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Notes on the California Tort Claims Act--The Discretionary Immunity Doctrine in California

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NOTES ON THE CALIFORNIA TORT CLAIMS ACT

THE DISCRETIONARY IMMUNITY DOCTRINE IN CALIFORNIA

It is a settled rule in California that governmental officials are not personally liable for harm resulting from "discretionary" acts within the scope of their authority.[1] This is the case even if it is alleged that they acted maliciously.[2] On the other hand, courts have repeatedly held that "ministerial" acts are not within the immunity rule, and liability will attach to public officers and employees should harm result from such acts.[3] The application of the discretionary immunity doctrine to the unusual sets of circumstances which find themselves the subjects of lawsuits has plagued the courts for years.

Currently the doctrine of discretionary immunity is codified in section 820.2 of the California Government Code:

> 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.

Section 820.2 is part of the Tort Claims Act of 1963,[4] which contains provisions of general application to all activities of public entities and numerous specific immunities covering areas of governmental activity which the legislature deemed deserving of explicit coverage.[5] This note will seek to explore the discretionary immunity doctrine under section 820.2.

Background of Section 820.2

The trend in the United States in recent years has been to depart from strict adherence to the doctrine of sovereign immunity.[6] This departure has come about by both judicial[7] and legislative action.[8]

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[1] *E.g.*, Downer v. Lent, 6 Cal. 94, 95 (1856); Martelli v. Pollock, 162 Cal. App. 2d 655, 658-60, 328 P.2d 795, 797-98 (1958).

[2] *E.g.*, White v. Towers, 37 Cal. 2d 727, 730-32, 235 P.2d 209, 211-12 (1951).

[3] *E.g.*, Payne v. Baehr, 153 Cal. 441, 444, 95 P. 895, 896 (1908); Mock v. City of Santa Rosa, 126 Cal. 330, 344, 58 P. 826, 829 (1899).

[4] Cal. Stats. 1963, ch. 1681, § 1, at 3266 (CAL. GOV'T CODE §§ 810-996).

[5] *See, e.g.*, CAL. GOV'T CODE § 821 (failure to adopt or enforce enactments), § 846 (failure to arrest or to retain in custody), § 850 (failure to provide fire department), §§ 850.2-.4 (failure to provide adequate fire equipment, personnel and facilities), § 856.2 (injury caused by escape of mental patient).

[6] A good discussion of this trend may be found in Muskopf v. Corning Hospital Dist., 55 Cal. 2d 211, 213-17, 359 P.2d 457, 458-60, 11 Cal. Rptr. 89, 90-92 (1961).

[7] *E.g.*, Colorado Racing Comm'n v. Brush Racing Ass'n, 136 Colo. 279, 316 P.2d 582 (1957); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

[8] *E.g.*, Cal. Stats. 1949, ch. 81, § 1, at 259 (repealed 1963); Cal. Stats. 1959, ch. 2, § 3, at 622 (repealed 1963); Cal. Stats. 1959, ch. 3, § 2, at 1653 (repealed 1963).

Blanket sovereign immunity came to an end in California when the California Supreme Court on the same day handed down decisions in *Muskopf v. Corning Hospital District*[9] and *Lipman v. Brisbane Elementary School District*.[10] In *Muskopf*, the plaintiff's broken hip was further injured when she fell due to the negligence of the hospital staff. The California Supreme Court had previously held that the abrogation of the sovereign immunity doctrine was a legislative prerogative.[11] In the *Muskopf* decision, the court declared that the doctrine was a judicial creation, and it discarded the doctrine after finding that blanket immunity for public entities was "mistaken and unjust."[12]

In the *Lipman* decision, the doctrine of discretionary immunity of public employees was reaffirmed. It was ruled that the alleged acts of the school district's trustees to discredit the superintendent and to force her from her position were discretionary.[13] Although the court also denied the liability of the school district,[14] it was indicated in dictum that the immunity of a public agency from liability for the discretionary conduct of its officials was not necessarily as extensive as the immunity of the officials personally.[15] Various factors were suggested to determine if the particular agency should be immune, including the "importance to the public of the function involved, the extent to which governmental liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages."[16]

The radical departure of *Muskopf* from the settled case law of sovereign immunity apparently caused widespread fear among officials of state and local agencies that the judicial abrogation of the doctrine would subject public entities to a liability burden which they could not bear. The legislature swiftly enacted section 22.3 of the California Civil Code,[17] delaying the effectiveness of the *Muskopf* and *Lipman* decisions until the 91st day after the close of the 1963 legislative session. In the interim provided by the moratorium statute, the legislature enacted the Tort Claims Act of 1963,[18] which became effective with the expiration of the moratorium statute.

Legislative Intent

According to the legislative committee comment accompanying section 820.2, the statute purports to reenact the prior case law.[19]

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[9] 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

[10] 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961).

[11] *E.g.*, Vater v. County of Glenn, 49 Cal. 2d 815, 820, 323 P.2d 85, 88 (1958).

[12] 55 Cal. 2d at 213, 218, 359 P.2d at 458, 461, 11 Cal. Rptr. at 90, 93.

[13] 55 Cal. 2d at 230, 359 P.2d at 467, 11 Cal. Rptr. at 99.

[14] *Id.* at 230, 359 P.2d at 468, 11 Cal. Rptr. at 100.

[15] *Id.* at 229, 230, 359 P.2d at 467, 11 Cal. Rptr. at 99.

[16] *Id.* at 230, 359 P.2d at 467, 11 Cal. Rptr. at 99.

[17] Cal. Stats. 1961, ch. 1404, § 1, at 3209.

[18] Note 4 *supra*.

[19] "This section restates the preexisting California law. [citation omitted] The discretionary immunity rule is restated here in statutory form to ensure that, unless otherwise provided by statute, public employees will continue to

However, apparently because of a certain amount of distrust of future judicial application to particular sets of circumstances, the legislature specifically spelled out in the following sections some activities which were to be deemed "discretionary."[20] The Law Revision Commission, which drafted the Tort Claims Act expressed hope that provisions of general application supplemented by specific immunities would "eliminate the need to determine the scope of discretionary immunity by piecemeal judicial decisions."[21] One finds that immunity for any governmental activity not within the coverage of the specific immunity provisions is dependent upon section 820.2. The codification of the discretionary immunity doctrine into a provision of general application did no more than to ratify a confusing body of case law and generally offered no new guidelines for distinguishing discretionary acts from others. Due to the precise language of the specific immunities, those activities which fall within these areas are more clearly defined as being discretionary. To this extent only has the confusion of the prior case law been alleviated.

Prior Case Law

Public employees who have been found to be within the discretionary immunity doctrine by the California courts include administrative board members,[22] building and loan commissioners,[23] building inspectors,[24] city councilmen,[25] city engineers,[26] city managers,[27] civil service administrators,[28] county surveyors,[29] court reporters,[30] game wardens,[31] grand jurors,[32] health officers,[33] judges,[34] legislators,[35]

remain immune from liability for their discretionary acts within the scope of their employment." CAL. GOV'T CODE § 820.2 comment; 1963 JOURNAL OF THE SENATE 1889.

[20] Statutes cited note 6 *supra*.

[21] 4 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS, & STUDIES 812 (1963).

[22] *E.g.*, Downer v. Lent, 6 Cal. 94 (1856).

[23] *E.g.*, Jones v. Richardson, 9 Cal. App. 2d 657, 50 P.2d 810 (1935).

[24] *E.g.*, Dawson v. Rash, 160 Cal. App. 2d 154, 324 P.2d 959 (1958); Dawson v. Martin, 150 Cal. App. 2d 379, 309 P.2d 915 (1957); White v. Brinkman, 23 Cal. App. 2d 307, 73 P.2d 254 (1937).

[25] *E.g.*, Ellis v. City Council, 222 Cal. App. 2d 490, 35 Cal. Rptr. 317 (1963); Martelli v. Pollock, 162 Cal. App. 2d 655, 328 P.2d 795 (1958).

[26] *E.g.*, Miller v. San Francisco, 187 Cal. App. 2d 480, 9 Cal. Rptr. 767 (1960).

[27] *E.g.*, Ellis v. City Council, 222 Cal. App. 2d 490, 35 Cal. Rptr. 317 (1963); White v. Brinkman, 23 Cal. App. 2d 307, 73 P.2d 254 (1937).

[28] *E.g.*, Hardy v. Vial, 48 Cal. 2d 577, 311 P.2d 494 (1957); Cross v. City of Tustin, 165 Cal. App. 2d 146, 331 P.2d 785 (1958).

[29] *E.g.*, Oppenheimer v. Arnold, 99 Cal. App. 2d 872, 222 P.2d 940 (1950).

[30] *E.g.*, Legg v. Ford, 185 Cal. App. 2d 534, 8 Cal. Rptr. 392 (1960).

[31] *E.g.*, White v. Towers, 37 Cal. 2d 727, 235 P.2d 209 (1951).

[32] *E.g.*, Turpen v. Booth, 56 Cal. 65 (1880); Irwin v. Murphy, 129 Cal. App. 713, 19 P.2d 292 (1933).

[33] *E.g.*, Jones v. Czapkay, 182 Cal. App. 2d 192, 6 Cal. Rptr. 182 (1960).

[34] *E.g.*, Haase v. Gibson, 179 Cal. App. 2d 259, 3 Cal. Rptr. 808 (1960) (chief justice of state supreme court); Reverend Mother Pauline v. Bray, 168 Cal. App. 2d 384, 335 P.2d 1018 (1959) (district court of appeal); Perry v. Meikle, 102 Cal. App. 2d 602, 228 P.2d 17 (1951) (superior court); Frazier v. Moffatt, 108 Cal. App. 2d 379, 239 P.2d 123 (1951) (justice of the peace).

police officers,[36] prosecutors,[37] school trustees,[38] superintendents of schools,[39] and tax assessors.[40]

Activities which have been found to be *discretionary* include building inspection and regulation,[41] issuance of franchises,[42] health protection (including quarantines),[43] law enforcement,[44] legislative decisions,[45] license issuance and revocation,[46] personnel administration of public employees,[47] public works and public improvements functions,[48] and taxation and public finance matters.[49]

On the other hand, activities which have been classified as *ministerial* and outside the discretionary immunity doctrine include arrest of suspected law violators without warrant or justification,[50]

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[35] *E.g.*, Allen v. Superior Court, 171 Cal. App. 2d 444, 340 P.2d 1030 (1959); Hancock v. Burns, 158 Cal. App. 2d 785, 323 P.2d 456 (1958).

[36] *E.g.*, Tomlinson v. Pierce, 178 Cal. App. 2d 112, 2 Cal. Rptr. 700 (1960); Rubinow v. County of San Bernardino, 169 Cal. App. 2d 67, 336 P.2d 968 (1959).

[37] *E.g.*, White v. Towers, 37 Cal. 2d 727, 235 P.2d 209 (1951); Prentice v. Bertken, 50 Cal. App. 2d 344, 123 P.2d 96 (1942); Norton v. Hoffman, 34 Cal. App. 2d 189, 93 P.2d 250 (1939); Pearson v. Reed, 6 Cal. App. 2d 277, 44 P.2d 592 (1935).

[38] *E.g.*, Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961).

[39] *E.g.*, Gridley School Dist. v. Stout, 134 Cal. 592, 66 P. 785 (1901).

[40] *E.g.*, Ballerino v. Mason, 83 Cal. 447, 23 P. 530 (1890).

[41] *E.g.*, Knapp v. City of Newport Beach, 186 Cal. App. 2d 669, 9 Cal. Rptr. 90 (1960) (commencement of civil proceedings to abate a public nuisance); Dawson v. Rash, 160 Cal. App. 2d 154, 324 P.2d 959 (1958) (prosecution of criminal enforcement proceedings against alleged violator).

[42] *E.g.*, Martelli v. Pollock, 162 Cal. App. 2d 655, 328 P.2d 795 (1958).

[43] *E.g.*, Jones v. Czapkay, 182 Cal. App. 2d 192, 6 Cal. Rptr. 182 (1960).

[44] *E.g.*, White v. Towers, 37 Cal. 2d 727, 235 P.2d 209 (1951); Tomlinson v. Pierce, 178 Cal. App. 2d 112, 2 Cal. Rptr. 700 (1960); Rubinow v. County of San Bernardino, 169 Cal. App. 2d 67, 336 P.2d 968 (1959); Dawson v. Martin, 150 Cal. App. 2d 379, 309 P.2d 915 (1957).

[45] *E.g.*, Allen v. Superior Court, 171 Cal. App. 2d 444, 340 P.2d 1030 (1959) (questioning a witness at legislative hearing); Hancock v. Burns, 158 Cal. App. 2d 785, 323 P.2d 456 (1958) (public disclosure of an investigating committee's findings and recommendations).

[46] *E.g.*, Downer v. Lent, 6 Cal. 94 (1856) (termination of an occupational license).

[47] *E.g.*, Ellis v. City Council, 222 Cal. App. 2d 490, 35 Cal. Rptr. 317 (1963) (officer's decision to compel subordinate to perform his duties); Cross v. City of Tustin, 165 Cal. App. 2d 146, 331 P.2d 785 (1958) (official investigations on qualifications and fitness of prospective public employees); Hardy v. Vial, 48 Cal. 2d 577, 311 P.2d 494 (1957) (prosecution of administrative proceedings to discipline public employees); Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961) (official discussions of the competence and efficient performance of duties by subordinates).

[48] *E.g.*, Miller v. San Francisco, 187 Cal. App. 2d 480, 9 Cal. Rptr. 767 (1960) (assurance that specified public improvements would be undertaken at public expense); Lavine v. Jessup, 161 Cal. App. 2d 59, 326 P.2d 238 (1958) (decisions on the location of planned public buildings).

[49] *E.g.*, Ballerino v. Mason, 83 Cal. 447, 23 P. 530 (1890) (assessments for tax purposes); Gridley School Dist. v. Stout, 134 Cal. 592, 66 P. 785 (1901) (wrongful reapportionment of school funds).

[50] *See* Dragna v. White, 45 Cal. 2d 469, 289 P.2d 428 (1955) (arrest of

assignment of inexperienced youth in juvenile forestry camps to dangerous firefighting duties,[51] diagnosis and treatment of diseases by physicians in public hospitals,[52] disclosure by school officials of confidential information about a pupil when the state statute specifically prohibits disclosure,[53] failure of a superior officer to discharge, suspend or discipline a subordinate known to be incompetent and thus dangerous to others,[54] and refusal to issue a building permit when all legal requirements have been satisfied.[55]

Breadth of Section 820.2

The prefatory language of section 820.2, "*except as otherwise provided by statute,*"[56] indicates legislative intent that immunity will attach to all discretionary acts except those specifically set forth by the legislature.[57] A further limitation imposed by the courts on the scope of the doctrine (apart from finding that the act complained of was "ministerial") is that the injury-causing act must be "within the scope of [the employee's] authority."[58] "Scope of authority" has been broadly interpreted to include not only activities established as primary functions of the office, but also activities which are incidental and collateral to the purposes of the office.[59] The "scope of authority" requirement has been used by courts to preclude the application of discretionary immunity to conduct intentionally exceeding explicit statutory grants of authority.[60]

The legislature specifically rejected the suggestion made in the *Lipman* decision that the immunity of the public entity was not necessarily coextensive with the immunity of the public employee. Section 815.2(b) specifies that the liability of the entity is vicarious—arising from the liability of the employee,[61] "except as otherwise pro-

suspected law violator by police officer without warrant or justification); Coverstone v. Davies, 38 Cal. 2d 315, 239 P.2d 876 (1952) (holding officers not liable for false arrest on facts).

[51] *See* Collenburg v. County of Los Angeles, 150 Cal. App. 2d 795, 310 P.2d 989 (1957).

[52] *See* Davie v. Regents of Univ. of Cal., 66 Cal. App. 689, 227 P. 247 (1924).

[53] Elder v. Anderson, 205 Cal. App. 2d 326, 23 Cal. Rptr. 48 (1962).

[54] *See* Fernelius v. Pierce, 22 Cal. 2d 226, 138 P.2d 12 (1943).

[55] Ellis v. City Council, 222 Cal. App. 2d 490, 35 Cal. Rptr. 317 (1963). *See* Armstrong v. City of Belmont, 158 Cal. App. 2d 641, 322 P.2d 999 (1958).

[56] CAL. GOV'T CODE § 820.2 (emphasis added).

[57] *See* note 19 *supra.*

[58] *Id.*

[59] White v. Towers, 37 Cal. 2d 727, 733, 235 P.2d 209, 213 (1951), *quoting with approval from* Nesbitt Fruit Prods. v. Wallace, 17 F. Supp. 141 (S.D. Iowa 1936). *See also* Frazier v. Moffatt, 108 Cal. App. 2d 379, 239 P.2d 123 (1951); Norton v. Hoffman, 34 Cal. App. 2d 189, 93 P.2d 250 (1939).

[60] 5 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 252 (1963).

[61] "Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." CAL. GOV'T CODE § 815.2(b). "This section imposes upon public entities vicarious liability for the tortious acts and omissions of their employees. It makes clear that in the absence of statute, a public entity cannot be held liable for an employee's act

vided."[62]

Judicial Interpretation

A statute which has its soul in a single, ambiguous word like "discretion," can predictably cause problems in judicial application. Several California courts of appeal which have been called upon to interpret section 820.2 have indeed had problems. Three different approaches to the distinction between acts which are "discretionary" and those which are "ministerial" have been formulated to aid the courts in applying the discretionary immunity doctrine to specific sets of facts.

"Dampen the Ardor" Approach

Several California cases have adopted the "dampen the ardor" approach suggested by Judge Learned Hand in *Gregoire v. Biddle*.[63] *Gregoire* supplied both a rationale for the doctrine and a test for its application, reasoning that liability of the public employee and the entity must be balanced against the effect that the liability would have upon the governmental function being provided. Judge Hand expressed fear that the burden of requiring public officials to litigate claims against themselves, while facing possible personal pecuniary loss, would "dampen the ardor" of such officials and that it would "in the end be better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."[64]

Judge Hand's argument is quoted in the *Muskopf*[65] opinion and has been cited in earlier California cases.[66] In *Lipman* the court substantially paraphrased the "dampen the ardor" approach when it said:

> The subjugation of officials, the innocent as well as the guilty, to the burden of a trial and to the danger of its outcome would impair their zeal in the performance of their functions, and it is better to leave the injury unredressed than to subject honest officials to the constant dread of retaliation.[67]

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or omission where the employee himself would be immune . . . . Thus, this section nullifies the suggestion appearing in a dictum in Lipman v. Brisbane Elementary School District [citation omitted] that public entities may be liable for the acts of their employees even when the employees are immune." CAL. GOV'T CODE § 815.2(b) comment.

[62] Statutes which provide for entity liability even though the employee is immune include: CAL. GOV'T CODE §§ 830-35.4, 840.2 (dangerous condition on public property); CAL. VEHICLE CODE §§ 17001, 17004 (injuries resulting from operation of emergency vehicles); CAL. PEN. CODE §§ 4900-06 (erroneous conviction of a felony); CAL. GOV'T CODE § 815.6 (failure to exercise reasonable diligence to discharge a mandatory duty imposed by enactment).

[63] 177 F.2d 579 (2d Cir. 1949).

[64] *Id.* at 581.

[65] Muskopf v. Corning Hospital Dist., 55 Cal. 2d 211, 221, 359 P.2d 457, 462-63, 11 Cal. Rptr. 89, 94-95 (1961).

[66] Hardy v. Vial, 48 Cal. 2d 577, 582-83, 311 P.2d 494, 496-97 (1957); Elder v. Anderson, 205 Cal. App. 2d 326, 333, 23 Cal. Rptr. 48, 53 (1962); Legg v. Ford, 185 Cal. App. 2d 534, 543-44, 8 Cal. Rptr. 392, 397 (1960).

[67] 55 Cal. 2d at 229, 359 P.2d at 467, 11 Cal. Rptr. at 99.

In *Ne Casek v. City of Los Angeles*[68] the court of appeal for the second district approved of Hand's reasoning. *Ne Casek* involved the negligence of a policeman in failing to use sufficient force to restrain an arrestee, who in the course of his flight injured the plaintiff. In finding the officer and the city immune under section 820.2, Justice Kaus expressed fear that to hold subject to judicial scrutiny at a later date a decision as to the amount of force necessary to make an arrest would affect the zeal of officers. Such zeal, he thought, is necessary to accomplish the goals of law enforcement.[69] Further, if officers should be liable for decisions to use minimal force to effect an arrest, the tendency of the officer on the beat would be to use excessive force. "A rule of law which may encourage police brutality is not desirable."[70]

The "dampen the ardor" or "impairment of zeal" approach to the application of discretionary immunity has been criticized by Professor Van Alstyne,[71] consultant to the Law Revision Commission, which drafted section 820.2. The rationale behind Judge Hand's argument is that public employees would be made to fear personal pecuniary loss, and that officials could be harrassed by groundless litigation. This rationale, Van Alstyne points out, is negated by the availability to the official of indemnification by the public entity for all nonmalicious torts committed within the scope of the officer's authority.[72] Further, the present system of administration of justice discourages groundless actions, while it allows those with merit to proceed to trial.[73]

Professor Van Alstyne further contends that Judge Hand's arguments for immunizing the individual do not justify extending that immunity to the public entity.[74] This criticism seems irrelevant, since the passage of section 815.2 makes the public entity's liability vicarious.[75]

To limit the intent behind the "dampen the ardor" approach to consideration of employees' personal pecuniary loss and harrassment in the courts deprives the approach of its real meaning. The subjugation of public officers and agencies to fear of liability cannot help but impinge upon the freedom of governmental action to some extent. The chief attribute of the "dampen the ardor" approach is that its application requires a balancing of the needs of the public as opposed to the loss suffered by the injured plaintiff.

The Semantic Approach

The case law prior to the passage of section 820.2 provides numerous examples of activities which have been classified as either "dis-

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[68] 233 Cal. App. 2d 131, 43 Cal. Rptr. 294 (1965).

[69] *Id.* at 135-38, 43 Cal. Rptr. at 299.

[70] *Id.* at 137, 43 Cal. Rptr. at 299.

[71] Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. REV. 463, 478-85 (1963).

[72] *Id.* at 478-79.

[73] *Id.*

[74] *Id.* at 484-86.

[75] *See* note 61 *supra.*

cretionary" or "ministerial."[76] Cases arising under section 820.2 can draw by analogy from distinctions made in past cases when the facts are sufficiently similar. The courts have naturally synthesized the prior holdings into a concise statement of the law, which as an aid for future interpretation is unfortunately rather useless due to its generality. For example, the rule formulated in *Elder v. Anderson*[77] was phrased:

> [W]here the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial, but where the act to be done involves the exercise of discretion and judgment it is not deemed merely ministerial.[78]

Such a distinction adequately covers the few instances of governmental activity where the activity is either an absolute statutory duty, or where the discretion of the public officer to act within a certain sphere is absolute. The twilight zone between "discretionary" and "ministerial" becomes no clearer by the use of such a semantic yardstick. One court has observed that "it 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."[79]

Only one California case decided solely on the basis of section 820.2 has resorted to the semantic approach. In *Glickman v. Glasner*,[80] the court of appeal for the second district, applied the "rule" offered by *Elder*, and concluded that alleged libelous statements by the State Kosher Food Law representative that certain kosher slaughterers had been disqualified under law as "schochtim" (slaughterers of poultry according to Orthodox Hebrew ritual) were exercises of "discretion."[81] All other cases decided under section 820.2, which have dealt with the defense of discretionary immunity by the semantic approach, have done so because section 820.2 was urged collaterally to a defense under one of the specific immunities within the Tort Claims Act.[82]

The Subsequent Negligence Approach

An act of discretion along with the immunity which it confers can continue to a point in time. But after this point has been reached, subsequent harm-producing acts will not be shielded by immunity. This distinction, which has the effect of severely limiting the doctrine

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[76] *See* text accompanying notes 22-55 *supra*.

[77] 205 Cal. App. 2d 326, 23 Cal. Rptr. 48 (1962).

[78] *Id.* at 331, 23 Cal. Rptr. at 51 *quoting* State *ex rel.* Hammond v. Wimberly, 184 Tenn. 132, 134, 196 S.W.2d 561, 563 (1946).

[79] Ham v. County of Los Angeles, 46 Cal. App. 148, 162, 189 P. 462, 468 (1920). *See also* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 29.10, at 1644 (1956).

[80] 230 Cal. App. 2d 120, 40 Cal. Rptr. 719 (1964).

[81] 230 Cal. App. 2d at 126, 40 Cal. Rptr. at 723.

[82] *See, e.g.*, Goff v. County of Los Angeles, 254 A.C.A. 53, 61 Cal. Rptr. 840 (1967); Miller v. Hoagland, 247 A.C.A. 16, 55 Cal. Rptr. 311 (1966); Burgdorff v. Funder, 246 A.C.A. 505, 54 Cal. Rptr. 805 (1966); Fish v. Regents of Univ. of Cal., 246 A.C.A. 375, 54 Cal. Rptr. 656 (1966).

of discretionary immunity can be found in *Costley v. United States.*[83] In *Costley,* with facts almost identical to those in *Muskopf,*[84] the federal government claimed immunity under section 2680 of the Federal Tort Claims Act,[85] the wording of which closely parallels the wording of section 820.2 of the California Government Code. In holding the government liable for the negligence of the hospital staff, the court found that after discretion had been exercised by admitting the plaintiff into the hospital, immunity would protect neither the government nor the employees.[86] The rationale of the *Costley* rule appears to be that it is within the sole discretion of the government to extend or withhold services to its citizens, but once the determination has been made to provide a specific service, the government will be held to the same standard of care the law requires of private citizens.

The *Costley* rule has been expressly adopted in one very recent California case, *Sava v. Fuller.*[87] The court of appeal for the third district held that the negligence of a state botanist in analyzing a plant substance believed ingested by a child was "subsequent" to the discretionary act of offering plant analysis services to the public; therefore the immunity under section 820.2 did not apply.[88] Judge Pierce justified the imposition of the subsequent negligence test by a

[83] 181 F.2d 723 (5th Cir. 1950).

[84] Muskopf v. Corning Hospital Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

[85] The government is immune from liability arising from "any claims 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 agency or employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a) (1964).

[86] 181 F.2d at 724.

[87] 249 A.C.A. 313, 57 Cal. Rptr. 312 (1967). There is dictum in the *Sava* decision indicating that Ne Casek v. City of Los Angeles, 233 Cal. App. 2d 131, 43 Cal. Rptr. 294 (1965), was decided on the basis of specific immunities. 249 A.C.A. at 319, 57 Cal. Rptr. at 316. A close reading of *Ne Casek* shows this is not the case.

Other California decisions contain language which indicates that the subsequent negligence test may have had some bearing on the courts' conclusions. *See, e.g.,* Collenburg v. County of Los Angeles, 150 Cal. App. 2d 795, 310 P.2d 989 (1957), holding the superintendent of a forestry camp for juveniles personally liable for negligently ordering inexperienced youth to assist in fighting fire on the "hot line," on the theory that "[i]f discretion is exercised and a course of conduct begun, a failure to exercise ordinary care will give rise to liability." *Id.* at 803, 310 P.2d at 995; *see* Dillwood v. Riecks, 42 Cal. App. 602, 184 P. 35 (1919). Morgan v. County of Yuba, 230 Cal. App. 2d 938, 41 Cal. Rptr. 508 (1964), apparently initiated a trend in the court of appeal for the third district, to adopt the rule of the *Costley* case (Judge Pierce wrote both the *Morgan* and *Sava* decisions). In *Morgan* the county sheriff promised to warn the plaintiffs' decedent prior to releasing a prisoner who had threatened the decedent's life. No warning was given and the threat was carried out. The court held the defendant to a standard of ordinary care in carrying out the promise. 230 Cal. App. 2d at 945, 41 Cal. Rptr. at 513.

Is it more than coincidental that the *Sava, Costley* and *Collenburg* cases involve children or juveniles in some manner? Are the courts merely saying that the "interests of justice" compel a finding of liability?

[88] 249 A.C.A. at 322-23, 57 Cal. Rptr. at 317-18.

close examination of the wording of section 820.2. Emphasis was placed upon the wording that the act or omission must be "the *result* of the exercise of . . . discretion (emphasis added)." The court interpreted this language in the familiar terms of tort law, saying "[a] result is the consequence of a cause and a cause means proximate cause. It does not include everything that follows later. In short the legislature has *not* granted immunity from liability for every act or omission following after the exercise of discretion."[89]

The court of appeal in *Ne Casek* apparently considered and rejected the subsequent negligence test, viewing as too subtle the distinction between a negligent execution of a course of conduct previously decided upon, and the primary decision to engage in such conduct.[90] Manifestly, where a substantial lapse of time occurs between discretion (decision to arrest) and subsequent negligence (allowing escape), the distinction is easily drawn. But where the discretion is exercised almost simultaneously with the execution of the act to implement that discretion (as in *Ne Casek*), the *Costley* rule becomes unworkable. However, if the subsequent negligence approach were applied to the facts in *Ne Casek*, there is a high probability that a court preoccupied with that test would distinguish between the discretionary decision to make the arrest, and the negligent execution of the course of conduct decided upon. Once this was accomplished, it would be a routine matter for the court to find the police officer liable, despite the suggestion that such liability might encourage use of excessive force.[91]

The *Costley* approach to discretionary immunity has been utilized in California solely in cases alleging negligence of the public employee. However, where the employee's tort is intentional, the same limitation on immunity has been achieved by holding that the discretionary immunity doctrine does not apply when the conduct was outside the "scope of authority" of the public employee.[92]

Federal Discretionary Immunity Rule

A distinction has been urged in federal cases under section 2680 of the Federal Tort Claims Act[93] between those governmental activities at the "planning level" and those at the "operational level," immunity attaching only to the former. In the leading case, *Dalehite v. United States*,[94] the plaintiff alleged negligent determination of safety standards for the handling of ammonium nitrate fertilizer being shipped overseas as foreign aid. The fertilizer exploded, devastating Texas City, Texas. In finding that the government was immune under section 2680, the United States Supreme Court held that the formulation of safety standards had been made at the planning level on the basis of policy judgment and decision.[95] Shortly

89 *Id.* at 316-17, 57 Cal. Rptr. at 314 (emphasis in original).
90 233 Cal. App. 2d at 137-38, 43 Cal. Rptr. at 299.
91 *See* text accompanying note 70 *supra.*
92 Authorities cited notes 58-60 *supra.*
93 28 U.S.C. § 2680 (1964).
94 346 U.S. 15 (1953). *See also* Eastern Air Lines v. Union Trust Co., 221 F.2d 62 (D.C. Cir.), *rev'd*, 350 U.S. 907 (1955), *modified*, 350 U.S. 961 (1956).
95 346 U.S. at 35-36.

after the *Dalehite* decision, the Supreme Court in *Indian Towing Co. v. United States*[96] held that negligence at the operational level of government was not within the immunity rule of section 2680. In *Indian Towing*, the plaintiff's tugboat and barge were damaged when the Coast Guard negligently maintained a navigational aid, and failed to warn the plaintiff that the aid was not operating. Because there was no immunity, the plaintiff recovered.[97]

It should be noted that the "planning level/operational level" distinction stated in *Dalehite* and *Indian Towing* has not been cited as controlling in any post-*Muskopf* California case. It has been criticized as offering no solution to the dilemma of classifying activities within the discretionary immunity rule.[98] It merely substitutes the equally ambiguous words "planning" and "operational" for "discretionary" and "ministerial."

The subsequent negligence approach of the *Costley* decision appears upon close examination to be an extension of the planning/operational level distinction. The discretion about which *Costley* speaks is the ability of the government to extend or withhold services to its citizens with total immunity. Such "discretion" corresponds quite closely with the "planning level" activities which are immune under the holding of *Dalehite*.

Appraisals of the Various Approaches

> While undoubtedly there are many cases where either judicial precedent or reason compel a holding in particular situations that a duty is discretionary or ministerial, there are others . . . where precedent at least is lacking. Thus we must look to the reasons advanced in justification of the discretionary immunity doctrine and determine whether in the situation before us, they are applicable.[99]

The very nature of selective sovereign immunity is that it attempts to balance the loss suffered by the plaintiff against the effect which liability would have on the governmental entity. Such balancing makes infinitesimally remote the possibility of devising a mechanical rule, such as the semantic test discussed above,[100] to cover all diverse fact situations to which discretionary immunity might apply.

The "dampen the ardor" and "subsequent negligence" approaches are irreconcilable. Judging by its effect, the subsequent negligence doctrine appears to have as its foundation the philosophy that governmental liability should conform closely to the liability of the private person. The subsequent negligence approach could have the effect of "dampening the ardor" of public officials to the extent that they will be reluctant to exercise the discretion vested in them. The imposition of blanket liability upon courses of conduct deliberately undertaken would tend to foster caution while engaged in that course

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[96] 350 U.S. 61 (1955).

[97] *Id.* at 69.

[98] Peck, *The Federal Tort Claims Act, A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207, 219 (1956).

[99] Ne Casek v. City of Los Angeles, 233 Cal. App. 2d 131, 136, 43 Cal. Rptr. 294, 298 (1965).

[100] *See* text accompanying notes 77-82 *supra*.

of conduct; however, it would discourage embarking upon *any* course of conduct.

It is possible that a court applying the "dampen the ardor" approach to the facts of the *Sava* case could have found the state botanist immune. Such immunity could be predicated upon a finding that liability for negligent analysis would tend to discourage the botanist from agreeing to make an analysis in the future. Yet the subsequent negligence test compels a holding of liability despite the fact that such liability may have the effect of denying the public a vital function of government. It must be conceded that the subsequent negligence test seems to offer greater predictability in its application due to its mechanical nature, and if generally recognized by all California courts, it would have the corollary effect of discouraging groundless litigation. However, predictability of result is only one of many factors discussed above which should be considered by the courts when interpreting section 820.2.

Conclusion

It would be unfortunate if the California Supreme Court rejected its own recognition of the "dampen the ardor" approach[101] in favor of the subsequent negligence rule proposed by the court of appeal for the third district.[102] Sovereign immunity is an area of the law in which inflexible rules are impractical. The inherent inflexibility of the subsequent negligence test detracts from any possible benefits which its adoption might bestow. On the other hand, the "dampen the ardor" approach requires balancing the merits of the plaintiff's case against the effect liability would have upon the governmental function involved. Such balancing seems more in tune with the legislative intent behind the Tort Claims Act of 1963.

*Justin A. Roberts**

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101 *See* text accompanying note 67 *supra.*
102 *See* text accompanying note 88 *supra.*
* Member, Second Year Class.