INTERNATIONAL ASSOCIATION OF JUDGES

2ND STUDY COMMISSION

45TH ANNUAL MEETING: ABIDJAN

UNITED KINGDOM RESPONSE
to
QUESTIONNAIRE
on
CIVIL LIABILITY OF JUDGES

Question 1(a): Errors in a Judgment

In answering this branch of question 1 it is appropriate to observe at the outset that in the historical development of the law in each of the legal systems within the United Kingdom, a distinction emerged between (a) the position of judges of the superior courts, appointed by the Monarch and (b) the position of inferior magistrates or justices, such as those appointed by a local authority or the Lord Chancellor. That distinction was material where the error in a judgment or decision consisted in a decision or order resulting in the imprisonment of the citizen or the confiscation of his property and that decision or order was outwith the powers or jurisdiction of the inferior magistrate.

Judges of the superior courts include, in England and Wales, not only judges of the appellate courts but also first instance judges sitting in the High Court of Justice and in the Crown Court. In Scotland the concept includes not only judges sitting in the Supreme Courts in Scotland but also all persons holding judicial office in the sheriff courts. In the case of such judges the general principal that they enjoy full immunity from claims for damages or other liability respecting any erroneous decision taken, or order pronounced, by them while acting in their capacity as judges.

That immunity is a wide one and applies even if the erroneous decision or act were outwith the judge's powers or competence. Consistently with that wide immunity a judge is not liable in damages for a decision which is based upon an erroneous
assessment or appreciation of the facts or evidence, or which involves a mistaken
interpretation or application of the law. It is also not a ground of liability that in
reaching an erroneous decision within his powers the judge was motivated by malice or
spite, or otherwise reached his decision in bad faith. However, the immunity does not,
extend to a judge who does an act known by him to be outwith his powers when acting
maliciously and in bad faith (in Re McC [1985] 1 A.C. 528, per Lord Bridge at 540G-H.)

The existence of such a far-reaching refusal to contemplate claims for damages arising
out of erroneous judicial decisions by superior judges is traditionally justified by various
considerations generally reflective of the need for judicial independence. Thus, in
constitutional terms, since such judges are appointed by the Crown – that is to say the
State – and may only be removed from office by Parliament in the event of misbehaviour
(or on other limited grounds) the remedy of the litigant complaining of misbehaviour is to
invoke that procedure for removal of office. That viewpoint was expressed in McCreadie
v Thomson 1907 S.C. 1176, 1182 thus:

“Upon the question of immunity of the Judges of the Supreme Court there can be
no doubt. The principle is clear and the decisions are emphatic. The principle is
that such Judges are the King’s Judges directly, bound to administer the law
between his subjects, and even between his subjects and himself. To make them
amenable to actions of damages for things done in their judicial capacity, to be
dealt with by Judges only their equals in authority and by juries, would be to
make them not responsible to the King, but subject to other considerations than
their duty to him in giving their decisions, and expose them to be dealt with as
servants not of him but of the public. Accordingly the remedy in this case, if they
flagrantly offend against duty is not by proceedings at in any Court but only by
addresses to the Crown from the Houses of Parliament. Between their position
and that of Judges appointed not by the King but by the community or some
authority in the community not having the kingly prerogative, but acting by a
delegated authority for local administration, as in the case of Justices of the Peace
appointed by the Lord Chancellor, there is no analogy.”

A further justification is the practical one that were judges to be liable in damages for
erroneous decisions and consequently liable to be confronted with and have to defend
such claims, even if ill-founded, the independence of the judge would be greatly
undermined. As it was put by Viscount Stair in his Institutions IVi5, after having made
reference to the recourse to the King for removal of a judge, “otherwise no man but a
beggar, or a fool, would be a judge”. A further consideration is of course that actions of
damages, either directly or vicariously, respecting a judge's decision involve a re-visiting of the issues earlier considered and determined by the court.

Historically, inferior magistrates sitting in criminal cases might be liable in damages were they to hear a case outwith their jurisdiction and competence or, having properly convicted an accused, sentence him to imprisonment when they had no power to do so. The position prevailing in Scotland in 1907 was set out in *McCreadie v Thomson* in a passage quoted by the House of Lords in *Re McC* as being consistent with the law then applicable in England and Wales and in Northern Ireland –

“...it is a totally different question whether a magistrate who when sitting as such does official acts which he has no power to do under a statute in accordance with which he is bound to act, and which judicial acts have the effect of restraining the liberty of the subject, and subjecting him to penalty in his person, is immune from civil consequences for the wrong he has done. I do not think that this has ever been held, and the opposite has been held in many cases. Where a Magistrate, professing to sit as such, and dealing with a case which he has no jurisdiction to deal with at all, commits what is an undoubted wrong upon a citizen, both by principle and practice he is held liable for the wrong done. If that is so, can it be said that a Magistrate who has before him a case which he can competently try under an Act of Parliament on which the [the criminal charge] is founded, and who, instead of dealing with the case as it is before him, and on conviction awarding such punishment as the [legislation] prescribes and allows, proceeds knowingly to pronounce a sentence which is not competent under the [legislation] and thereby sends a person to prison contrary to the [legislation] – I say, can it be said that he is in any more favourable position than a Magistrate trying a case in circumstances where he has no jurisdiction? In the one case his sentence is illegal, because he has no [criminal charge] before him on which he can pronounce a sentence at all. In the other he has a [criminal charge] before him on which he cannot pronounce the sentence which he does pronounce. The wrong is as great in the latter case as in the former...”.

That divergence or discrepancy between the liability of inferior and superior judges was subsequently restricted by legislation. In Scotland, legislation was introduced to the effect that the liability of the inferior magistrate would only arise if the party claiming damages had suffered imprisonment; the sentence of imprisonment had been quashed; and the person concerned proved malice and absence of any reasonable cause on the part of the inferior magistrate. Further protection for the inferior magistrate was
contained in a provision that the claim for damages would be defeated were the
magistrate defending such a claim to show that the claimant was in fact guilty of the
offence of which he had been convicted. A further provision imposed a strict two month
time limit on the bringing of such proceedings. Similar, though not identical, statutory
protections were also provided in legislation in England and Wales and Northern Ireland.

The distinction between superior and inferior judges and the tension between their
separate liabilities resulting in efforts by the legislature to reduce the discrepancy is
perhaps reflective of some of the difficulties involved in the striking of a balance between
the need for judicial independence and the interests of the citizen who is the subject of a
wrongous judicial decision.

However subject to one recent qualification, since nearly all legally qualified professional
judges are to be found within the category of the “superior judges” the practical position
may be roughly summarised by saying that a professional judge in the United Kingdom
is not liable to be sued for any decision taken by him while acting in his judicial capacity
other than in the exceptional case of a decision taken outwith his powers, for a malicious
or spiteful motive.

The qualification to which reference has just been made flows from the Human Rights
Act 1998 which rendered most of the provisions of, an protocols to, the European
Convention on Human Rights directly applicable in the legal systems of the United
Kingdom. Section 9(3) of the Human Rights Act contemplates an award of damages
respecting a judicial decision, where that is necessary to compensate for that decision
having resulted in the arrest or detention of the citizen in contravention of the provisions
of Article 5 of the Convention relating to the arrest and detention of citizens.

**Question 1(b): Defamatory Utterances in Court or in a Judgment**

It is well established in all of the legal systems of the United Kingdom that any judge –
including for these purposes any inferior magistrate or any tribunal – enjoys absolute
privilege in what may be said by him while acting in a judicial capacity. It is immaterial
whether the judge may have been acting from malicious motives or in bad faith. The
sole test is whether what was said was spoken or written while acting in the exercise of
his judicial function. Provided that the judicial function test is satisfied, the extremity of
language used does not matter, the freedom to express views being seen as essential to
judicial independence. The justification is not that a judge should be at liberty to act
maliciously or in bad faith but that those acting as judges would be impeded in their functions were they to be exposed to the mere possibility of claims for defamation on the basis that they were allegedly acting maliciously and in bad faith. Thus, even “inferior judges” are not liable

“for words used, however severely they may comment on the conduct of individuals, provided such words are uttered where acting in the exercise of their magisterial functions. ...The principle of this is that the right to express himself clearly in dealing with matters before him must not be hampered by apprehension that he may be sued in a civil court and subjected to damages, as if what he said had been uttered by him as an ordinary citizen not acting in a public judicial capacity, the words being uttered for what presumably at the time seemed to him to be good and just cause.” [McCreadie v Thomson, 1183]

The need for such immunity from liability to claims for damages was emphatically established in England in Scott v Stansfield (1868) LR 3 Ech. 220, in a decision subsequently accepted in Scotland, in which absolute protection against liability for claims of defamation was upheld in circumstances involving extreme language and clear allegations of malice and ill-will.

**Question 1(c): Delays**

It has never been contended that a judge should be liable for loss or damage resulting from excessive delay in the issuing of his judgment or in the prior course of the litigation.

**Question 1(d): Poor Functioning of the Court Administration**

There is no mechanism for compensating litigants who are prejudiced by the malfunctioning or inadequacy of the court administration. An attempt, in Scotland, to have the State found liable for the costs involved where a case could not proceed on the appointed day by reason of the judge’s absence on holidays failed – Meekison v Uniroyal Englebert Tyres Ltd 1995 S.L.T. (Sh. Ct.) 63 - but it has to be observed that in that case what was sought was an order for expenses against the State within that process, the State not being a party to that particular process and that constituted the primary ground for rejection of liability.
**Question 1(e): Other Behaviour in the Performance of his Office**

Consistent with the foregoing answers, provided that a judge is acting within his judicial capacity, performing the duties of his office, he is not exposed to any other liability.

**Question 2:**

Any liability arising under the Human Rights Act 1998 is vicarious in the sense that the appropriate authority – the State – must accept liability. Otherwise there is no provision for the vicarious liability of the State.

**Question 3: Liability Insurance**

Liability insurance is neither compulsory nor usual.

**Question 4: Jeopardisation of the Independence of the Judiciary**

The whole thrust and development of the law within the United Kingdom has been towards ensuring the independence of the judiciary by avoiding their being liable in damages for their decisions or their utterances.

**Question 5: Reform**

There are no plans for reform.

**Question 6:**

[to be advised]

**Question 7:**

[to be advised]
**Question 8:**

[to be advised]

**Question 9:**

[to be advised]