PART I

1. Under what circumstances may a judge be liable (in damages) for
   (a) errors contained in a judgment
   (b) defamatory utterances made in court, or defamatory statements contained in a judgment
   (c) (undue) delays
   (d) poor functioning of the court administration
   (e) other behaviour in the performance of his office

The general principle in Australia is that no action may be brought against judges for acts performed in the course of hearing or deciding cases which come before them. This rule is absolute when a judge acts within jurisdiction and is effective where a judge lacking jurisdiction acts in good faith in the performance of a judicial duty. It also applies to the non-judicial functions of a judge provided that an act done is intimately or immediately associated with a judicial function.

It has been argued that immunity should be lost only in “circumstances where the lack of jurisdiction is so clear that it indicates not just error of fact, law or jurisdiction but a deliberate abandonment of the judicial function”. To determine whether there is an arguable case of such abandonment, it may be necessary to consider the nature of the acts complained of and whether they are such as may be normally performed by a judicial officer acting in his judicial capacity. For example, a family court judge who dealt with a traffic conviction in his court would be acting without jurisdiction and would have difficulty arguing that his obvious error was not deliberate.

The High Court of Australia has not ruled directly on the principle of judicial immunity, but comments in several cases make it clear that the principle is accepted in Australia to the extent that it exists in England.

Kirby P (as he then was, now a Justice of the High Court) in Rajski v Powell (1987) 11 NSWLR 522 said at 527-8:

“It is a fundamental principle of our law that a judge of a superior court is immune from civil liability for acts done in the exercise of his judicial function or capacity. Such immunity rests...upon considerations of public policy. Its object is not to protect judges as individuals but to protect the interests of society. The purpose of the rule is to preserve the integrity, independence and resolve of the judiciary and to ensure that justice may be administered by such judges in the courts, independently and on the basis of their unbiased opinion – not influenced by any apprehension of personal consequences.”

1 Laws of Australia Law Book Company at Volume 19.4 [40]
2 ibid
3 For example in Queensland: “A judge has, in the performance or exercise of an administrative function or power conferred on the judge under an Act, the same protection and immunity as a judge has in a judicial proceeding in the court.”: Supreme Court of Queensland Act 1991 (QLD) Section 27AA
4 Rajski v Powell (1987) 11 NSWLR 522 at 535
5 ibid
6 op cit 4 at 536
7 op cit 4 at 534
Personal conduct of a judicial officer (that is, non-judicial conduct) is not entitled to immunity from suit. For example, see the case of O’Connor v The State of South Australia (1976) 14 SASR 187 where a Judge of the Local and District Court was found partly negligent for inadvertently opening a court door with excessive force and injuring a court stenographer standing behind the door. (It was alleged that the judge was a servant, agent or employee of the State of South Australia. This allegation was admitted for the purpose of this proceeding but there is no general principle to that effect in our law.)

“If a judge were to accept a bribe and enter judgment for the party who offered such inducement, that judge would remain immune from suit for damages occasioned by his judicial act. But he or she would be liable to the criminal law for the offences constituted by the taking of the bribe. Liability to removal from office would also follow. But the judicial act, being within jurisdiction, would be immune from suit. ...A judge who, in a newspaper interview, made comments upon a pending or current trial would render himself or herself liable to proceedings for contempt of court. But such proceedings, although brought against a person who was a judge, would be concerned with activities having nothing to do with the judge’s judicial functions.”: Yeldham v Rajski (1989) 18 NSWLR 48 per Kirby P at 58-59.

There are other avenues available to disappointed litigants, or to society at large:
- An appeal from the decision
- Judicial review of the decision
- Prerogative writs or orders in the nature of prerogative writs
- Criminal charges against the judge where an offence has been committed
- Judges of most states may be removed by the Crown on any ground upon an address by Parliament. Federal judges may be removed by the Commonwealth parliament for “proved misbehaviour or incapacity”.
- In only one of the states of Australia (New South Wales), judges may be censured or removed by a Judicial Conduct Commission established under the Judicial Officers Act 1986 (NSW).

None of these alterative avenues comprehends a judge being liable in damages.

In England, a superior court judge has absolute immunity from civil liability for all judicial acts unless he deliberately or recklessly acted “without any show or colour of right”. Inferior courts, on the other hand, enjoy absolute immunity only when acting within jurisdiction. It appears that immunity may survive when the judge acts outside jurisdiction as a result of a mistake of facts, but immunity does not survive when such an act results from a mistake of law. This area of the law is still not settled in England. In Australia, the differences in immunity between superior and inferior court judges has not been discussed in any detail. Australian courts would not be bound by the English position but it is open to them to consider these principles as persuasive.

(a) errors contained in a judgment
Writing reasons for judgment is a judicial act. There will be no liability for damages for errors in the judgment unless the judge has deliberately acted without jurisdiction.

(b) defamatory utterances made in court, or defamatory statements contained in a judgment
A handful of English and Australian cases have supported the principle of judicial immunity in the context of defamation and other civil wrongs allegedly resulting from a judicial act: Scott v

Immunity for defamation during court proceedings appears to be stronger than immunity for other judicial acts including judgment writing. Words spoken during court proceedings are not subject to careful and meticulous scrutiny, therefore considerations such as bad faith, motive and excess of jurisdiction are not relevant. Furthermore, immunity for defamation in court proceedings extends to others:

“For freedom of utterance has always been considered indispensable to the administration of justice, and therefore, persons acting judicially, advocates and witnesses alike receive absolute protection for what they say.” Gibbons v Duffell (1932) 47 CLR 520 at 525.

Judicial immunity will not extend, however, to a defamatory statement made by a judge that has no connection whatsoever with the case at hand as this would not be a judicial act.

(c) (undue) delays
A judge will not be liable in damages for undue delays in proceedings as this is part of the judicial process. Other remedies are available. A couple of years ago, an address to parliament was made to remove a State Supreme Court judge for delays in delivering judgments. The attempt to remove the judge was not successful.

(d) poor functioning of the court administration
Judges or chief judges may not be held liable for the poor functioning of the court administration. However administrative functions of courts may give rise to legal proceedings involving the State. For example:

“Any judicial or other proceedings relating to matters arising out of the administration of the affairs of the High Court under section 17, including any proceedings relating to matters arising out of the performance of the functions or the exercise of the powers of the Chief Executive and Principal Registrar under this Act, may be instituted by or against the Commonwealth, as the case requires.”: High Court of Australia Act 1979 (Cth) Section 45.

(e) other behaviour in the performance of his office
The existence of immunity depends on whether the behaviour falls within the concept of judicial acts. Deliberately acting outside jurisdiction may not attract immunity.

2. Does liability in these cases lie with the judge in person or with the State? Could the judge, if held liable, recover the sum for which he is liable from the government (or vice versa)?

Even if there were liability in damages, there is no defined relationship of liability between judges and the State. It is fundamental to Australia’s constitutional arrangement that judges are completely independent of the Executive Government.

There is no relationship of employment or agency, even though the Attorney-General (a member of the Executive Government) normally leads the process of selecting judges and exercises certain
administrative responsibilities for courts and judicial officers.\textsuperscript{13} The principle of vicarious liability that exists between employer and employee is based on the notion that the employer has the power to direct and control the employee. It is fundamental to our system that the Executive Government have no such power over judges.\textsuperscript{14}

Neither does the Crown, Attorney-General, or the Executive Government provide any indemnity to judicial officers. Having to defend claims for damages would place a serious burden on judges.\textsuperscript{15}

3. If liability lies with the judge in person, is a liability insurance usual, compulsory, or provided by the government?

In light of the answer to Question 2, this question is not applicable.

4. In your opinion do the rules governing the liability of judges in any way jeopardize their independence? Are these rules otherwise satisfactory?

The present rules governing liability of judges for damages provide generous protection to judges in comparison to other legal systems such as Italy and Spain.\textsuperscript{16} There are several considerations justifying the present rules including protection from liability for honest mistakes, the presence of alternative remedies, the need for finality, the protection of judges from the burden of litigation and independence of the judiciary from political and other interference.\textsuperscript{17}

5. Are there any plans for reform?

There are no plans to introduce civil liability for judicial acts by judges to be borne by the judge himself or the State.

There have been calls to reform the judiciary in terms of its efficiency by imposing mandatory performance standards.\textsuperscript{18} It is unlikely that any such standards will be imposed in the near future.

Draft guidelines have been released for a judicial code of conduct providing advice on general conduct, public behaviour and public utterances especially involving politically sensitive issues that may come before the courts.\textsuperscript{19} These guidelines, if adopted, could be voluntary, or prescriptive as in most American jurisdictions. Based upon our traditions and attitudes in respect of the judiciary, a voluntary code of conduct would have a greater chance of achieving wide acceptance by our political institutions.

On 13 March 2002, the Prime Minister of Australia indicated that he would act on a two-year-old recommendation of the Australian Law Reform Commission that a special committee be established to report on the misbehaviour or incapacity of a federal judge before steps are taken to remove that judge by an address to the Commonwealth Parliament.\textsuperscript{20}

\textsuperscript{13} ibid  
\textsuperscript{14} ibid  
\textsuperscript{15} op cit 4 at 535  
\textsuperscript{16} op cit 8 at 210 & 219.  
\textsuperscript{17} op cit 8 Chapter 6  
\textsuperscript{20} Wright S, “Revamp for complaints procedure” The Courier Mail 14 March 2002.
PART II

6. Which subjects would you like to discuss in detail?

No preference.

PART III

7. What changes in the law on this subject do you suggest?

The present law in Australia on the liability of judges is regarded as satisfactory. Any change would encourage collateral attacks on final judgments. The present mechanisms available for the correction of judicial misbehaviour or error are considered adequate and appropriate.
PART IV


Why not: The civil liability of lawyers for
(i) conduct in court;
(ii) conduct associated with court work; and
(iii) legal but non-court conduct?

9. What is your opinion on the present experiment of including cases for discussion, with a shorter questionnaire? Would you prefer to return to the former practice of a longer questionnaire without a case, or do you have other suggestions?

The present is the preferable regime.