Recent Development

Torts—JUDICIAL IMMUNITY—Judge's erroneous grant of a sterilization petition held not in clear absence of jurisdiction and therefore entitled to the defense of judicial immunity. *Stump v. Sparkman*, 46 U.S.L.W. 4253 (U.S. Mar. 28, 1978).

In *Stump v. Sparkman*,[1] the United States Supreme Court rendered its first major decision on the scope of judicial immunity in more than a century.[2]

In 1971, a mother presented to an Indiana circuit court judge a petition seeking to perform a tubal ligation on her fifteen-year-old daughter. The judge approved the petition in an ex parte proceeding without notice to the daughter, without the appointment of a guardian ad litem, and without a hearing.[3] Five years after the operation, the daughter brought a damage suit against the judge in federal district court under 42 U.S.C. § 1983,[4] for alleged deprivation of her constitutional rights. The district court dismissed the action on the grounds that the judge was immune from liability under the doctrine of judicial immunity.[5] The Seventh Circuit Court of Appeals reversed the judgment of the district court, holding that the judge

---

[1]46 U.S.L.W. 4253 (U.S. Mar. 28, 1978).

[2]Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872).

[3]46 U.S.L.W. at 4254, 4256. The minor had been told that the operation was for the removal of her appendix. *Id.* at 4254.

[4]Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 creates, in effect, a federal tort action against any state officer who, under color of state law, deprives a person of his constitutional or federal rights. The test for color of state law in a civil suit against a judge is whether the judge is representing the state and wearing its badge of authority. Monroe v. Pape, 363 U.S. 167, 172 (1961); Lucarell v. McNair, 453 F.2d 836, 838 (6th Cir. 1972). Under § 1983, the scope of a judge's immunity is a question of federal, not state, law. Garfield v. Palmieri, 279 F.2d 526 (2d Cir. 1962); Nelson v. Knox, 256 F.2d 312 (6th Cir. 1958). In Pierson v. Ray, 386 U.S. 547, 554 (1967), the Supreme Court determined that § 1983 is subject to the doctrine of judicial immunity. Thus, the standard enunciated in *Stump* determines the liability of a state court judge who has been sued under § 1983. In addition, most states have adopted the doctrine of judicial immunity as it was first established by the Supreme Court in Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872). The *Stump* Court opinion is essentially a modern application of *Bradley* principles.

[5]Sparkman v. McFarlin, Civil No. F 75-129 (N.D. Ind. May 13, 1976), *rev'd*, 552 F.2d 172 (7th Cir. 1977), *rev'd sub. nom.* Stump v. Sparkman, 46 U.S.L.W. 4253 (U.S. Mar. 28, 1978).

had acted outside of his jurisdiction and had failed to comply with principles of due process.[6]

The Supreme Court held that the circuit court judge had performed a judicial act that was not in clear absence of all jurisdiction,[7] and he was therefore entitled to judicial immunity.[8] The Court's opinion focused on two critical aspects of the doctrine of judicial immunity: The concept of jurisdiction and the judicial act requirement. The Court's interpretation of these terms determined the extent of a judge's immunity from civil liability.

I. JURISDICTION ANALYSIS

The Supreme Court set forth its last major interpretation of the doctrine of judicial immunity in 1872 in *Bradley v. Fisher.*[9]

> [J]udges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are *in excess of their jurisdiction*, and are alleged to have been done maliciously or corruptly. A distinction must be here observed *between excess of jurisdiction* and the *clear absence of all jurisdiction over the subject matter.*[10]

Bradley has since been universally accepted as establishing the governing principles of the doctrine. Before concluding that Judge Stump was immune from civil liability, the Supreme Court scrutinized his jurisdiction over the petition for sterilization. This inquiry was to determine whether the judge had acted in clear absence of all jurisdiction.[11]

In analyzing Judge Stump's jurisdiction, the Court first examined the statutory authority vested in an Indiana circuit court judge. Under Indiana law, such a judge has "original exclusive jurisdiction

---

[6]Sparkman v. McFarlin, 552 F.2d 172, 176 (7th Cir. 1977), *rev'd sub nom.* Stump v. Sparkman, 46 U.S.L.W. 4253 (U.S. Mar. 28, 1978).

[7]46 U.S.L.W. at 4255.

[8]*Id.* at 4257.

[9]80 U.S. (13 Wall.) 335 (1872).

[10]*Id.* at 351 (emphasis added). To illustrate the distinction between "excess" and "clear absence" of all jurisdiction, the *Bradley* Court contrasted the following hypotheticals. The first involved a probate court judge whose jurisdiction was limited to wills and estates. If such a judge were to assume jurisdiction over criminal matters and proceeded to try a defendant for a public offense, his acts would be in clear absence of all jurisdiction and would subject him to civil liability. The second example involved a judge with general jurisdiction over criminal offenses. If that judge were to convict and sentence a defendant for a nonexistent crime, his acts would be merely in excess of his jurisdiction. *Id.* at 352.

[11]Stump v. Sparkman, 46 U.S.L.W. 4253, 4255 (U.S. Mar. 28, 1978); Imbler v. Pachtman, 424 U.S. 409, 418 (1976); Pierson v. Ray, 386 U.S. 547, 554 (1967).

in all cases at law and in equity whatsoever . . . and in all other proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer."[12] The Court then noted that a now-repealed Indiana statute expressly authorized sterilization, but only upon institutionalized persons.[13] The Court rejected the contention that these statutes implied that a circuit court was without jurisdiction to consider a petition for sterilization in other circumstances.[14] The Court stated that the statutes do not warrant the inference that a court of general jurisdiction cannot entertain such a petition when brought by the parents of a minor.[15] In concluding its analysis, the Court held that, since there was no case law or statute expressly proscribing the court's power to consider a petition for sterilization, the defendant did not act in clear absence of all jurisdiction.[16]

A more precise understanding of jurisdiction, as used in the context of judicial immunity, emerges from the Court's application of the *Bradley* principles. First, the Court unequivocally held that whether a judge is within the ambit of immunity depends on his jurisdiction over the subject matter.[17] The term "subject matter jurisdiction" refers only to the authority of a court to decide a particular type of case—*i.e.*, criminal, adoption, probate of an estate, or divorce.[18] Thus, a judge presiding over an action within the general

---

[12]IND. CODE § 33-4-4-3 (1976). This section also provides:

> Said court shall have original exclusive jurisdiction in all cases at law and in equity whatsoever, and in criminal cases and actions for divorce, except where exclusive or concurrent jurisdiction is, or may be conferred by law upon justices of the peace. It shall also have exclusive jurisdiction of the settlement of decedents' estates and of guardianships: Provided, however, That in counties in which criminal or superior courts exist of may be organized nothing in this section shall be construed to deprive such courts of the jurisdiction conferred upon them by laws, and it shall have such appellate jurisdiction as may be conferred by law, and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer.

[13]Ch. 227, § 1, 1951 Ind. Acts 649; ch. 244, §§ 1-3, 1937 Ind. Acts 1164; ch. 312, §§ 1-6, 1935 Ind. Acts 1502; ch. 50, §§ 2-6, 1931 Ind. Acts 116; ch. 241, §§ 1-6, 1927 Ind. Acts 713 (repealed 1974) (formerly codified at IND. CODE ANN. §§ 16-13-13-1 to -16-1 (Burns 1973)).

[14]46 U.S.L.W. at 4255.

[15]*Id.*

[16]*Id.* at 4256. The dissent did not challenge the majority's conclusion that the judge did not act in clear absence of all jurisdiction. *Id.* at 4258 n.5 (Stewart, J., dissenting).

[17]46 U.S.L.W. at 4255.

[18]Murrell v. Stock Growers' Nat'l Bank of Cheyenne, 74 F.2d 827 (10th Cir. 1934); Rensing v. Turner Aviation Corp., 166 F. Supp. 790 (N.D. Ill. 1958); Olcott v. Pendleton, 128 Conn. 292, 22 A.2d 633 (1941); Williams v. Kaylor, 218 Ga. 576, 129 S.E.2d 791 (1963); J.R. Watkins Co. v. Kramer, 250 Iowa 947, 97 N.W.2d 303 (1959); Brumm v. Pittsburgh Nat'l Bank, 213 Pa. Super. Ct. 443, 249 A.2d 916 (1968).

class of cases that he is empowered to entertain will never act in clear absence of all jurisdiction. Any error will be merely in excess of his jurisdiction. The inquiry is limited to the power to render a decision and does not consider the particular decision made.[19]

This interpretation of jurisdiction overrules a line of cases which held that the jurisdiction requirement necessitated an inquiry into the decision that had been rendered.[20] In these cases, a judge acted in clear absence of all jurisdiction if there were no set of circumstances or conditions authorizing his action, even though he had jurisdiction over the subject matter.[21] *Wade v. Bethesda Hospital*[22] illustrated this analysis. There an action had been brought against a probate court judge for ordering the performance of a tubal ligation on a retarded person. The district court held that the judge had acted in clear absence of all jurisdiction.[23] In reaching this result, the court did not inquire into the judge's power to decide the case but instead examined Ohio law to determine if there were any conditions that would permit the judge to *issue* the sterilization order. Under the jurisdictional test required by *Stump*, the judge would have been immune.[24]

Prior to *Stump*, some cases held, at least with respect to sterilization, that there must be *specific* statutory or common law authority vesting the court with jurisdiction over the subject matter.[25] The most recent case so holding was *Briley v. California*.[26] This section 1983 action was brought against a judge and a prosecutor for allegedly coercing the plaintiff to submit to castration as part of a

---

[19]The *Stump* Court was concerned only as to whether case or statutory law had circumscribed the judge's power to approve a petition for tubal ligation. 46 U.S.L.W. at 4256.

[20]Briley v. California, 564 F.2d 849 (9th Cir. 1977); Harley v. Oliver, 539 F.2d 1143 (8th Cir. 1976); Martin v. Merola, 532 F.2d 191 (2d Cir. 1976); Duba v. McIntyre, 501 F.2d 590 (8th Cir. 1974), *cert. denied*, 424 U.S. 975 (1976); Hevelone v. Thomas, 423 F. Supp. 7 (D. Neb. 1976); Wade v. Bethesda Hosp., 337 F. Supp. 671 (S.D. Ohio 1971).

[21]*See* note 20 *supra*.

[22]337 F. Supp. 671 (S.D. Ohio 1971).

[23]*Id.* at 673-74.

[24]Although the defendant in *Wade* was not a judge of general jurisdiction, his jurisdiction under Ohio law was broad: "The probate court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute." OHIO REV. CODE ANN. § 2101.24 (Page 1976). As in *Stump*, this grant of jurisdiction was sufficient to empower the judge to act on the affidavit by the welfare board. The fact that he acted erroneously in issuing the order was not relevant to the question of immunity. 337 F. Supp. at 673.

[25]Briley v. California, 564 F.2d 849 (9th Cir. 1977); Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977), *rev'd sub nom.*, Stump v. Sparkman, 46 U.S.L.W. 4253 (U.S. Mar. 28, 1978); Wade v. Bethesda Hosp., 337 F. Supp. 671 (S.D. Ohio 1971).

[26]564 F.2d 849 (9th Cir. 1977).

plea bargain agreement. The court remanded the case with the instruction that the availability of judicial immunity would depend upon the existence of specific statutory authority empowering the judge to order the castration.[27]

That instruction is now an erroneous statement of the law. The *Stump* Court held that "the scope of a judge's jurisdiction must be construed broadly."[28] The absence of specific authority in Indiana to act upon the petition for sterilization was not considered significant, according to the Court; the critical factor was that neither case law nor statute expressly prohibited the judge from entertaining the petition.[29] Therefore, a judge of a court of general jurisdiction will be deemed to have jurisdiction over the subject matter of any case before him, for purposes of judicial immunity, if there is not a specific statutory or case law prohibition.[30]

The Supreme Court's discussion of *A.L. v. G.R.H.*[31] demonstrated that a judge who failed to observe a statutory or case law limitation on his judicial power would not be deprived of the defense of judicial immunity unless the limitation directly circumscribed his subject matter jurisdiction. That Indiana decision held that parents have no common law right to seek the sterilization of their children.[32] The Supreme Court emphasized that *A.L. v. G.R.H.* did not question a judge's power to consider and act upon a petition for sterilization and concluded that the decision imposed a restriction only on the manner in which a judge should exercise his jurisdiction.[33] Thus, Judge Stump's *approval* of the sterilization in contravention of Indiana law was merely in excess of his jurisdiction.

The principle that an act in excess of jurisdiction is covered by a judicial immunity defense dates back to *Bradley* and is acknowledged

---

[27]*Id.* at 857-58.

[28]46 U.S.L.W. at 4255.

[29]*Id.* at 4255-56. The Court refused to infer a lack of jurisdiction from the express statutory limitation of jurisdiction to institutionalized persons. *See* text accompanying note 16 *supra.*

[30]The extent to which this conclusion applies to courts of inferior jurisdiction is not clear. One can argue, however, that where the subject matter jurisdiction of the court is precisely itemized by statute, the *Briley* analysis should be employed. *See* notes 26-28 *supra* and accompanying text.

[31]325 N.E.2d 501 (Ind. Ct. App. 1975), *discussed in* Stump v. Sparkman, 46 U.S.L.W. at 4256.

[32]325 N.E.2d at 502.

[33]The Court explained:

> A circuit court judge would err as a matter of law if he were to approve a parent's petition seeking the sterilization of a child . . . . Indeed, the clear implication of the opinion is that . . . the circuit judge should deny [the petition] on its merits rather than dismissing it for lack of jurisdiction.

Id.

in the recent cases.[34] Unfortunately, the distinction between a limitation on the power to decide a case and a limitation that dictates the proper exercise of that power is not always easily or consistently made.[35] The difficulty can be seen in the cases that dealt with the power of a judge to order sterilization. Missouri,[36] Texas,[37] and Kentucky[38] have all held that the courts of their states do not have subject matter jurisdiction over cases involving sterilization.[39] Under the *Stump* analysis, these cases impose a restriction that forecloses judicial consideration of sterilization. If a judge in one of these states were to authorize a sterilization, he would act in clear absence of all jurisdiction and would be liable in a civil action. In Indiana, on the other hand, a judge can issue the same order and, possessing jurisdiction over the subject matter, be entitled to the defense of judicial immunity.

Some courts have indicated that where a judge violates a specific statute or commits an illegal act, judicial immunity will not be a defense.[40] In *Luttrell v. Douglas*,[41] the actions of a criminal court judge were held to be beyond the scope of immunity when he conditioned the appointment of a public defender upon payment of attorney fees.[42] Although an Illinois statute authorized the judge of a court of criminal jurisdiction to appoint a public defender for an indigent defendant, the same statute expressly prohibited the payment of fees to a public defender.[43] Thus, the judge in *Luttrell* had jurisdiction over both criminal offenses and the appointment of public defenders. His error, therefore, was in the exercise of that jurisdiction.

The Supreme Court did not directly consider this point in *Stump*. From what the Court did say, however, *Luttrell* is, at least, a questionable precedent. Several times in the opinion, the Court noted that the restriction on a court's power must relate to the *authority* to decide the controversy and not merely to *how* it should

---

[34]Harley v. Oliver, 539 F.2d 1143 (8th Cir. 1976); Williams v. Williams, 532 F.2d 120 (8th Cir. 1976); Potter v. LaMunyon, 389 F.2d 874 (10th Cir. 1968); Ryan v. Scoggin, 245 F.2d 54 (10th Cir. 1957); McGlasker v. Calton, 397 F. Supp. 525 (M.D. Ala. 1975); Luttrell v. Douglas, 220 F. Supp. 278 (N.D. Ill. 1963).

[35]20 AM. JUR. 2d *Courts* § 90 (1965).

[36]*In re* M.K.R., 515 S.W.2d 467 (Mo. 1974).

[37]Frazier v. Levi, 440 S.W.2d 393 (Tex. Ct. App. 1969).

[38]Holmes v. Powers, 439 S.W.2d 579 (Ky. 1969).

[39]These cases were direct appeals and did not involve the issue of judicial immunity.

[40]*See, e.g.*, Jacobson v. Schaefer, 441 F.2d 127 (7th Cir. 1971); Barksdale v. Ryan, 398 F. Supp. 700 (N.D. Ill. 1974); Luttrell v. Douglas, 220 F. Supp. 278 (N.D. Ill. 1963).

[41]220 F. Supp. 278 (N.D. Ill. 1963).

[42]*Id.* at 279. The suit was dismissed, despite the absence of immunity, for failure to allege deprivation of a constitutionally protected right.

[43]ILL. REV. STAT. ch. 38, § 113-3; *id.* ch. 34, §§ 5604-5605 (1973).

be decided.[44] That the statutory restriction is unambiguous seems to be immaterial. When a judge commits an illegal act or is neglectful of his official duties, the proper course is to file criminal charges.[45]

The Seventh Circuit Court of Appeals, in what appeared to be an alternative holding, stated: "Even if defendant Stump had not been foreclosed under the Indiana statutory scheme, we would still find his action to be an illegitimate exercise of his common law power because of his failure to comply with elementary principles of procedural due process."[46] The judge's procedural errors included the failure to appoint a guardian ad litem, the failure to give notice of the true nature of the proceeding to the daughter, and the failure to afford an opportunity to contest the petition.[47] The Supreme Court, noting that the Seventh Circuit had mis-conceived the doctrine of judicial immunity, held that "the commission of grave procedural errors" in the exercise of a conferred power would destroy a judge's immunity from liability.[48] This statement is consistent with the principle enunciated in *Bradley*.[49] Other courts that have considered the issue have also consistently followed *Bradley*.[50]

Perkins v. United States Fidelity & Guaranty Co.[51] is representative. The plaintiff in *Perkins* alleged that the judge had ordered his commitment to a mental hospital without providing him with notice and the opportunity to be heard. The court, after finding the judge had jurisdiction over the commitment proceeding, stated that non-observance of procedural safeguards did not destroy a court's jurisdiction over the case and, thus, did not affect the availability of judicial immunity.[52] One must conclude that procedural matters, such

---

[44]46 U.S.L.W. at 4255-56.

[45]The immunity doctrine holds, however, that misperformance of a judicial act by a judge acting honestly and in good faith does not constitute criminal conduct. Braatelien v. United States, 147 F.2d 888 (8th Cir. 1945); People v. Ferguson, 20 Ill. 2d 295, 170 N.E.2d 171 (1960); Commonwealth v. Tartar, 239 S.W.2d 265 (Ky. 1951); Robbins v. Commonwealth, 232 Ky. 115, 22 S.W.2d 440 (1929).

[46]Sparkman v. McFarlin, 552 F.2d 172, 176 (7th Cir. 1977), *rev'd sub nom.* Stump v. Sparkman, 46 U.S.L.W. 4253 (U.S. Mar. 28, 1978).

[47]*Id.*

[48]46 U.S.L.W. at 4256.

[49]The *Bradley* Court, referring to the procedural errors committed by the defendant judge, stated: "But this erroneous manner in which its jurisdiction was exercised, however it may have affected the validity of the act, did not . . . render the defendant liable to answer in damages . . . as though the court had proceeded without having any jurisdiction whatever . . . ." 80 U.S. (13 Wall.) at 357.

[50]Duba v. McIntyre, 501 F.2d 590 (8th Cir. 1974), *cert. denied*, 424 U.S. 975 (1976); Perkins v. United States Fidelity & Guar. Co., 433 F.2d 1303 (5th Cir. 1970); Sullivan v. Kelleher, 405 F.2d 487 (1st Cir. 1968); Potter v. LaMunyon, 389 F.2d 874 (10th Cir. 1968); Ryan v. Scoggin, 245 F.2d 54 (10th Cir. 1957).

[51]433 F.2d 1303 (5th Cir. 1970).

[52]*Id.* at 1304.

as the right to notice and a hearing, involve only the exercise of a conferred power. Error in the exercise of this power falls squarely within the immunity doctrine.

In *Stump*, the Supreme Court did not dwell on the policy reasons for providing immunity for a judge who acts in excess of his jurisdiction. Relying on a quotation from *Bradley*, the Court stated that it is important to the administration of justice that a judge be free to act without fear of personal consequences.[53] A more satisfactory explanation can be found in *Pierson v. Ray*:[54]

> The judicial function involves an informed exercise of judgment. It is often necessary to choose between differing versions of fact, to reconcile opposing interests, and to decide closely contested issues. Decisions must often be made in the heat of trial. A vigorous and independent mind is needed to perform such delicate tasks. It would be unfair to require a judge to exercise his independent judgment and then to punish him for having exercised it in a manner which, in retrospect, was erroneous.[55]

II. The Judicial Act Requirement

The *Stump* Court also held that the doctrine of judicial immunity will not apply unless the judge's conduct constitutes a judicial act.[56] The judicial act requirement also dates back to *Bradley*.[57] The plaintiff in *Stump* argued that the judge had not performed a judicial act because the petition had not been given a docket number, had not been placed on file, and had been approved in an ex parte proceeding without first giving notice, appointing counsel for the minor, or holding a hearing.[58]

The argument that the lack of formality and the presence of procedural irregularities would destroy the judicial character of a judge's action was rejected.[59] The Supreme Court established a test

---

[53]46 U.S.L.W. at 4255 (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) at 347).

[54]38 U.S. 547 (1967).

[55]*Id.* at 566 (Douglas, J., dissenting).

[56]46 U.S.L.W. at 4256.

[57]As pointed out by the dissent in *Stump*, the proposition that immunity only applies to the performance of judicial acts was emphasized seven times by the *Bradley* Court. *Id.* at 4257 n.2 (Stewart, J., dissenting) (citing Bradley v. Fisher, 80 U.S. (13 Wall.) at 347, 348, 349, 351, 354, 357).

[58]46 U.S.L.W. at 4256.

[59]In so concluding, the Court cited McAlester v. Brown, 469 F.2d 1280 (5th Cir. 1972), *cited in* Stump v. Sparkman, 46 U.S.L.W. at 4256. In *McAlester*, the judge's alleged misconduct involved an improper arrest ordered outside of the courtroom and at a time when the judge was not wearing his robes. Nevertheless, the reviewing

for determining when a judge's conduct should be classified as a judicial act for purposes of judicial immunity. The first factor to be considered is whether the party dealt with the judge in a judicial capacity.[60] This inquiry is made subjectively, based upon the parties' expectations. In applying this part of the test to the facts in *Stump*, the Court found that the petition had been presented to Judge Stump only because of his position as circuit court judge.[61] That is, the minor's parent realized she was dealing with the judge in his judicial role. *Lynch v. Johnson*,[62] cited with approval by the Court, demonstrated the point at which a judge is no longer acting in his judicial capacity. The judge in *Lynch* was not permitted the defense of judicial immunity for actions arising out of his service pursuant to state statute, as the presiding officer of the county "Fiscal Court."[63] Since the "Fiscal Court" was merely a board of county commissioners who performed only administrative or legislative functions, the court held the judge had not performed any judicial acts.[64] Arguably, since the events did not transpire in a judicial forum, the parties did not feel they were dealing with the judge in his official capacity.[65]

The second factor relevant to the judicial act determination is whether the act is a "function normally performed by a judge."[66] The Court did not contend that normal judicial functions include approval of petitions for sterilization but reasoned that consideration of a petition relating to the affairs of a minor is the type of action a judge is normally called upon to review in his official capacity.[67] One should note that it is not the particular subject matter of the petition but the act of entertaining and acting upon petitions of a general type that is the critical consideration. *Gregory v. Thompson*[68] was cited as an example of a judge who did not perform a judicial act. In *Gregory*, a judge had been sued for assaulting a man while physically removing him from the courtroom. The reviewing court concluded that the judge had not performed a judicial act, but

---

court held that the judge was acting in his judicial capacity and was entitled to judicial immunity. 469 F.2d at 1282.

[60]46 U.S.L.W. at 4256.

[61]*Id.* at 4257.

[62]420 F.2d 818 (6th Cir. 1970), *cited in* Stump v. Sparkman, 46 U.S.L.W. at 4256.

[63]420 F.2d at 820.

[64]*Id.*

[65]The example posed by the *Lynch* court is useful. "A judge does not cease to be a judge when he undertakes to chair a PTA meeting, but, of course, he does not bring judicial immunity to that forum either." *Id.*

[66]46 U.S.L.W. at 4256.

[67]*Id.* at 4257.

[68]500 F.2d 59 (9th Cir. 1974), *cited in* Stump v. Sparkman, 46 U.S.L.W. at 4256.

rather that the judge had discharged a function normally performed by a sheriff or bailiff.[69]

The dissenting opinions in *Stump* contended that the judge's conduct should not have been classified as a judicial act. Justice Powell argued that a judicial act is one that does not preclude a party's right to resort to appellate or other judicial remedies.[70] Because the judge's "unjudicial" conduct prevented the minor from protecting her rights through the appeal process, the dissent asserted that the judge should not have been entitled to immunity.[71] Support for this characterization of a judicial act can be found in *Gregory* where the court stated: "A judicial act within the meaning of the doctrine may normally be corrected on appeal."[72]

The characteristics of a judicial act considered by the Supreme Court are conduct of a type normally performed by a judge and conduct performed in an official judicial capacity. The Court did not mention the exercise of discretion. The Court also did not mention the exercise of judgment—a characteristic with considerable support in case law.[73] In 1843, it was stated: "Some of the . . . [acts] of a justice are judicial, and some ministerial; and when he acts ministerially, . . . for error and misconduct he is responsible in like manner . . . as all other ministerial officers."[74] The distinction between a ministerial act and a judicial act is that the former is precisely prescribed by law and allows no discretion while the latter requires the exercise of judgment or decision-making.[75]

Perkins v. United States Fidelity & Guaranty Co.[76] shows how the exercise of decision-making applies to the judicial act requirement. In *Perkins*, the complaint alleged that a probate court judge had wrongfully committed the plaintiff to a mental institution. In an effort to circumvent the immunity doctrine, the plaintiff argued that the judge's action in effecting the commitment had merely been a ministerial act. The Fifth Circuit Court of Appeals, after restating

---

[69]500 F.2d at 64-65. Since the judge was deemed to have acted as a sheriff, he was permitted to claim a qualified immunity. Such immunity only extends to acts committed in good faith. Pierson v. Ray, 386 U.S. 547 (1967).

[70]46 U.S.L.W. at 4259 (Powell, J., dissenting).

[71]*Id.*

[72]500 F.2d at 64.

[73]*Ex parte* Virginia, 100 U.S. 339 (1879); Perkins v. United States Fidelity & Guar. Co., 433 F.2d 1303 (5th Cir. 1970); Doe v. County of Lake, Ind., 399 F. Supp. 553 (N.D. Ind. 1975); Bramlett v. Peterson, 307 F. Supp. 1311 (M.D. Fla. 1969); Stone v. Graves, 8 Mo. 148 (1843); Yates v. Lansing, 5 Johns. 282 (N.Y. 1810).

[74]Stone v. Graves, 8 Mo. 148, 151 (1843).

[75]Dear v. Locke, 128 Ill. App. 2d 356, 262 N.E.2d 27 (1970); Sweeney v. Young, 82 N.H. 159, 131 A. 155 (1925); State v. Nagel, 185 Or. 486, 202 P.2d 640, *cert. denied*, 338 U.S. 818 (1949).

[76]433 F.2d 1303 (5th Cir. 1970).

the rule that a judicial act is one that results from the exercise of discretion, rejected the plaintiff's argument:

> We doubt the existence of many situations calling for more judicial discretion and decision-making talent than in the determination of the competency of a human being. The task calls for the court to look into the mind of an individual and determine his mental state under rules which are vague, difficult to apply, and necessarily imperfect.[77]

Acts which have been held to be ministerial and thus beyond the scope of judicial immunity are acts related to the selection of jurors,[78] judicial control over the processing and treatment of detained juveniles,[79] and failure to inform indigent defendants of their right to court-appointed counsel.[80]

The primary reason given for the existence of the judicial immunity doctrine is to preserve the integrity and independence of the judicial decision-making function.[81] Since the ministerial/judicial distinction attempts to separate acts that involve the exercise of judgment from those that allow the judge no discretion, it serves to bring the scope of protection into closer harmony with its purpose. If immunity were extended to include the misperformance of a ministerial act, then the purpose would be only to protect the judge and not the decision-making process of the judiciary. It is doubtful, therefore, that the mere omission of this element from the *Stump* opinion indicates disapproval.

Finally, the Supreme Court held that immunity applies with equal force to suits in which a judge is alleged to have acted with malice or from corrupt motives.[82] This principle was firmly established by *Bradley v. Fisher*[83] and has been uniformly followed in the

---

[77]*Id.* at 1305.

[78]*Ex parte* Virginia, 100 U.S. 339 (1879) (judicial immunity not a defense in criminal action where judge given no discretion by statute).

[79]Doe v. County of Lake, Ind., 399 F. Supp. 553 (N.D. Ind. 1975) (suit seeking only equitable relief).

[80]Bramlett v. Peterson, 307 F. Supp. 1311 (M.D. Fla. 1969) (suit seeking only equitable relief).

[81]Pierson v. Ray, 386 U.S. 547, 554 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 348 (1872); Gregory v. Thompson, 500 F.2d at 63; Shore v. Howard, 414 F. Supp. 379, 385 (N.D. Tex. 1976); Doe v. County of Lake, Ind., 399 F. Supp. 553, 555 (N.D. Ind. 1975). *See* Jennings, *Tort Liability of Administrative Officers*, 32 MINN. L. REV. 263, 270-72 (1937).

[82]46 U.S.L.W. at 4255 (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) at 351).

[83]80 U.S. (13 Wall.) at 335, 351. In Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868), the Court stated that a judge might be held liable if his acts were done maliciously. 74 U.S. (7 Wall.) at 536. The *Bradley* Court characterized this statement as dictum and concluded that malice did not affect the scope of immunity. 80 U.S. (13 Wall.) at 351.

case law.[84] The policy justification for immunizing malicious conduct is to free judges from harassing, expensive, and time consuming law suits.[85] Since there will be no issue involving the judge's state of mind, the suit will be highly susceptible to dismissal at an early stage in the litigation.

DAVID S. CURRY

---

[84]Imbler v. Pachtman, 424 U.S. 409 (1976); Pierson v. Ray, 386 U.S. 547 (1967); Wiggins v. Hess, 531 F.2d 920 (8th Cir. 1976); Duba v. McIntyre, 501 F.2d 590 (8th Cir. 1974), *cert. denied*, 424 U.S. 975 (1976); Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974); Cadena v. Perasso, 498 F.2d 383 (9th Cir. 1974); Skolnick v. Campbell, 398 F.2d 23 (7th Cir. 1968); Meredith v. Van Oosterhout, 286 F.2d 216 (8th Cir. 1960), *cert. denied*, 365 U.S. 835 (1961); Harris v. Harvey, 419 F. Supp. 30 (E.D. Wis. 1976); Weaver v. Haworth, 410 F. Supp. 1032 (E.D. Okla. 1975); Bottos v. Beamer, 399 F. Supp. 999 (N.D. Ind. 1973); McGlasker v. Calton, 397 F. Supp. 525 (M.D. Ala.), *aff'd*, 524 F.2d 1230 (5th Cir. 1975); Garfield v. Palmieri, 193 F. Supp. 137 (S.D.N.Y. 1961), *aff'd*, 297 F.2d 526 (2d Cir.), *cert. denied*, 369 U.S. 871 (1962).

[85]Pierson v. Ray, 386 U.S. 547, 554 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 348 (1872); McCray v. Maryland, 456 F.2d 1, 3 (4th Cir. 1972); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).