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Discretionary Function Exception to Government Tort Liability

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THE DISCRETIONARY FUNCTION EXCEPTION TO GOVERNMENT TORT LIABILITY

In 1957 Florida became the first American jurisdiction to abolish the rule that government entities are immune from tort liability when acting in a governmental, rather than a proprietary, capacity.[1] The trend toward governmental tort liability has become so strong that at least twenty-six jurisdictions have either judicially abolished or modified the immunity rule.[2] Some courts have simply made categorical statements that a government body shall be liable for its torts.[3] However, most courts and commentators have emphasized that not all injury-causing governmental acts create liability, even though they would be tortious if committed by a private person.[4] Courts

1. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957).

2. Spencer v. General Hosp., 425 F.2d 479 (D.C. Cir. 1969); City of Fairbanks v. Schaible, 375 P.2d 201 (Alas. 1962); Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963); Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); Evans v. Board of County Comm'rs, 174 Colo. 97, 482 P.2d 968 (1971); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957); Smith v. State, 93 Idaho 795, 473 P.2d 937 (1970); Molitor v. Kaneland Com. Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960); Campbell v. State, 259 Ind. 55, 284 N.E.2d 733 (1972); Klepinger v. Board of Comm'rs Co., 143 Ind. App. 155, 239 N.E.2d 160 (1968); Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964); Board of Comm'rs v. Splendour Shipping & Enterprises Co., 273 So. 2d 19 (La. 1973); Sherbutte v. Marine City, 374 Mich. 48, 130 N.W.2d 920 (1964); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962); Johnson v. Municipal Univ., 184 Neb. 512, 169 N.W.2d 286 (1969); Brown v. City of Omaha, 183 Neb. 430, 160 N.W.2d 805 (1968); Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963); Merrill v. City of Manchester, 114 N.H. 722, 332 A.2d 378 (1974); Willis v. Department of Cons. & Econ. Dev., 55 N.J. 534, 264 A.2d 34 (1970); Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975); Kitto v. Minot Park Dist., 224 N.W.2d 795 (N.D. 1974); Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 305 A.2d 877 (1973); Becker v. Beaudoin, 106 R.I. 562, 261 A.2d 896, *rehg. denied*, 106 R.I. 838, 261 A.2d 896 (1970); Long v. City of Weirton, 214 S.E.2d 832 (W. Va. 1975); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962); Jivelekas v. City of Worland, 546 P.2d 419 (Wyo. 1976).

3. *See, e.g.*, Evans v. Board of County Comm'rs, 174 Colo. 97, 482 P.2d 968 (1971); Jivelekas v. City of Worland, 546 P.2d 419 (Wyo. 1976).

4. *See, e.g.*, Elgin v. District of Columbia, 337 F.2d 152 (D.C. Cir. 1964); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957); Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962); Merrill v. City of Manchester, 114 N.H. 722, 332 A.2d 378 (1974); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962); K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 25.00 *et seq.* (1970 Supp.); Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963); Reynolds, *The Discretionary Function Exception of the Federal Tort*

abolishing governmental immunity have not only had to determine the principles on which some limited immunity should be retained but have also been required to develop standards for distinguishing the type of government actions which give rise to liability from those which do not.[5]

I. THE NEED FOR IMMUNITY

A major difference between government and private entities lies in the types of activities performed by governmental bodies, many of which are not paralleled in the private sector.[6] As one author points out,

> The power to prescribe what conduct is unlawful, and to arrest, prosecute and imprison persons for violations thereof, for example, is solely allocated to public agencies. Similarly, one finds no exact counterpart in private life . . . to promulgate and invoke civil sanctions, *e.g.*, licensing systems, in aid of many types of regulatory measures. Certain types of public welfare activities, including such protective measures as fire prevention and suppression, flood control and water conservation, and water and air pollution control, as well as beneficial services in the areas of public health, recreation, sanitation, education and local transportation, are also typically engaged in to a greater degree by public entities than by private persons.[7]

The difference in the nature of activities has several implications for governmental tort liability. Often activities are performed by the government because they carry too great a risk of harm to be undertaken by private persons, *e.g.*, arresting and imprisoning wrongdoers and providing fire protection.[8] Additionally, because the tort system has little experience with in-

Claims Act, 57 GEO. L. J. 81 (1968); Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L. F. 919.

5. Because the decisions vary greatly in the scope of government entities covered by their holdings, this paper will refer generally to "government liability." This includes all state level liability, whether of the state itself or local political subdivisions. Unless otherwise noted, it does not refer to the United States government.

6. *See* City of Louisville v. Louisville Seed Co., 433 S.W.2d 638 (Ky. 1968); Brown v. City of Omaha, 183 Neb. 430, ___, 160 N.W.2d 805, 810 (1968) (Newton, J., dissenting); 4 CALIF. L. REV. COMM'N 801, 810 (1963); 5 CALIF. L. REV. COMM'N 5, 269-71 (1963); Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A. L. REV. 463 (1963).

7. Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A. L. REV. 463, 468 (1963).

8. City of Louisville v. Louisville Seed Co., 433 S.W.2d 638 (Ky. 1968).

juries caused by these functions, it is difficult to reduce the impact of liability by purchasing insurance or taking other protective measures.

A private person faced with the probability that his actions will produce tort liability has several options: pursue the activity in the face of the risk; modify the activity to reduce the risk; or, abandon the activity altogether. Government bodies often do not have such options. Although potential liability encourages elimination or modification of dangerous activities, it has little affect on governments performing duties mandated by a constitution or legislative enactment.[9]

All governmental bodies, especially local units, are continually faced with the problem of limited financial resources.[10] Private persons also have limited funds, but they are not required to perform mandatory duties or restricted to particular forms of fund raising. The availability of insurance and statutory limits on recovery do reduce the impact of this problem,[11] but even with insurance and recovery limits, tort liability means that a higher percentage of public funds must ultimately be devoted to payment of claims.

Although seldom emphasized by commentators, the effect of potential tort liability on the zeal of public officers and employees is another factor to be considered.[12] Government officials should not be deterred from diligent pursuit of their duties because of a fear of tort liability arising from their actions.

The position of a government employee or officer is similar to that of an agent of a private corporation. The agent may expose the corporation to liability while not being personally liable, or he may be covered by the principal's insurance so that he does not bear the financial brunt of his torts. It is not neces-

9. Brown v. City of Omaha, 183 Neb. 430, 160 N.W.2d 805, 809 (1968) (dissenting opinion); 4 CALIF. L. REV. COMM'N 801, 810 (1963); 5 CALIF. L. REV. COMM'N 5, 269-71 (1963). It will be noted that the former governmental-proprietary distinction, at least in theory, avoided this problem by only making governments liable for activities comparable to those undertaken by private individuals.

10. Brown v. City of Omaha, 183 Neb. 430, 160 N.W.2d 805, 810 (1968) (Newton, J., dissenting).

11. *See, e.g.*, WIS. STAT. § 895.43 (1975).

12. Johnson v. State, 69 Cal.2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610 (1955); Note, *The Discretionary Function Exception of the Federal Tort Claims Act*, 66 HARV. L. REV. 488, 495-96 (1963). *But see* Note, *The Discretionary Immunity Doctrine in California*, 19 HASTINGS L. J. 561 (1968), which points out that some "dampening of the ardor" is inevitable.

sarily undesirable that government officers and employees be concerned that their actions may create tort liability. In addition to the normal desire to do the job well, the employee or officer who exposes the government unit to expensive litigation and damages may lose his job. This certainly gives him a personal interest in avoiding tortious actions.

The principal reason for limiting the scope of government tort liability, however, is the principle of separation of powers inherent in our governmental system.[13] The authority to make some decisions is vested in certain government branches, departments, agencies, and officers; thus, it would be improper for the judicial branch to review these decisions in tort actions. This theory was most tersely stated by Justice Jackson in his dissenting opinion in *Dalehite v. United States*: "[I]t is not a tort for government to govern."[14] The California Supreme Court elaborated on this principle in *Johnson v. State*, stating that there must be

> an assurance of judicial abstention in areas in which the responsibility for *basic policy decisions* has been committed to coordinate branches of government. Any wider judicial review, we believe, would place the court in the unseemly position of determining the propriety of decisions expressly entrusted to a coordinate branch of government.[15]

II. STANDARDS FOR GOVERNMENT IMMUNITY

Courts, commentators, and legislatures have had little difficulty determining that a total waiver of government immunity is undesirable.[16] However, devising standards to separate those

13. This reason has been stressed more heavily by courts than commentators, probably because they are personally aware of the sensitivity of other branches of government to judicial intrusion on their areas of decision making. *See, e.g.*, Elgin v. District of Columbia, 337 F.2d 152 (D.C. Cir. 1964); Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968); Weiss v. Fote, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960). The great majority of cases make at least some reference to this principle, either through an analysis of the theory or by a flat statement that certain areas of government decision making retain immunity. *See also* K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 25.08 *et seq.* (1970 Supp.); Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L. J. 81 (1968); Note, *Separation of Powers and the Discretionary Function Exception: Political Question in Tort Litigation Against the Government*, 56 IOWA L. REV. 930 (1971).

14. 346 U.S. 15, 57 (Jackson, J. dissenting) (1953).

15. Johnson v. State, 69 Cal. 2d 782, ____, 248 P.2d 352, 360, 73 Cal. Rptr. 240, 248 (1968) (emphasis in original).

16. *See* N.Y. CT. CL. ACT § 8 (McKinney 1963); WASH. REV. CODE ANN. § 4.92.090 (1975 Supp.). In these states, the courts have found it necessary to create judicial

acts that should be protected from those that should create liability has proved to be a complex task. The most common approach is to provide immunity for actions which should not be subjected to judicial review under the separation of powers doctrine.[17] The remainder of this article will examine various formulations of this rule of governmental immunity.

A. The Discretionary Function Exception

The basis of this rule is that a "discretionary function" performed by a governmental unit does not give rise to tort liability. The older rule of liability only for proprietary activities and not for governmental functions looked only to the level at which the decision is made to undertake the activity and did not consider the nature of activity. Now, however, any function, whether "governmental" or "proprietary," can come within the discretionary function exception.[18]

The discretionary function rule originated with the Federal Tort Claims Act of 1946,[19] which exempted

> [a]ny 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 is abused.[20]

Several states have enacted legislation patterned after the federal act,[21] and others have judicially adopted the discretion-

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exceptions. *See, e.g.*, Weiss v. Fote, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960); Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P.2d 440 (1965). *But see* Note, *The Discretionary Exception and Municipal Tort Liability: A Reappraisal*, 52 MINN. L. REV. 1047 (1968) for the proposition that the reasons for retaining immunity at the national and state level do not apply to local government units.

17. Some courts, for example, follow a rule that the victim of government action can only recover if he can show a government duty owed to him as an individual, not just to the general public. Duran v. City of Tucson, 20 Ariz. App. 22, 509 P.2d 1059 (1973); Motyka v. City of Amsterdam, 15 N.Y.2d 134, 204 N.E.2d 635, 256 N.Y.S.2d 595 (1965). Another rule is that there is no liability for nonfeasance, Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968), but that once the government voluntarily undertakes an action, it is liable for misfeasance. Veach v. City of Phoenix, 102 Ariz. 195, 427 P.2d 335 (1967).

18. *See* Spencer v. General Hosp., 425 F.2d 479 (1969) for a good discussion of this point.

19. 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401-02, 2411-12, 2671-80 (1970).

20. 28 U.S.C. § 2608(a) (1970).

21. *See, e.g.*, ALASKA STAT. § 9.50.250(1) (1973); CAL. GOV'T CODE § 820.02 (West 1966); IOWA CODE ANN. § 25A.14.1 (West 1971); MINN. STAT. ANN. § 466.03(6) (West

ary function exception.[22] The major problem with this rule is the lack of an adequate standard for determining what is a discretionary function. No legislature to date has attempted to define precisely what this term means. The courts have developed three basic interpretations: a literal or semantic definition, a standard which distinguishes "planning level functions" from "operational level functions," and a flexible approach which evaluates the particular facts in light of the purpose of the exception. However, none of these approaches provide a standard which clearly separates those activities that are protected from those for which the government is properly liable.[23]

1. The Literal or Semantic Interpretation

Courts have encountered problems in applying the discretionary function rule because there is some measure of discretion involved in nearly every activity undertaken by a government official, employee, or agency.[24] For a time, the lower appellate courts in California labored unsuccessfully to develop a dictionary definition of "discretion" which established liability for minor discretionary actions and preserved immunity for higher level decisions. However, this definitional approach was rejected by the California Supreme Court in the case of *Johnson v. State*.[25] In *Johnson*, the court relied on *Lipman v. Brisbane Elementary School District*,[26] decided before Califor-

1963); OR. REV. STAT. § 30.265(2)(d).

22. Weiss v. Fote, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960); Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P.2d 440 (1965).

23. The literature on this point, especially on the Federal Tort Claims Act, is extensive. *See* Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L. J. 81 (1968); Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963); Note, *The Discretionary Function Exception of the Federal Tort Claims Act*, 66 HARV. L. REV. 488 (1963); Peck, *The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207 (1956). Although these and other authors have suggested methods of construing the discretionary function rule, none has been able to devise a standard that would fulfill the purpose of maintaining separation of powers while clearly delineating acts creating liability from those which should be immune. For the suggestion that separation of powers should be only one of several factors in determining liability, *see* Note, *Separation of Powers and the Discretionary Function Exception: Political Question in Tort Litigation Against the Government*, 56 IOWA L. REV. 930 (1971).

24. Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968); Roberts, *The Discretionary Immunity Doctrine in California*, 19 HASTINGS L.J. 561 (1968).

25. 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

26. 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961).

nia adopted a legislative discretionary function rule, for the following proposition:

> Although it may not be possible to set forth a definitive rule which would determine in every instance whether a governmental agency is liable for discretionary acts of its officials, various factors furnish a means of deciding whether the agency in a particular case should have immunity, such as the importance to the public of the function involved, the extent to which government liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages.[27]

The *Johnson* approach, which based the immunity determination on a consideration of policy factors, effectively laid to rest the semantic test of the discretionary function exception. No case since *Johnson* has seriously attempted to apply a semantic interpretation to determine the discretionary function question.

2. Planning vs. Operational Level of Decision Making

Under the Federal Tort Claims Act and several state statutes patterned after the federal act, decisions made at the "planning level" are discretionary functions while "operational level" functions are not.[28] The distinction was first made in *Dalehite v. United States*,[29] the leading Supreme Court case construing the federal act. *Dalehite* arose out of the extensive

27. *Id.* at 230, 359 P.2d at 467, 11 Cal. Rptr. at 99. *Lipman* was a companion case to Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961), which rejected government immunity from tort liability as mistaken and unjust. *Lipman* and *Muskopf* set forth a judicial rule that government immunity should continue for discretionary acts. The California legislature responded with an extremely comprehensive statute attempting to delineate specifically which government actions would create liability. CAL. GOV'T CODE §§ 810-996.6 (West 1966). The statute was based on a study and subsequent recommendations made by the California Law Revision Commission. 4 CAL. LAW REV. COMM'N 801 (1963) and 5 CAL. LAW REV. COMM'N 5 (1963). In addition to the numerous specific government actions rendered immune by the act, there is also a catch-all discretionary function exception, § 820.02, which was definitively construed in *Johnson*. Although *Johnson* is of limited application in its home jurisdiction because most actions that might otherwise come within the discretionary function exception are covered by specific provisions, *Johnson* is the leading case on construction of the discretionary function exception.

28. Dalehite v. United States, 346 U.S. 15 (1953); State v. Abbot, 498 P.2d 712 (Alas. 1972); Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968); Rogers v. State, 51 Hawaii 293, 459 P.2d 378 (1969); Silver v. City of Minneapolis, 284 Minn. 266, 170 N.W.2d 206 (1969); Carroll v. State, 27 Utah 384, 496 P.2d 888 (1972).

29. 346 U.S. 15 (1953).

damage caused whenammonium nitrate fertilizer manufactured under the direction of the United States government exploded while being loaded for export. The Court looked primarily to the level of government at which the decision to act was made to determine whether the exception applied:

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives and administrators in establishing plans, specifications or schedules of operations. *Where there is room for policy judgment and decision there is discretion.* It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion.[30]

The Court held that the original cabinet-level decision to undertake the fertilizer export program clearly brought the action within the planning area. Any subsequent acts of negligence were therefore immune because once an initial decision is within the discretionary function exception, all actions to carry it out are also immune. Since the activity involved was clearly the result of a planning level decision, the court was not required to map out a boundary between planning and operational level functions.

The breadth of the exception set out in *Dalehite* has caused considerable confusion. Many federal courts have developed more limited rules.[31] State courts have used the decision as a touchstone for interpreting the discretionary function exception. Thus, planning level functions are generally interpreted to be those requiring basic policy decisions, while operational level functions are those that implement policy. The *Dalehite* suggestion that implementation of policy is also immune has never been adopted by the state courts.

30. 346 U.S. at 35-36 (emphasis added).

31. *See* Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81 (1968).

Johnson v. State[32] is the leading state case construing the discretionary function exception. The plaintiff in *Johnson* was assaulted by a juvenile parolee placed in her home as a foster child by a state parole officer. She alleged that the officer was negligent in not warning her of the youth's known aggressive tendencies. The state contended that the decision to place the boy in her home without a warning was a discretionary function.

In addition to its disapproval of the semantic approach, the court rejected the proposition that broad immunity is necessary to avoid unduly dampening the zeal of public officers and employees. The *Johnson* court adopted a rule that "basic policy decisions" alone fall within the scope of the immunity.[33] This rule is based on the separation of powers concept. Since responsibility for basic policy decisions is vested in other government branches, these decisions should not be reviewed by the courts. The court relied on *Dalehite*[34] to distinguish between planning and operational level decisions. However, the court rejected the *Dalehite* reasoning that the execution of immune policy decisions should also be protected.[35] Although the initial decision to parole a juvenile is a policy decision within the discretionary function exception, the court ruled that the parole arrangement and the decision to warn the foster parents of the juvenile's history were operational level decisions not protected by the discretionary function rule: "Although a basic policy decision (such as standards for parole) may be discretionary and hence warrant governmental immunity, subsequent ministerial actions in the implementation of that basic decision still must face case-by-case adjudication on the question of negligence."[36]

Although the court in *Johnson* acknowledged that the planning-operational distinction lacked certainty and predictability, it felt that this deficiency was overridden by its emphasis of the considerations behind the rule of governmental immunity:

> Admittedly, our interpretation will necessitate delicate ques-

32. 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).
33. *Id.* at ___, 447 P.2d at 360, 73 Cal. Rptr. at 248.
34. *Id.*, 447 P.2d at 360, 73 Cal. Rptr. at 248.
35. *Id.*, 447 P.2d at 360, 73 Cal. Rptr. at 248.
36. *Id.* at ___, 447 P.2d at 362, 73 Cal. Rptr. at 250.

> tions; the very process of ascertaining whether an official determination rises to the level of insulation from judicial review requires sensitivity to the considerations that enter into it and an appreciation of the limitations on the court's ability to re-examine it. Despite these potential drawbacks, however, our approach possesses the dispositive virtue of concentrating on the reasons for granting immunity to the governmental entity. It requires us to find and isolate those areas of quasi-legislative policy-making which are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision.[37]

Johnson has been widely followed by other states interpreting statutory discretionary function exceptions. The Alaska Supreme Court, in *State v. Abbot*,[38] adopted the planning-operational distinction. After reviewing federal interpretation of the exception and the confusion caused by the overbreadth of *Dalehite*, the court held that the *Johnson* test "has the analytic virtue of focusing on the reasons for granting immunity to the governmental entity."[39] The court in *Abbot* rejected the state's contention that failure to exercise reasonable care in maintaining highways came within the exception:

> Although it is true, as the state contends, that the district engineer's decision as to how many men and how much equipment were necessary to maintain this particular stretch of highway involved a certain amount of planning and discretion, it is not the kind of broad policy decision at which the exception . . . is aimed. Once the initial policy determination is made to maintain the highway throughout the winter by salting, sanding and plowing it, the individual district engineer's decisions as to how that decision should be carried out in terms of men and machinery is made at the operational level; it merely implements the basic policy decision.[40]

Hawaii adopted a similar construction of discretionary function immunity in *Rogers v. State*,[41] holding that the state's decisions as to where to place highway signs and how frequently to repaint highway center stripes are operational level

37. *Id.* at ____, 447 P.2d at 360-61, 73 Cal. Rptr. at 248-49.
38. 498 P.2d 712 (Alas. 1972).
39. *Id.* at 721.
40. *Id.* at 722.
41. 51 Hawaii 293, 459 P.2d 378 (1969).

decisions. Operational acts were defined as "those which concern routine, everyday matters, not requiring evaluation of broad policy factors."[42]

Rejecting a broad *Dalehite* interpretation, the Utah Supreme Court cited *Johnson* in a case with substantially the same facts as *Rogers*, and reached a similar conclusion.[43] Minnesota has held that the discretionary function exception applies to the deployment of police and fire departments during riots,[44] but not to the failure of municipal officials to prevent dogs from running loose.[45]

3. Evaluation of the Purpose of Immunity

Although the planning-operational test can be stated as a concise formula, the courts have not applied it rigidly. Instead they have carefully evaluated the purpose to be served by immunity to decide which decisions should be considered planning level, and hence discretionary and immune. This decision usually involves a determination of whether the activity is a basic policy decision. Other jurisdictions, often those without a statutory discretionary function rule, eliminate the intermediate step of making the planning-operational determination and inquire whether the decision is the kind that is delegated to a coordinate branch of government and therefore immune from judicial review. In effect, there is little difference between results obtained under each of the two approaches. The distinction is mainly one of semantics.

The courts that reject the planning-operational test do so on the grounds that it is impossible to devise a precise formula to distinguish acts for which the government is properly liable in tort from those in which it should retain immunity. Although these courts have done an excellent job of evaluating the implications of the separation of powers doctrine on tort liability and immunity, there has been little consideration of the other reasons which support retention of governmental immunity. Occasionally a court has mentioned that other factors should enter into the decision,[46] but no court has actually

42. *Id.* at 298, 459 P.2d at 381.
43. Carroll v. State, 27 Utah 384, 496 P.2d 888 (1972).
44. Silver v. Minnesota, 284 Minn. 266, 170 N.W.2d 206 (1969).
45. Hansen v. City of Saint Paul, 298 Minn. 205, 214 N.W.2d 346 (1974).
46. Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968); Smith

applied any other factors while deciding the case before it.[47]

An early case of this type is *Weiss v. Fote*.[48] New York by statute had waived government tort immunity, with no express exceptions. In spite of the statute, the *Weiss* court held that

> [t]o accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexpert hands what the Legislature has seen fit to entrust to experts.[49]

No attempt was made to reduce the rule to a formula. The court clearly intended that the immunity decision rest solely on an evaluation of whether or not the decision of the governmental body should be final. Thus, the *Weiss* court ruled that the programming of traffic signals is not a reviewable decision.

An interesting evaluation of the purpose of governmental immunity appears in the decision in *Elgin v. District of Columbia*.[50] In *Elgin*, the Court of Appeals for the District of Columbia effectively abrogated traditional government tort immunity while denying that it was doing so. The plaintiff, a pupil at a Washington school, alleged that his fall into a depressed area around the school basement was caused by the negligent failure to keep a guardrail in repair. The district answered that maintaining school guardrails was a governmental act and therefore immune under the governmental-proprietary immunity test. Although the court stated that it would not abolish the tort immunity doctrine, it abandoned the governmental-proprietary standard and adopted the rule that "discretionary" acts are immune while "ministerial" acts are not.[51]

Professor Davis pointed out that this was the equivalent of formally ending immunity but still preserving an area of immune acts based on the separation of powers concept.[52] The

v. Cooper, 475 P.2d 78 (Or. 1970); Evangelical United Brethren Church v. Washington, 67 Wash. 2d 246, 407 P.2d 440 (1965).

47. This failure was severely criticized in Note, *Separation of Powers and the Discretionary Function Exception: Political Question in Tort Litigation Against the Government*, 56 IOWA L. REV. 930 (1971).

48. 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960).

49. *Id.* at 585-86, 167 N.E.2d at 66, 200 N.Y.S.2d at 413.

50. 337 F.2d 152 (D.C. Cir. 1964).

51. *Id.* at 154.

52. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 25.01 (1965 Supp.).

Elgin court recognized that the trend is not to impose blanket liability, but rather to develop more rational criteria for separating those government acts that should give rise to tort liability from those that should not.

The *Elgin* court recognized the need to define the terms used in the discretionary-ministerial test. To do this, it looked to reasons behind the retention of immunity. Rather than analyzing the nature of the particular act involved, the court focused its attention on the level at which the action was initiated. Thus, when responsibility for making policy decisions is vested in a government official or body, the *Elgin* standard provides that such decisions should be final.

> That analysis is more concerned with trying to distinguish between the functions performed within an area of readily recognizable governmental responsibility, than with undertaking to define precisely where the boundaries of that area lie . . . . "Ministerial" connotes the execution of policy as distinct from its formulation. This in turn suggests differences in degree of discretion and judgment involved in the particular government act. Where those elements are important, it is desirable that they operate freely and without the inhibiting influence of potential legal liability asserted with the advantage of hindsight. To the extent that the rule of municipal tort immunity continues to serve any useful purpose, this would appear to be that purpose; and its illumination in any given set of facts has been, and is, sought through the function-discriminating exception.[53]

Applying this standard to the facts of the case before it, the *Elgin* court ruled that the decision to repair or neglect broken guardrails was a ministerial act which subjected the district to liability if improperly done.[54]

Five years after *Elgin*, the same court formally abolished government tort immunity in *Spencer v. General Hospital*.[55] The decision in *Spencer* affirmed the discretionary function test developed in *Elgin*.[56]

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53. 337 F.2d at 154-55.

54. *Id.* at 157. Chief Judge Bazelon wrote a short but intriguing concurring opinion suggesting that even the discretionary-ministerial test is too restrictive. This opinion is discussed below.

55. 425 F.2d 479 (D.C. Cir. 1969).

56. Judge Wright in a concurring opinion expanded upon the idea put forth by Judge Bazelon in *Elgin* that the discretionary test was a step in the right direction, but inadequate. His opinion is discussed below.

A flexible approach to the discretionary function exception was adopted by the Oregon Supreme Court in *Smith v. Cooper*.[57] The discretionary function exception in Oregon was originally adopted judicially and later incorporated into a government tort liability statute patterned after the Federal Tort Claims Act.[58] *Smith* illustrates how the discretionary function exception evolved from a mere semantic definition to a fluid, purpose-oriented approach. The *Smith* court rejected any qualitative distinction between discretionary and ministerial acts because "at some point along the continuum of discretion a division must be made with liability on one side and immunity on the other and this division must necessarily be arbitrary."[59] The court also rejected the planning-operational test of the federal courts because it felt that test was likely to degenerate into arbitrary labelling.

The *Smith* court failed to recognize, however, that the planning-operational standard is actually a convenient shorthand analysis of whether action is taken at a policy level and hence, whether the separation of powers doctrine requires judicial abstention. This is evident from the fact that the *Smith* opinion stated that California, in *Johnson*, refused to adopt the planning-operation test, whereas *Johnson* expressly stated that it adopted the planning-operational distinction.[60]

The *Smith* court concluded that proper application of the discretionary function exception requires assessment of a variety of factors grounded on the reasons for the immunity rule. It mentioned several factors, including the importance to the public of the function, the extent to which government liability would impair the exercise of the function, the availability of other remedies, and whether the function required the use of discretion in a literal sense.[61] The court, however, made it clear that

> [t]he most decisive factor but [the] one most difficult to articulate is that it is essential for efficient government that certain decisions of the executive or legislative branches of

57. 256 Or. 458, 475 P.2d 78 (1970).

58. Jarrett v. Wills, 235 Or. 51, 383 P.2d 995 (1963); OR. REV. STAT. § 30.265(2)(d) (1969).

59. 256 Or. at ___, 475 P.2d at 85.

60. *Id.* at ___, 475 P.2d at 87. *See* 69 Cal. 2d at ___, 447 P.2d at 360, 73 Cal. Rptr. at 248.

61. 256 Or. at ___, 475 P.2d at 88.

> the government should not be reviewed by a court or jury. The reason behind such factor is that the bases for the legislative or executive decision can cover the whole spectrum of the ingredients for governmental decisions such as the availability of funds, public acceptance, order of priority, etc.[62]

Despite its statement that a variety of factors are to be considered in determining whether the government should be immune in a given situation, the court only considered whether the decisions involved were entrusted to a coordinate branch of government.

An excellent example of judicial reasoning on the standards for government tort immunity is found in *Evangelical United Brethren Church v. State*.[63] The Washington statute contains no express limitations or exceptions to government tort liability. The state is simply liable in tort "to the same extent as if it were a private person or corporation."[64] The court in *Evangelical* noted that while the statute is intended to create broad liability, it is limited in that only government actions analogous to private acts can create liability. Immunity remains, therefore, for "the acts of governing."[65] Despite the obvious similarity to the governmental-proprietary rule, the court followed the typical discretionary function approach in defining the type of government actions which constitute the discretionary "act of governing." The familiar separation of powers concept was used to draw this line. Unlike most courts, the Washington court established preliminary guidelines which are useful in determining whether a particular government action gives rise to liablity.

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?
>
> (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program or objective?
>
> (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?

62. *Id.*, 475 P.2d at 88.
63. 67 Wash. 2d 246, 407 P.2d 440 (1965).
64. WASH. REV. CODE ANN. § 4.92.090 (1976 Supp.).
65. 67 Wash. 2d at ____, 407 P.2d at 444.

> (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?[66]

The *Evangelical* court held that affirmative answers to these four questions required a finding that the action is discretionary or governmental and therefore immune. In the event that there is no preliminary finding of immunity, the court should inquire further to determine whether judicial review is proper. The court in *Evangelical* determined that the establishment of a juvenile correction facility in such a way that a juvenile delinquent with criminal tendencies was able to escape was a protected action under the four basic guidelines. There was no need, therefore, to indicate what further facts and circumstances would render an action discretionary even though all four criteria were met. The Washington court has not decided any subsequent cases involving situations where immunity was considered even though all of the four basic criteria were not met.

Washington has, however, added one limitation on the discretionary function exception. In *King v. City of Seattle*,[67] the city was found to have arbitrarily refused to issue street use and building permits. The Washington court stated that the policy reasons behind the discretionary function exception do not apply when the government acts arbitrarily and capriciously. Because there was no evidence that "a policy decision, consciously balancing risks and advantages, took place," the lack of a judgment by a coordinate branch allowed the court to review the decision.[68]

B. Immunity for Judicial and Legislative Functions

The most common formulation of an immunity rule based on the separation of powers principle is the discretionary function exception. Three jurisdictions, however, provide that judicial, legislative, quasi-judicial, and quasi-legislative acts are

66. *Id.* at ___, 407 P.2d at 445.

67. 84 Wash. 2d 239, 525 P.2d 228 (1974).

68. *Id.* at ___, 525 P.2d at 233. The court cited *Weiss* and *Johnson*. Both of these cases, however, had only stated the rule affirmatively. Neither stated expressly that where there is not, in fact, a proper exercise of discretion, the exception should not apply.

not subject to judicial review.[69] These states, Florida, Wisconsin, and Kentucky, were among the first to adopt a general rule of government tort liability, and in none of these jurisdictions has the standard for immunity been changed legislatively.

Commentators and judges have warned that both the discretionary-ministerial and planning-operational tests can break down into arbitrary labelling.[70] The judicial-legislative test has been more susceptible to this danger because a court may be forced into pigeonholing the numerous governmental activities into "legislative" or "judicial" categories. This may be termed the "literal approach." The other approach, the "open method," requires the court to evaluate the purpose of the immunity exception. Both methods provide a striking contrast to the painstaking analysis of some courts under the discretionary function doctrine. Neither of these approaches is satisfactory in view of the availability of a well-developed, purpose-oriented discretionary function rule.

1. Florida: The Literal Approach

When the Florida Supreme Court broke precedent by abolishing government tort immunity in *Hargrove v. Town of Cocoa Beach*,[71] it provided the caveat that "[w]e think it advisable to protect our conclusion against any interpretation that would impose liability on the municipality in the exercise of legislative or judicial, or quasi-legislative or quasi-judicial, functions."[72] This did not prevent the court in *Modlin v. City of Miami Beach*,[73] from becoming enmeshed in the standard definitional tangle. In *Modlin*, the plaintiff sued for damages resulting from the negligence of the city building inspector. The court ruled that this was an executive function, not within the bounds of the immunity retained in *Hargrove*.[74] It then developed a definitional test for distinguishing quasi-judicial

69. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957); Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

70. Elgin v. District of Columbia, 337 F.2d 152 (D.C. Cir. 1964) (Bazelon, C.J., concurring); Spencer v. General Hosp., 425 F.2d 479 (D.C. Cir. 1969) (Wright, J., concurring); Note, *Separation of Powers and the Discretionary Function Exception: Political Question in Tort Litigation Against the Government*, 56 IOWA L. REV. 930 (1971).

71. 96 So. 2d 130 (Fla. 1957).

72. *Id.* at 133.

73. 201 So. 2d 70 (Fla. 1967).

74. *Id.* at 73.

acts from executive and administrative acts.[75] Thus, the court laid the groundwork for a return to the rigid and often arbitrary distinctions among government activities that had caused such difficulty under the governmental-proprietary test.

The court in *Modlin* also made the inconsistent statement that the underlying intent of *Hargrove* was to equate the tort liability of municipal corporations with that of private corporations.[76] Similar statutory language in New York and Washington has been construed to imply a discretionary function immunity rule.[77] The Florida court failed to consider that many executive and administrative functions have no counterpart in the private area and, thus, under this rule, should be immune.

In *Wong v. City of Miami*,[78] the plaintiff alleged negligence in the deployment of police during riots. Confronted with a situation where immunity seemed appropriate but the action could not be pigeonholed into the quasi-judicial or quasi-legislative categories, the court bypassed the *Hargrove* and *Modlin* rules and appeared to adopt an approach similar to the discretionary function exception:

> While sovereign immunity is a salient issue here, we ought not lose sight of the fact that inherent in the right to exercise police powers is the right to determine strategy and tactics for the deployment of those powers. The sovereign authorities ought to be left free to exercise their discretion and choose the tactics deemed appropriate without worry over possible allegations of negligence.[79]

2. Wisconsin: The Open Approach

Wisconsin was among the earliest jurisdictions to abrogate government tort immunity. Citing *Hargrove*, the Wisconsin court stated in *Holytz v. Milwaukee*[80] that "[t]his decision is not to be interpreted as imposing liability on a governmental body in the exercise of its legislative or judicial or quasi-

75. *Id.* at 73-74.

76. *Id.* at 73.

77. Weiss v. Fote, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960); Evangelical United Brethren Church v. Washington, 67 Wash. 2d 246, 407 P.2d 440 (1965).

78. 237 So. 2d 132 (Fla. 1970).

79. *Id.* at 134. The plaintiff in Florida First Nat'l Bank v. City of Jacksonville, 310 So. 2d 19 (Fla. 1975) attempted to use *Wong* as precedent for a broader discretionary conduct rule. The court refused to accept the argument, appearing to confine *Wong* to its facts.

80. 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

legislative or quasi-judicial functions."[81] The court held that an allegation that the city had negligently left open a trapdoor covering a water meter pit stated a cause of action. Since this was clearly not a quasi-judicial or quasi-legislative function, the court did not have to determine the limits of retained immunity.

In *Raisanen v. City of Milwaukee*,[82] the plaintiff alleged that the city was negligent in programming the sequence of traffic control signals at a stop light. The court dismissed the action without reference to the legislative-judicial rule of *Holytz*. The opinion, while concentrating on the facts, cited *Weiss v. Fote*[83] as authority that immunity extends to government decisions in programming traffic signals. *Weiss*, however, was decided under a discretionary function rule. The court failed to consider that the legislative-judicial rule used in Wisconsin may have produced a different result.

The court did use the *Holytz* language in *Dusek v. Pierce County*.[84] The plaintiff in *Dusek* alleged negligence in failing to erect highway warning signs. The court held, based on *Raisanen*, that this was a legislative function.[85] However, no such language was used in *Raisanen*. There was no analysis in *Dusek* of what constitutes a legislative function, nor any explanation of why programming a traffic control light is a legislative function.

Most recently, in *Jorgensen v. Northern States Power Company*,[86] the Wisconsin court reviewed its post-*Holytz* cases and held that highway sign placement is an exercise of a legislative or quasi-legislative function.[87] The court held that the failure of the city to temporarily remove a light pole while the power company was digging a trench alongside the pole was not a legislative, judicial, quasi-legislative, or quasi-judicial function. Again, the court made no inquiry into what factors bring an activity within these categories.[88]

The differing treatment that Florida and Wisconsin have

81. *Id.* at 40, 115 N.W.2d at 625.
82. 35 Wis. 2d 504, 151 N.W.2d 129 (1967).
83. 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960).
84. 42 Wis. 2d 498, 167 N.W.2d 246 (1969).
85. *Id.* at 506, 167 N.W.2d at 250.
86. 60 Wis. 2d 29, 208 N.W.2d 323 (1973).
87. *Id.* at 37, 208 N.W.2d at 327.
88. *Id.*, 208 N.W.2d at 327.

given the legislative-judicial rule illustrates two faults of the formula.[89] Florida has attempted to follow a consistent, analytical approach, carefully defining legislative and judicial action and excluding immunity for any functions that do not fall into these categories. Unfortunately, this tack leads to the artificial and illogical results so severely criticized under the governmental-proprietary rule. Except in its broadest form, it ignores the purposes intended to be served by retaining immunity.[90]

Wisconsin, on the other hand, has made no attempt to analytically determine the limits of its immunity rule. The court determines whether the action involved should be immune, and, if so, labels it as legislative. Wisconsin is groping toward a discretionary function exception by an evaluation of the alleged action in light of the reasons which support governmental immunity. Although Wisconsin's ad hoc method may produce better results than Florida's rigid semantic approach, it is a poor method of fashioning a rule of law. The Wisconsin court would do better to consider explicitly adopting the discretionary function immunity rule which it seems to use implicitly.

C. *Inclusion of Factors Other Than Separation of Powers*

All of the rules discussed above are essentially grounded on the separation of powers concept. Some courts and commentators have advanced several reasons for retaining a limited government tort immunity, but the standard actually adopted is designed only to prevent courts from substituting their judgment for that of a coordinate branch of government in matters of public policy. The suggestion has been made, however, that this analysis is too limited and that a broad standard encompassing several factors would be more responsive to the needs of both government and the public.

The concurring opinions in *Elgin*[91] and *Spencer v. General Hospital*,[92] warned that the adoption of any formula would lead to rigid and arbitrary classification of government acts without reference to the purpose of immunity. Chief Judge Bazelon, concurring in *Elgin*, was concerned that the court "[i]n retain-

89. Kentucky stated the legislative-judicial rule in Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964), but has not followed it in any subsequent case.

90. *See* footnotes 6 through 15, *infra*, and accompanying text.

91. 337 F.2d 152 (D.C. Cir. 1964).

92. 425 F.2d 479 (D.C. Cir. 1969).

ing a rigid classification of cases . . . harbors seeds of the same arbitrariness which presently characterizes" the government immunity rule.[93] He suggested that "the existence and extent of the defendant's duty to the plaintiff is to be determined in the context of all the circumstances of the action of which the plaintiff complains."[94] The opinion, however, did not elaborate on the types of circumstances that would be influential in determining whether immunity or liability is required.

In *Spencer*, Judge Wright, joined by Chief Judge Bazelon, agreed that "the degree of discretion left to officials in the performance of their duties [should] be merely one factor to be weighed in the calculus of 'reasonable care'."[95] Judge Wright warned that

> [t]he *Elgin* position could easily rigidify into a rule that any time an official or an agency adopts a "plan," injuries arising from the plan itself, as distinguished from its negligent execution, cannot be compensated in tort. I would not want to take the flat position that the government is immune from paying for the consequences of the adoption of every policy, however neglectful that policy might be of the bodily security or the property of those affected by it.[96]

As noted above, the courts in *Johnson* and *Smith* stated that the importance to the public of the government function, the extent to which liability might impair the exercise of the function, and the availability to the injured party of remedies other than tort actions were factors to be considered in determining whether the government is liable. Neither court, however, evaluated these factors in deciding the case before it. The Washington court, in its otherwise excellent decision in *Evangelical United Brethren Church*, stated that "other factors" than separation of powers may affect the determination, but it gave no indication of what those factors might be.

An exhaustive recent review severely criticizes the assumption that the separation of powers principle is the controlling factor and argues for a flexible method of evaluating and balancing all interests involved in the particular fact situation.[97]

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93. 337 F.2d at 157.

94. *Id.*

95. 425 F.2d at 489.

96. *Id.* at 490.

97. Note, *Separation of Powers and the Discretionary Function Exception: Political Question in Tort Litigation Against the Government*, 56 IOWA L. REV. 930 (1971).

Any set formula is rejected as being likely to be applied mechanically and arbitrarily. Among the factors suggested are the seriousness of the injury, whether the injury was an isolated occurrence unlikely to be repeated, whether the government induced reliance by the injured party, whether the injured party has alternative remedies available, whether the government action was discretionary and whether the discretion was abused, whether the action was a mandatory government duty or a service voluntarily assumed, whether the negligence was commission or omission, the burden placed on the government by imposing liability, the general public interest, and the capacity of the judiciary for reviewing the case.[98] The method recommended in this article obviously goes far beyond what any court has attempted.

III. Summary and Conclusion

The development of the immunity standard has evolved from attempts to create a precise, predictable semantic definition into a flexible, if unpredictable, guideline. Almost all courts that have abrogated the rule of government tort immunity have recognized that there must be some government acts which are immune from tort liability. The predominant principle that the courts have followed in devising standards for government tort immunity is that acts that constitute "governing," *i.e.*, high level policy decisions for which coordinate branches of government are responsible, are not appropriate for judicial review. Guided by this controlling principle, the courts and legislatures have developed a standard for immunity that is most frequently termed the discretionary function exception.

The problem faced by the courts has been two-fold. It must be determined where, along the continuum of decision making, government actions rise to the level where immunity is appropriate. The courts must then formulate a test or rule that will separate these decisions from those that should come within the general rule of liability. Most courts have abandoned efforts to develop a set formula to resolve these issues. The trend is to analyze the particular government action involved in terms of the separation of powers principle. If the action is a

98. *Id.* at 974-83.

basic policy decision that should not be subject to judicial second-guessing, the government is immune from tort liability. While some courts call this the difference between planning level functions and operational level functions, it is generally a legal conclusion rather than the starting point in the analysis.

The courts have been fairly successful in fashioning standards for determining which government acts are immune solely on the basis of the separation of powers concept. The technique of evaluating whether the act is a basic policy decision is a flexible tool, and the courts have generally avoided the pitfall of merely categorizing government actions in a mechanical manner. The more basic issue, however, is whether there are other factors of equal importance. No court has squarely handled this issue, and the rule has become so firmly established that it is highly unlikely that any court will.

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