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THE DISCRETIONARY FUNCTION EXCEPTION OF THE FEDERAL TORT CLAIMS ACT

Passage of the Federal Tort Claims Act[1] in 1946 was universally regarded as a needed step towards governmental responsibility for the tortious conduct of its agents. In general, the purpose of the legislation was to assimilate, in so far as practicable, the position of the government in respect to liability for the "negligent and wrongful acts" of its employees, to that of a private employer. Congress, however, chose to limit the relinquishment of its sovereign right and clearly indicated this intent by the inclusion of thirteen exceptions to the waiver of immunity.

While the majority of the exceptions are directed to specific gov-

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38. This solution is analogous to the technique used in the Conflict of Laws, where one factor is often taken as determinative in order to provide uniformity in the law. See, *e.g.*, Hoxie v. New York, N.H. & H. Ry., 82 Conn. 352, 73 Atl. 754 (1909); Clark v. Southern Ry., 69 Ind. App. 679, 119 N.E. 539 (1918); Garnett v. Boston & M. Ry., 238 Mass. 125, 130 N.E. 183 (1921) (In actions *ex delicto* the law of the state where the tort was committed governs the rights of the parties).

39. See Shestack, *Disposition of Unclaimed Property—A Proposed Model Act*, 46 ILL. L. REV. 48, 75 (1951). Professor Shestack suggests a provision for escheat by the domiciliary state of the last known owner.

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1. 28 U.S.C. §§ 1346(b), 2401(b), 2671-2680 (Supp. 1950).

ernmental operations,[2] the first is couched in broad sweeping terminology whereby liability is denied to:[3]

> Any claim based . . . upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

The increasing frequency with which this exception is successfully invoked in cases arising under the act makes desirable an inquiry as to its meaning and possible justification.

Difficulty is encountered in ascertaining what Congress sought to accomplish by the inclusion of this limitation. The committee reports afford some indication by designating certain types of claims to which the exception was intended to be applicable. Thus, recovery was to be precluded in claims arising out of discretionary acts of the regulatory agencies,[5] and for injuries sustained by reason of governmental operations in improving navigation or furthering flood control.[6] Aside from these specifically mentioned objectives, there is little intimation of legislative intent; unless one includes the fact that Congress did not contemplate total abandonment of limitations against tort actions.[7]

At least one writer, in reference to the discretionary exception, has proposed that, ". . . the rationale underlying this concept is predicated upon the well-recognized distinction between the acts of the Government

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2. The exceptions dealing with specific agencies or specific operations of the government are: 28 U.S.C. § 2680(b), post office; *Id.* (c), customs; *Id.* (d), admiralty cases: *Id.* (e), Trading With The Enemy Act; *Id.* (f), quarantines; *Id.* (g), Panama Canal; *Id.* (i), fiscal operations of the Treasury Department and regulation of the monetary system; *Id.* (j), military operations in time of war; *Id.* (l), Tennessee Valley Authority; *Id.* (m), Panama Railway Corporation; *Id.* (h), liability for intentional torts, and *Id.* (k), any claim arising in a foreign country.

3. The portion quoted is preceded by the clause: "Any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid," which would seem to be independent of the discretionary function clause. Boyce v. United States, 93 F.Supp. 866 (S.D. Iowa 1950). The first clause was probably inserted to except suits based solely on the claim that a statute or regulation is unconstitutional, and hence, that the acts arising from such statute or regulation are wrongful. Congress felt that a tort action was not a proper means of testing the constitutionality of legislation. H.R. REP. No. 2245, 77th Cong., 2d Sess. 44 (1942).

4. 60 STAT. 845, 28 U.S.C. § 2680(a) (1946).

5. H.R. REP. No. 1287, 79th Cong., 1st Sess. 5 (1945).

6. *Ibid.* This committee report, however, refers to the whole of Sec. 2680(a) and congressional reference to flood control and navigation claims may have been directed to the first clause rather than the discretionary function exception. That is, the Federal Tort Claims Act was not intended as a substitute for the traditional remedy of a taking within the Fifth Amendment. See note 2 *supra.*

7. "The right to sue the Government which would be granted by the bill is surrounded by certain safeguards and circumscribed by certain limitations." H.R. REP. No. 1287, 79th Cong., 1st Sess. 1 (1945).

'qua government' and those of a proprietary nature, the courts holding the sovereign harmless in the former case."[8]

This is said to find support in the fact that many of the earlier bills introduced in Congress omitted this principle, on the theory that the courts would read into the act the substance of the exception.[9] Actually, this has occurred under T.V.A.'s "sue and be sued on" clause, which is silent as to any exceptions. The courts have interpreted this clause to permit an action only for harms resulting from proprietary functions.[10] However, the description of the immunity retained in terms of "discretionary functions" would indicate a differing scope than one based on the governmental-proprietary dichotomy. That an official is performing acts in the governmental category would not prescribe the acts as discretionary,[11] and similarly, functions which are proprietary or corporate in nature are not necessarily ministerial.[12] Thus, whatever the rationale underlying the exception, its coverage would seem to be derived from the meaning to be accorded the phrase "discretionary function."

Although intrinsically so vague as to be almost meaningless, it is significant that the terms, discretionary and ministerial, have a history of application in other legal contexts. For example, the discretionary test has been employed to determine whether mandamus will issue to compel action by a governmental officer.[13] More important for purposes of

8. Gottlieb. *The Federal Tort Claims Act—A Statutory Interpretation,* 35 GEO. L.J. 1, 42 (1946).

9. ". . . It is likely that the cases embraced within that subsection [Sec. 2680 (a)] would have been exempted by judicial construction. H.R. REP. No. 2245, 77th Cong., 2d Sess. 72 (1942).

10. In Grant v. T. V. A., 49 F.Supp. 564 (E.D. Tenn. 1942), the court said the clause did not permit plaintiff to sue for damages from flood control and navigation activities (governmental activities), but did permit suit for damages from T. V. A.'s commercial activities such as generating and selling electricity. Pacific National Fire Ins. v. T. V. A., 89 F.Supp. 978 (W.D. Va. 1949).

11. "Probably no function of a municipal corporation is more 'governmental' in character than the care of its highways, streets, and bridges. In theory, therefore, the city should be immune from responsibility for negligence in such matters; and such was the common law. Precisely the opposite result, however, constitutes the weight of judicial authority in this country on the commonly advanced ground that the duty of taking care of the public highways is ministerial in character." Borchard, *Government Liability in Tort,* 34 YALE L.J. 229 (1925).

12. Although proprietary and ministerial have been used interchangeably by some courts; *e.g.,* in cases of tort liability of municipal corporations, by definition they cannot be synonymous. Proprietary refers to a function in the sense that the function resembles that of private business. A test for this may be whether the activity is producing a profit or is competing with private business. Ministerial, on the other hand, designates an act which involves a small degree of judgment in performance and which posits a duty to perform upon the official or government.

13. Kendall v. United States *ex rel.* Stokes, 12 Pet. 524 (U.S. 1838); Decatur v. Paulding, 14 Pet. 497 (U.S. 1840); Sherwood, *Mandamus To Review State Administrative Action,* 45 MICH. L. REV. 123, 139 (1946).

the exception, the discretionary test generally has been the criterion for determination of personal liability and immunity of government officials.[14] An official may be held responsible for an injurious act which was merely ministerial; but is immune if the injury arose from an act which was discretionary in nature.[15] By relating this accepted immunity of officials to the discretionary function exception, the immunity waived by the Federal Tort Claims Act would extend only to instances where respondeat superior is applicable, and would exclude situations where personal liability does not attach to the officer or employee performing the act.[16] If this constitutes the coverage of the exception, an examination of the manner in which the test has been applied in litigation involving tort immunity and liability of government officials is necessary.

Broadly speaking, the courts have designated as ministerial, official action which is absolute, certain, and imperative.[17] Discretionary action, on the other hand, has been characterized as that which necessarily requires the exercise of reasoning and judgment in deciding whether action is to be taken or in what manner it is to be performed.[18] More concrete factors aid in ascertaining the nature of an official's function. Thus, the language of the statute authorizing the action is important, and often controlling. If the time, mode, and occasion is prescribed, the activity will likely be considered as ministerial, while, if these factors are to be determined by the official, the activity will probably be discretionary.[19] The use of mandatory or permissive language in the statute may influence the court's decision.[20] The position or importance of the official performing the act may also be persuasive.[21] However, none of these considerations are conclusive, and the test is at best, abstract and extremely difficult to apply with any semblance of certainty.[22]

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14. Little v. Barreme, 2 Cranch 170 (U.S. 1804); Cooper v. O'Connor, 69 App. D.C. 100, 99 F.2d 135 (1938); Ham v. Los Angeles County, 46 Cal. App. 148, 189 Pac. 462 (1920); PROSSER, TORTS § 108(c) (1941).

15. See note 14 *supra.*

16. Kendrick v. United States, 82 F.Supp. 430 (N.D. Ala. 1949); *accord,* Coates v. United States, 181 F.2d 816 (8th Cir. 1950).

17. People v. May, 251 Ill. 54, 95 N.E. 999 (1911); Wailes v. Smith, 76 Md. 469, 25 Atl. 922 (1893); Garff v. Smith, 31 Utah 102, 89 Pac. 772 (1907); HART, AN INTRODUCTION TO ADMINISTRATIVE LAW 278 (2d ed. 1950).

18. See authorities cited in note 17 *supra.* Also see Stewart v. Stewart, 28 Ind. App. 378, 62 N.E. 1023 (1901); State v. Tindell, 112 Kan. 256, 210 Pac. 619 (1922).

19. Patterson, *Ministerial and Discretionary Official Acts,* 20 MICH. L. REV. 848, 853 (1921).

20. *Id.* at 876.

21. *Id.* at 862; HART, *op. cit. supra* note 16, at 259.

22. "Such statements [distinguishing ministerial and discretionary functions] would seem to postulate a class of official acts in which the official is an automaton; the facts and the statute are placed in a machine, a lever is pressed, and out comes the

This lack of objective criteria has permitted the introduction of policy considerations in deciding the nature of a particular function. Thus, in the adjudication of personal liability of the officials, the courts have been influenced by a desire to grant immunity, and, consequently, have liberally construed acts as discretionary, regardless of the hardships on individual citizens. The rationale of this official immunity can be traced to sound and practical arguments,[23] which include: (1) Individuals would be deterred from accepting government offices if forced to assume the risk of personal financial loss. (2) Officials would not be free to exercise independent judgment, since the fear of law suits would discourage their acting or possibly intimidate them to act other than on the basis of sound discretion. (3) The mere time and effort expended in defending such suits would render the official incapable of performing his duties fully and efficiently. (4) Breach of such duties should be redressed through criminal prosecutions or at the election polls. (5) It is basically unfair to hold an official liable for an act which the legislature has authorized or granted him power to perform.

These arguments were more persuasive prior to the Federal Tort Claims Act since the financial burden of tort liability was borne entirely by the official. The government was protected by sovereign immunity from the principle of respondeat superior which is applicable in similar situations in the business world.

If these same considerations apply with equal force to governmental tort immunity, it seems that the courts necessarily should give the discretionary function exception a scope comparable to that found in the suits against government officials. However, that they are not so applicable is apparent. It cannot be maintained that citizens would be discouraged from accepting public office because of a realization that their wrongful acts would create liability in the government. Nor would officials be particularly deterred from acting, or intimidated into improper acts through fear of a suit against the government.[24] Efficiency would

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official act. Such official never was on land or sea. Human action always involves the exercise of some judgment or discretion. . . . One might infer that the courts have no law on the subject of discretionary powers. That each case is decided subjectively and the result is not predictable. Certainly there is a basis for such pessimism." Patterson, *supra* note 19, at 854, 873.

23. For a general discussion see Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 271 (1937); Keefe, *Personal Tort Liability of Administrative Officials*, 12 FORD. L. REV. 130 (1943).

24. "There is one suggestion . . . which must be rejected with scorn. It is said that if the government is held to responsibility for breaks in canals and dams which it has constructed, it will effectually dampen the ardor of the bureaus for constructing other works. This suggestion is amoral at least." Ure v. United States, 93 F.Supp. 779, 792 (1950).

not be hampered to the same extent as if the suits were against the officials personally. Finally, the availability of remedies through criminal prosecution or at the election polls are not practical or consoling to a tortiously injured citizen. Thus, it would seem that any justification for the discretionary function exception must be based on arguments other than those forming the basis of the officials' immunity.

Turning to the cases under the Federal Tort Claims Act which have considered the exception, it is noted that the courts, generally, have failed to explain satisfactorily why the act in question was or was not discretionary. Likewise, little is found in the opinions concerning a possible rationale behind the exception. The decisions, at best, are grounded upon interpretation of the statutes authorizing the act complained of,[25] and upon statements that the test will be identical with its employment in other legal context.[26] This approach has led to application of the exception without considering its purposes and has resulted in unjustifiable denials of claims.

Boyce v. United States[27] typifies the factual situation and holding in a number of the cases. There, the Corps of Engineers, while improving navigation in the Mississippi River, damaged plaintiff's property as a result of dynamiting. Under state law the government, if a private person, would have been liable on the theory of strict liability. The court, however, considered the determination as to quantity and manner of using the dynamite to be a discretionary function which fell within the exception.[28] Dicta intimated that the plaintiff could recover by proving a negligent variance from the plans by the actual laborers but was without a remedy if the plans were followed. This was said to be true, even though such plans were drawn negligently or with an abuse of discretion. However, the case of *Ure v. United States*[29] would seem to be irreconcilable with the *Boyce* holding. In the *Ure* case a government constructed and operated irrigation canal had broken, flooding plaintiff's land. The government was held liable under the rule of *Rylands v. Fletcher* and it was stated that the construction of an

25. Denny v. United States, 171 F.2d 365 (5th Cir. 1948); Kendrick v. United States, 82 F.Supp. 430 (N.D. Ala. 1949); Old King Coal Company v. United States, 88 F.Supp. 124 (S.D. Iowa 1948).

26. Coates v. United States, 181 F.2d 816 (8th Cir. 1950).

27. 93 F. Supp. 866 (S.D. Iowa 1950).

28. *Accord,* Coates v. United States, 181 F.2d 816 (8th Cir. 1950); North v. United States, 94 F.Supp. 824 (D. Utah 1950); Olson v. United States, 93 F.Supp. 150 (N.D. 1950); Thomas v. United States, 81 F.Supp. 881 (W.D. Mo. 1948). See note 5 *supra* as to whether these cases are a proper result of Congressional intent concerning navigation and flood control claims.

29. 93 F.Supp. 779 (D. Ore. 1950).

irrigation canal was not within the exception. Assuming there is no valid distinction, in respect to the exception, between the planning and construction of an irrigation canal and the planning and improving of river navigation, the decisions in the *Boyce* and *Ure* cases are in direct conflict.

A particularly unjustifiable result arising from the application of the exception occurred in *Denny v. United States.*[30] Plaintiff was an Army officer, and by regulation, his family was entitled to hospital care "whenever practical." An army hospital had treated plaintiff's wife throughout her pregnancy, had assured her of care at time of delivery, and when called on the eve of childbirth had agreed to send an ambulance. The ambulance failed to arrive and the child was stillborn; but when the plaintiff sued, the majority of the court held that the hospital was under obligation to provide care only when it was practical and were thus exercising a discretionary function. It would seem clear, as the concurring Judge indicates,[31] that the discretion as to whether it was practical to treat the wife had been exercised when the authorities agreed to care for her and to send an ambulance. This has been the logic of several decisions, refusing to resort to the exception. Since the discretion involved had been exercised in the causal chain leading up to the injury, the act proximately causing the harm was merely ministerial.[32]

Other applications of the exception denying claims seem entirely proper. Typical is *Old King Coal Company v. United States,*[33] involving the failure of the Secretary of the Interior to operate plaintiff's coal mine when taken over by the government and the failure to return the mine on plaintiff's request. The government's acts had been predicated upon a national emergency produced by a strike of the miners. The court held that the statutes authorizing the acts had granted the officials discretion as to operation of the mines and therefore the case fell within the discretionary function exception.[34] There is considerable doubt whether such governmental action would even be tortious, and the injury, if redressed at all, should be compensated under the well

30. 171 F.2d 365 (5th Cir. 1948).

31. *Id.* at 367.

32. The courts have held the government liable for negligent acts of its hospital employees in treating patients, even though it was discretionary as to whether they should be admitted to the hospital. Costley v. United States, 181 F.2d 723 (5th Cir. 1950); Griggs v. United States, 178 F.2d 1 (10th Cir. 1949); Dishman v. United States, 93 F.Supp. 567 (D. Md. 1950).

33. 88 F.Supp. 124, (S.D. Iowa 1949).

34. *Cf.* Jones v. United States, 89 F.Supp. 980 (S.D. Iowa 1949).

established constitutional proscription against taking without due process of law.[35]

The background of the discretionary function exception, the legislative history, the usages of the discretionary test in other legal contexts, and the early judicial applications under the Federal Tort Claims Act have not produced a satisfactory answer as to exactly when the exception should retain governmental immunity. The very presence of the discretionary function exception indicates the congressional awareness of the impossibility of compensation for every injury flowing from government operations. An attempt to make continual adjustments between the sovereign and the individual citizen is neither expected nor practical and would be more burdensome than beneficial to everyone concerned.[36] However, it would seem that the courts have overextended the discretionary immunity to instances where it was not intended and where there is no valid justification for its existence.

Admittedly, the discretionary-ministerial test offers little, if any, definite guide for drawing the delicate line of immunity.[37] Few official acts are purely mechanical. Invariably they will require some degree of judgment and reasoning by the official performing the act. The test may further pose insolvable problems in selecting the act upon which the test is to operate. The most minute task may be viewed as a necessary part of a larger function until an obviously discretionary responsibility is found.[38] Immunity based upon a criterion so elusive must depend largely upon the attitude of the courts. It would not seem too "unjudicial" to urge the courts, when presented with the problem, to seek not only an objective determination of whether an act is discretionary or ministerial, but also to take into consideration the reasons for government immunity. Thus, in the numerous borderline cases, where reasonable men may disagree as to the nature of the act, the court could well weigh the considerations favoring government immunity

35. United States v. Pewee Coal Co., 341 U.S. 114 (1951) (Plaintiff recovered operating losses for period that government controlled mine under theory of Fifth Amendment violation).

36. See, however, Gellhorn and Schenck, *Tort Actions Against The Federal Government,* 47 COL. L. REV. 722, 736 (1947), for argument that government responsibility for damages should go further than for mere negligent acts and should include a large degree of strict liability.

37. See note 21 *supra.*

38. *E.g.,* the decision in the *Denny* case would seem to be the result of failing to distinguish the conduct of not sending the ambulance from the discretionary function of deciding whether it was practical to admit the wife for treatment. Failure to distinguish such acts seem contrary to congressional intent which stated that common law torts of employees are not exempted even though such employees have discretionary powers. H.R. REP. No. 1287, 79th Cong., 1st Sess. 5 (1945).

against the reasons for redressing the plaintiff's injury and characterize the act according to the factors which seem controlling.

The most important of these considerations in respect to government immunity is the prevention of massive and widespread claims resulting from a single governmental act. Thus, it would not seem that Congress intended to create liability for each individual harm resulting from a ruling of the price control administrator, even if such ruling be shown to have been negligently made so as to assume a tortious appearance. The damages in such a case would be difficult to ascertain, would be spread over a sizable portion of the population, and in most instances would be greatly out of proportion to the fault proved. To waive immunity for such injuries would be to create liability "in an indeterminate amount for an indeterminate time to an indeterminate class."[39] In effect such a consideration would advocate the use of the exception to prevent the recognition of a new type of tort arising from the acts of government which affect a large segment of the population.[40]

The choice may turn upon whether the allegedly tortious conduct is similar to activities performed by private individuals and to which courts have previously attached tort liability. That is, immunity under the exception should be reserved more readily for an act such as taking over and controlling the nation's coal mines than for activities such as dynamiting or the operation of a hospital. Duties in the latter category are usually performed by personnel in the lower heirarchy of officialdom and judicial inquiry as to the propriety of their action would be less disrupting than calling to question the decisions of higher officers.

A final indication may be the nature of the damages inflicted. Although difficult to logically rationalize with the discretionary test, it would seem that the government, with few exceptions, should be responsible for tortious acts which invade tangible interests in property or the physical person. Generally in such cases, the damages are easily ascertained, are localized, and are likely to be commensurate with the fault shown. There is some authority for adhering to this line of distinction. Courts have always been more zealous in their protection of tangible interests in property and the physical person than of mere interests of an intangible economic nature. Thus, in applying the discre-

39. Ultramares Corporation v. Touche, 225 N.Y. 170, 174 N.E. 441 (1931).

40. The number of people affected by an act has been a limiting factor on tort liability among private persons, particularly when the interests affected are economic. Robins Dry Dock and Repair Co. v. Flint, 275 U.S. 303 (1927); Ultramares v. Touche, *supra* note 39; Stevenson v. East Ohio Gas Co., 47 Ohio Law Abs. 586, 73 N.E.2d 200 (1946).

tionary test to determine the personal immunity of officials, the courts seem to have preferred to call the act ministerial (thereby permitting the injured party recovery) when the harm was an invasion of more tangible interests.[41]

Continued judicial application of the discretionary function exception without reference to the fundamental bases of government immunity may invoke Congressional amendment of the exception so as to permit remedies where sovereign protection is unnecessary. It would seem that the whole exception might well be removed without jeopardizing government efficiency and economy. As previously noted, the great majority of claims which would validly be denied by this exception in reality are not torts and would not create government liability even without the exception. Either a judicial or a legislative move in this direction would more completely assimilate the position of the citizen as against the government to his position when suing another citizen.