A SURVEY OF MUNICIPAL IMMUNITY IN NEW JERSEY

During the last half century the doctrine of municipal immunity has been subjected to extensive criticism by both courts[1] and legal scholars.[2] Despite such attacks, however, and recent inroads made against it,[3] most courts have recognized the basic need to preserve at least some vestige of immunity in order to protect the essential processes of government.[4]

The difficulty which has always plagued the courts when considering an immunity question is the scope of the protection from tort claims to be accorded municipal activities. This comment attempts to analyze prior judicial solutions to this problem and to clarify the current posture of New Jersey courts.

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1 Cloyes v. Delaware Township, 23 N.J. 324, 329-30, 129 A.2d 1, 4 (1957); Milstrey v. City of Hackensack, 6 N.J. 400, 407, 79 A.2d 37, 40 (1951); Casale v. Housing Authority, 42 N.J. Super. 52, 60, 125 A.2d 895, 899 (App. Div. 1956).

2 18 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.24a (3d ed. rev. 1963); W. PROSSER, THE LAW OF TORTS § 131, at 977 (4th ed. 1971); Borchard, *Government Liability in Tort* (pts. 1-3), 34 YALE L.J. 1, 129, 229 (1924-25); Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751 (1956). Some commentators have expressed certain reservations with the trend of the law away from the doctrine of municipal immunity. *See, e.g.*, Johndroe, *Report of Committee on Tort Liability*, 34A NIMLO MUN. L. REV. 362 (1971), wherein it is stated:

> [D]uring the past year the doctrine for governmental immunity as applied to municipal corporations has been severely limited not only by legislative enactments but also by the decisions of judicial piranha fish who appear to have some compulsion to create the image of being "super-humanitarians." Many of the decisions of the federal and state courts reveal an apparently insatiable desire to distribute not only public funds in the form of compensation, but also eternal guidance of an executive, legislative and judicial nature.

Id.

3 City of Fairbanks v. Schaible, 375 P.2d 201 (Alas. 1962) (municipality could be held liable for negligence in fire fighting); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957) (municipal corporation may be held liable for the torts of police officers); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959) (school district held liable for injuries arising out of school bus accident); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961) (municipality held liable for injuries arising from failure to guard open elevator shaft); Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962) (school district held immune from liability for maintaining defective classroom equipment); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962) (municipality liable for tortious act without regard to the proprietary-governmental distinction). *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.00 (Supp. 1970).

4 In Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 133 (Fla. 1957) and Holytz v. City of Milwaukee, 17 Wis. 2d 26, 40, 115 N.W.2d 618, 625 (1962), the courts recognized the necessity of preserving legislative, judicial, quasi-legislative and quasi-judicial immunity. *See* K. DAVIS, *supra* note 3.

HISTORY

The doctrine of municipal immunity, although often confused with its sister doctrine, sovereign immunity, has a separate and distinct history. Sovereign immunity is thought to have arisen from the unique position of the English king in feudal society,[5] while municipal immunity seems to have grown from a public policy decision that a township should not have to bear the financial responsibility for its misdeeds.[6]

In *Russell v. Men of Devon*,[7] the first case to hold a municipal entity immune from suit,[8] the inhabitants of an unincorporated county were sued for negligently failing to repair a bridge. The suit was dismissed on the grounds that traditionally there had been no remedy in tort against the inhabitants of a township,[9] that Devon was not an incorporated entity,[10] and that it was "better that an individual should

[5] The king in feudal times was considered the fountainhead of justice. Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 214, 359 P.2d 457, 458-59, 11 Cal. Rptr. 89, 90-91 n.1 (1961). He could not be sued because "he is below no man and below no court of law." 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 515-16 (2d ed. 1968); 3 W. BLACKSTONE, COMMENTARIES *255; 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 43-44 (1778); Borchard, *supra* note 2, pt. 1, at 4.

[6] Russell v. Men of Devon, 100 Eng. Rep. 359, 362 (K.B. 1788); *see* Mower v. Leicester, 9 Mass. 247, 249 (1812).

[7] 100 Eng. Rep. 359 (K.B. 1788).

[8] Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 213-16, 359 P.2d 457, 459, 11 Cal. Rptr. 89, 91 (1961). Apparently municipalities were not the target of many suits in the early English law period because of the relative unimportance of such political entities. English towns were not at first incorporated and had few political or civil rights and little if any self-government. 19 THE ENCYCLOPEDIA AMERICANA *Municipalities* 590 (1948). However in 1439 municipalities began to become incorporated in the modern sense and by the 16th century the borough corporation was recognized as a "Body Politick that indureth in perpetual succession." 11 ENCYCLOPEDIA OF THE SOCIAL SCIENCES *Municipal Corporation* 87 (1933).

[9] 100 Eng. Rep. at 362. The plaintiff had contended that the Statute of Hue & Cry, 13 Ed. 1, c. 2, presented an analogous form of remedy. That law provided that the hundreds (counties) in which felonies were committed would be answerable for those acts and the damages sustained thereby, and plaintiff argued a cause of action could therefore be brought against a local governing unit. Chief Justice Kenyan answered this by pointing out that the Statute of Hue & Cry was a legislative enactment and no remedy would exist without that enactment.

Justice Ashhurst stated on this point:

> It is a strong presumption that that which never has been done cannot by law be done at all.

100 Eng. Rep. at 362.

[10] 100 Eng. Rep. at 362. Even if the men of Devon could be considered incorporated, the court pointed out:

> [W]here an action is brought against a corporation for damages, those damages are not to be recovered against the corporators in their individual capacity, but out of their corporate estate: but if the county is to be considered as a corpora-

sustain an injury than that the public should suffer an inconvenience."[11] This last ground, basically a public policy decision, continues as the essential justification for municipal immunity.

Russell was cited as authority in *Mower v. The Inhabitants of Leicester,*[12] the first American case dealing with municipal responsibility.[13] The plaintiff therein was also injured as the result of a defective bridge. Relying on *Devon,* Mower contended that he should recover because the township was an incorporated entity, was charged by statute with the responsibility for repairing the bridge, and had a fund out of which a judgment could be paid. However, the court summarily rejected these contentions[14] and ruled that no action could be brought against a corporation established for the public benefit unless such a remedy were provided for by statute.[15]

Another defective bridge led the New Jersey courts to consider the tort responsibility of its governmental entities.[16] In *Freeholders of Sussex v. Strader*[17] the plaintiff brought an action against the Board of Chosen Freeholders for damages he allegedly suffered due to their failure to repair a bridge. The court, after considering *Russell,*[18] ruled

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tion, there is no corporation fund out of which satisfaction is to be made.

Id.

11 *Id.*

12 9 Mass. 247, 248 (1812).

13 Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 215, 359 P.2d 457, 459, 11 Cal. Rptr. 89, 91 (1961).

14 9 Mass. at 249.

15 *Id.* The court expressed its reasoning as follows:

> [Q]*uasi* corporations, created by the legislature for purposes of public policy, are subject, by the common law, to an indictment for the neglect of duties enjoined on them; but are not liable to an action for such neglect, unless the action be given by some statute. The only action furnished by statute, in this case, is for double damages after notice . . . . This question is fully discussed in the case of *Russell & Al. vs. The Men of Devon,* cited at the bar, and the reasoning there is conclusive against the action.

Id. (footnote omitted).

16 Freeholders of Sussex v. Strader, 18 N.J.L. 108 (Sup. Ct. 1840).

It should be noted that the New Jersey courts make no distinction as far as tort liability is concerned between municipalities and quasi-municipalities such as counties and school districts. Jackson v. Hankinson, 51 N.J. 230, 233, 238 A.2d 685, 687 (1968) (board of education); Kent v. County of Hudson, 102 N.J. Super 208, 219, 224-25, 245 A.2d 747, 753, 756 (App. Div. 1968), *aff'd,* 53 N.J. 546, 251 A.2d 760 (1969) (county); Wall v. Hudson County Park Comm'n, 80 N.J. Super. 372, 376, 193 A.2d 857, 859 (App. Div. 1963) (county park commission).

17 18 N.J.L. 108 (Sup. Ct. 1840).

18 The court rejects the *Russell* reasoning that an action could not be brought against a county because it was not incorporated nor did it have a corporate fund out of which a judgment could be satisfied, stating that the argument was merely "thrown out, arguendo." *Id.* at 116.

that the action was not brought against the county, but rather against the freeholders individually and observed:

> [N]ot a solitary case is on record, of such public officer having been held liable for damages to individuals by reason of a neglect of his public duties.[19]

This observation does not accurately represent the legal responsibilities of public officers at common law. In fact, they were often held responsible for their torts.[20] Chief Justice Hornblower, in a concurring opinion, stated a sounder position when he concluded that the repairing of a road was a public duty, the remedy for a breach of which was the criminal sanction of presentment.[21]

In 1884 New Jersey abandoned the *Strader* rationale[22] and substi-

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19 *Id.* at 118.

20 Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 9-16 (1963). *See* DICEY, LAW OF THE CONSTITUTION (8th ed. 1923), where the author states:

> With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages . . . .

Id. at 189. *See also* Ehrlich, *Proceedings Against the Crown*, in 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY (1921).

21 The Chief Justice reasoned:

> The principle of law, I take to be this: that where a corporate body, whether of a municipal or of a private character, owes a specific duty to an individual, an action will lie for a breach or neglect of that duty, whenever such breach or neglect has occasioned an injury to that individual: but if such corporation, owe a duty to the *public*, and neglect to perform it, although every individual comprising that public, *is* thereby injured, some more, and some less, yet they can have no private remedy, at the common law.

18 N.J.L. at 121 (Hornblower, C.J., concurring). This analysis indicates a remedy in the nature of a public nuisance. *See generally* W. PROSSER, THE LAW OF TORTS § 89, at 605-08 (3d ed. 1964).

The situation referred to by the Chief Justice wherein a single individual is the only one injured by a public nuisance was considered in Jersey City v. Kiernan, 50 N.J.L. 246, 13 A. 717 (Sup. Ct. 1888). The court, in response to that problem, stated:

> [T]hat whenever an indictment will not lie for such a neglect as is here complained of, attended with such consequences as have here ensued, the person thus specially injured may, in order to right the wrong, resort to an action. The injury is altogether private in its character and is capable of being continued indefinitely, so that under some circumstances the land might, in substance, be applied to the public use without compensation. The injustice done and the necessity for a remedy are alike obvious, and it would be to push to an extreme the doctrine which, under most circumstances, gives immunity to the community in case of the misconduct of public officials.

Id. at 250, 13 A. at 170; *accord*, Waters v. Newark, 56 N.J.L. 361, 363, 28 A. 717, 718 (Sup. Ct.), *aff'd*, 57 N.J.L. 456, 35 A. 1131 (Ct. Err. & App. 1894). *See* Weintraub & Conford, *Tort Liability of Municipalities in New Jersey*, 3 MERCER BEASLEY L. REV. 142, 155-64 (1934).

22 Weintraub & Conford, *supra* note 21, at 142.

tuted a rule similar to the one espoused in *Devon* and *Mower*. In *Condict v. Jersey City*[23] the court held that a municipality would not be answerable for its torts since such entities were required by law to perform certain actions and derived no special benefit therefrom.[24] Thus, New Jersey adopted the public policy theory of municipal immunity and this explanation served as the basic tenet until very recently.

Although *Condict* and the other early cases did not contain any language limiting municipal immunity, courts soon realized the harshness of such an all-inclusive approach and began to carve out exceptions. The first of these was set forth in *Hart v. Board of Chosen Freeholders*.[25] In that case the municipality had left an unguarded excavation in the middle of the road into which the plaintiff fell, injuring himself. The court, after dismissing a count alleging general negligence,[26] sustained the second count in which it was alleged that the defendant wrongfully and illegally made an excavation in the highway.[27] The court found this theory to be one upon which a viable cause of action could be founded and reasoned:

> This [count] discloses a special injury inflicted on plaintiff by a common and public nuisance created, not by this defendant's neglect of or negligence in performing a public duty, but by its active wrongdoing.
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> . . . .
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> There is no reason arising out of public policy why municipal corporations should be shielded from liability when a private injury is inflicted by their wrongful acts, as distinguished from mere negligence.[28]

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23 46 N.J.L. 157 (Ct. Err. & App. 1884).

24 *Id.* at 160. Although this court adopted the *Devon* and *Mower* reasoning, it did not cite either of these cases. Rather it relied on Hayes v. City of Oshkosh, 33 Wis. 314 (1873), reasoning as follows:

> [T]hat the corporation is engaged in the performance of a public service in which it has no particular interest and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants and the community . . . .

46 N.J.L. at 160. Weintraub & Conford, *supra* note 21, at 142-43, called this reasoning the "true principle."

In addition, the court pointed out that to hold the municipality responsible the doctrine of respondeat superior would have to be applied and to do this "would indirectly fix upon the corporation a liability from which it is by law, on considerations of public policy, exempted." 46 N.J.L. at 161. This dictum subsequently became a stumbling block to the expansion of municipal immunity. *See* text at 422-23 and accompanying notes *infra*.

25 57 N.J.L. 90, 29 A. 490 (Sup. Ct. 1894).

26 *Id.* at 91, 29 A. at 490. This count was dismissed based on the exemption of municipal corporations from liability "on the ground of ancient precedent and public policy." *Id.* at 92, 29 A. at 490-91.

27 *Id.*, 29 A. at 491.

28 *Id.* at 92-93, 29 A. at 491.

The exception created by this case, known as the doctrine of "active wrongdoing," became one of the most prolific exceptions to the general rule of municipal immunity.[29]

In order for the exception to become operative, there must be some positive act of commission rather than mere failure to act or omission.[30] However, it is not necessary that the wrongful action be

> the most proximate or nearest in time in a sequence of causes to the injury sustained; it is sufficient if, in the sequence, there is such an affirmative wrongful act even though the cause nearest in the succession of causes may be a mere omission to act.[31]

In other words, the affirmative act on the part of the municipality may occur prior to the nonactive negligence[32] and need not to be of a tortious nature at all.[33] It is the total sequence of acts that constitutes the active wrongdoing.[34]

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29 Caporossi v. Atlantic City, 220 F. Supp. 508 (D.N.J. 1963) (personal injury action based on exposed pipe maintained on public beach owned by municipality); Hayden v. Curley, 34 N.J. 420, 169 A.2d 809 (1961) (action based on defect in a public sidewalk); McAndrew v. Mularchuk, 33 N.J. 172, 162 A.2d 820 (1960) (action by minor for injuries sustained when struck by a bullet fired by a police officer); Hartman v. City of Brigantine, 23 N.J. 530, 129 A.2d 876 (1957) (wrongful death occasioned when decedent's truck struck dirt piles on roadway); Cloyes v. Delaware Township, 23 N.J. 324, 129 A.2d 1 (1957) (action for wrongful death of infant who drowned in open sedimentation tank of defendant municipality); Kress v. City of Newark, 8 N.J. 562, 86 A.2d 185 (1952) (action for damages from over-exposure to x-ray radiation in city hospital); Milstrey v. City of Hackensack, 6 N.J. 400, 79 A.2d 37 (1951) (personal injury action resulting from fall on municipal sidewalk); Robinson v. Ocean Township, 123 N.J.L. 525, 9 A.2d 300 (Ct. Err. & App. 1939) (open concrete gutter was struck by auto causing physical harm to the driver and passenger); Allas v. Borough of Rumson, 115 N.J.L. 593, 181 A. 175 (Ct. Err. & App. 1935) (municipality sued for injuries sustained by plaintiff when she fell from a ramp constructed without guard rails); Casey v. Bridgewater Township, 107 N.J.L. 163, 151 A. 603 (Ct. Err. & App. 1930) (plaintiff suffered injuries when an improperly graded gravel pit collapsed upon him); Ennever v. Borough of Bergenfield, 105 N.J.L. 419, 144 A. 809 (Ct. Err. & App. 1929) (action for damages to plaintiff's property caused by municipality's negligent construction and operation of sewerage disposal plant); Callan v. City of Passaic, 104 N.J.L. 643, 141 A. 778 (Ct. Err. & App. 1928) (wrongful death action arising from city's failure to properly guard a catch-basin); Farkas v. Middlesex Bd. of Freeholders, 49 N.J. Super. 363, 139 A.2d 779 (App. Div. 1958) (action for damages occasioned by the alleged negligent repair of a roadway).

30 Hoy v. Capelli, 48 N.J. 81, 84-86, 222 A.2d 649, 650-51 (1966) (action against municipality arising out of intersectional collision); Hayden v. Curley, 34 N.J. 420, 425-26, 169 A.2d 809, 812 (1961); McAndrew v. Mularchuk, 33 N.J. 172, 181, 162 A.2d 820, 825 (1960).

31 McAndrew v. Mularchuk, 33 N.J. 172, 181, 162 A.2d 820, 825 (1960).

32 Hayden v. Curley, 34 N.J. 420, 425-26, 169 A.2d 809, 812 (1961); Allas v. Borough of Rumson, 115 N.J.L. 593, 596-97, 181 A. 175, 177 (Ct. Err. & App. 1935).

33 Hayden v. Curley, 34 N.J. 420, 425-26, 169 A.2d 809, 812 (1961).

34 *Id.* at 426, 169 A.2d at 812.

In *Hayden v. Curley*,[35] a leading case in New Jersey on active wrongdoing, the plaintiff was injured when he tripped over a section of the sidewalk which had been uplifted by a root. The tree from which it had grown had been planted 18 years earlier by the defendant city's Shade Tree Commission at the defendant homeowner's request. In ruling on the city's liability, the supreme court held that the positive act of planting the tree coupled with the municipality's subsequent failure to act (by inspecting the sidewalk) created a jury question as to whether the city was negligent.[36]

It is readily apparent that active negligence greatly expanded the area of municipal liability. However, the expansion was limited by one important restraint—the doctrine of respondeat superior was not applied. In order to hold the municipality liable, therefore, it was necessary to show that some ranking official of the township with power to remedy the situation had knowledge of the tort.[37] This requirement presented a difficult problem of proof since a plaintiff had to show either that the act was ordered by a responsible municipal officer, or that the municipality had constructively participated in the act by failing to remedy it after being notified of its existence.[38]

In 1960, the supreme court rectified this situation by ruling that the doctrine of respondeat superior would be applied to municipal corporations. In *McAndrew v. Mularchuk*,[39] the plaintiff was shot while involved in an altercation with a reserve police officer. He alleged that

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35 34 N.J. 420, 169 A.2d 809 (1961).

36 *Id.* at 427-28, 169 A.2d at 813.

37 McAndrew v. Mularchuk, 33 N.J. 172, 182, 162 A.2d 820, 826 (1960); Kelley v. Curtiss, 29 N.J. Super. 291, 298-99, 102 A.2d 471, 474-75 (App. Div. 1954). The origin of this rule was Condict v. Jersey City, 46 N.J.L. 157, 160-61 (Ct. Err. & App. 1884). For a discussion of the *Condict* case, see Weintraub & Conford, *supra* note 21, at 151-52. *See also* Note, *Respondeat Superior: An Inroad Upon Governmental Immunity*, 15 RUTGERS L. REV. 98, 103 (1960).

38 The general rule is stated in Kelley v. Curtiss, 29 N.J. Super. 291, 102 A.2d 471 (App. Div. 1954):

> [A] municipality has notice of a matter such as this, where notice is given to some officer intrusted with a general authority to remedy the matter. . . .
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> Furthermore, a municipality is chargeable with notice of such facts as this officer would have discovered with the exercise of ordinary diligence in the performance of his duties. . . .
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> So, if a municipal officer, entrusted with a general authority in the premises, would have, in the exercise of ordinary diligence, discovered active wrongdoing on the part of an employee or inferior officer, the municipality is charged with notice of it. Furthermore, if in such a case he does not take reasonable measures to prevent a continuance of the wrongdoing, then the municipality will have participated in its continuance.

Id. at 299-301, 102 A.2d at 475-77. *See also* Tomlin v. Hildreth, 65 N.J.L. 438, 441, 47 A. 649, 650 (Sup Ct. 1900).

39 33 N.J. 172, 162 A.2d 820 (1960).

the municipality was negligent in equipping such an officer with a dangerous instrument without properly training him. Under the rule as originally set forth in *Condict*, the plaintiff would have been compelled to prove participation by the municipality in the tort or knowledge of the dangerous condition. The court held, however, that such a rule was

> so artificial and unjust that it constantly sends the courts in particular cases on a deep and liberal search through the facts to find some higher echelon employee who may be said to have participated in the negligent act of commission of the lower level employee.[40]

Thus, where the municipality is guilty of negligent acts of commission, the general doctrine of respondeat superior will be applied.

The second, and perhaps most important exception to municipal immunity arose as a natural corollary to the reasoning which had originally lead to the formation of the *Condict* rationale. As previously mentioned, early decisions had concluded that it was unfair to hold a municipality responsible for acts which it was under a duty to perform and from which it gained no benefit.[41] Hence, when a situation arose wherein the injury resulted from an activity which the municipality was under no duty to perform, courts were forced to concede that the town could be held responsible.[42] This position was first stated as dictum in *Tomlin v. Hildreth*[43] and later incorporated into the law in New Jersey by *Karpenski v. Borough of South River*.[44] The "governmental-proprietary" test, as it has come to be known, provides that where a municipal corporation engages in an activity of a proprietary or corporate nature in which it "voluntarily assume[s]—powers intended for the private advantage and benefit of the locality and its inhabitants"[45] it will be held responsible for the torts committed in the

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40 *Id.* at 192, 162 A.2d at 831.

41 *See* notes 23 & 24 *supra* and accompanying text.

42 The first prominent case in the United States to recognize the governmental-proprietary distinction was Bailey v. City of New York, 3 Hill 531, 539 (Sup. Ct. 1842). *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 29.6, at 1620 (1956).

43 65 N.J.L. 438, 47 A. 649 (Sup. Ct. 1900). The court stated:

> [A]n officer elected or appointed by a municipal corporation . . . to perform a public service *in which the corporation has no private interest and from which it derives no special benefit or advantage in its corporate capacity*, cannot be regarded as the servant or agent of the municipality for whose negligence or want of skill it can be held liable.

Id. at 441, 47 A. at 650 (emphasis added).

44 83 N.J.L. 149, 83 A. 639 (Sup. Ct. 1912).

45 City of Galveston v. Posnainsky, 62 Tex. 118, 127 (1884). *See* 18 E. MCQUILLIN, *supra* note 2, § 53.23, at 165.

furtherance of these activities in the same way as any private corporation.[46]

The most immediate problem arising from this exception is the determination of which municipal activities are to be considered governmental and which proprietary. Generally, when the municipality is carrying out responsibilities of the state, such as making and enforcing police regulations, preventing crime, preserving the public health, providing fire protection, caring for the poor and educating the young, it is exempted from responsibility for its tortious conduct.[47]

In *Fahey v. Jersey City*,[48] Justice Schettino, in deciding whether the maintenance of a park was proprietary or governmental, considered significant

> the fact that an activity was historically engaged in by a local government; that it is uniformly so furnished today; that it could not be performed as well by a private corporation; that it is not undertaken for profit or for revenue; and, most significantly, that it is within the imperative public duties imposed on a municipality as agent of the State.[49]

Applying these standards, the court found that the operation of a public park was governmental in nature.[50]

As a rule, the New Jersey courts have looked with favor upon the plaintiff's contention that the activity is proprietary in nature.[51] As a result the list of activities which have been held to be proprietary is long.[52]

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46 Weintraub & Conford, *supra* note 21, state the rationale for this as follows:

> [W]here a municipality embarks upon a venture from which it derives some special benefit or advantage in its corporate capacity, it is liable as fully and completely as any private individual similarly engaged.

Id. at 144. *See* 18 E. McQUILLIN, *supra* note 2, § 53.30, at 196-97.

47 18 E. McQUILLIN, *supra* note 2, § 53.30, at 196.

48 52 N.J. 103, 244 A.2d 97 (1968).

49 *Id.* at 108-09, 244 A.2d at 100.

50 *Id.* at 109, 244 A.2d at 100.

51 Stringfield v. City of Hackensack, 68 N.J. Super 38, 171 A.2d 361 (App. Div. 1961), wherein it was stated:

> [T]he understandable judicial reluctance to deprive, under modern-day conditions, an injured party of recovery for personal injuries on the sole basis of sovereign immunity has led to a whittling down of the immunity, in part by means of "a more lenient attitude toward the proprietary classification."

Id. at 43, 171 A.2d at 364 (quoting from Schwartz v. Stockton, 32 N.J. 141, 147, 160 A.2d 1, 4 (1960)).

52 Cases holding specific municipal actions to be proprietary include: Caporossi v. Atlantic City, 220 F. Supp. 508 (D.N.J. 1963) (maintenance of a public bathing beach); Leemon v. South Jersey Port Comm'n, 145 F. Supp. 828 (D.N.J. 1956) (operation of a pier); Goldberg v. Housing Authority, 38 N.J. 578, 186 A.2d 291 (1962) (local housing authority); Cloyes v. Delaware Township, 23 N.J. 324, 129 A.2d 1 (1957) (operation of sewage system);

Although New Jersey has changed its basic approach to municipal immunity,[53] the governmental-proprietary test continues to be applied to statutorily granted immunity. N.J. STAT. ANN. §§ 18A:20-35[54] and 40:9-2[55] provide school districts and municipalities respectively with immunity from liability for any injuries resulting from the use of any public grounds, buildings or structures. In interpreting N.J. STAT. ANN. § 40:9-2 in *Fahey*, it was concluded that the governmental-proprietary test was still to be used in the application of that statute.[56] By implication, it would appear that the same rule would also be applicable to N.J. STAT. ANN. § 18A:20-35.

Although retaining the governmental-proprietary test for the purposes of these two statutes, New Jersey courts have refused to apply the active wrongdoing exception to both section 40:9-2[57] and section 18A:20-35[58] on the grounds that "[t]he language is broad and all inclusive and nothing is left to implication."[59] Denying this exception seems somewhat incongruous in light of the fact that the

Fay v. City of Trenton, 126 N.J.L. 52, 18 A.2d 66 (Ct. Err. & App. 1941) (operation of water department); Martin v. City of Asbury Park, 111 N.J.L. 364, 168 A. 612 (Ct. Err. & App. 1933) (operation of bathing pavilion); Stringfield v. City of Hackensack, 68 N.J. Super. 38, 171 A.2d 361 (App. Div. 1961) (parking lot); Weeks v. City of Newark, 62 N.J. Super. 166, 162 A.2d 314 (App. Div. 1960), *aff'd*, 34 N.J. 250, 168 A.2d 11 (1961) (operation of swimming pool); Karpenski v. Borough of South River, 83 N.J.L. 149, 83 A. 639 (Sup. Ct. 1912) (operation of a lighting plant).

Cases holding specific municipal actions not to be proprietary include: Schwartz v. Stockton, 32 N.J. 141, 160 A.2d 1 (1960) (maintenance of volunteer fire house); Kress v. City of Newark, 8 N.J. 562, 86 A.2d 185 (1952) (operation of a hospital for indigents); Boyle v. County of Hudson, 8 N.J. 294, 85 A.2d 269 (1951) (operation of a county penitentiary); Truhlar v. Borough of East Paterson, 4 N.J. 490, 73 A.2d 163 (1950) (designing and building streets); Vickers v. City of Camden, 122 N.J.L. 14, 3 A.2d 613 (Ct. Err. & App. 1939) (erection and maintenance of traffic light); Lanni v. City of Bayonne, 7 N.J. Super. 169, 72 A.2d 397 (App. Div. 1950) (enforcement of ordinance).

53 *See* notes 84 and 88 *infra* and accompanying text.

54 N.J. STAT. ANN. § 18A:20-35 (1968) provides:

> No school district shall be liable for injury to the person from the use of any public grounds, buildings or structures, any law to the contrary notwithstanding.

55 N.J. STAT. ANN. § 40:9-2 (1967) provides:

> No municipality or county shall be liable for injury to the person from the use of any public grounds, buildings or structures, any law to the contrary notwithstanding.

56 52 N.J. at 108, 244 A.2d at 99. The *Fahey* court further held:

> Thus, despite the dissatisfaction with the artificial governmental-proprietary distinction which this and other courts have expressed on so many occasions, the test must be retained for purposes of *R.S.* 40:9-2.

Id. at 108, 244 A.2d at 99.

57 Zapf v. Board of Chosen Freeholders, Middlesex County, 87 N.J. Super. 426, 428, 209 A.2d 660, 661 (App. Div. 1965).

58 Thompson v. Board of Educ., 11 N.J. 207, 210, 94 A.2d 206, 207 (1953).

59 *Id.*

supreme court could find that the governmental-proprietary test would be applied even though the statute does not specifically encompass that exception.

MODERN THEORIES OF GOVERNMENTAL IMMUNITY: DISCRETIONARY-MINISTERIAL TEST

Although the modern trend in municipal immunity and sovereign immunity is toward greater tort responsibility for governmental units,[60] there still exists some areas of governmental activity which almost everyone recognizes should remain protected.[61] The problem, of course, is to determine just what activities the government is to be responsible for.

The modern response to this problem has been the advent of the "discretionary function" test. This test developed to a large extent from section 2680(a) of the Federal Tort Claims Act of 1946,[62] which was enacted as a result of "a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work."[63] Included within the Act are 13 specific exceptions to liability, two of which are of major importance.[64] The first is the immunity of the federal government for intentional torts of its agents.[65] The other, and more pertinent exception, is section 2680(a) which provides immunity for

> [a]ny 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, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal

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60 *See* Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 131 (Fla. 1957); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 14-15, 163 N.E.2d 89, 90 (1959), *cert. denied*, 362 U.S. 968 (1960); Willis v. Department of Cons. & Ec. Dev., 55 N.J. 534, 538, 264 A.2d 34, 36 (1970); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 33-36, 115 N.W.2d 618, 621-23 (1962). *See also* K. DAVIS, *supra* note 3, § 25.00, at 823-44.

61 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 25.11, at 482, 485 (1958); Borchard, *supra* note 2, at 240.

62 28 U.S.C.A. § 2680(a) (1965).

63 Dalehite v. United States, 346 U.S. 15, 24 (1953).

64 3 K. DAVIS, *supra* note 61, § 25.08, at 469 states:

> The limited or minor exceptions relate to postal matter, collection of taxes and customs duties, admiralty, Trading with the Enemy Act, quarantines, vessels passing through the Panama Canal or in Canal Zone waters, fiscal operations of the Treasury or regulation of the monetary system, combatant activities during wartime, claims arising in a foreign country, activities of the Tennessee Valley Authority, and activities of the Panama Railroad Company.

65 28 U.S.C.A. § 2680(h) (1965).

> agency or an employee of the Government, whether or not the discretion involved be abused.

The Supreme Court interpreted this section of the Act in the case of *Dalehite v. United States*.[66] The claim against the government arose out of the famous Texas City, Texas disaster of 1947 in which 560 people were killed and 3,000 injured when a freighter being loaded with fertilizer grade ammonium nitrate exploded in the harbor, leveling much of that city.[67] The plaintiff alleged negligence on the part of the federal officials who were involved in the production and control of the explosive material because it was being produced as part of the foreign aid program. The district court found negligence in the bagging, labeling and coating of the material.[68] The Supreme Court, however, ruled that the government's involvement with respect to these acts was protected as discretionary within the meaning of section 2680(a).[69] Concerning the meaning of discretion, the Court stated:

> The "discretion" protected by the section is not that of the judge—a power to decide within the limits of positive rules of law subject to judicial review. It is the discretion of the executive or the administrator to act according to one's judgment of the best course . . . .
>
> . . . .
>
> [T]he "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 or 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.[70]

The Court further attempted to clarify the distinction by stating that decisions made at the "planning level" rather than the "operational level" were immune.[71]

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66 346 U.S. 15 (1953).

67 *Id.* at 48 (Jackson, J., dissenting).

68 *Id.* at 39-40.

69 *Id.* at 17-45.

70 *Id.* at 34-36 (footnotes omitted).

71 *Id.* at 42. Justice Jackson in his dissenting opinion expressed some incredulity with respect to the majority's findings concerning the "high level" nature of the allegedly negligent decisions:

> [I]f decisions are being made at Cabinet levels as to the temperature of bagging explosive fertilizers, whether paper is suitable for bagging hot fertilizer, and how the bags should be labeled, perhaps an increased sense of caution and responsibility even at that height would be wholesome. The common sense of this matter

The decision in *Dalehite* was somewhat limited, and a more inclusive interpretation was given to the government's liability by *Indian Towing Co. v. United States*,[72] wherein it was held that the government could be liable for the negligent maintenance by the Coast Guard of a lighthouse.[73] The Court rejected the defendant's contention that the Act provided the government with immunity when it was performing actions which private individuals could not perform,[74] stating that such a position "would thus push the courts into the 'non-governmental'—'govermental' quagmire that has long plagued the law of municipal corporations."[75]

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is that a policy adopted in the exercise of an immune discretion was carried out carelessly by those in charge of detail.

Id. at 58. He went on to expound what has come to be the more accepted view toward discretionary functions:

> But many acts of government officials deal only with the housekeeping side of federal activities. The Government, as landowner, as manufacturer, as shipper, as warehouseman, as shipowner and operator, is carrying on activities indistinguishable from those performed by private persons. In this area, there is no good reason to stretch the legislative text to immunize the Government or its officers from responsibility for their acts, if done without appropriate care for the safety of others. Many official decisions even in this area may involve a nice balancing of various considerations, but this is the same kind of balancing which citizens do at their peril and we think it is not within the exception of the statute.

Id. at 60. *See* Fair v. United States, 234 F.2d 288, 292 (5th Cir. 1956).

72 350 U.S. 61 (1955).

73 *Id.* at 69. 3 K. DAVIS, *supra* note 61, § 25.09, at 473-74, § 25.10, at 478; *The Supreme Court, 1955 Term*, 70 HARV. L. REV. 83, 136-37 (1956).

74 The government in *Indian Towing* had relied on the *Dalehite* conclusion that § 2680 of the Tort Claims Act demonstrated that Congress had "exercised care to protect the Government from claims, however negligently caused, that affected the governmental function." 346 U.S. at 32.

75 350 U.S. at 65. In synthesizing the *Dalehite* and *Indian Towing* cases, Professor Davis set down ten guiding principles concerning discretionary functions:

> 1. The government probably is not liable for negligence in planning "at a planning rather than operational level."
>
> 2. The statutory concept of "a discretionary function," with respect to which the government is not liable whether or not the discretion involved be abused, probably is limited to the planning level and probably does not include functions at the operational level even if those functions involved discretion.
>
> 3. The location of the line between the planning and operational levels is yet to be worked out, but the government is probably immune from liability for negligence in "a plan developed at a high level under a direct delegation of plan-making authority from the apex of the Executive Department."
>
> 4. The line between the planning and operational levels may depend not merely upon the position of the actor in the government hierarchy but may depend in part on whether the negligence is "in policy decisions of a regulatory or governmental nature" or whether the negligence relates to "actions akin to those of a private manufacturer, contractor, or shipper."
>
> 5. "When an official exerts governmental authority in a manner which legally binds one or many," the government probably is not liable.
>
> 6. The test of government liability does not depend upon the governmental-proprietary distinction. The government may be liable for negligence at the operational level, even if the function performed is governmental.

The "discretionary-ministerial" or "planning-operation approach" to immunity has not been received with unanimous support. Probably the most persuasive criticism of the doctrine, as it is interpreted under the Federal Tort Claims Act, is that it allows too much protection for governmental acts because courts have tended "to emphasize the literal meaning of the term 'discretionary,' along with [the assumption] that anything in the nature of 'planning' calls for immunity . . . ."[76]

A recent California Supreme Court case recognized this criticism and proposed a solution. In *Johnson v. State*,[77] the plaintiff brought an action alleging that the Youth Authority of California had negligently placed a 16-year-old foster child in her home without revealing his homicidal tendencies or his background of violence and cruelty to humans and animals. Plaintiff brought the action after suffering injuries when the boy assaulted her with a butcher knife.[78] The court, in interpreting a California statute[79] simlar to the Federal Tort Claims Act, refused to assign a literal definition to the term "discretionary," stating:

> We follow equally sound precedent, however, in rejecting the state's invitation to enmesh ourselves deeply in the semantic thicket of attempting to determine, as a purely literal matter, "where the ministerial and imperative duties end and the discretionary powers

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7. Negligence in regulating or in failing to regulate through resort to legislative power probably does not subject the government to liability.

8. Absolute liability without fault does not arise even if the government handles an inherently dangerous commodity or engages in an extra-hazardous activity.

9. The government may be liable for negligence in performing a function even if the function has no counterpart in the activities of private persons.

10. The government may be liable for negligence in performing a service which neither the government nor the agency nor the officers have an obligation to undertake.

3 K. DAVIS, *supra* note 61, § 25.10, at 479-82 (footnotes omitted).

76 K. DAVIS, *supra* note 3, § 25.08, at 846; *see* F. HARPER & F. JAMES, *supra* note 42, § 29.15, at 1663-664.

Justice Jackson, in his dissenting opinion in *Dalehite*, expressed a similar point of view, reasoning:

> Surely a statute so long debated was meant to embrace more than traffic accidents. If not, the ancient and discredited doctrine that "The King can do no wrong" has not been uprooted; it has merely been amended to read, "The King can do only little wrongs."

346 U.S. at 60.

77 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

78 *Id.* at 785, 447 P.2d at 354, 73 Cal. Rptr. at 242.

79 CAL. GOV'T. CODE § 820.2 (West 1966) states:

> Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

> begin. *** "[I]t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail."[80]

Rather the court limited its holding to the rule that the state would be immune for only "basic policy decisions."[81] It further stated that, while the Youth Authority may make certain protected discretionary decisions concerning the placing of children,[82] it is the duty of the Authority, once the decision is made, to warn the foster parents of any potentially dangerous abnormalities in the child's history.[83]

Although the *Johnson* decision certainly serves to mute any judicial trend expanding immunity under the cloak of discretionary functions,[84] it is questionable whether the term "basic policy decision" will provide any better guidelines for other courts than will the terms "discretionary-

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80 69 Cal. 2d 782, 788, 447 P.2d 352, 357, 73 Cal. Rptr. 240, 245 (quoting from Ham v. County of Los Angeles, 46 Cal. App. 148, 162, 189 P. 462, 468 (1920)).

81 69 Cal. 2d at 793, 447 P.2d at 360, 73 Cal. Rptr. at 248. The court recognized that its solution was not dispositive of the problem. It stated:

> We recognize that this interpretation of the term "discretionary" presents some difficulties. For example, problems arise in attempting to translate this concern for the court's role in the governmental structure into an applicable touchstone for decision. Our proposed distinction, sometimes described as that between the "planning" and "operational" levels of decision-making . . . however, offers some basic guideposts, although it certainly presents no panacea. Admittedly, our interpretation will necessitate delicate decisions; 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 reexamine 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.

Id. at 794, 447 P.2d 360-61, 73 Cal. Rptr. at 248-49 (footnote omitted).

82 Whether parole is to be granted is a protected discretionary decision. *Id.* at 795, 447 P.2d at 361, 73 Cal. Rptr. at 250.

> 83 Once an official reaches the decision to parole . . . the determination as to whether to warn the foster parents of latent dangers facing them presents no such reasons for immunity; to the extent that a parole officer consciously considers pros and cons in deciding what information, if any, should be given, he makes such a determination at the lowest, ministerial rung of official action.

Id. at 795-96, 447 P.2d at 362, 73 Cal. Rptr. at 250.

Another problem which the court raised was the issue of whether the existence of a primary policy decision would clothe a subsequent ministerial decision made to implement the primary one with immunity. While rejecting such a holding for the case at bar, it left the final resolution of that question for a later determination, pointing out, however, that most of these situations "involve failures to warn of foreseeable, latent dangers flowing from the basic, immune decision." *Id.* (footnote omitted).

84 K. DAVIS, *supra* note 3, § 25.08, at 846-48.

ministerial" or "planning-operational." What is needed is not new terminology but a uniform judicial determination that immunity is to be strictly limited.

MODERN NEW JERSEY LAW

Such a judicial determination was made by the New Jersey Supreme Court in the case of *B. W. King, Inc. v. Town of West New York*[85] where the court stated "that most of the reasons for immunity have expired and that municipal liability should be subject to less restrictive limits."[86] The court further ruled that the new theory should be allowed to "metamorphize slowly"[87] on a case-by-case basis, with each case approached not by "asking why immunity should not apply in a given situation but rather . . . [by] asking whether there is any reason why it should apply."[88]

While *B. W. King* directed that a new approach be taken to immunity, it did not completely abrogate it. Rather, it specifically recognized that there were certain municipal actions, "regardless of how defined and tested, [which] should continue to be immune from tort liability."[89] To illustrate this the court cited four cases:[90] *Amelchenko v. Borough of Freehold*,[91] *Fitzgerald v. Palmer*,[92] *Hoy v. Capelli*,[93] and *Visidor Corp. v. Borough of Cliffside Park*.[94] From these can be distilled the parameters within which municipal immunity in New Jersey is now limited.

In *Amelchenko* the issue before the court was the liability of a municipality to a person injured from a fall on the unplowed snow of one of its parking lots, 33 hours after the snowfall had ended. The supreme court, ignoring the parties' and the lower court's discussion of the governmental-proprietary test,[95] ruled that the Township was under a duty to remove the snow only within a reasonable time.[96] However, an inquiry into a breach of that duty must be limited strictly

85 49 N.J. 318, 230 A.2d 133 (1967).
86 *Id.* at 324, 230 A.2d at 136.
87 *Id.* at 325, 230 A.2d at 137.
88 *Id.*
89 *Id.* at 324-25, 230 A.2d at 137.
90 *Id.* at 325, 230 A.2d at 137.
91 42 N.J. 541, 201 A.2d 726 (1964).
92 47 N.J. 106, 219 A.2d 512 (1966).
93 48 N.J. 81, 222 A.2d 649 (1966).
94 48 N.J. 214, 225 A.2d 105 (1966), *cert denied*, 386 U.S. 972 (1967).
95 42 N.J. at 546, 201 A.2d at 729.
96 *Id.* at 551, 554, 201 A.2d at 731, 733.

to the question of whether the Township varied from its established practices and procedures in dealing with the storm. Inquiry may not be made into the question of whether certain discretionary decisions were correctly formulated. The court was concerned with two specific areas of decision-making. The first of these related to the policy-making process of the town governing body, wherein it decides what problems will face the town and how the town will respond to them.[97] An example of this would be a decision to allocate a certain amount of money for men and equipment to deal with snowstorms. While this amount may be grossly inadequate to alleviate that problem and, as a result, an injury occurs, this determination is, nevertheless,

> a matter of judgment committed under our system of government to the local authority and it should not be interfered with by the courts in a tort damage suit.[98]

The court apparently felt constrained to allow the governing unit to carry out its function without the bridling effect of a potential lawsuit delving into the intricacies of the governmental process through the "Monday morning quarterbacking" of a jury.[99]

The second area of decision-making is derivative of the first. It concerns the method by which the administrative arm implements the general policy determinations of the governing body. Included thereunder are decisions prescribing when, where, how and in what order the men and equipment will be utilized.[100] For example, if a plan were developed by a major administrative officer detailing which streets were to be plowed and in what order, that plan would not be reviewable in a tort suit. Such decisions are rightly within the province of those who are politically responsible for them, and not a jury. The court stated that the quality of service provided is strictly a political decision and that public officials must be free to face this decision without fear of tort liability for themselves or their town.[101] The basic theory under-

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97 *Id.* at 550, 201 A.2d at 730-31.

98 *Id.* at 549, 201 A.2d at 730.

99 *Id.* at 550, 201 A.2d at 731. Justice Francis, writing for the court, reasoned that the priorities to be given in clearing of streets, the quantum of equipment to be purchased, and the number of men to be hired "represents the exercise of judgment on a governmental matter . . . . [and a] jury cannot be allowed to substitute its decision for that of the municipality." *Id.* at 555, 201 A.2d at 733.

100 42 N.J. at 550, 201 A.2d at 730-31. Justice Francis noted that to allow such decisions to be reviewed in a tort suit "would take the ultimate decision-making authority away from those who are responsible politically for making the decisions." *Id.* at 550, 201 A.2d at 730.

101 *Id.* at 550, 201 A.2d at 730-31.

lying this rationale is summed up in Justice Francis' statement: "It cannot be a tort for government to govern."[102]

In *Fitzgerald* and *Hoy*, two other cases cited as guidelines in *B. W. King*, the plaintiffs complained that the governing bodies had not sufficiently exercised their governmental prerogatives. The plaintiff in *Fitzgerald* alleged that her decedent was injured when vandals pushed a 60-pound slab of concrete onto his car from a recently built overpass. She contended that the state was negligent in failing to provide protective fences on the overpass,[103] but the court rejected this, stating:

> A private entrepreneur may readily be held for negligent omissions within the chosen ambit of his activity. But the area within which government has the power to act for the public good is almost without limit, and the State has no duty to do everything that might be done. Rather there is a political discretion as to what ought to be done, as to priorities, and as to how much should be raised by taxes or borrowed to that end. If government does act, then, when it acts in a manner short of ordinary prudence, liability could be judged as in the case of a private party. So if a road were constructed of a design imperiling the user, the issue of fault would present no novel problem. But whether a road should have four or six or eight lanes, or there should be dividers, or circles or jughandles for turns, or traffic lights, or traffic policemen, or a speed limit of 50 or 60 miles per hour—such matters involve discretion and revenue and are committed to the judgment of the legislative and executive branches. As to such matters, the question is whether a judge or jury could review the policy or political decisions involved without in effect taking over the responsibility and power of those other branches.[104]

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102 *Id.* at 550, 201 A.2d at 731. *See* Dalehite v. United States, 346 U.S. 15, 57 (1953); K. DAVIS, *supra* note 3, § 25.08, at 847.

103 47 N.J. at 108, 219 A.2d at 513.

104 *Id.* at 109-10, 219 A.2d at 514. Since this action was against the state, the court was faced with the problem of separation of powers. On that point the court reasoned:

> [T]he State's "immunity" involves ultimately the question, which branch of government shall decide for the State when it shall pay? In the abstract, a question of that kind would seem "judicial" enough in the absence of a controlling policy expression by the Legislature. But the judiciary could not enforce a judgment if it gave one. No money may be drawn from the State treasury but for appropriations made by law. *Const., Art.* VIII, § II, ¶ 2. The judiciary could not order the Legislature to appropriate money, or the Governor to approve an appropriation if one were made. . . . Nor would it do to issue a writ of execution to sell the State House or the courtroom furnishings. . . . Thus the problem arises from the circumstance that under our system of separation of powers, the judiciary, not controlling the purse strings, cannot act effectively alone.

Id. at 108, 219 A.2d at 513. This problem does not arise, however, when the alleged tort is committed by a municipality because the municipalities are not coequal bodies to the courts.

Once again, the court was interested in protecting the governing body, in this case the state, from investigation by an inexpert group unattuned to the technical or political subleties to which the legislative and administrative branches are exposed.

In *Hoy*, the plaintiff was injured in an accident at an intersection formerly controlled by a traffic light. The light had been removed two month prior to the accident. The plaintiff claimed that the municipality negligently failed to replace the signal after removing it.[105] The supreme court rejected this contention of active wrongdoing, however, and framed the issue of the case along the same lines as in *Amelchenko*, namely,

> whether there are certain kinds of acts or omissions of government, no matter how they are categorized, defined or labelled or how governmental immunity from suit is to be regarded, which should not give rise to tort liability.[106]

The court concluded that there were certain "discretionary" functions which must necessarily be considered immune from tort liability. Additionally, it decided that a governmental determination to install or not to install a traffic light would be considered a "discretionary" function.[107] This position is consistent with *Amelchenko* and, in fact, seems mandatory in light of the *Fitzgerald* decision.[108]

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105 48 N.J. at 84, 222 A.2d at 650.

106 *Id.* at 87, 222 A.2d at 652.

107 *Id.* at 91, 222 A.2d at 654-55.

Both the *Hoy* and *Amelchenko* decisions were based to a large extent on the reasoning expressed by Judge Fuld in the New York Court of Appeals case of Weis v. Fote, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960). The plaintiff claimed she was injured because the city of Buffalo had allowed too short an interval between the red and green lights. Judge Fuld, in determining that immunity must continue to exist in certain situations, expressed the often quoted rationale justifying immunity for high-level policy decisions:

> Lawfully authorized planning by governmental bodies has a unique character deserving of special treatment as regards the extent to which it may give rise to tort liability. It is proper and necessary to hold municipalities and the State liable for injuries arising out of the day-by-day operations of government—for instance, the garden variety injury resulting from the negligent maintenance of a highway—but to submit to a jury the reasonableness of the lawfully authorized deliberations of executive bodies presents a different question. . . . To 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. Acceptance of this conclusion, far from effecting revival of the ancient shibboleth that "the king can do no wrong", serves only to give expression to the important and continuing need to preserve the pattern of distribution of governmental functions prescribed by constitution and statute.

Id. at 585-86, 167 N.E.2d at 65-66, 20 N.Y.S.2d at 413.

108 In *Fitzgerald*, Chief Justice Weintraub stated that the decision as to whether a

The *Visidor* case, while leading to the same conclusion as the other three, had a slightly different factual pattern. The injury suffered by the plaintiff was not directly inflicted by the municipality but emerged as the indirect consequence of a legitimate governmental act. The Visidor Corporation operated a tavern in the defendant municipality. The latter had passed an ordinance declaring a street used by the plaintiff's patrons to be one-way, which resulted in a loss of business to the tavern. Subsequently, the plaintiff successfully challenged the ordinance on procedural grounds[109] and, in the same action, sought money damages from the Borough for the business it had lost during the time the street was illegally declared one-way.[110]

Justice Jacobs, speaking for the court, stated that legislative actions by governing bodies are immune from tort claims even when the act in question is subsequently deemed to be invalid.[111] Plaintiff's remedy lay only in having the ordinance declared illegal.[112] This decision, the court ruled,

> serves to protect municipalities against endangering financial demands and to permit their governing bodies to govern conscientiously for the public interest, as they find it, without the fears and burdens of litigating such demands.[113]

The court's decision would seem to fit neatly into the strictures of immunity developed in the three earlier New Jersey decisions. A determination by a city council that a certain street is to be declared one-way is decidedly an action of a character to which liability should not attach because it requires the balancing of many different public interests. There is no real right or wrong determination. If the street is not declared one-way then motorists would suffer a detriment, while if it is declared one-way people in situations similar to the plaintiff's would suffer a detriment. The governing body must weigh the two conflicting harms and make a determination. It should not be held responsible for making one decision when another group of individuals

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road should have traffic lights was discretionary and committed to the judgment of the legislative and executive branches. 47 N.J. at 110, 219 A.2d at 514.

109 48 N.J. at 216, 225 A.2d at 106.

110 *Id.*

111 *Id.* at 222, 225 A.2d at 109.

112 In *Visidor* the ordinance was voided because of the municipalities' failure to comply with N.J. STAT. ANN. § 39:4-197 (1961), and N.J. STAT. ANN. § 39:4-202 (1961), which require approval from the Director of Motor Vehicles for such ordinances. 48 N.J. at 216, 225 A.2d at 109.

113 48 N.J. at 224, 25 A.2d at 110.

(a jury) might come to a different conclusion based upon the same facts.[114]

Of course, it should be pointed out that Visidor did not specifically deny the above reasoning. Rather it contended that the tort committed by the Borough was its failure to take the proper procedural steps in enacting the ordinance. While technically the plaintiff might appear to have a cause of action under the discetionary-ministerial test since the procedural requirement would seem to be clearly ministerial, the real harm resulted not from the Borough's procedural failure to notify the state about its ordinance[115] but from the effect of the ordinance itself. Therefore, to allow the plaintiff to prevail on the grounds of the procedural deficiencies would have been to overlook the substance of his complaint.[116]

It would appear that the following guidelines can be postulated concerning the present status of municipal immunity in New Jersey:[117]

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114 Perhaps under a more Utopian system every action by the government wherein harm is done to an individual will be remedied. While at first blush this may seem unlikely, it appears to be the direction of the law. *Compare* Mower v. Inhabitants of Leicester, 9 Mass. 247 (1812), *with* B. W. King, Inc. v. Town of West New York, 49 N.J. 318, 230 A.2d 133 (1967), for a view of the radical change in judicial and social attitudes.

115 *See* note 111 *supra.*

116 The court justified its decision on this issue by pointing out that the judicial trend was against recovery, that an expedient action by an aggrieved party could quickly invalidate an improper ordinance, that the Board had acted in good faith, and finally, that the purpose of the ordinance was not for the protection of economic interests but for the advancement of traffic safety. The court balanced the above factors against the harm done to the plaintiff and ruled that the plaintiff's damage claim must fail. 48 N.J. at 223, 225 A.2d at 109-10.

117 In light of Willis v. Department of Cons. & Ec. Dev., 55 N.J. 534, 264 A.2d 34 (1970), most of these guidelines would also apply to soverign immunity. In that case the court stated that after January 1, 1971, the state could no longer rely on the defense of sovereign immunity. The court stated:

> It is time for the judiciary to accept a like responsibility and adjudicate the tort liability of the State itself. For the reasons already given, we will not attempt to express an ultimate doctrine; the constituent principles will be better evolved out of the realities of specific cases. But we do emphasize that the State will not be held liable for legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial cast, nor generally with respect to decisions calling for the exercise of official judgment or discretion. This limitation seems to be uniformly accepted, as we pointed out in *Hoy* . . . and *Visidor* . . . . In those cases, we invoke the same limitation with respect to the liability of municipal corporations.

Id. at 540-41, 264 A.2d at 37.

Subsequent to *Willis* the New Jersey Legislature enacted N.J. STAT. ANN. § 52:4A-1 (Supp. 1971-72), which extended the date after which immunity was waived until July 1, 1971. In 1971 this date was changed to April 1, 1972. Law of June 2, 1971, ch. 187, [1971] N.J. Laws 748. Recently, a bill was signed into law extending immunity to July 1, 1972. Law of April 7, 1972, ch. 9, [1972] N.J. Laws —.

I. Municipal immunity is still a functioning doctrine in New Jersey law, but its application is limited to those situations wherein:
   (A) The cause of the alleged wrong was an action of discretionary governmental quality on the part of the municipality.[118]
      (1) A discretionary governmental action protected by immunity exists where:
         (a) the alleged wrong springs directly from some policy decision on the part of the governing board to take some action or not to take some action; or,
         (b) the alleged wrong is generated as the result of the general plan set up by the governing board or its administrative officer to carry out that policy decision;[119] or,
         (c) an employee of the municipality, although not an elected governing official, carries out actions for the town which are of a legislative, judicial,[120] quasi-legislative or quasi-judicial nature.[121]
   (B) A statute creates a specific zone of immunity in favor of the municipality.[122]

II. In all other cases where the tort results from a variation from the municipal plan,[123] from the negligence of a municipal servant or agent, or from a breach of duty on the part of the township,[124] it will be held liable.

Although the New Jersey Supreme Court instituted rather innovative standards in *B. W. King* and the cases cited therein, the court chose to ignore them when the first opportunity for their

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118 Amelchenko v. Borough of Freehold, 42 N.J. 541, 549-50, 201 A.2d 726, 730-31 (1964); Bergen v. Koppenal, 97 N.J. Super. 265, 268, 235 A.2d 30, 31 (App. Div. 1967), *aff'd*, 52 N.J. 478, 246 A.2d 442 (1968).

119 Hoy v. Capelli, 48 N.J. 81, 87-91, 222 A.2d 649, 652-55 (1966); Fitzgerald v. Palmer, 47 N.J. 106, 108-10, 219 A.2d 512, 513-14 (1966); Amelchenko v. Borough of Freehold, 42 N.J. 541, 550-51, 201 A.2d 726, 730-31 (1964).

120 Willis v. Department of Cons. & Ec. Dev., 55 N.J. 534, 540, 264 A.2d 34, 37 (1970).

121 *See* Fiduccia v. Summit Hill Constr. Co., 109 N.J. Super. 249, 255, 262 A.2d 920, 923 (Essex County Dist. Ct. 1970).

122 Fahey v. City of Jersey City, 52 N.J. 103, 109, 244 A.2d 97, 100 (1968). In *Fahey* the statute in question was N.J. STAT. ANN. § 40:9-2 (1967).

123 B. W. King, Inc. v. Town of West New York, 49 N.J. 318, 325-26, 230 A.2d 133, 137-38 (1967); Amelchenko v. Borough of Freehold, 42 N.J. 541, 550, 201 A.2d 726, 731 (1964).

124 McAndrew v. Mularchuk, 33 N.J. 172, 184-85, 162 A.2d 820, 827 (1960).

application arose. In *Jackson v. Hankinson*,[125] the plaintiff sued the Board of Education of the Borough of New Shrewsbury after he was injured by an obstreperous fellow pupil while riding on a school bus. The trial court had relieved the Board of liability on the grounds of municipal immunity.[126] The appellate division remanded the case for consideration of the issue of the active wrongdoing of the school board.[127] On appeal, the supreme court, after recognizing the present trend in municipal immunity, sidestepped the issue of active wrongdoing[128] and immunity in general[129] and based its reasoning on the duty of care owed by the Board to the children in its charge. It stated:

> It must be borne in mind that the relationship between the child and the school authorities is not a voluntary one but is compelled by law. The child must attend school . . . and is subject to school rules and disciplines. In turn the school authorities are obligated to take reasonable precautions for his safety and well-being.[130]

By avoiding the issue of immunity, the court seems to have created another exception to the immunity rule: where the municipality is under a special duty of care imposed by statute. Whether the court intended to create this exception or was simply interested in avoiding the issue of immunity so as to assure a remedy to the infant plaintiff is not particularly clear from the decision, although the latter would seem to be more likely because of the difficulty the court would have faced if it had to determine whether the Board's approach to bus safety was a protected decision.[131] It is also interesting to speculate as to

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125 51 N.J. 230, 238 A.2d 685 (1968).

126 94 N.J. Super. 505, 508, 229 A.2d 267, 269 (App. Div. 1967).

127 *Id.* at 518, 229 A.2d at 274.

128 The court pointed out that the concept of active wrongdoing had never been expressly disavowed and stated:

> We need not here pursue the question of whether the active wrongdoing concept may still have vitality in other contexts for we are satisfied that, in any event, it has none here.

51 N.J. at 235, 238 A.2d at 688.

It would appear, in light of *B. W. King's* abolition of the governmental-proprietary test, that the active wrongdoing concept has taken on a vestigial nature. That concept, as was previously mentioned, is applied when the act complained of is said to be of a governmental nature. Therefore, since *B. W. King* abolished the governmental-proprietary test, there is no place in the law for it. It should be further pointed out that the one place in New Jersey law where the governmental-proprietary test was applied—statutorily granted immunity—the active wrongdoing concept was not applied. *See* notes 54-58 *supra* and accompanying text.

129 51 N.J. at 235-36, 238 A.2d at 688.

130 *Id.* at 235, 238 A.2d at 688.

131 Since a school board is a local governmental unit, Botkin v. Borough of Westwood, 52 N.J. Super. 416, 425, 145 A.2d 618, 623 (App. Div. 1958), *appeal dismissed*, 28 N.J. 218, 146 A.2d 121 (1958), the reasoning of *Amelchenko* would be applicable to it. Therefore, the

whether the same reasoning would have similarly applied to a prisoner injured while in municipal custody.[132]

The court could not as easily sidestep the immunity question in *A. & B. Auto Stores v. City of Newark*.[133] In that case, the plaintiffs had alleged that the defendant municipality was negligent with respect to its planning for, and response to, riots. Among other things, the plaintiffs complained in the lower court that the defendant failed to purchase the proper riot equipment and had deployed its manpower carelessly during the actual rioting.[134] The supreme court rejected these contentions, stating that the plaintiffs had challenged "administrative or legislative decisions of a discretionary character"[135] and that these were within the purview of municipal immunity. It would appear that the court could have made no other decision without becoming hopelessly enmeshed in the upper-echelon political and administrative decision-making processes of Newark.

In another case involving police discretion, *Bergen v. Koppenal*,[136] the plaintiff was injured in a traffic accident which was allegedly caused by a defective traffic light on a state highway. A municipal police officer, while patrolling the state highway, had observed the condition and reported it to his superiors. They, in turn, had notified state authorities, but had failed to dispatch an officer to the scene to direct traffic. The plaintiff contended this was negligence. The trial judge dismissed the claim against the Township on the grounds that the municipality had no control over the light, and that the decision as to whether to send a

court would have had to contend with the holding in *Amelchenko* that decisions concerning when, where, and in what order personnel and equipment are to be used are not subject to review in tort suits. 42 N.J. at 550, 201 A.2d at 730-31.

132 *See* Williams v. Field, 416 F.2d 483 (9th Cir. 1969); Note, *Tortious Conduct of Prison Officials—Application of the Civil Rights Act*, 1 SETON HALL L. REV. 243 (1970).

133 59 N.J. 5, 279 A.2d 693 (1971); *see* Manzo v. City of Plainfield, 59 N.J. 30, 279 A.2d 706 (1971), and R. L. Mulliken, Inc. v. City of Englewood, 59 N.J. 1, 279 A.2d 691 (1971), which were related cases arising out of racial turmoil of the late 1960's.

134 106 N.J. Super. 491, 494, 256 A.2d 110, 111 (L. Div. 1969).

135 59 N.J. at 11, 279 A.2d at 696. The supreme court relied to a large extent on Judge Larner's trial decision that the actions taken by the City of Newark and its police department were discretionary. He had noted that the municipality's decision whether to purchase extraordinary riot equipment was a policy decision because it required taking into account such factors as the tax ramifications, the effect of such a decision on the community and whether the deployment of such equipment would have exacerbated the problem. He further pointed out:

> How is a fact finder to arrive at a determination of fault or cause and effect in such nebulous areas as riot training or planning or community relations between city officials and militant racial groups?

106 N.J. Super. at 499, 256 A.2d at 114.

136 97 N.J. Super. 265, 235 A.2d 30 (App. Div. 1967), *aff'd as modified*, 52 N.J. 478, 246 A.2d 442 (1968).

policeman was a discretionary and legislative function.[137] The appellate division reversed, holding that the Township's decision not to send an officer was not a discretionary function.[138] The case was remanded to the trial division to ascertain if the Township had acted reasonably and had fulfilled its duty to the users of the highway.[139]

The supreme court affirmed the appellate division's ruling that the police action was not discretionary, but modified it,[140] holding that, while a duty may be imposed upon the police if notified of emergency road conditions, the municipality may justify its actions by showing that it did not act because of competing demands upon its manpower. In such a case the jury would be instructed that they may not disagree with the police judgment unless it was "palpably unreasonable."[141] Thus the court appeared to graft another new exception onto the municipal immunity doctrine.[142]

While at first the *Bergen* decision appears to be in conflict with the decision in *A. & B. Auto Stores,* the two are actually in harmony. In *Bergen* the alleged tort was a decision of individual policemen as to how they would handle a specific problem. This is a ministerial action.[143] On the other hand, in *A. & B. Auto Stores* the wrongs complained of stemmed from the decisions as to what equipment to purchase,[144] clearly a discretionary legislative determination, and how to deploy manpower and equipment, clearly a high-level discretionary administrative decision.[145]

Of course a comparison of *Bergen* and *A. & B. Auto Stores* points up a problem which will always face courts when deciding an immunity question: where in the municipal decision-making process do decisions become discretionary?

An examination of a recent lower court decision, *Fiduccia v. Summit Hill Construction Co.*,[146] illustrates the difficulties encountered in dealing with this problem. In that case, the plaintiff sued the Borough

137 97 N.J. Super. at 268, 235 A.2d at 31. The trial court relied on the supreme court's decision in *Hoy*.

138 *Id.* at 269, 235 A.2d at 32.

139 *Id.* at 269-70, 235 A.2d at 32.

140 52 N.J. 478, 480, 246 A.2d 442, 444 (1968).

141 *Id.*

142 It is interesting to speculate whether this umbrella of protection would have been extended if private corporations performed this same type of activity or whether the exception was granted as a result of the arcane nature of the work performed.

143 97 N.J. Super. at 269, 235 A.2d at 32; *see* Czyzewski v. Schwartz, 110 N.J. Super. 255, 261, 265 A.2d 173, 176 (App. Div. 1970).

144 106 N.J. Super. at 498, 256 A.2d at 114.

145 *Id.* at 499, 256 A.2d at 114.

146 109 N.J. Super. 249, 262 A.2d 920 (Essex County Dist. Ct. 1970).

of Roseland claiming that its building inspector had wrongfully issued a certificate of occupancy when he should have been aware that the house had been improperly constructed and the land improperly graded.[147] The trial court dismissed the complaint against the municipality on the grounds that the action of the building inspector was a discretionary function requiring considerable skill[148] and also because the protection of the landowner was not the purpose of the certificate of occupancy.[149]

Analyzed in light of the seminal New Jersey decisions on discretionary immunity,[150] it would appear that the *Fiduccia* court incorrectly applied the term "discretionary," equating it with a decision-making process requiring a high degree of skill. With respect to this point, the court stated:

> While issuance of a certificate of occupancy does not involve planning or policy functions, it does entail the exercise of discretion. Not only must the building inspector determine whether there has been compliance with building regulations and health regulations, but whether the structure complies with the requirements of the zoning ordinance. The books are replete with zoning cases which demonstrate that this can be a task requiring considerable skill.[151]

However, a close reading of *Amelchenko, Fitzgerald, Hoy* and *Visidor* will reveal that in each of those cases the court was discussing not the fact that the decision was a technically difficult one, but the fact that the governing body had to make a *politically* difficult choice,[152] involving the weighing of such factors as tax ramifications[153] and the balancing of

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147 *Id.* at 250, 262 A.2d at 921.

148 *Id.* at 255, 262 A.2d at 923.

149 *Id.*, 262 A.2d at 924.

150 Visidor Corp. v. Borough of Cliffside Park, 48 N.J. 214, 225 A.2d 105 (1966); Hoy v. Capelli, 48 N.J. 81, 222 A.2d 649 (1966); Fitzgerald v. Palmer, 47 N.J. 106, 219 A.2d 512 (1966); Amelchenko v. Borough of Freehold, 42 N.J. 541, 201 A.2d 726 (1964).

151 109 N.J. Super. at 254-55, 262 A.2d at 923 (emphasis added).

152 In *Amelchenko* the problem was the quality of snow removal. On this issue the court stated that to subject such decisions to review in tort suits "would take the ultimate decision-making authority from those who are responsible *politically* for making the decisions." 42 N.J. at 550, 201 A.2d at 730 (emphasis added).

In *Fitzgerald* the problem was the quality of road safety. The court stated that "there is a *political* discretion as to what ought to be done." 47 N.J. at 109, 219 A.2d at 514 (emphasis added).

Both *Hoy* and *Visidor* cite favorably to *Amelchenko* and *Fitzgerald*. Hoy v. Capelli, 48 N.J. 81, 87-88, 222 A.2d 649, 652-53 (1966); Visidor Corp. v. Borough of Cliffside Park, 48 N.J. 214, 221, 225 A.2d 105, 108 (1966), *cert. denied*, 386 U.S. 972 (1967). *See also* Judge Larner's decision in *A. & B. Auto Stores* wherein he discusses the problems faced by the city official in Newark. 106 N.J. Super. at 498-99, 256 A.2d at 114.

153 47 N.J. at 109, 219 A.2d at 514.

different group interests.[154] The court could not impose the tort standard of reasonableness on municipal *governmental* decisions because of their subtle and esoteric nature, the justification for which could never be brought out in the cold objectivity of a trial. However, a building inspector's function presents a much different situation. While his job undoubtedly requires a high degree of skill, the exercise of that skill can be measured against an objective standard. Expert witnesses can be brought in to testify as to what would be a reasonably prudent decision under similar circumstances. In addition, the inspector himself can testify fully as to why he reached his decision. Also, in such a case the court would not be guilty of intruding into an essential process of another branch of government. The new doctrine of immunity is not meant to shield all actions of the governing body entirely, only those which are "basic governmental policy decisions."[155]

Furthermore, even assuming a broad interpretation of "discretionary," it is submitted that a building inspector's function involves no choice. When a landowner has complied with the necessary prerequisites, a permit must issue.[156]

CONCLUSION

While advances in the field of municipal immunity have been made, both through a more impartial treatment of plaintiffs and a simplification of the immunity rule and its exceptions, it is very questionable whether these innovations will provide a stable and comprehensible body of law with the limited purpose of protecting only fundamental decision-making. The very nature of the solution invites controversy because of the difficulty in determining what is meant by the term discretionary and to which level of governmental acts it is to be applied. Recent lower court cases underscore this difficulty. Moreover, the approach of the supreme court itself has not been characterized by a preconceived and uniform design. The court developed the present response prior to acknowledging the existence of a new test.[157]

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154 48 N.J. at 221-24, 225 A.2d at 108-10; 48 N.J. at 87-91, 222 A.2d at 652-55; 42 N.J. at 549-50, 201 A.2d at 730-31.

155 48 N.J. at 550, 201 A.2d at 730-31.

156 Schack v. Trimble, 48 N.J. Super. 45, 50-51, 137 A.2d 22, 24-25 (App. Div. 1957); Piscitelli v. Township Committee, 103 N.J. Super. 589, 598-99, 248 A.2d 274, 279 (L. Div. 1968). Both cases hold issuance of building permits under N.J. STAT. ANN. § 40:55-39 (1967), is mandatory where property owner has complied with ordinance.

157 The cases delineating the strictures of the present immunity rule were decided several years prior to the *B. W. King* decision. *Compare* B. W. King, Inc. v. Town of West

Furthermore, the integrity of the rule was immediately undermined when the court was faced with a situation wherein strict application would have produced an inequitable result.

In light of the foregoing, it seems clear that the logical and simple test which the supreme court has formulated will soon become so encumbered with numerous exceptions and technicalities that it will be necessary to allow a completely new approach to "metamorphize."

Richard P. Cushing

New York, 49 N.J. 318, 230 A.2d 133 (1967) *with* Visidor Corp. v. Borough of Cliffside Park, 48 N.J. 214, 225 A.2d 105 (1966), *cert. denied*, 386 U.S. 106 (1967) *and* Amelchenko v. Borough of Freehold, 42 N.J. 541, 201 A.2d 726 (1964).