IMMUNITY OF ADMINISTRATIVE DECISIONS BY JUDICIAL OFFICERS

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The genesis of this article was an opinion by Deputy Chief Magistrate Tsavdaridis to the Chief Magistrate, Judge Johnstone. Given the relevance of the topic to the work of judicial officers more broadly, it was suggested that the opinion be published in article form.

Introduction

Judicial immunity has been described as an 'essential corollary of judicial independence'.[3] Judicial officers enjoy an 'indefeasible'[4] immunity from civil and criminal sanctions for certain acts connected to their office.[5] The immunity does not derive from legislation[6] but instead from the common law[7] 'because of the law's acceptance that, for reasons of public interest higher even than the accountability and transparency of the exercise of public power, such exercise … should not be examined in a criminal or civil court.'[8]

The purpose of this article is two-fold. First, to propose a new 'breadth' and 'depth' framework for considering the doctrine of judicial immunity. Whilst the breadth of the immunity has arguably been expanded by statute in Pt 8A of the *Judicial Officers Act 1986* (NSW), the depth of the immunity is determined solely by reference to the common law. Secondly, to consider whether the breadth of judicial immunity extends to what is described in this article as 'incidental administrative functions',

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[3] *Wentworth v Wentworth* (2000) 52 NSWLR 602, 609 [24] (Fitzgerald JA) ('*Wentworth*').

[4] *Gibbons v Duffell* (1932) 47 CLR 520, 528 (Gavan-Duffy CJ, Rich and Dixon JJ).

[5] *Yeldham v Rajski* (1989) 18 NSWLR 48 ('*Yeldham*'); *Anderson v Gorrie* [1895] 1 QB 668, 670 (Lord Esher MR).

[6] *Rajski v Powell* (1987) 11 NSWLR 522, 534–7 (Kirby P, as his Honour then was), 538–9 (Priestley JA, Hope JA agreeing at 536).

[7] *Scanlon v Director-General, Department of the Arts, Sport & Recreation* (2007) 70 NSWLR 1, 16 [52], 18 [58] (Tobias JA, Mason P agreeing at 2 [1], Beazley JA, as Her Excellency then was, agreeing at 2 [2]) ('*Scanlon*'); *Stankovic v State of New South Wales* [2016] NSWSC 18, [20]–[21] (Davies J) ('*Stankovic*').

[8] *Fingleton v The Queen* (2005) 227 CLR 166, 212 [132] (Kirby J) ('*Fingleton*').

which refers to decisions including the assignment of judicial officers to various geographical locations, divisions, court sittings and court lists, the allocation of courtrooms and the direction of court staff.[9] The conclusion reached is that judicial immunity extends to incidental administrative functions performed by judicial officers in NSW in the discharge of their judicial functions.

The Breadth and Depth of Judicial Immunity

It is proposed that the doctrine of judicial immunity should be viewed from a 'breadth' and 'depth' perspective.

The 'breadth' (or 'boundaries') of judicial immunity concerns the acts by a judicial officer that would be covered by or fall within the scope of the immunity. For example, it is well-accepted that the decisions of judicial officers 'in the exercise of their judicial function or capacity' fall within the breadth of the immunity.[10] Although the immunity at common law was historically limited to judges of superior courts, it has been accepted that the immunity applies to 'judges of all ranks high or low', including judicial officers of inferior courts.[11]

As the rationale for judicial immunity is judicial independence, not the private advantage of judicial officers,[12] it is suggested that the test for whether an act falls within the breadth of the immunity at common law is whether it is necessary for the protection of judicial independence in the public interest that that act be the subject of immunity. On this test, the immunity attaches to protect judicial officers in the exercise of their judicial function because '[i]f judges were personally liable for erroneous decisions, the resulting avalanche of suits ... would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits'.[13] There would be a real threat to the imperatives of impartiality and independence[14] if judicial officers were exposed to the possibility of liability or reprisals for the manner in which they exercised their judicial functions. As Gleeson CJ explained:

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[9] See *Valente v The Queen* [1985] 2 SCR 673, 708–9 (Le Dain J for the Court) ('*Valente*').

[10] *Re East; Ex parte Nguyen* (1998) 196 CLR 354, 365–6 [30] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[11] *O'Shane v Harbour Radio Pty Ltd* (2013) 85 NSWLR 698, 719 [87] (Beazley P, as Her Excellency then was, McColl JA agreeing at 728 [131], Tobias AJA agreeing at 751 [243]) quoting *Sirros v Moore* [1975] QB 118, 132 (Lord Denning MR, Ormrod LJ agreeing at 149).

[12] *Fingleton* (n 8) 186 [38] (Gleeson CJ, Gummow and Heydon JJ agreeing at 211 [123]).

[13] *Forrester v White*, 484 US 219, 226–7 (O'Connor J) (1988).

[14] Although the caselaw about judicial immunity has not been framed on constitutional grounds, it is suggested that the constitutional imperative of judicial independence in both federal and State courts (see generally *Kable v DPP (NSW)* (1996) 189 CLR 51) is relevant to determining the breadth of the immunity.

> [T]he public interest in maintaining the independence of the judiciary requires security, not only against the possibility of interference and influence by governments, but also against retaliation by persons or interests disappointed or displeased by judicial decisions.[15]

However, the breadth of the immunity at common law is neither all encompassing, nor does it shield judicial officers from everything they may do. As Gleeson CJ also explained:

> At common law, judicial officers enjoy no immunity or protection from criminal responsibility for their extra-judicial conduct, and even in respect of their judicial conduct there are well-established limits to their immunity.[16]

Those limits demarcate the breadth of the immunity at common law. 'It is, of course, clear that the holder of any judicial office who acts in bad faith, doing what he knows he has no power to do, is liable in damages.'[17] However, no action will lie in common law against a judicial officer 'doing something within his jurisdiction, but doing it maliciously and contrary to good faith'.[18]

For judicial officers in NSW, Pt 8A of the *Judicial Officers Act*[19] provides as follows:

> **Part 8A Immunity of judicial officers and others**
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> **44A Immunity of Supreme Court Judges**
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> The protection and immunity of a Judge of the Supreme Court (or a Judge having the same status as a Judge of the Supreme Court) performing duties as such a Judge extends to the Judge when performing ministerial duties as such a Judge.
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> **44B Immunity of certain judicial officers**
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> (1) A judicial officer has, in the performance of his or her duties as a judicial officer (including ministerial duties), the same protection and immunity as a Judge of the Supreme Court has in the performance of his or her duties as a Judge.
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> (2) This section does not apply to a Judge of the Supreme Court or to a Judge having the same status as a Judge of the Supreme Court.

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[15] *Fingleton* (n 8) 186 [39] (Gleeson CJ, Gummow and Heydon JJ agreeing at 211 [123]). Similarly, Hope AJA (with whom Priestley JA agreed) stated in *Yeldham* (n 5) at 69:

> If the law were that any disgruntled litigant could charge a judge with contempt for being wrong and mala fide in his conclusion, or in arriving at the conclusion without any or any sufficient evidentiary basis, the independence required of judges would be greatly eroded.

[16] *Fingleton* (n 8) 186 [40] (Gleeson CJ, Gummow and Heydon JJ agreeing at 211 [123]).

[17] *Re McC (A Minor)* [1985] AC 528, 540 (Lord Bridge of Harwich), cited approvingly in *Fingleton* (n 8) at 185 –6 [37] (Gleeson CJ, Gummow and Heydon JJ agreeing at 211 [123]). See *Wentworth* (n 3) 611 [28], 615 [43] (Fitzgerald JA).

[18] *Anderson v Gorrie* [1895] 1 QB 668, 670 (Lord Esher MR).

[19] Part 8A was added by the *Justices Legislation Repeal and Amendment Act 2001* (NSW) and commenced on 7 July 2003.

44C Immunity of officers performing duties of judicial officers

A registrar, an associate Judge of the Supreme Court, a Commissioner of the Land and Environment Court, an authorised justice, an authorised officer (within the meaning of the *Criminal Procedure Act 1986*) or any other officer of a court has, when performing the duties of a judicial officer (including ministerial duties), the same protection and immunity as the judicial officer has in the performance of those duties.

The meaning of the phrase '[t]he protection and immunity of a Judge of the Supreme Court … performing duties as such a Judge' can only be determined by the common law. This phrase is likely a reference to the immunity attaching to the exercise of powers and functions by Judges of the Supreme Court that fell within the breadth at common law. Section 44A[20] extends that immunity to any 'ministerial functions' that were not already incorporated into the breadth of the immunity at common law. Section 44B extends that immunity to other judicial officers performing their duties 'as a judicial officer'.[21] Section 44C also extends that immunity to specified officeholders when they are 'performing the duties of a judicial officer'. Other legislation extends that immunity to members of tribunals.[22] Thus, it has been held that Pt 8A 'merely clarifies and extends the breadth of the immunity at common law'.[23]

In contrast, the 'depth' (or 'content') is concerned with the extent that liability or responsibility is precluded by the immunity. Nothing in Pt 8A or any other State legislation goes to the depth of the immunity. Instead, the depth continues to be determined by the common law.[24] The immunity has been described as 'absolute'[25] or a 'complete defence'[26] at common law and applies to both civil and criminal proceedings.[27] Indeed, matters falling within the breadth of the immunity can be 'pleaded in bar to suits at the outset, so as to secure their dismissal at that point, rather than permitting the allegations to be

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[20] Section 44A also applies to Judges of the Land and Environment Court: see *Land and Environment Court Act 1979* (NSW) s 9.

[21] The words 'judicial officer' in s 44B include a Judge of the District Court, a Magistrate of the Local Court and a member of the Industrial Relations Commission: *Judicial Officers Act* s 3(1) (definition of 'judicial officer'). See also *Industrial Relations Act 1996* (NSW) sch 2 cl 8.

[22] A member of the Civil and Administrative Tribunal or the Personal Injury Commission have, in the exercise of their duties and functions, the same protection and immunities as a Judge of the Supreme Court: *Civil and Administrative Tribunal Act 2013* (NSW) sch 2 cl 4; *Personal Injury Commission Act 2020* (NSW) sch 2 cl 4.

[23] *Stankovic* (n 7) [21] (Davies J). See also *Sheridan v Colin Biggers & Paisley* [2019] NSWSC 621, [8] (Black J).

[24] *Yarraford Pastoral Co Pty Ltd v Registrar of the Downing Centre Local Court* [2013] NSWSC 293, [23] (Campbell J). See also *ABC v Parsonage; ABC v Commissioner of Corrective Services* [2022] NSWSC 994, [57] (Davies J).

[25] *Donaldson v State of New South Wales* [2019] NSWCA 109, [8] (Macfarlan and Meagher JJA), citing *Mann v O'Neill* (1997) 191 CLR 204, 238 (Gummow J).

[26] *Fingleton* (n 8) 228 [183] (Kirby J).

[27] *Yeldham* (n 5) 69 (Hope AJA, Priestley JA agreeing at 64).

tried'.[28] However, the depth of the immunity does not extend to exempting judicial officers from disciplinary processes where misbehaviour is alleged.[29]

Under the framework proposed, two questions should be asked when judicial immunity is raised. The first question is whether the act or omission complained of falls within the breadth of the immunity, whether at common law or as expanded by the statutory provisions. If the act or omission falls within the breadth, the second question is whether the depth of the immunity precludes liability in the circumstances. Even if a judicial officer's misbehaviour may be immune from civil or criminal proceedings, there may still be accountability in other forums.

Incidental Administrative Functions and the Breadth of Judicial Immunity

This article does not seek to comprehensively formulate the precise metes and bounds of the breadth and depth of judicial immunity. Instead, focus is directed to whether the incidental administrative functions fall within the breadth of judicial immunity. This, necessarily, begins with a summary of the High Court's decision in *Fingleton* and explains its relevance to judicial officers in NSW. Consideration is then given to the common law and statutory provisions contained in the *Judicial Officers Act* that applies to NSW judicial officers.

The Case of Chief Magistrate Fingleton

Ms Diane Fingleton was the Chief Magistrate of Queensland between 1999 and 2002. As Chief Magistrate, her responsibilities included assigning Magistrates to locations throughout Queensland and appointing and removing Co-ordinating Magistrates.[30] At some point, Chief Magistrate Fingleton decided to transfer Magistrate Thacker from Brisbane to Townsville. Magistrate Thacker applied for a review of this decision by the judicial committee and wrote to the Magistrates' Association seeking assistance.

Magistrate Gribbin was the Association's Vice-President and the Co-ordinating Magistrate for Beenleigh. He provided an affidavit in support of Magistrate Thacker to the judicial committee. In a separate matter, Magistrate Gribbin circulated an agenda item for a meeting of Co-ordinating

[28] *Wentworth* (n 3) 638 [260] (Heydon JA, as his Honour then was, Davies AJA agreeing at 639 [271]).

[29] *Scanlon* (n 7) 23 [82] (Tobias JA, Mason P agreeing at 2 [1], Beazley JA, as Her Excellency then was, agreeing at 2 [2]).

[30] *Magistrates Act 1991* (Qld) s 10(2) (now renumbered to s 12(2)) ('*Magistrates Act*'). See also *Acts Interpretation Act 1954* (Qld) s 25(1).

Magistrates. Chief Magistrate Fingleton objected to Magistrate Gribbin providing the affidavit and circulating the agenda item without first discussing both of these matters with her. Chief Magistrate Fingleton accused Magistrate Gribbin of disloyalty and asked him to show cause why he should not be removed from the position of Co-ordinating Magistrate.

Chief Magistrate Fingleton was charged with 'causing or threatening harm without reasonable cause in retaliation for something lawfully done in a judicial proceeding'.[31] She denied sending the letter in retaliation for Magistrate Gribbin's support of Magistrate Thacker. Instead, her Honour said that the letter was sent because Magistrate Gribbin's conduct showed she did not have his confidence and loyalty. Chief Magistrate Fingleton was found guilty by a jury in a second trial of this charge in the Supreme Court of Queensland. An appeal to the Court of Appeal was dismissed.

The statutory immunity provisions were raised for the first time in the High Court. Section 21A of the *Magistrates Act*[32] provided:

> A magistrate has, in the performance or exercise of an administrative function or power conferred on the magistrate under an Act, the same protection and immunity as a magistrate has in a judicial proceeding in a Magistrates Court.

Section 30 of the *Criminal Code* also provided:

> Except as expressly provided by this Code, a judicial officer is not criminally responsible for anything done or omitted to be done by the judicial officer in the exercise of the officer's judicial functions, although the act done is in excess of the officer's judicial authority, or although the officer is bound to do the act omitted to be done.

Unlike the NSW provisions, which address the issue of administrative and judicial immunity within the same section, the Queensland provisions distinguish between administrative and judicial functions in separate Acts.

The High Court held that the Chief Magistrate should not have been held criminally responsible for her conduct because she was entitled under the *Magistrates Act* or the *Criminal Code* to an immunity that was wrongly denied to her. Chief Justice Gleeson summarised the underlying principle as follows:

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[31] *Criminal Code Act 1899* (Qld) s 119B ('*Criminal Code*'). A proceeding before the judicial committee was a 'judicial proceeding' for the purpose of s 119B because evidence can be given on oath.

[32] This provision has been renumbered to s 51 of the *Magistrates Act*.

> If a Chief Magistrate could be called to account, in civil or criminal proceedings, for decisions about how Magistrates Courts arrange their business, or about the assignment of magistrates to cases, or classes of case, the capacity for the erosion of independence is obvious.[33]

The Court held that Chief Magistrate Fingleton's conduct in calling upon Magistrate Gribbin to show cause why he should not be removed from the position of Co-ordinating Magistrate was conduct in the exercise of an administrative power conferred on her by s 10(2) of the *Magistrates Act*. It was held that the organising of court lists, the allocation of Magistrates to particular localities and the assigning of Magistrates to particular work are 'not merely matters of internal administration'.[34] These decisions affect litigants and the public and are 'a matter intimately related to the independent and impartial administration of justice'.[35]

The Court held that Chief Magistrate Fingleton's conduct in calling upon Magistrate Gribbin to show cause why he should not be removed from the position of Co-ordinating Magistrate was conduct in the exercise of an administrative power conferred on her by s 10(2) of the *Magistrates Act*.

The administrative functions and powers of the Chief Magistrate of Queensland under s 10 of the *Magistrates Act* are very similar to those of heads of jurisdiction in NSW.[36] Those functions may also be delegated to a coordinating judicial officer or List Judge. *Fingleton* suggests, by deduction, that those types of functions — including the arrangement of the business of their respective courts, the assignment of judicial officers to cases, and the designation of judicial officers into coordinating roles or as a List Judge — can attract similar immunity, at least where statutory provisions provide for immunity for 'administrative functions or powers'.

A broad reading of *Fingleton* suggests that other administrative functions, provided that they are 'intimately related to the independent and impartial administration of justice', may also attract judicial

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[33] *Fingleton* (n 8) 191 [52] (Gleeson CJ). See also 211 [122] (Gummow and Heydon JJ, Hayne J agreeing at 231 [193]).

[34] Ibid 190 [52] (Gleeson CJ, Gummow and Heydon JJ agreeing at 211 [123]).

[35] Ibid.

[36] Some statutes use nearly identical language in describing that the head of jurisdiction is responsible for ensuring the 'orderly and expeditious' discharge of the business of their respective courts: *Land and Environment Court Act 1979* (NSW) s 30 (Chief Judge of the Land and Environment Court); *Local Court Act 2007* (NSW) s 23 (Chief Magistrate). Other statutes specify certain functions, including determining the places and times where the respective courts sit and the allocation of judicial officers: see, eg, *Children's Court Act 1987* (NSW) s 16 (President of the Children's Court); *Coroners Act 2009* (NSW) s 10 (State Coroner); *District Court Act 1973* (NSW) ss 32(1), 33, 173(1) (Chief Judge of the District Court); *Drug Court Act 1998* (NSW) s 25(1) (Senior Judge of the District Court); *Dust Diseases Tribunal Act 1989* (NSW) s 13(2) (President of the Dust Diseases Tribunal); *Supreme Court Act 1970* (NSW) s 39 (Chief Justice, President of the Court of Appeal and Chief Judges of the Divisions).

immunity under similarly worded legislation. Chief Justice Gleeson noted the mischief that the Parliament sought to address by inserting s 21A of the *Magistrates Act* was the concern of judicial officers who 'authorise the use of surveillance and listening devices' or perform other functions under a statute.[37] Although dicta, it was suggested s 21A may even extend to non-judicial powers, such as deciding whether a person charged with an indictable offence should be committed for trial, issuing a search warrant or approving the execution of a contract by a minor.[38]

Thus, the provisions relating to immunity may extend to non-judicial powers conferred on judicial officers undertaken persona designata.

Immunity at Common Law

At common law, the breadth of judicial immunity was not limited to an exercise of judicial functions. In *Yeldham*, the Court of Appeal held that the immunity could extend to acts by judicial officers that were administrative or ministerial in nature provided they were 'intimately associated' with the judicial function. Accordingly, the immunity extended to a decision by a Judge of the Supreme Court to refuse leave to prosecute a witness for perjury because:

> These powers are incidental to, indeed an extension of, the judicial function of presiding at the trial. They are 'intimately associated' with those functions. They are required to be exercised by a judge or magistrate who has direct knowledge, by reason of presiding at the trial, of the evidence given by the alleged perjurer and of the other evidence in the matter.[39]

It is asserted that the assignment of judges and court sittings bears directly and immediately on the exercise of the judicial function.[40] It is clear that the incidental administrative functions relate to which judicial officer is presiding, the place and time of the judicial proceedings, and require knowledge of the nature and workload of the cases. The appointment and removal of coordinating judicial officers, whether for particular lists or at particular locations, ensures the day-to-day discharge of the judicial function.

Furthermore, these are matters that pertain directly to judicial independence. As explained in *Fingleton*, if these matters were the subject of executive control, the 'capacity for the erosion of independence is obvious' because there would be a perception that judicial officers were merely public servants in the

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[37] Explanatory Note, Justice Legislation (Miscellaneous Provisions) Bill (No 2) 1999 (Qld).

[38] *Fingleton* (n 8) 188–9 [43]–[45] (Gleeson CJ, Gummow and Heydon JJ agreeing at 211 [123]).

[39] *Yeldham* (n 5) 72–3 (Hope AJA, Priestley JA agreeing at 64).

[40] *Valente* (n 9) 709 (Le Dain J for the Court).

executive branch. Chief Justice Gleeson stated that '[w]here it is the function of a Chief Justice to assign members of a court to hear particular cases, the capacity to exercise that function, free from interference by, and scrutiny of, the other branches of government is an essential aspect of judicial independence'.[41] Thus, the conclusion to be arrived at is that the incidental administrative functions, when performed by judicial officers, fall within the breadth of judicial immunity at common law.

Statutory Immunity

It is further asserted that the incidental administrative functions fall within the purview of the extended immunity in Pt 8A.

The phrase 'ministerial duties' in Pt 8A is not defined. However, that phrase cannot be taken to mean that a judicial officer is a minister of some kind. In carrying out their functions, judicial officers are 'neither acting as servants of the Crown nor in its service, but as independent judicial officers'.[42] Therefore, the use of the word 'ministerial' describes the quality of the decision made, rather than the title of the person making the decision.

Relevantly, the word 'ministerial' is defined in the Macquarie Dictionary as 'relating to a ministry or minister of state; relating to or invested with delegated executive authority; of ministry or service; instrumental' and is defined in the Merriam-Webster Dictionary as 'being or having the characteristics of an act or duty prescribed by law as part of the duties of administrative office.'

In *Yeldham*, which was decided before Part 8A of the *Judicial Officers Act* was inserted, Hope AJA made the following observations about judges performing 'ministerial acts':

> There are a number of instances where judges are required to perform ministerial acts of various kinds, whether by statute or otherwise, which are similarly associated with the exercise by the judge of his judicial function. An example is the report which a judge presiding at a criminal trial may furnish, or may be required by the Chief Justice to furnish, giving his opinion upon the case or upon any point arising in the case where there has been an appeal or application for leave to appeal under the *Criminal Appeal Act 1912*, s 11. The giving of such a report is not a judicial act in the strict sense; it is a ministerial act. It is not done in court; it is done in the judge's private chambers but it flows directly from his presiding at the trial and is, in effect, an extension of what he has done at the trial.[43]

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[41] *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518, 523-524 [12].

[42] *Hammond v State of New South Wales* [2013] NSWSC 1930, [70] (Adamson J, as her Honour then was).

[43] *Yeldham* (n 5) 72 (Hope AJA, Priestley JA agreeing at 64).

In *QT v State of New South Wales*,[44] it was held that nothing in the wording of the *Judicial Officers Act* requires ministerial duties to be 'intimately connected' with a judicial officer's judicial functions. The Administrative Decisions Tribunal held that 'in order to be protected by the doctrine of judicial immunity when performing ministerial duties, a judge has to be performing those duties in his or her capacity or role as a judge'.[45] The Tribunal held that a direction made by a Coroner that the body of a deceased person undergo a post mortem examination[46] is protected by s 44B even if it is deemed a ministerial duty because it is exercised in the performance of the Coroner's duties as a judicial officer.[47]

In *Johnston v State of New South Wales*,[48] the Tribunal considered that, although listing decisions by a Registrar of the Tribunal may be administrative, the Registrar's decision attracted judicial immunity under s 44C. This is because the relevant legislation made listing a function of the President, who was expressly afforded judicial immunity, and the Registrar was acting as a proxy for the President by virtue of delegation.[49] Justice Kavanagh noted that the line of authority indicates that 'ministerial' duties can mean administrative duties.[50]

In *Budd v State of New South Wales*,[51] the Tribunal defined 'ministerial' in s 44B as 'acts requiring the exercise of little or no discretion'. This, it is suggested, is not understood to mean acts the outcome of which are a foregone conclusion. Rather, the Tribunal's decision ought be read as referring to acts that involve little or no exercise of judicial power. The Tribunal found that the term covers actions of a Magistrate such as referring a matter to mediation and directing a court officer to inform an applicant of their rights and options.[52] The Tribunal held that decisions and associated ministerial actions done in respect of an application for an apprehended violence order are accordingly protected by judicial immunity.[53]

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[44] [2010] NSWADT 68 ('*QT*').

[45] Ibid [15] (Hennessy LCM, Deputy President).

[46] *Coroners Act 1980* (NSW) s 48(1).

[47] *QT* (n 44) [19] (Hennessy LCM, Deputy President). In a different decision, Young JA observed that a 'post mortem examination under the aegis of a coroner is part of a judicial process and there is protection under s 44B of the *Judicial Officers Act 1986*': *Sydney Local Health Network v QY and QZ* (2011) 83 NSWLR 321, 344 [162].

[48] [2009] NSWADT 314, [53] (Kavanagh J).

[49] Ibid [47]–[59] (Kavanagh J).

[50] Ibid [53] (Kavanagh J), citing *Wentworth* (n 3).

[51] [2007] NSWADT 112, [49] (Judicial Member Layton, Non-Judicial Members Lowe and Hiffernan).

[52] Ibid.

[53] Ibid [50] (Judicial Member Layton, Non-Judicial Members Lowe and Hiffernan).

It is contended that the phrase 'ministerial duties' in Pt 8A of the *Judicial Officers Act* incorporates duties which are administrative in nature and is analogous to the immunity relied upon in *Fingleton* for decisions involving the allocation of judicial officers to court locations and the appointment and removal of coordinating judicial officers. The decision of *QT* suggests that Pt 8A expands the common law position for judicial immunity in relation to ministerial decisions because it displaces the requirement to show an 'intimate association' to judicial functions. This accords with the natural meaning of the words 'in the performance of his or her duties as a judicial officer' in s 44B, which does not draw a distinction between judicial and other duties. All that is required is that the performance of such duties be carried out in one's capacity as a judicial officer.[54] As the incidental administrative duties fall within the breadth, the depth of the immunity creates an 'absolute' bar for civil and criminal liability.

Conclusion

What is advanced is a suggested framework for considering judicial immunity. The immunity should be separated by its breadth and depth dimensions – the former focusing on the acts or omissions to which the immunity applies, and the latter concerning the extent to which the immunity precludes liability. Whilst Pt 8A of the *Judicial Officers Act* has clarified and expanded the breadth of the immunity at common law, the depth remains to be determined by the common law in NSW.

It is contended that the phrase 'ministerial duties' in Pt 8A is sufficiently broad to capture the incidental administrative functions performed by judicial officers. As such, it appears that the performance of those day-to-day functions, particularly by heads of jurisdiction and coordinating judicial officers, would attract immunity from civil and criminal liability.

[54] See also *Towie v Victoria* (2008) 19 VR 640, 655 [55]–[56] (Kyrou J, as his Honour then was).