Torts—Abrogation of Sovereign Immunity—Scope of Retained Immunity—Jones v. State Highway Commission

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tent administrative or criminal sanctions to both parties for their respective violations. Because the tippee's maximum liability in the Tarasi context would be for attempted fraud, the risk of sanctions for that violation probably would not outweigh the tippee's interest in recovering his losses, especially if they were large. In this way, each party would be held responsible for his own misdeeds, and neither would escape unpenalized.

The Tarasi decision solidifies judicial support for a position which insufficiently serves the objectives of rule 10b-5 and the implied civil action in the tippee-tipper situation. Denial of recovery to the tippee will have little deterrent effect on securities violations and will provide unwarranted insulation from liability to the tipper. In pari delicto is a common law defense developed in cases involving purely individual equities; the Tarasi court overlooked a substantial public interest consideration by applying the defense in a suit brought under remedial legislation. The holding is inconsistent with a marked trend to interpret the securities laws as an expansion of the common law, both to effectuate their broad remedial purposes and to insure uniformity of enforcement. In pari delicto hinders the enforcement of rule 10b-5 through the medium of private suits. The consequences of letting an occasional unscrupulous investor recover his losses are outweighed by the salutary policing effect which the private suit can have above and beyond the threat of governmental action.

GEORGE E. MURRAY III

TORTS—ABROGATION OF SOVEREIGN IMMUNITY—SCOPE OF RETAINED IMMUNITY

Jones v. State Highway Commission

Jean Jones was driving south on highway 71 in Jackson County, Missouri, when the road curved to the right and her automobile went off the left side. The shoulder was four inches below the road's surface


1. 557 S.W.2d 225 (Mo. En Banc 1977).
and was not evenly graded; when Jones tried to return to the road she lost control of her automobile. The car ran off the opposite side of the road into a highway sign set in concrete and rolled down an embankment. Jones filed suit for personal injuries against the state highway commission and alleged both negligent design and maintenance and failure to warn of the dangerous and defective condition of the highway. A second count alleged that the highway's condition constituted a public nuisance. Three companion cases were argued and decided with Jones.3

In these four actions alleging negligence on the part of governmental agencies at various levels, the Missouri Supreme Court finally took the responsibility for abolishing the doctrine of sovereign immunity it had repeatedly left for the legislature to dismantle. The opinion is unusual in its unreserved adoption of the views expressed in the opinion of Judge Finch, dissenting two years earlier in O'Dell v. School District of Independence. In O'Dell Judge Finch outlined how the Missouri courts developed doctrines to limit governmental tort immunity. Missouri was like most American jurisdictions in laying down a general rule of immunity for injuries arising out of "governmental" functions, but finding liability for tortious injury caused by the "proprietary" functions of a governmental entity. The governmental-proprietary distinction failed to produce consistent results.

Discarding the doctrine of sovereign immunity does not result in governmental liability for every injury caused by government operations. As in several decisions abrogating sovereign immunity in other jurisdi-

2. Id. at 227.
4. "We hold that sovereign immunity against tort liability is no longer a bar to such actions...." Jones v. State Highway Comm'n, 577 S.W.2d at 227.
5. O'Dell v. School Dist. of Independence, 521 S.W.2d 403 (Mo. En Banc 1975); Payne v. County of Jackson, 484 S.W.2d 483 (Mo. 1972); Smith v. Consolidated School Dist. No. 2, 408 S.W.2d 50 (Mo. En Banc 1966); Fette v. City of St. Louis, 366 S.W.2d 446 (Mo. 1963).
6. 521 S.W.2d 403, 409 (Mo. En Banc 1975) (Finch, J., dissenting).
7. Id. at 417-19.
9. Jones v. State Highway Comm'n, 557 S.W.2d 225, 229 (Mo. En Banc 1977). In O'Dell Judge Finch noted the anomaly of granting a cause of action to a pedestrian injured due to the negligent maintenance of hazardous sidewalks while denying a remedy to a pedestrian standing on the same sidewalk who is injured by a falling traffic signal, on the theory that maintenance of streets and sidewalks is a proprietary function but regulation of traffic is a governmental function. 521 S.W.2d at 417-18. (Finch, J., dissenting).
tions. 10 Jones reserved an area in which governmental entities retain immunity from tort actions:

[T]he liability is for torts committed in the execution of activity decided upon, not for the decision itself in matters which go to the essence of governing; ... our decision is not meant to impose liability upon the state or any of its agencies for acts or omissions constituting the exercise of a legislative, judicial, or executive function. 11

Analogous reservations are common in state 12 and federal 13 statutes providing for governmental liability for torts. Before Jones the government was immune except for torts arising from the exercise of proprietary functions; after Jones 14 one can sue the government but not for


11. 557 S.W.2d at 230. The original slip opinion read: “for acts or omissions constituting the exercise of a legislative or judicial function or the exercise of an executive or planning function.” Jones v. State Highway Comm’n, No. 60017, slip op. at 8 (Mo. En Banc Sept. 12, 1977) (emphasis added). On Nov. 14, 1977, it was announced that some of the wording in the Sept. 12 slip opinion was mistakenly included from an earlier draft. The new version omitted any mention of an exception to governmental liability for “planning functions.” By revising its language at this critical passage arguably the court intended to narrow the exception to liability to fewer kinds of governmental functions than a formula excepting planning functions would permit. It is not to be lightly assumed, however, that courts applying the exception will not find the widely accepted distinction between planning-level and operational-level decisions useful in segregating those functions which will remain immune. A court may less readily classify a function as legislative, for example, if it does not involve planning in the sense of a conscious weighing of risks against advantages.


13. The Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1970) provides: “The provisions of this chapter ... shall not apply to-(a) Any claim ... based upon the exercise or performance or the failure to exercise to perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”

14. The doctrine of sovereign immunity was abrogated prospectively as to all claims arising on or after August 15, 1978. 557 S.W.2d at 231. Judge Finch
injuries arising from legislative, judicial, or executive functions. If the change is not to become purely cosmetic by expansive construction of the exception to liability, it must be made clear what test will be used to isolate the governmental decisions dealing with "matters which go to the essence of governing" which will retain tort immunity. Beyond the pronouncement that "clearly all of the petitions in the four cases before us are sufficient to state a cause of action," Jones sheds no light on the test to be used.

This note will survey recent decisions and display the prevailing judicial treatment of retained governmental tort immunity. It is very likely that the Missouri General Assembly will enact legislation pertaining to governmental tort liability, probably during the current session. Several of the jurisdictions discussed herein operate under statutory waivers of governmental tort immunity. Most such statutes provide for an exception to governmental liability modeled after that in the Federal Tort Claims Act (F.T.C.A.); other states have enacted statutory exceptions to liability which are unique. The analysis also includes jurisdictions that have abrogated governmental tort immunity but do not have a statutory exception to liability.

Judge Finch's dissenting opinion in O'Dell endorsed the limitation on liability laid down in Parish v. Pitts. Nearly identical language appears argued for such prospective application in O'Dell, so the change would not take effect until after the effective date for legislation adopted by the next regular session of the General Assembly, in order to "give time for it to consider the subject and then to enact such legislation as it deems appropriate." 521 S.W.2d at 422.

15. 557 S.W.2d at 230
16. Exhaustive treatment of construction of the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1970) is beyond the scope of this survey. Several states will not be studied here for various reasons. Arkansas, Colorado, Kansas, and New Jersey have reinstated a general rule of immunity with specified legislative exceptions and do not fit the liability-with-exceptions pattern now existing in Missouri. Ark. Stat. Ann. § 12-2901 (Supp. 1975); Colo. Rev. Stat. §§ 24-10-104 to 24-10-117 (1973); Kan. Stat. § 46-901 (1973); N.J. Stat. Ann. §§ 59:1-1 to 59:2-10 (West Supp. 1977). Oklahoma's statute defines municipalities so narrowly that only Tulsa and Oklahoma City fall within the class of municipalities which will be liable for their torts (over 200,000 population), so many of the Oklahoma cases rely on the old governmental-proprietory distinction. Okla. Stat. Ann. tit. 11, §§ 1751-1766 (West Supp. 1977). Other states have so recently abolished governmental immunity that there has not yet developed a clear picture of how any exceptions to liability will be handled (e.g., New Hampshire, New Mexico, North Dakota, and West Virginia).

17. See note 12 supra.
18. See note 13 supra. States having similar statutory exceptions are: Alaska, California, Hawaii, Minnesota, Nevada, Oregon, and Utah.
19. Texas and Wisconsin. See note 71 infra.
21. 244 Ark. 1239, 429 S.W.2d 45 (1968).
in Kitto v. Minot Park District, 22 which cited the experience of the federal courts applying the discretionary function exception to the F.T.C.A. as providing a useful source of reference. 23 The crucial distinction drawn between a governmental decision and the "execution of activity decided upon" may be found in the leading United States Supreme Court cases interpreting the F.T.C.A.'s discretionary function exception, Dalehite v. United States 24 and Indian Towing Co. v. United States. 25

Dalehite involved the execution of a plan approved by the cabinet for shipping ammonium nitrate fertilizer to occupied countries following World War II. The fertilizer was coated with paraffin, rosin, and petrolatum and was packed at 200° F. in paper bagging. Some of the packaged fertilizer was loaded at Texas City, Texas, on a ship carrying a cargo of explosives. A fire broke out in the fertilizer hold and the resulting explosions left 560 people dead, 3000 injured, and much of the city reduced to rubble. Tort claims totaling over $200,000,000 were filed against the government. In a 4-3 decision (Douglas and Clark, J.J., not participating), the Supreme Court denied recovery squarely on the ground of the discretionary function exception and held that the exception immunizes not only "the initiation of programs and activities" but also "determinations made by executives or administrators in establishing plans, specifications or schedules of operations." 26 The majority opinion provides little in the way of a guiding principle for application of the exception to liability: "Where there is room for policy judgment and decision there is discretion." 27 The Court found such "policy" judgments had taken place when the specifications for the manufacture and packaging of the fertilizer were drawn up. The majority opinion thus distinguished plans from operations, but did not consider that some negligence may have occurred in the execution of the Field Director's plan: "The decisions held culpable [by the district court] were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's

22. We hold that no tort action will lie against governmental units for those acts which may be termed discretionary in character. Included within this category are acts traditionally deemed legislative or quasi-legislative, or judicial or quasi-judicial, in nature. The exercise of discretion carries with it the right to be wrong. It is for torts committed in the execution of the activity decided upon that liability attaches, not for the decision itself.

23. Id. at 804-05.


27. Id. at 36.
fertilizer program." It was this finding that Justice Jackson seized upon in making out the argument of the dissenters in Dalehite. Jackson contrasted cabinet-level policymaking with housekeeping-level execution of policy that already had been settled upon, and maintained that deliberations at the housekeeping level are not within the exception because such activities are analogous to activities for which private citizens are routinely held liable.

The Court's decision in Indian Towing shows at least a shift in attitude from the position adopted by the majority in Dalehite. The Indian Towing Company sued the government for the loss of cargo resulting when a tugboat ran aground. It alleged that the Coast Guard negligently failed to inspect and repair a lighthouse or failed to warn that the light was not functioning. The government did not raise a discretionary immunity defense and conceded that the acts complained of were at the operational level. However, the government argued that because the F.T.C.A. was intended to make the government liable wherever private persons would be liable and because the operation of a lighthouse had no private counterpart, there was no standard of conduct by which to assess liability. The government's theory was analogous to that used by municipalities claiming immunity for torts arising from governmental (as opposed to proprietary) activities. The attempt to read the governmental-proprietary distinction into the F.T.C.A. was flatly rejected.

28. Id. at 41. The Dalehite majority suggested that the discretionary function exception is most needed where "a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, . . . discretion." Id. at 36. The causal step of loading the fertilizer on a ship also loaded with explosives may not have been an act directed by the plans, but it also was not an act included in the district court's findings of negligence. If the Dalehite decision requires that all decisions alleged to cause plaintiff's injury be at the highest level of planning before the discretionary exception will immunize them, the dictum that "the acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable" is not so broad as critics have supposed. On this view, the difference between the majority and the dissenters is primarily a factual one.

29. The common sense of this matter is that a policy adopted in the exercise of an immune discretion was carried out carelessly by those in charge of detail. We cannot agree that all the way down the line there is immunity for every balancing of care against cost, of safety against production, of warning against silence.

30. "Surely a statute so long debated was meant to include 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.'" Id. at 60. See Reynolds, The Discretionary Function Exception of the Federal Tort Claims Act, 57 Geo. L.J. 81, 98 n.79 (1968).


32. Reynolds, supra note 30, at 99.

33. "There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapa-
The Court found that although there was initially no duty to construct a lighthouse, once the Coast Guard undertook to provide that service, it was obligated to do so with care. This "undertaking" rule was developed in earlier federal cases under the F.T.C.A. and has found application in many subsequent federal cases.

Three patterns have been identified in the reasoning of the federal courts whether the act alleged to be tortious was an immune exercise of discretion. Similar patterns are evident in state decisions applying a discretionary function exception to governmental tort liability in those jurisdictions which have abandoned general immunity. Other grounds for decision also have been advanced frequently enough to warrant discussion. Accordingly, state decisions using the following five tests for finding an exception to governmental liability will be discussed: (1) the "official zeal" or "dampening the ardor" test; (2) the broad semantic or definitional test; (3) the "planning-operational" test (either coupled with or independent of a requirement that the act or decision in question involved basic policy considerations); (4) the "undertaking" test; and (5) the legal duty test.

In the "official zeal" group of cases, a finding of immunity follows from a concern that imposing liability would tend to inhibit officials from enthusiastically performing their duties, out of fear of litigation. On the same day that the California Supreme Court did away with the

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34. 350 U.S. at 69.
35. Reynolds, supra note 30, at 90.
37. [The cases] (1) apply the rule suggested by Dalehite that planning-level decisions are within the exception, and operational-level ones are not; (2) ignore the fact that the exception was not really argued or considered in Indian Towing, and apply that case's "good samaritan" rule; or (3) use a broad definition of "discretion" such as applied by Dalehite.

38. See Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949). This approach de-emphasizes the fact that the device of tort liability encourages officials to be reasonably careful in the discharge of their duties; whatever the value of "unflinching" performance, it ought not to be allowed to displace the value of careful
rule of governmental immunity from tort liability, it also handed down a decision recognizing a discretionary function exception to such liability. The court thought this rule necessary so that the threat of judicial review of officials' decisions would not impair official zeal. NeCasek v. City of Los Angeles followed similar reasoning. The court conceived its task to be determining whether a risk of dampening official ardor was present. The court found such a risk was present and concluded that the defendant police officers' alleged negligence was immune as involving the exercise of discretion. The California Supreme Court later came to reject the official zeal argument on the ground that statutory provisions for indemnification of officials obviate this concern.

Several cases have attempted to lay down a definition of "discretion" which can be more or less mechanically applied to various factual situations. Typically such definitions are very broad, and if literally followed would restore governmental immunity to a wider class of cases than before the abandonment of the immunity doctrine. An early California decision defined governmental acts which would remain immune from liability as "those wherein there is no hard and fast rule as to the course of conduct one must or must not take ...." In NeCasek the court held that the exercise of an official's powers is immune if the powers are "to be exerted or withheld according to his own judgment as to what is necessary and proper." Silver v. City of Minnesota defined immune


40. Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 229, 359 P.2d 465, 467, 11 Cal. Rptr. 97, 99 (1961) ("government officials are not personally liable for their discretionary acts within the scope of their authority even though it is alleged that their conduct was malicious").


42. Johnson v. State, 69 Cal. 2d 782, 790, 447 P.2d 352, 358, 73 Cal. Rptr. 240, 246 (1968). For a large class of public employees in Missouri, the Tort Defense Fund provisions have a similar impact. V.A.M.S. § 105.710 (Supp. 1978). "As part of the compensation to be paid to ... [listed groups of state employees] the commissioner of administration is hereby authorized to pay ... all final judgments ... against the aforesaid ... for acts arising out of and performance in connection with their official duties on behalf of the state." The Act also provides that the Attorney General's office may defend such employee at trial.


44. 233 Cal. App. 2d 131, 135, 43 Cal. Rptr. 294, 297 (1965).

45. 284 Minn. 266, 269, 170 N.W.2d 206, 208 (1969) (police and firemen immune where plaintiff's store was burned during a riot). This definition was
functions as those involving the "power or right of acting officially according to what appears best and appropriate under the circumstances." In *Smith v. Cooper* the *Dalehite* definition of discretion was adopted. While some definitions are better than others, reliance on a definition tends to produce uneven results to the extent that the rule comes to be applied without consideration of the reasons for excepting certain governmental functions from liability. The definitions cited above are especially in need of some qualification because they contain no limiting

adopted from Romsdahl v. Town of Long Lake, 175 Minn. 34, 36, 220 N.W. 166, 167 (1928) (mandamus action).

46. 256 Or. 485, 502, 475 P.2d 78, 86 (1970) (state immune from suit for negligence in planning and designing highway). See text accompanying note 23 supra. Contrs, State v. P'Anson, 529 P.2d 188 (Alaska 1974); State v. Abbott, 498 P.2d 712 (Alaska 1972); Breed v. Shaner, 562 P.2d 436 (Haw. 1977); Rogers v. State, 51 Haw. 293, 459 P.2d 378 (1969); Sutton v. State Highway Dep't, 549 S.W.2d 9 (Tex. 1977); Carroll v. State, 27 Utah 2d 384, 496 P.2d 888 (1972). Other Oregon cases distinguished design from maintenance and held that there is no immunity for negligent highway maintenance. Daugherty v. State Highway Comm'n, 270 Or. 144, 526 P.2d 1005 (1974); Lanning v. State Highway Comm'n, 15 Or. App. 310, 515 P.2d 1355 (1973). The *Smith* court unfortunately concluded that the distinction between immune and nonimmune governmental activities cannot be rationally drawn: "[T]his division must necessarily be arbitrary." 256 Or. at 499, 475 P.2d at 85 (emphasis added). Consequently, the cases following *Smith* have interpreted the exception to liability more broadly and more erratically than courts in jurisdictions that have adopted the planning-operational or undertaking tests. Wright v. Scappoose School Dist., 25 Or. App. 103, 548 P.2d 535 (1976) (decision not to remove a nonfunctional fire escape that created a known hazard was ministerial); Keeland v. Yamhill County, 24 Or. App. 85, 545 P.2d 137 (1976) (prison official's decision to allow inmates to possess razor blades, where plaintiff was injured when another inmate threw a razor blade at him, is ministerial) (citing *Smith* as the "leading" Oregon case); Baker v. State Bd. of Higher Educ., 20 Or. App. 277, 531 P.2d 716 (1975) (decision to hold a school picnic at a certain park location was discretionary but maintenance of the park was ministerial; park officials may be subject to liability when child at school picnic was injured by horse); Donahue v. Bowers, 19 Or. App. 50, 526 P.2d 616 (1974) (firing of employee, even if malicious, is discretionary); Sullivan v. State, 14 Or. App. 254, 515 P.2d 194 (1973) (prison official's refusal to award inmate 208 days of "good time" was "a question of judgment of the prison officials and, as such, becomes a discretionary decision"); Schlicting v. Bergstrom, 13 Or. App. 522, 511 P.2d 846 (1973) (public employer's discharge of a probationary employee was within the employer's "unfettered discretion"); Baker v. Straumfjord, 10 Or. App. 414, 500 P.2d 497 (1972) (physician's placement of plaintiff on the third floor of an infirmary without tranquilizing him, guarding him, or securing the window, with the result that he was injured in a fall or jump from the window, found discretionary).

47. A thoughtful definition of the F.T.C.A.'s discretionary function exception is found in Swanson v. United States, 229 F. Supp. 217, 220 (N.D. Cal. 1964):

The planning-level notion refers to decisions involving questions of policy, that is, the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy. The operations-level decision, on the other hand, involves decisions relating to the normal day-to-day operations of the Government.
principle. Nearly any act or decision which is free from coercion could be found to be immune under such definitions. Leading decisions in several jurisdictions acknowledge the point that literal definitions are too easily stretched to cover the field of potential liability: "[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." 48

The "planning-operational" test suggested in Dalehite helps courts analyze fact situations by focusing attention upon the act the official is alleged to have done and allowing a separation of decisionmaking (which is immune) from subsequent activities which merely implement that decisionmaking (which are not immune). In Hansen v. City of St. Paul 49 the plaintiff was hospitalized after being mauled by a pack of roaming dogs. There had been seven reported dog bites in the previous thirteen months, and at the time the plaintiff was attacked, officers investigating a dogbite incident reported two hours earlier were taking a lunch break. The court distinguished Silver 50 and held that the city was subject to liability as its culpable failure to act was at the operational level rather than the executive or administrative level. 51 In State v. Webster 52 the plaintiff alleged negligent failure to install a cattle guard at a freeway entrance with the result that her husband was killed in a collision with a horse at night. The court found that the state was subject to liability, distinguishing Dalehite but applying a planning-operational test. 53

Most courts that adopt a planning-operational distinction find it necessary to use a supplemental guide to constrict the scope of "plan-

48. Ham v. City of Los Angeles, 46 Cal. App. 148, 162, 189 P. 462, 468 (1920). The Ham quotation has found its way into many recent opinions, often without acknowledgment of its source. See, e.g., State v. Abbott, 498 P.2d 712, 720 (Alaska 1972); Johnson v. State, 69 Cal. 2d 782, 788, 447 P.2d 352, 357, 73 Cal. Rptr. 240, 245 (1968); NeCasek v. City of Los Angeles, 233 Cal. App. 2d 131, 135, 43 Cal. Rptr. 294, 297 (1965); King v. City of Seattle, 84 Wash. 2d 239, 246, 525 P.2d 228, 232 (1974). Abbott also cites Swanson v. United States, 229 F. Supp. 217, 219 (N.D. Cal. 1964): "In a strict sense, every action of a government employee, except perhaps a conditioned reflex action, involves the use of some degree of discretion." It is this failure of conceptual limits that has plagued those courts using a simple planning-operational test and has prompted some to adopt a further guiding principle. See text accompanying note 70 infra. The limiting consideration often takes the form of a rule that only a basic policy decision is so sensitive as to preclude judicial review.

49. 298 Minn. 205, 214 N.W.2d 346 (1974).
50. 284 Minn. 266, 170 N.W.2d 206 (1969).
51. 298 Minn. at 212, 214 N.W.2d at 350. Cf. Williamson v. Cain, 245 N.W.2d 242, 244 (Minn. 1976), in which government agents tearing down an abandoned house cracked the neighbor's basement wall in their operation of a caterpillar and allowed a wall to fall against the neighbor's house. Although the decision to demolish the house may have been discretionary, defendants' acts were ministerial: "Their job was simple and definite—to remove a house."
52. 88 Nev. 690, 504 P.2d 1316 (1972).
53. Id. at 695, 504 P.2d at 1319-20.
ning” in order to narrow the range of immunity, consistent with the reasons for retaining immunity.54 Most of these courts adopt the rule that only where a planning decision involves consideration of basic policy factors will it be immune from tort liability. In State v. I'Anson55 the state was found liable for failure to place no-passing stripes on a highway. The court relied on a planning-operational test. Central to the decision was the finding that marking highways involves no “broad basic policy decisions which come within the ‘planning’ category of decisions which are expressly entrusted to a coordinate branch of government.” For this reason, I'Anson found that courts are competent to evaluate the proper marking of a highway.56

Several California decisions may be said to adopt a planning-operational test coupled with the view that the purpose of the exception is to protect officials only in the making of basic policy decisions. In Elton v. County of Orange57 the plaintiff alleged that the county negligently screened the foster home in which she was placed, and that she became the victim of physical and mental abuse as a result. The court found the county’s action was not sheltered from liability because its placement decision did not involve basic policy considerations.58 Hawaii’s cases also emphasize that an immune exercise of official discretion must involve consideration of basic policy factors.59 At least one Utah decision

54. The problems created by resting decisions on the naked planning-operational distinction have been observed by at least one commentator:
   Indeed, the distinction between activities at the “operational level” and those at the “planning level” is susceptible of no greater precision in definition than the distinction between activities which are “governmental” and those which are “non-governmental” or “proprietary”—a distinction which the realigned majority in the Indian Towing case emphatically rejected as a quagmire of municipal law, based on casuistries and requiring the reconciliation of the irreconcilable. Peck, supra note 38, at 219. It is not so obvious as Peck supposed that the Indian Towing majority rejected one unsatisfactory dichotomy in favor of an equally unworkable one. The purpose of immunizing governmental functions was never so narrowly circumscribed as the purpose of immunizing only discretionary functions has come to be. See text accompanying note 85 infra.

55. 529 P.2d 188 (Alaska 1974).

56. Id. at 194. Cases using an “undertaking” test have also restricted immunity to decisions involving basic policy judgment. See text accompanying note 70 infra.

57. 3 Cal. App. 3d 1053, 84 Cal. Rptr. 27 (1970).

58. Id. at 1058, 84 Cal. Rptr. at 30-31. See also Sanborn v. Chronicle Pub. Co., 18 Cal. 3d 406, 556 P.2d 764, 134 Cal. Rptr. 402 (1976) (county clerk decision to discuss with reporters the release of impounded funds to plaintiff was not a basic policy decision, so clerk’s alleged defamation of plaintiff was not immunized as an exercise of discretion); Susman v. City of Los Angeles, 269 Cal. App. 2d 803, 75 Cal. Rptr. 240 (1969) (the decision when to call out the National Guard during the 1965 Watts riots “constitutes the type of basic policy decision” that should be immunized as an exercise of discretion).

followed a similar approach. In *Carroll v. State* over forty feet of abandoned road was torn out incident to the removal of four culverts, and earthen berms were formed in place of the paved surface. The earth was washed away and the plaintiffs were injured when their car plunged off the pavement. The court rejected the defense that the decision to use earthen berms was discretionary, found that no basic policy was involved in that decision, and held that immunity does not extend to ministerial implementation of basic policy decisions. The court observed that most of the cases imposing liability involve failure to warn of foreseeable dangers.

*Mason v. Bitton* illustrates the "basic policy decision" approach to distinguishing planning from operational functions. Bitton led as many as seven officers of the Washington State Patrol and the Seattle Police Department on a frightening chase, being clocked at one intersection at 140 m.p.h. The police did not abandon their pursuit, and Bitton's car finally jumped a median strip, collided head-on with Mason's car, and killed both drivers. Mason's estate sued Bitton's estate and the state was joined as a defendant. The court unanimously held that the decisions to pursue Bitton and to continue pursuit in the face of the risk it posed to public safety were operational because those decisions did not involve basic policy questions.

home; the decision to delay was found to be at the operational-level); Rogers v. State, 51 Haw. 293, 298, 459 P.2d 378, 381 (1969) (court found that repainting highway stripes "did not require evaluation of policies but involved implementation of decisions made in the everyday operation of governmental affairs").

60. 27 Utah 2d 384, 496 P.2d 888 (1972).
61. Id. at 389, 496 P.2d at 891.
62. Id. But see notes 78 & 79 and accompanying text infra. This reasoning is inconsistent with the later resolution of Epting v. State, 546 P.2d 242 (Utah 1976). The plaintiffs in *Epting* were the children of a woman who was allegedly battered, raped, and murdered by an escapee from the work-release program of a Utah prison. The Utah Supreme Court disposed of the case by finding the decision whether to use work release programs was "within the discretion of the prison authorities to decide." Id. at 244. The dissenters argued that the majority ignored that portion of plaintiffs' complaint alleging negligence in failure to warn the deceased of the inmate's escape under circumstances known to prison officials making the inmate a special threat to the safety of the deceased. In the four years between *Caroll* and *Epting*, the Utah Supreme Court's sensitivity to cases involving failure to warn of foreseeable dangers and to the distinction between plans and operations appears to have faded; that discretion was exercised in choosing to use work-release programs does not determine whether such discretion was exercised in the choice not to warn plaintiff of the inmate's escape.
64. Id. at 328, 534 P.2d at 1365. There is no express exception to governmental liability in Wash. Rev. Code § 4.92.090 (West Supp. 1976), yet the Washington courts observe an exception which is similar to the one fashioned in *Jones*. This exception was created in Evangelical United Brethren Church v. State, 67 Wash. 2d 246. 407 P.2d 440 (1965). *Evangelical* proceeded on the theory that is is not tortious to govern (a phrase borrowed from Jackson's dissent
The "undertaking" rule is illustrated by Indian Towing where the Supreme Court held the Coast Guard liable for the exercise of due care once a service had been undertaken, even though there initially was no duty to provide that service. In Connelly v. State the court employed a form of this test. The plaintiff was the owner of a marina and waterfront apartments which were damaged by flood. He had relied on the California State Department of Water Resources forecast that the water would not rise above twenty-four feet when he set his docks to withstand a water level rise up to twenty-six feet. The water reached twenty-nine feet for two weeks and the owner sued for property damage. Although the state had no duty to issue flood forecasts, because it undertook to do so, it was held to a standard of reasonable care.

in Dalehite, 346 U.S. at 57) and emphasized that the statute only makes government liable for its torts:

"[T]he legislative, judicial, and purely executive processes of government, including as well the essential quasi-legislative and quasi-judicial or discretionary acts and decisions within the framework of such processes, cannot and should not, from the standpoint of public policy and the maintenance of the integrity of our system of government, be characterized as tortious however unwise, unpopular, mistaken, or neglectful a particular decision or act might be."

67 Wash. 2d at 253, 407 P.2d at 444. Washington cases use a litany of four questions designed to permit finding immunity only for an act, omission, or decision which necessarily involved the exercise of basic policy evaluation, judgment or expertise by an authorized agency and only if the act, omission, or decision is essential to the accomplishment of a basic governmental policy, program, or objective. See Walters v. Hampton, 14 Wash. App. 548, 543 P.2d 648 (1975); King v. City of Seattle, 84 Wash. 2d 239, 525 P.2d 228 (1974).

An exactly parallel argument was used in the construction of Ohio's 1974 tort claims act, OHIO REV. CODE ANN. § 2743.2(A) (Page Supp. 1976) to supply a discretionary function exception to an otherwise unqualified statutory waiver of immunity. In Adamov v. State, 46 Ohio Misc. 1, 345 N.E.2d 661, 75 Ohio Op. 2d 41 (1975), the plaintiff was attacked by a juvenile who was released to his parents' custody three months earlier by the Ohio Youth Commission. The court found the decision to release was essential to the attainment of a basic governmental policy or objective and therefore immune. Accord, Harris v. State, 48 Ohio Misc. 27, 358 N.E.2d 639, 2 Ohio Op. 3d 358 (1976). It is interesting to observe that at least one state construing a statute with an express discretionary function exception to liability finds broader liability in a negligent-release-of-inmate context than Washington and Ohio have found under statutes providing for unqualified tort liability. In State v. Silva, 86 Nev. 911, 478 P.2d 591 (1970) a husband and wife sued the state after the wife was raped by an inmate of Peavine Honor Camp. The court held that the question of negligence was properly a jury question.

65. 3 Cal. App. 3d 744, 84 Cal. Rptr. 257 (1970).
66. Id. at 751, 184 Cal. Rptr. at 262. Accord, McCorkle v. City of Los Angeles, 70 Cal. 2d 252, 449 P.2d 453, 74 Cal. Rptr. 389 (plaintiff was struck by a car while standing in an intersection with a police officer who was investigating an earlier collision involving the plaintiff; the court found no immunity as the injury resulted from the officer's negligence in performance subsequent to the discretionary decision to investigate); Morgan v. County of Yuba, 250 Cal. App. 2d 938, 41 Cal. Rptr. 508 (1964) (sheriff's failure to warn plaintiff's decedent as
In *State v. Stanley* the employees of the State Department of Fish and Game took possession of a fishing boat after an official discovered an under-sized crab in the catch. State employees failed to notice that the ship was taking water and it sank. The court found that any discretion was exhausted in the state's decision to take possession of the vessel and the state was subject to liability for damages to it.

In *Harrigan v. City of Reno* the elderly plaintiff stooped to retrieve her parking stub and the wind blew her off a drop several feet deep at

promised if a prisoner who had threatened the life of plaintiff's decedent were released; the court found that when the sheriff promised to warn he had exhausted the only discretion involved. The leading California case of *Johnson v. State*, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968) is more difficult to classify because its language is consistent with both the planning-operational and the undertaking test. The plaintiff was attacked with a butcher knife by a 16 year old placed in her home by the Placement Officer of the Youth Authority who elected not to warn the plaintiff of the youth's violent tendencies. The court found that although a decision to parole is immune under the statute, the failure of the parole officer to give appropriate warnings was not. See K. Davis, *Admnistrative Law Treatise* 846, 858, 860, 870 (Supp. 1970). But see Comment, *Separation of Powers and the Discretionary Function Exception: Political Question in Tort Litigation Against the Government*. 56 Iowa L. Rev. 930, 959-61 (1971).


68. The failure to exercise proper care [in seizing the ship] ... does not rise to the 'level of governmental policy decisions' to which the discretionary function immunity from suit applies. Stated otherwise, the acts occurred at the operational, rather than at the planning level, and consequently do not come under the umbrella of discretionary function immunity.

*Id.* at 1291. This quotation provides an example of the way in which a rigid classification of decisions, separating cases using a planning-operational test from those using an undertaking test, is unrealistic. Some decisions contain language consistent with both tests. Similarly, one may describe a broad range of fact situations using the grammatical form of either test: (a) Although the decision to do X was made at the planning level, the government may be liable for subsequent negligence in operations executing that decision; (b) Although the agency was under no obligation to do X, once it undertook to do X, it was bound to do so with reasonable care. The planning formulation (a) stresses time sequence; the undertaking formulation (b) emphasizes the relation of means to ends. It is not surprising that the results in courts using either test compare closely, insofar as ends are commonly selected in advance of implementing the means to attain them. See Reynolds, *supra* note 30, at 107.

A more recent Alaska case which may be characterized as using the undertaking test is *State v. Morris*, 555 P.2d 1216 (Alaska 1976). State inspectors ignored a safety infraction after undertaking to inspect a scaffolding and caused the death of a workman who fell from the scaffolding. The court found the inspection was operational and not immune, although the decision whether or not to inspect a particular project was discretionary.

the edge of a city parking lot. The Nevada Supreme Court held that the city was not immune from suit and reasoned that although the decision to construct a parking lot is a policy decision, negligent omission of guardrails and warning signs is actionable once construction is undertaken.70

In Coffey v. City of Milwaukee 71 the plaintiff sued the city for loss of property in an office building fire and alleged negligent inspection of standpipes located in the building for firefighting purposes. The authorities had undertaken to inspect the standpipes but had failed to find or order corrections of deficiencies. The court held that, whatever the status of a decision to conduct inspections, the subsequent judgments of inspectors were not quasi-judicial: "Only when it is determined that violations do exist, might quasi-judicial actions take place involving enforcement procedures." 72 Coffey cites the Restatement (Second) of Torts § 324A for its definition of liability to third persons for negligent performance of an undertaking.73

In a few cases the courts have found there can be no discretionary immunity where the officer or entity involved violates a duty imposed by

70. Id. at 681, 475 P.2d at 96. The court in LaFever v. City of Sparks, 88 Nev. 282, 496 P.2d 750 (1972) cited Harrigan to support its finding that the failure to replace a stop sign the absence of which had been noticed by a traffic officer a half hour before the plaintiff was involved in a collision was discretionary and therefore immune from liability. It is not clear how the undertaking rule found in Harrington can support the rule that failure to restore a missing traffic sign is not actionable. Contra, Firkus v. Rombalski, 25 Wis. 2d 352, 130 N.W.2d 835 (1964). It is submitted that the failure of the Nevada cases to restrict findings of immunity to basic policy determinations renders the undertaking test a less predictable guide for fixing the limits of liability. Adams v. State used the undertaking test and restricted immunity to cases involving basic policy decisions. 555 P.2d 235 (Alaska 1976). The plaintiffs were the injured and the families of those killed in a hotel fire which occurred after the Department of Public Safety had undertaken inspection of the premises. The state was held to a duty to inspect with care and to follow up on hazards already seen. Citing Indian Towing and State v. Abbott, 498 P.2d 712 (1972), the court said:

The thread common to the many cases on the issue is that the basic policy decision to undertake an activity is immune, but the execution is not. In this case, the discretionary act could be described as the decision to inspect the Gold Rush Hotel; the negligent performance of that inspection would then be an operational or ministerial act, and thus not immune.

555 P.2d at 243-44.

71. 74 Wis. 2d 526, 247 N.W.2d 132 (1976). Coffey applied a statutory codification of the exception language used in the decision which abrogated governmental tort immunity in Wisconsin, Holytz v. City of Milwaukee, 17 Wis. 2d 26, 40, 115 N.W.2d 618, 625 (1962). Wis. Stat. Ann. § 895.43(3) (West 1966) provides: "No suit shall be brought against any political corporation, governmental subdivision or any agency thereof . . . for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions."

72. 74 Wis. 2d at 534-35, 247 N.W.2d at 137.

73. Id. at 540, 247 N.W.2d at 139 n.2.
law. In *Ramos v. County of Madera* 74 the plaintiffs were recipients of welfare payments who allegedly were told by the county welfare department that they were required to work in the grape harvest under substandard conditions or their assistance would be terminated. Disabled and retarded children and children who were regularly attending school were among those allegedly required to work. Some children were harassed by welfare agents over the telephone. Assistance to nineteen families was terminated. The court refused the county's claim of immunity and held that, as eligibility standards were fixed at the state level by the Welfare and Institutions Code, the county had no discretion to vary those standards. 75

In *Campbell v. City of Bellevue* 76 poorly insulated wires were connected to electric lights in a creek. Discovery of an electrocuted raccoon prompted inspection of the wiring, but the inspector failed to reinspect to see that the wires were properly disconnected. Five months later the occupant of the faultily wired premises turned on the wrong switch in his garage and a neighbor's child playing in the creek received paralyzing electrical shocks. The child's mother tried to rescue him and was electrocuted. The court found that a municipal ordinance required that noncomplying installations be disconnected; therefore, the failure to require disconnection was not immune.

In *Sutton v. State Highway Department* 77 the plaintiff's decedent was driving his car behind a truck and either hit or veered into a bridge to avoid hitting an object bounced from the back of the truck when the truck struck a depression in the road. Citing a Texas statute making maintenance of highways the responsibility of the state highway department, the court rejected the department's defense of immunity.

Utah has followed the converse of the rule applied in the California, Washington, and Texas cases. In *Wilcox v. Salt Lake City Corp.* 78 a waitress was issued a work permit after approval of her miniature chest x-ray by one of two physicians hired by the city to examine such x-rays. The plaintiff lost employment when she later was discovered to have tuberculosis. She filed suit and alleged that the city had undertaken to diagnose such ailments and negligently carried out that service. The court sidestepped the question whether there was an undertaking to diagnose.

74. 4 Cal. 3d 685, 484 P.2d 93, 94 Cal. Rptr. 421 (1971).
75. Id. at 693, 484 P.2d at 99,100, 94 Cal. Rptr. at 427. See Morris v. County of Marin, 18 Cal. 3d 901, 559 P.2d 606, 136 Cal. Rptr. 251 (1977) (an injured employee unable to recover damages from a bankrupt employer sued the county for failure to require as a condition of issuing his employer a building permit that the employer file certification of workmen's compensation insurance; the court found that the county had a legal duty to require the workmen's compensation certificate and that the county's failure to require it was nondiscretionary).
76. 88 Wash. 2d 1, 550 P.2d 234 (1975).
77. 549 S.W. 2d 59 (Tex. 1977).
78. 26 Utah 2d 78, 484 P.2d 1200 (1971).
It found that a Utah statute gave the city power to regulate and to issue or not issue permits, and that the city's action was therefore discretionary and sheltered from liability.79

Apart from the question of the manner in which the stated exceptions to liability will be worked out in the courts, there is the suggestion in Jones that another type of impediment to suits against the government may be recognized.80 The Missouri Supreme Court attempted to distinguish immunity from tort liability, which it judicially abrogated, and governmental entities' "immunity from suit," which arises from a lack of legislative consent. An entity's immunity from suit is waived if the words "may sue and be sued" appear in the statute creating the governmental entity.81 In O'Dell Judge Finch cited pre-abrogation cases not involving torts that declared that the state may not be sued without its consent, but he refrained from confronting the question whether that rule is independent of the rule of governmental tort immunity.82 Only one state cited by Judge Finch observed such an esoteric distinction when not compelled to do so by a constitutional provision requiring legislative consent to suit. Speland v. Mounds View School District83 abrogated entity immunity as to municipalities in Minnesota, but retained immunity as to the state itself in the absence of legislative consent to being sued. The same year that O'Dell was decided, however, Nieting v. Blondell84 judicially abrogated state sovereign immunity in Minnesota as well. Consequently, the distinction so delicately drawn in Jones does not appear to be observed in any state that is not forced to do so by the dilemma posed in the conflict between a public policy that the government be liable for its torts and a constitution that requires legislative consent to suit. Because Missouri's constitution does not require such hairsplitting, it is to be hoped that, should a governmental entity without the words "may sue or be sued" legislatively inserted in its charter be named as a defendant, the Missouri court will finish the job of interring the doctrine of governmental immunity it stopped short of burying in Jones. Retaining immunity for these entities where no such statutory phrase appears is not consistent with the policy of spreading the "hidden" costs (recoveries for tortious injuries) of governing over the class of persons benefited by government. It is questionable whether the fortuity of having

79. The decision is unjustified because the plaintiff did not complain that issuing her a permit was negligent, but that issuing her a permit implied a certain diagnosis of her lung condition which was negligently carried out and erroneous. The discretion of the city to issue a permit is simply immaterial to the question whether misfeasance in diagnosis is immune from tort liability. See also Velasquez v. Union Pac. R.R., 24 Utah 217, 469 P.2d 5 (1970).
80. 557 S.W.2d at 230.
81. Id. at 230.
82. 521 S.W. 2d at 421.
83. 264 Minn. 279, 118 N.W.2d 795 (1962).
84. 235 N.W.2d 597 (Minn. 1975).
certain words in the charter of a tortfeasor entity is a fair ground for distinguishing among plaintiffs; a plaintiff cannot choose the language in the charter of the entity whose agent runs over him.

Jones unequivocally represents a switch in the judicial view of the question of governmental liability from general immunity with qualifications to general liability with narrowly defined exceptions: "[H]enceforth, so far as governmental responsibility for torts is concerned, the rule is liability—the exception is immunity." 85 As it is no longer considered public policy that an injured individual should bear the burden of a loss incident to the day-to-day operations of government, but rather that such costs should be spread over all those who benefit from governmental operations, the exceptions to liability must be read narrowly. The exceptions, however, serve recognized purposes and should be read broadly enough to protect certain governmental activities from judicial scrutiny.

The reasons for treating a limited class of governmental decisions as immune from suit or as nontortious have as much to do with the organizational limitations of the judicial forum as they do with the functional requirements of efficient exercise of executive, legislative or judicial functions. Courts are neither authorized nor designed to review all governmental decisions. The courts are not permitted, by the the policies underlying the division of governmental labors into three distinct branches, to appropriate the essential decisionmaking powers of correlative branches of government under the guise of tort adjudication. The evil of such unchecked exercise of power is the risk of of abuse inherent in all centralized authority. Neither are the courts equipped to evaluate the wisdom of executive and legislative decisions. A court cannot hold investigative hearings to determine the need for or probable efficacy of pursuing a certain course, but must confine itself to case-by-case conflict resolution.

Other considerations dictate the reservation of immunity from tort liability of judicial functions. Courts are designed to resolve controversies, not to compound them. Numerous procedural rules are dictated by a concern to avoid unnecessary duplication of judicial effort. Opportunities for appeal or for collateral attack of a judgment are the remedies afforded a party for review of allegedly wrongful adjudications. Although the adequacy of these vehicles may be disputed, it is beyond dispute that open-ended review would involve cumbersome multiplication of judicial functions. Allowing tort liability for judicial functions also might permit an even greater disparity than now exists between the ability of the wealthy and that of the poor to secure meaningful recourse through the courts.

85. 557 S.W.2d at 230.
The decisions discussed herein show that some states have been able to apply exceptions to liability in the wake of the abrogation of immunity in a responsible and clear-sighted manner, sensitive to the purposes outlined above. The best decisions have recognized the fluidity of the planning-operational or undertaking tests and have adopted either of these tests. These decisions have expressly limited application of any exception to liability to meet the articulated purposes of retaining a residue of immunity and have found immunity only if the injury can be said to have resulted from a basic policy decision. Courts careful enough to incorporate all three of these features in their opinions are more likely to achieve consistency in their decisions and are less likely to expand the exception to governmental liability beyond its proper scope. Because such models of responsible interpretation exist in the case law, it would be prudent for the Missouri General Assembly to follow the lead of other states in enacting a waiver of immunity statute modeled after the F.T.C.A. which incorporates an exception for discretionary or for legislative, judicial, and executive functions.

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