personally liable for disregarding anti-discrimination policies and then to relieve them of that liability via state-paid insurance is inconsistent. Judges who are uncomfortable with exposure to this risk should pay to insure against the risk themselves.

SOURCES

Jeffrey M. Shaman, *Judicial Immunity from Civil and Criminal Liability* (1990), 27 San Diego Law Rev. 1;

David R. Cole, *Judicial Malpractice Insurance? The Judiciary Responds to the Loss of Absolute Judicial Immunity* (1990), 41 Case W. Res. L. Rev. 267;

22 Ohio Jur.3d, *Courts and Judges*, Sections 109-111; 218.

Disciplinary claims

- “Contingent” coverage
- \$20,000 limit
- Judge must re-pay if disciplined
- Can be expensive to defend
- Significant reserve expense
- Insurer can recover defense costs from judge if disciplined

Employment-related claims

- Violation of federal or state employment law
- Ex. wrongful termination, discrimination, harassment
- \$40,000 limit per claim
- Expensive to defend
- Most likely to result in damages

Other civil claims

- Civil claims such as civil rights violation or violation of constitutional rights
- Coverage only if money damages — mandamus and prohibition not included
- ¾ of all claims filed in this category
- No case has proceeded to trial or judgment against judge in past 12 yrs

Criminal claims

- Private citizen claims
- Constitutionalsists?

APPENDIX B

STATE COMPARISON OF JUDGE LIABILITY PROGRAMS

State	Judges Represented in Lawsuits	Source	Limits	Judges Represented in Disciplinary Matters	Source	Limits
Alaska	Yes	AG; some special counsel paid by state-created risk pool	Act must be within scope of official duties	Yes	Private counsel; cost reimbursed by state-created risk pool	Alleged misconduct must have occurred within scope of official duties
Arizona	Yes	AG	None noted	No	N/A	N/A
California	Yes	AG; private counsel, county counsel. Paid by Judicial Council, Litigation Management Program	Act outside scope of employment; actual fraud, corruption, or malice; defense would create conflict of interest between public entity and judge	Yes	Master insurance policy paid by Judicial Council	\$1M/claim; representation limited for complaints that also are subject of criminal proceedings, certain voting rights issues, and allegations of sexual assault or sexual harassment
Hawaii	Yes	AG; Settlement on judgment in excess of \$10K subject to Legislative appropriation. Private counsel may be obtained in conflict situations.	None noted	No	N/A	N/A
Indiana	Yes	AG; private counsel for conflicts	None noted	No	N/A	N/A
Kansas	Yes	AG; private counsel in some cases	Outside scope of employment; actual fraud or malice.	No	N/A	N/A

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Maine	Yes	AG; judiciary pays annual premium of \$55/judge to state's risk management program	\$400K for state; \$10K per occurrence for judge	No	N/A	N/A
Michigan	Yes	AG; some private counsel employed by local courts. In latter case, cost is paid by local funding authority	Representation usually limited to claims for monetary damages.	No. But, some local jurisdictions have funded cost of representation, although this is discouraged.	N/A	N/A
Minnesota	Yes	AG	Alleged act must be within scope of employment	No	N/A	N/A
Mississippi	Yes	AG; Judiciary also pays premium in \$1M insurance policy (judge must pay deductible)	None for AG; insurance policy includes unspecified exclusions.	Yes; through insurance policy	Judiciary pays premium; judge must pay deductible.	Insurance policy includes unspecified exclusions.
Missouri	Yes	AG provides representation; damages covered by state liability risk fund	AG has discretion as to whether risk fund and AG will undertake representation.	No; some judges apparently obtain insurance at own expense.	N/A	N/A
Nebraska	Yes	AG	Claim must arise out of official duties	No	N/A	N/A
Pennsylvania	Yes	State AOC, litigation section	Claim must arise within scope of judicial duties	No	In exonerated, judge may be reimbursed for attorney fees incurred in defending action.	
Rhode Island	Yes	Judge can be represented by AG or Judiciary general counsel. Insurance may approve private counsel and will pay cost of deductible.	No coverage for criminal acts, bodily injury or property damage, conflict with outside activities; collective bargaining or labor matters.	Yes	Private counsel approved by insurance	Same as in nondisciplinary matters.

South Carolina	Yes	AG or private counsel. Private counsel paid by Judiciary or State Insurance Reserve Fund	No limits on defense costs; damages are limited.	No	N/A	N/A
South Dakota	Yes	AG; state employee liability fund; insurance policy	\$1M/claim; \$1M/judge (annual)	Yes	Insurance exists but judges generally secure and pay cost of counsel	Same as in nondisciplinary matters
Tennessee	Yes	AG	No limit on representation; damages paid only if act is within scope of official duties	No	N/A	N/A
Texas	Yes	AG	No limit if judge was acting in official capacity	No	N/A	N/A
Utah	No	N/A	N/A	No	N/A	N/A
Vermont	Yes	Insurance with some representation by AG. State pays cost of insurance.	No	Yes	Insurance policy	No
Wisconsin	Yes	AG; outside counsel at Judiciary expense if AG has conflict	No	No	N/A	N/A
Washington	Yes	AG or local government attorney	Claim must arise from judicial activities or other official acts	No	N/A	N/A
Wyoming	Yes	AG	None	No; judge must retain and pay for counsel		



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