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National Cooperative Highway Research Program

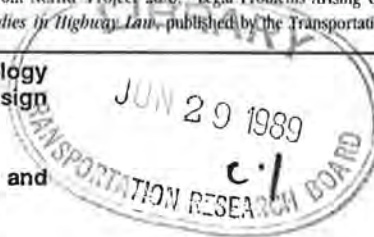
# LEGAL RESEARCH DIGEST

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Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

**Areas of Interest:** 11 administration, 12 planning, 21 facilities design, 22 hydrology and hydraulics, 23 environmental design, 24 pavement design and performance, 25 structures design and performance, 33 construction, 40 maintenance, 51 transportation safety, 52 human factors, 53 vehicle characteristics, 54 operations and traffic control, 55 traffic flow, capacity, and measurements, 70 transportation law (01 highway transportation)



## Impact of the Discretionary Function Exception on Tort Liability of State Highway Departments

*A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency conducting the research. The report was prepared by John C. Vance. Robert W. Cunliffe, TRB Counsel for Legal Research was principal investigator, serving under the Special Activities Division (B) of the Board at the time this report was prepared.*

### THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. In no area of highway law is this more true than in the area of tort law which has had a severe economic impact on the operations of highway/transportation programs. Highway transportation administrators, engineers and attorneys must be kept aware of all defenses to tort actions and be kept current.

This paper continues NCHRP policy of keeping the departments up to date on tort liability. It is a new study to be published in Volume 4, Selected Studies in Highway Law.

The statutory discretionary function exception first made its appearance in the Federal Tort Claims Act of 1946. Since that time more than half the States have, by statute or judicial decree, adopted some form of discretionary immunity. The paper traces the development of the discretionary function exception at the state level through an examination of

applicable State statutes and court decisions. The thrust of the paper is to determine the applicability of the exception to the activities of State highway departments. Because the discretionary function exception, when pleaded and proved, operates as a retention of sovereign immunity and hence a complete bar to recovery, it is of great importance to highway lawyers and all others concerned with the tort liability of the State.

This paper will be published in a future addendum to SSHL. Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976. Volume 3, dealing with contracts, torts, environmental and other areas of highway law, was published and distributed early in 1978. An expandable publication format was used to permit future supplementation and the addition of new papers. The first addendum to SSHL, consisting of 5 new papers and supplements to 8 existing papers, was issued in 1979, and a second

addendum, including 2 new papers and supplements to 15 existing papers, was released at the beginning of 1981. In December 1982, a third addendum, consisting of 8 new papers, 7 supplements, as well as an expandable binder for Volume 4, was issued. In June 1988, NCHRP published 14 new papers and 8 supplements and an index that incorporates all the new papers and supplements that have been published since the original publication in 1976, except two papers that will be published when Volume 5 is issued in a year or so. The text, which totals about 3000 pages, comprises 67 papers, 38 of which are published as supplements in SSHL. Copies of SSHL have been sent free of charge, to NCHRP sponsors, other offices of State and Federal governments, and selected university and state law libraries. The officials receiving complimentary copies in each state are: the Attorney General and the Chief Counsel and Right-of-Way Director of the highway agency. Beyond this initial distribution, the volumes are for sale through the publications office of TRB at a cost of \$145.00.

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## IMPACT OF THE DISCRETIONARY FUNCTION EXCEPTION ON TORT LIABILITY OF STATE HIGHWAY DEPARTMENTS

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### BACKGROUND AND SCOPE

The discretionary function exception, which had its origin in the Federal Tort Claims Act, is a remnant, albeit a powerful one, of the doctrine of sovereign immunity.

Experimentation by the Congress of the United States with waiver of sovereign immunity began more than 100 years ago with the establishment in 1855 of a Court of Claims, to hear causes of action based on contract or Federal law or regulation. Consent of the Government to be sued was enlarged in 1887 to include all claims for damages not sounding in tort. Partial entry into the tort field was accomplished in 1920 with the granting of consent to be sued upon admiralty and maritime torts involving Government vessels. However, full-fledged entry into the significant field of ordinary or common law torts did not take place until 1946, when the 79th Congress enacted the Federal Tort Claims Act, as Title IV of the Legislative Reorganization Act, 60 Stat. 842. The passage of the Federal Tort Claims Act (FTCA), according consent of the Federal Government to be sued for ordinary torts, was hardly a hasty piece of legislation, the same having been under consideration by the Congress of the United States for a period of nearly 30 years prior to its enactment.

Passage of the Act was prompted by the persuasion—finally accepted—that the time had arrived to abandon the shibboleth that “the king can do no wrong,” and the conviction that simple justice required the provision of an easy and readily available means of compensating the innocent victims of tortious misconduct on the part of Government employees. An additional reason for passage of the Act was that the device of the private bill, long employed by the Congress to redress injuries at the hands of employees of the Government, had proved to be notoriously awkward and inadequate to accomplish substantial justice, and the Congress was persuaded that the time was at hand to replace this device with a more efficient method of compensating the victims of tort. Because the courts had had vast experience in the handling of ordinary tort claims it was thought to be peculiarly within their competence to hear and adjust claims of this nature, and the matter of compensating the victims of tortious conduct was hence thrown into the courts by making the United States Government liable therein “in the same manner and to the same extent as a private individual under like circumstances....”<sup>1</sup>

However, in the numerous drafts of the FTCA that had been made over the years before its final passage in 1946, consideration had always been had for exempting from coverage of the Act certain activities that were deemed to be purely “governmental” in nature, as distinguished from the type of activities normally undertaken and carried out by private persons.

Activities that are “governmental” in nature are probably insusceptible of precise definition. However, a clear-cut example would be the construction of flood control projects that cross the boundaries of several States and pursue the path of a river as it winds through different terrains and regions on its course to the sea. Projects of this nature are of such gigantism as only to be undertaken by the Government itself. The multitude of decisions to be made and carried out in the prosecution of such projects were thought by the Congress to be beyond the competence of ordinary courts and juries to weigh and assess, and projects of this nature were hence intended to be withdrawn from the consideration of ordinary courts and lay jurors untrained to think in terms of the magnitude of the technicalities and difficulties involved.

The judgment of the Congress that such type of activity was outside the province of ordinary jurors and courts, while based on practical considerations, was also fully supported by constitutional considerations. Under our tripartite form of government the powers of the legislative, executive, and judicial branches of government are to be kept separate and distinct. Hence, a further basis for excluding “governmental” functions from review by the judiciary was to preserve the separation of powers.

Perhaps because of the difficulty involved in attempting to define “governmental” activities, no attempt was made in the FTCA to except “governmental” activities, as such. The exception was instead couched in terms of precluding from judicial review governmental activities that are “discretionary” in nature. The pertinent language, found in 28 U.S.C. 2680, reads as follows:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, 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 an employee of the Government, whether or not the discretion involved be abused.

The distinction between discretionary and nondiscretionary activity contemplated by the FTCA, of course, represents nothing new in the way of legal conceptualizations. The distinction that is to be made between a discretionary and a nondiscretionary or ministerial function or duty is one of ancient lineage both in the English and American common law. The law of mandamus, for example, is premised on the distinction between discretionary and nondiscretionary or ministerial activities. In this country, in suits brought against public officers and employees to recover damages for tortious conduct, a distinction was always made between activities that were deemed discretionary in nature and those deemed merely ministerial, recovery being allowed in cases of ministerial action and denied in cases of discretionary activity.<sup>2</sup>

The cases involving personal liability that were premised on this distinction find support on two different grounds. The first ground is a policy consideration designed to afford public servants a measure of protection against tort liability in order to encourage competent persons

to enter public service and engage in fearless conduct.<sup>3</sup> The other ground is to ensure the constitutionally required separation of powers. It was reasoned in respect to the latter that in the discretionary or decision-making process the public official may draw on information that is not generally available and to which he has access by virtue of his office; and that because the courts are not privy to the special information or endowed with the expertise that goes with the office, the process of review opens up the hazard of substituting judicial judgment for legislative or executive judgment, in violation of the separation of powers.

The first ground for exclusion has, of course, now been largely abrogated in States providing for the defense and indemnification of public employees, but the second ground—separation of powers—remains valid and untouched.

In the drafting of 28 U.S.C. § 2680(a) the fact that the common law made provision for exclusion of discretionary activities from tort liability was always in the forefront of consideration. As illustrative, in an appearance before the House Committee on the Judiciary, Assistant Attorney General Francis M. Shea testified that, in his opinion, in the absence of a specific statutory exception for discretionary activity, the courts would read such exception into the Act, stating that: "It is not probable that the courts would extend a Tort Claims Act into the realm of the validity of legislation or *discretionary administrative action*, but H.R. 6463 makes this specific." (Emphasis added.)<sup>4</sup> Thus, at the time of its adoption 28 U.S.C. § 2680(a) was apparently regarded as little more than a clarifying provision to make specific the common law rule of exclusion from tort liability for discretionary administrative action.

For the reasons stated the exception carved out for a discretionary function or duty attracted scant attention at the time of passage, and the prophecy that if such provision were not included in the Act, the same would be read into the terms thereof, was fulfilled in the States of New York, Washington, and Florida, where legislation was passed waiving tort immunity but without the inclusion of a discretionary function exception, and the courts in those jurisdictions read the exception into the legislation, based on the common law exclusion from tort liability of governmental activities discretionary in nature.

In the drafting of 28 U.S.C. § 2680(a), it was also thought by the Congress that the long experience of the courts in drawing distinctions between discretionary and nondiscretionary or ministerial actions would enable them to solve the problem of differentiation between the two without difficulty.

It is now wholly evident that such a perception could not have been more wrong. The inability of the courts over the intervening years to draw a clear-cut distinction between discretionary and nondiscretionary activities has led to a maze of confusion in the cases.

At the core of this confusion is the fact (now fully recognized) that virtually all human activity involves some element of choice, judgment, or discretion. As an example of judicial recognition of this fact see the statement of the Court in *Smith v. United States*, 375 F.2d 243 (C.A. 5, 1967), to the effect that: "Most conscious acts of any person whether

he works for the government or not, involves choice. Unless government officials . . . make their choices by flipping coins, their acts involve discretion in making decisions." See also the interesting analogy used by the Court in *Sava v. Fuller*, 57 Cal.Rptr. 312 (1967), where in observing that all human activity involves some element of discretion the Court stated: "He who says that discretion is not involved in driving a nail has either never driven one or has a sore thumb, a split board, or a bent nail as the price of attempting to do so."

Since judgment, choice, or discretion is omnipresent in virtually all human activity, how is a line to be drawn between activities that are discretionary and those that are nondiscretionary? That is the problem before the courts in attempting to interpret the provisions of the discretionary function exception. While no definitive answers have been provided, certain guidelines have been laid down by the courts, and it will be the purpose of this paper to attempt to delineate and interpret these guidelines.

Because this paper is concerned with liability of State highway departments—not liability of the Federal Government—direction is next turned to a consideration of statutes enacted at the State level that have taken their cue from the Federal Tort Claims Act (28 U.S.C. § 2680(a)) and made provision for discretionary function immunity.

#### State Statutes Providing for Discretionary Function Immunity

The previously discussed Section 2680(a) of the FTCA is the precursor of all State legislation embodying the discretionary function exception to waiver of immunity from tort liability. While all State legislation providing for discretionary immunity shows the influence of Section 2680(a), in the great majority of the States that have adopted this type of legislation the language of Section 2680(a) has been either precisely duplicated, or followed in reasonably close detail, including in most instances adoption of the language "whether or not the discretion involved be abused," as the same appears in the Federal Act.

Because of the similarity in the State statutes and the fact that they can be related to the language of Section 2680(a) previously set forth herein in full (*supra*, p. 3), it will suffice for the purpose of this paper to provide a listing of the State statutory provisions that derive from and show the influence of the comparable provisions of the Federal Act.

In the following States the language of Section 2680(a) of the Federal Act has been either duplicated or closely followed in providing for an exception to waiver by the State of its immunity to suit in tort litigation:

Alaska:	Alaska Statutes: 09.50.250
California:	West's Annotated California Codes: Government Code, 820.2
Delaware:	Delaware Code Annotated: 10 Sec. 4011
Hawaii:	Hawaii Revised Statutes: 662.15
Idaho:	Idaho Code: 6-904
Illinois:	Smith-Hurd Illinois Annotated Statutes: 85 Sec. 2-201



Iowa:	Iowa Code Annotated: 25 A. 14
Kansas:	Kansas Statutes Annotated: 75-6104
Maine:	Maine Revised Statutes Annotated: 14 Secs. 8103, 8111
Massachusetts:	Massachusetts General Laws Annotated: 258 Sec. 10
Minnesota:	Minnesota Statutes Annotated: 3.736
Mississippi:	Mississippi Code Annotated: 11-46-9
Nebraska:	Revised Statutes Nebraska: 81.8.219
Nevada:	Nevada Revised Statutes: 41.032
North Dakota:	North Dakota Century Code: 32-12.1-03
Oregon:	Oregon Revised Statutes Annotated: 30.265
Tennessee:	Tennessee Code Annotated: 29-20-205
Utah:	Utah Code Annotated: 63-30-10
Vermont:	Vermont Statutes Annotated: Tit. 12, Sec. 5602.

In the following States statutory provisions for discretionary immunity reflect the influence of Section 2680(a) of the Federal Act, but vary somewhat in terminology from the language thereof:

Arizona:	Arizona Revised Statutes: 12-820.01
Indiana:	Burns Indiana Statutes Annotated: 34-4-16.5-3
New Jersey:	New Jersey Statutes Annotated: 59:2-3
Oklahoma:	Oklahoma Statutes Annotated: 51 Sec. 155
South Carolina:	Code of Laws of South Carolina: 15-78-60
Texas:	Vernon's Texas Codes Annotated: Civil Practise and Remedies, 101.056.

As previously indicated, in the States of New York, Washington, and Florida, statutes waiving the immunity of the State in respect to tort claims have been construed impliedly to incorporate an exception to immunity for governmental acts discretionary in nature. The cases accomplishing this result (to be discussed more fully later herein) are, respectively: *Weiss v. Fote*, 7 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.E.2d 63 (1960); *Evangelical United Brethren Church of Adna v. State*, 67 Wash.2d 246, 407 P.2d 440 (1965); and *Commercial Carrier Corporation v. Indian River County*, 371 So.2d 1010 (Fla., 1979).

Thus, there are at the time of this writing 25 States that have statutory provisions excepting from waiver of sovereign immunity a discretionary function or duty, and 3 States that have reached the same result by way of court decision. Hence, in the 43 years that have elapsed since the passage of the FTCA, more than half the States have opted to follow the lead of the Federal Government in making provision for discretionary immunity.

The cases construing the provisions of statute making exception to a waiver of immunity for a discretionary function or duty fall naturally

into the classifications of Federal decisions and State cases. This paper is primarily concerned with the latter. However, although State courts are not obligated to take their lead from Federal decisions, the fact remains that there are certain decisions of the Supreme Court of the United States, construing the provisions of 28 U.S.C. 2680(a), that have had enormous influence on the State courts in interpreting the similar provisions of their own local statutes. The language of the Supreme Court decisions has been weighed and assessed over and again in the State court cases. It follows that it is literally impossible to discuss the meaning of State discretionary immunity legislation without reference to these Federal decisions.

This paper hence will first undertake a brief review of the United States Supreme Court cases that have strongly influenced local decision-making. It will next undertake a review of State cases construing State legislation comparable with the Federal legislation. All of this will be in an effort to determine if there is an agreed consensus as to the boundaries of discretionary function immunity, as it relates to the entirety of governmental activities.

The paper will then turn to its principal concern, the specific application of discretionary function immunity to the activities of State highway departments.

It is to be emphasized at this point that the discretionary function exception at both Federal and State levels applies to all government activities, and that highway activities constitute but one aspect of the multitudinous functions of government. It is further to be emphasized that highway activities, as one function of government, are touched with the singularity of being at all times primarily concerned with public safety. This singularity cannot but have strong implications for the application of a doctrine that, given liberal interpretation, would abjure the fault principle and accord very broad immunity from liability in tort.

Attention is now turned to the decisions of the Supreme Court of the United States interpreting the provisions of 28 U.S.C. § 2680(a).

#### FEDERAL CASES INTERPRETING THE DISCRETIONARY FUNCTION EXCEPTION

The first case to reach the Supreme Court of the United States involving the construction of 28 U.S.C. § 2680(a) was *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). In this case it appeared that the Federal Government had participated at the highest levels (including the Cabinet of the United States) in the decision to manufacture and distribute a fertilizer known as FGAN, such product being designed for use in accelerating food production for the benefit of persons residing in occupied countries at the termination of hostilities in World War II. Certain deactivated ordnance plants were turned over for the manufacture of this product, which contained as a component the chemical ammonium nitrate, long used as an ingredient of explosives. Fire broke out in the hold of one of two ships loaded with this fertilizer and docked in Texas City, Texas, and an explosion took place of such magnitude as to level much of the City and cause enormous losses in life

and property. *Dalehite* was a test case to determine the result in several hundred like suits brought under the FTCA against the United States Government, charging negligence in having used as a base of the fertilizer a chemical known to possess explosive properties. The Government asserted as a defense that it was rendered immune to suit by the provisions of Section 2680(a) of the FTCA.

In upholding the Government's claim of immunity the Court stated in respect to the coverage of Section 2680(a): "Where there is room for policy judgment and decision there is discretion." The Court sought to make this broad statement more specific by adding that: "The decisions held culpable were all responsibly made at a planning rather than operational level..."

Whatever weight the Supreme Court may have intended to be given to the planning/operational distinction thus made, the same was immediately seized upon by courts and commentators alike, to serve as a useful tool to distinguish between activities that are protected by the provisions of Section 2680(a), and those that are not protected. The planning/operational distinction has had a somewhat chequered history since first announced in *Dalehite*, but, as will be shown later, appears to have survived more or less intact.

The next case that requires consideration is *Indian Towing Co., Inc. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 4 (1955). In this case petitioners brought suit under the FTCA to recover for damages to the cargo of a ship which went aground on an island off the coast of Alaska, due to the alleged negligence of the United States Coast Guard in failing to keep the signal light burning in a lighthouse situated on the island. For obvious reasons counsel for the Federal Government in the case made no effort to persuade that the failure to keep the light in proper working order was a protected planning level decision. However, the Court did not choose to rest its decision on the ground (equally obvious) that the failure to keep the light in good working order was an operational level or ministerial activity and, therefore, not protected under the planning/operational dichotomy. Instead, in holding the Government liable, the Court elected to rest its decision on the application of the Good Samaritan rule, the Court stating that "it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'Good Samaritan' task in a careful manner." The Court spelled out that: "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order..."

The failure of the Court to apply the planning/operational test in this case led to a measure of confusion, the decision being construed by some to mean that the Court intended to beat a retreat from the use of the test to differentiate protected from unprotected activities under the discretionary function exception. Although subsequent to the decision in *Indian Towing* the planning/operational test was adopted and applied by many State courts in construing the provisions of their own State legislation containing the discretionary function exception, uncertainty

as to the exact position of the Supreme Court of the United States with respect to the validity of the test persisted for a period of nearly 30 years, until apparently resolved in 1984 in its decision in *United States v. Varig Airlines*, 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984).

Another area of confusion that remained unresolved until the decision of the Court in *Varig* was in respect to the influence of the level of decision-making on the applicability of the discretionary function exception. Probably as a result of the fact that in *Dalehite* the Supreme Court emphasized that the decision to manufacture the fertilizer was made at the highest levels of the Federal Government, the impression gained currency that in order for a decision to qualify as a planning level decision, it must be made at one of the higher levels of government (notwithstanding the obvious fact that high level officials frequently make mere housekeeping decisions in the performance of their duties).

Both the question of the validity of the planning/operational test, and the question of the influence of the level of decision-making, were squarely before the Court in *Varig*. This case involved the question whether the certification by the Federal Aviation Administration of the airworthiness of private aircraft constituted an activity immunized by the provisions of Section 2680(a) of the FTCA. Counsel for the claimants in this case squarely presented to the Court the argument that the planning/operational test announced in *Dalehite* was no longer a valid test to separate discretionary from nondiscretionary activities. The Court took express note of this contention in the language as follows: "Respondents here insist that the view of Sec. 2680(a) expressed in *Dalehite* has been eroded, if not overruled, by subsequent cases construing the Act, particularly *Indian Towing Co. v. United States*..." It then went on to reject this argument by stating that "we do not accept the supposition that *Dalehite* no longer represents a valid interpretation of the discretionary function exception," and by distinguishing *Indian Towing* and other cases said to repudiate the planning/operational test.

The lower Federal court cases since *Varig* generally interpret the decision as reaffirming the validity of the planning/operational test. See, for example, *Alabama Electric Cooperative, Inc. v. United States*, 769 F.2d 1523 (C.A. 11, 1985), wherein the Court stated that: "In our opinion *Varig Airlines* supports the planning/operational distinction developed by the lower courts in cases subsequent to *Dalehite*," adding that planning level decisions are those that involve "the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy," whereas operational level decisions are those involving "normal day-by-day operations of the government."

As before noted, the Court in *Varig* also met head-on the argument that planning level activities can only take place at the higher levels of government. In rejecting this contention the Court stated that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." The Court went on to add: "Thus, the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability."



The Court then stated, in respect to the intent of Congress in enacting the discretionary function exception, that: "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."

Thus, the decision in *Varig* did much to clarify the confusion caused by *Indian Towing* in respect to the status of the planning/operational test, and it also served to clear up the misapprehension caused by *Dalehite* that the level of decision-making is a controlling factor in determining the applicability of the discretionary function exception. *Varig* is, however, perhaps most instructive in elucidating that for decision-making to be discretionary in nature, it must be grounded on considerations of "social, economic, and political policy."

The latest expression of the Supreme Court in respect to the nature of the discretionary function exception is found in *Kevin Berkovitz, et al. v. United States*, 56 U.S.L.W. 4549 (June 13, 1988). In this case suit was brought against the United States to recover damages for the licensing and approval for release of a polio vaccine that in fact caused the disease to be contracted. In holding that Section 2680(a) of the FTCA was inapplicable to the facts of the case, the Court undertook a review of those portions of its prior opinions relating to the discretionary function exception that it deemed to be of special significance and relevance. Because of the "summing-up" nature of the opinion in *Berkovitz* parts of the opinion are deemed worth quoting at some length. The following is extracted therefrom:

The determination of whether the discretionary function exception bars a suit against the Government is guided by several established principles. This Court stated in *Varig* that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." . . . In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice. See *Dalehite v. United States* . . . (stating that the exception protects "the discretion of the executive or the administrator to act according to one's judgment of the best course"). Thus, the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect. Cf. *Westfall v. Erwin* . . . (recognizing that conduct cannot be discretionary if prescribed by law).

Moreover, assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield. The basis for the discretionary function exception was Congress' desire to "prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. Varig Airlines*. . . . The exception,

properly construed, therefore protects only governmental actions and decisions based on considerations of public policy. See *Dalehite v. United States* . . . ("Where there is room for policy judgment and decision there is discretion"). In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment. (Emphasis added.)

Later on in the opinion the Court stated that: "The discretionary function exception applies *only* to conduct that involves the permissible exercise of policy judgment." (Emphasis added.)

In recapitulating and summing up the position of the Supreme Court of the United States in respect to the discretionary function exception little need be added to the above language from *Berkovitz*.

It now appears to be crystal clear that the discretionary function exception applies only to a fact situation involving a judgment or choice made on the basis of an evaluation of broad policy factors. The exception relates solely to "the permissible exercise of policy judgment," and the policy judgment that is permissible is said to be tied to "social, economic, and political policy." It follows that the word "planning", as used in the planning/operational test, announced in *Dalehite*, necessarily means a judgment or choice based on the above specified policy considerations.

This paper now leaves the Federal cases and turns to a comparative review of the State court cases considering the nature of discretionary immunity.

#### STATE CASES CONSTRUING THE DOCTRINE OF DISCRETIONARY IMMUNITY

One of the earliest State court cases (subsequent to the enactment of the FTCA) to examine the nature of discretionary immunity was *Weiss v. Fote*, 7 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.E.2d 63 (1960), decided by the New York Court of Appeals. This case arose out of a multi-party motor vehicle accident, the proximate cause of which was alleged to have been the negligence of the City of Buffalo in having installed an electric traffic light signal with insufficient interval between the change of lights to allow for clearance of traffic. In holding that the determination of the Board of Safety of the City of Buffalo as to the length of the interval was an immune discretionary decision, the Court of Appeals was first faced with the hurdle that the New York statute waiving sovereign immunity to suit contained no provision for an exception in the case of discretionary decision-making by a governmental body. In reading immunity for such decision-making into the statute, the Court said:

Lawfully authorized planning by governmental bodies has a unique character deserving of special treatment as regards the extent to which it may give rise to tort liability. It is proper and necessary to hold municipalities and the State liable for injuries arising out of the day-by-day operations of government—for instance, the garden variety injury resulting from the negligent maintenance of a highway—but to submit to a jury the reasonableness of the lawfully authorized deliberations of executive bodies presents a different question. . . . To accept a jury's verdict as to the reasonableness and safety of a plan of governmental services

and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexperienced hands what the Legislature has seen fit to entrust to experts. Acceptance of this conclusion, far from effecting revival of the ancient shibboleth that "the king can do no wrong", serves only to give expression to the important and continuing need to preserve the pattern of distribution of governmental functions prescribed by constitution and statute.

It is clear that the Court's decision reading immunity into the statute was based on (1) constitutional requirements in respect to the separation of powers, and (2) the common law rule of immunity for the discretionary acts of governmental entities. The decision of the New York Court of Appeals in this respect has had wide influence on the decision of other courts of last resort faced with the problem of the nature of discretionary immunity.

Another decision that has proved of paramount importance is that of the Supreme Court of California in the case of *Johnson v. State*, 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352 (1968). Unlike the *Weiss* case, *Johnson* involved the construction of a statutory discretionary function exception modeled on the language of Section 2680(a) of the FTCA. The California statute (Gov't Code, § 820.2) provided in relevant part that "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." The statute also immunized governmental entities "where the employee is immune from liability" and hence insulated the State (with certain exceptions) against liability to the same extent as a public employee.

The action in the case was brought against the State to recover damages for failure to give adequate warning of the homicidal tendencies of a 16-year old youth placed by the State in a foster home. In holding that the State was not immunized by the above provisions of statute, the Court first rejected a semantic approach to the applicability of the discretionary function exception, pointing out that a distinction sought to be drawn between the words "discretionary" and "ministerial" based on linguistics or lexicography will not work because virtually all ministerial activity involves the exercise of discretion. The Court then went on to posit its interpretation of immunity on the purpose behind the discretionary function exception. This purpose was said to be that the discretionary function exception was designed to assure "judicial abstention in areas in which the responsibility for basic policy decisions has been committed to coordinate branches of government." (Emphasis by the Court.) The Court added that: "Any wider judicial review, we believe, would place the court in the unseemly position of determining the propriety of decisions expressly entrusted to a coordinate branch of government."

Thus, the exception was said to be based on the constitutional separation of powers, which compels the courts to abstain from review of determinations made by a coordinate branch of government that involve "basic policy decisions."

The Court went on to recognize that "this interpretation of the term 'discretionary' presents some difficulties." It stated that "our interpretation will necessitate delicate decisions; the very process of ascertaining whether an official determination rises to the level of insulation from judicial review requires sensitivity to the considerations that enter into it and an appreciation of the limitations on the court's ability to reexamine it. Despite these potential drawbacks, however, our approach possesses the dispositive virtue of concentrating on the reasons for granting immunity to the governmental entity. It requires us to find and isolate those areas of quasi-legislative policy-making which are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision."

Thus, the California Supreme Court held that the discretionary function exception of the State legislation related exclusively to determinations made by a coordinate branch of government that involve "basic policy decisions". Cf. the decisions of the Supreme Court of the United States in *Varig* (*supra*, p. 6) and *Berkovitz* (*supra*, p. 7), reaching exactly the same conclusion with respect to the comparable provisions of the FTCA.

Another decision that has had wide influence is that of the Supreme Court of Washington in *Evangelical United Brethren Church of Adna v. State*, 67 Wash.2d 246, 407 P.2d 440 (1965). This decision, like that in *Weiss* (*supra*, p. 7), involved the interpretation of a statute waiving immunity but not containing an express exception for discretionary activities. The facts were that a 14-year old boy escaped from the custody of a State-maintained correctional institution and thereafter caused the destruction of the Evangelical United Brethren Church by setting fire thereto. The action for recoupment of the loss charged negligence to the State in applying only minimum security measures in the custodial detention of the youth when it was known, or should have been known, that the boy possessed propensities for incendiarism and was in fact a known pyromaniac.

In holding the State protected by the rule of discretionary immunity, the Court first noted that in States waiving immunity to suit in tort litigation, provision had been made either judicially or statutorily, for an exception in the case of governmental activities discretionary in nature. It stated that: "The reason most frequently assigned is that in any organized society there must be room for basic governmental policy decision and the implementation thereof, unhampered by the threat or fear of sovereign tort liability..." (Emphasis added.) The Court continued that: "Recognizing the need and reason for a limitation on sovereign tort liability is one thing. Establishing guidelines for its application, however, is another matter, particularly in the area involving executive or administrative decision." It then went on to lay down a four-pronged test (since adopted by courts of last resort in other jurisdictions) to determine the applicability of discretionary immunity, stating:



Whatever the suitable characterization or label might be, it would appear that any determination of a line of demarcation between truly discretionary and other executive and administrative processes, so far as susceptibility to potential sovereign tort liability be concerned, would necessitate a posing of at least the following four preliminary questions: (1) Does the challenged act, omission, or decision necessarily involve a *basic governmental policy*, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that *policy*, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of *basic policy evaluation*, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a discretionary governmental process and non-tortious, regardless of its unwisdom. (Emphasis added.)

Thus in *Evangelical United Brethren* the Court brought the State of Washington squarely into line with the decisions in *Varig* (*supra*, p. 6), *Berkovitz* (*supra*, p. 7), and *Johnson* (*supra*, p. 8), laying down the rule that discretionary immunity relates solely to decision-making by a governmental entity that involves the evaluation of broad *policy* factors and considerations.

This line of reasoning was subsequently adopted by the Supreme Court of Florida in the later decision of *Commercial Carrier Corporation v. Indian River County*, 371 So.2d 1010 (Fla., 1979). It appeared that Florida, like New York and Washington, had passed legislation waiving immunity to suit in tort, but without containing the discretionary function exception. The facts involved a collision at an unmarked intersection, where previously a stop sign had been in place, and the word stop painted on the pavement in advance of the intersection. Negligence was alleged in failing to replace the downed or missing sign and in failing to repaint the worn pavement surface signing. The State defended on the ground, *inter alia*, that the act of omission in failing to replace the sign and keep the pavement painted was an exercise of discretion by government officials and employees, which discretionary act was exempt from the operation of the statute waiving immunity.

The Court held that the State was liable to suit on the facts before it but in so doing read an exception for discretionary immunity into the act. Heavy reliance was placed on the decisions in *Weiss* (*supra*, p. 7) and *Evangelical United Brethren* (*supra*, p. 8), the Court expressly adopting the four-pronged test announced in *Evangelical United Brethren*. In support of its decision the Court stated that "we are persuaded by these authorities that even absent an express exception . . . for discretionary functions, certain *policy-making* . . . governmental functions cannot be the subject of traditional tort liability." (Emphasis added.) The Court also followed the lead of many other States in adopting the planning/operational test, stating with respect thereto:

As a tool for identifying discretionary acts under the Federal Tort Claims Act the federal courts, commencing with the decision in *Dalehite v. United States* . . . have developed an analysis which distinguishes between decisions made at the "planning level" and those at the "operational level." Planning level functions are generally interpreted to be those requiring basic policy decisions, while operational level functions are those that implement policy. *Johnson v. State* . . . likewise employed the planning-operational distinction as an aid to isolate those discretionary functions of government which should be immune from tort liability.

The decision in *Commercial Carrier* is significant because it was handed down at a point in time rather later than most other supreme court decisions wherein the nature of discretionary immunity was presented as a question *de novo*, and the Court had the advantage of being able to consider the quite considerable body of previously decided judicial opinion relating thereto. It is further significant in that it elected to adopt the reasoning (announced in the Federal and State cases previously set forth in this paper) that the discretionary function exception relates solely to "policy-making" decisions of a coordinate branch of government.

Because the decisions of other State courts of last resort are generally in accord with the foregoing cases, a further review of individual State court cases is deemed unnecessary to this paper. Before turning next to the principal thrust hereof—the applicability of the discretionary function exception to highway activities—it can be said that a review of the Federal and State decisions indicates a broad consensus in respect to the nature of the exception, which area of agreement can be expressed in terms of the following:

1. The basic purpose of the discretionary function exception is to ensure the separation of powers.
2. The cases in which judicial restraint is to be exercised in order to preserve the separation of powers are those that involve policy decision-making by a coordinate branch of government.
3. Although the word "policy" cannot be precisely defined there is broad agreement that it includes within its umbrage *social, economic, and political* considerations.
4. It follows that in the application of the widely used planning/operational test, the word "planning" is to be given the restricted meaning of evaluation of *social, economic, and political* policy considerations.

With these settled principles in mind, attention is now turned to the question of the effect of the discretionary function exception on the activities of State highway departments.

#### APPLICATION OF THE DISCRETIONARY FUNCTION EXCEPTION TO ACTIVITIES OF STATE HIGHWAY DEPARTMENTS

The cases involving the application of the discretionary function exception to State highway department activities are many, and limitations



of space prevent a comprehensive review of all such cases. Hence, the approach necessarily taken in the paper is to use representative cases. The selection of cases deemed to be representative is, of course, a judgmental matter. However, in the choice of cases an effort has been made to include all such cases as might properly be deemed to be leading cases in the jurisdiction where decided. As will later be seen, there is a paucity of case law in respect to certain common activities of State highway departments, but all types of activity that have case law pertinent thereto have been included.

Because this paper is concerned with liability of State highway departments under State statute law, the Federal decisions relating to liability of the United States Government under 28 U.S.C. § 2680(a) are not considered. The Federal cases treating this question are, however, collected and discussed in an annotation in 37 A.L.R. Fed. 587 (1978) entitled "Claims Based on Construction and Maintenance of Public Property as Within Provision of 28 U.S.C. 2680(a) Excepting from Federal Tort Claims Act Claims Involving 'Discretionary Function or Duty,'" and the reader interested in the Federal decisions is referred to such annotation.

Review of the State cases commences with the subject of design activity.

#### Design

If there is one area of highway activity that may be thought to be generally immune as a protected discretionary function, it is the area of design; and there is some early authority that appears to take this view.<sup>6</sup> However, in the more recent decisions, where the question of design immunity has been fully met and considered, this view has been thoroughly rejected. The following cases illustrate:

In *Breed v. Shaner*, 57 Haw. 656, 562 P.2d 436 (1977), plaintiff was a passenger in an automobile which failed to negotiate a curve in the roadway and turned over causing injuries to the plaintiff. The State of Hawaii was named a party defendant in an action brought to recover damages for the injuries suffered by plaintiff in the accident. Negligence was charged to the State in the design of the highway; and the evidence at trial established that a number of similar accidents had occurred previously at the locus of the curve in question. The State contended successfully at trial that the design of the highway was protected by the terms of the discretionary exemption. The issue on appeal framed by the State was recited by the Supreme Court of Hawaii as follows: "The State argued that under the planning-operational distinction . . . any act or omission involving the design of a highway would always fall on the planning side of the dichotomy and thus be exempt from liability as discretionary."

In rejecting this contention, and reversing summary judgment entered below for the State, the Supreme Court of Hawaii ruled that not all aspects of the design function fall within the exempt planning stage. After noting that the purpose of the discretionary exemption is "to protect the decision-making processes of state officials and employees

which require the evaluation of broad public policies," the Court went on to state:

The effect of the circuit court's order is to hold the designing of a highway always involves the evaluation of broad policy factors. This places total emphasis on protecting the State to the exclusion of those who sustain injuries proximately caused by the negligent design of a highway. Although broad policy considerations may be a factor in certain aspects of highway design we do not think the circuit court's generalization is correct. For certain, there are decisions made by officials which require evaluation of broad policy factors by their very nature, e.g., a decision to purchase certain aircraft, a decision to activate an airbase, or a decision not to build a prison. However, we are of the opinion that the decisions made in designing a highway do not always fall in this category. A curve may be placed in a road to simply get around an obstacle. In this situation further facts must be adduced on the record to show that the decision to include the curve or other design feature involved the evaluation of broad policy factors before the court can decide that the discretionary function exception applies.

The legislative policy to compensate the victims of negligent conduct by State officials and employees in the same manner and to the same extent as a private person in like circumstances weighs heavily against adopting the rule asserted by the State. The State's interest in protecting public policy decisions does not require a prophylactic rule in this case. It is sufficient to apply the exception when the record shows that broad policy factors were involved in reaching the allegedly negligent decision.

Thus, the Court announced the rule that only those aspects of design activity that involve decision-making in respect to broad policy considerations are clearly within the ambit of the protected planning stage of the planning/operational dichotomy.

*Japan Air Lines Co., Ltd. v. State*, 628 P.2d 934 (Alaska, 1981), involved the question whether the State of Alaska could be held liable under the discretionary exemption of the State Tort Claims Act for alleged negligence in the design of a taxiway, i.e., design in such manner as to allow "black ice" to form causing the crash of a plane. In holding that the taxiway design was not protected by the discretionary exemption the Court stated:

The purpose of the discretionary function exception is to preserve the separation of powers inherent to our form of government by recognizing that it is the function of the state, and not the courts or private citizens, to govern. Essentially, it seeks to ensure that private citizens do not interfere with or inhibit the governing process by challenging through private tort actions basic governmental policy decisions. . . . It is well-settled, however, that not all decisions or acts of state employees fall within the exception. Rather, the exception applies, and immunity therefore attaches, only "[w]here there is room for policy judgment and decision. . . ." *Dalehite v. United States*, 346 U.S. 15, 36, 73 S.Ct. 956, 968, 97 L.Ed. 1427, 1441 (1953) (emphasis added). Under the "planning-operational" test adopted by this court, and applied by the superior court, decisions that rise to the level of planning or policy formulation will be considered discretionary acts which are immune from tort liability, whereas decisions that are merely operational in nature, thereby imple-



menting policy decisions, will not be considered discretionary and therefore will not be shielded from liability.... In other words, the key distinction is between basic policy formulation, which is immune, and the execution or implementation of that basic policy, which is not immune....

*A design decision which does not require evaluation of broad policy factors does not come within the discretionary function exception....*

*In summary, the state may be held liable for injuries which result from negligent designs. The issue, as always, is whether the design decision in question involved a basic policy formulation which, under separation of powers concepts, should be immune to judicial review in a tort action, or whether the design decision at issue was merely part of the implementation or execution of a basic policy decision, and therefore not immune.*

In the present case, the design decisions made in the taxiway plans by the state's engineers were operational decisions which merely implemented the basic policy formulation decision to build a taxiway suitable for use by wide-body jets such as the Boeing 747. Once the basic policy decision to build such a taxiway at Anchorage International Airport was made, the state was obligated to use due care to make certain that the taxiway met the standard of reasonable safety for its users. (Emphasis added.)

Thus the Court ruled that the design function can be broken down into planning and operational stages, and only that part of the design activity which involved policy formulation (i.e., the decision to build a taxiway suitable for wide-bodied jets such as the Boeing 747) was part of the protected planning stage of design. Once the decision was made to build such a taxiway the construction thereof must meet standards of reasonable care for the safety of users, and such duty was held to be part of the operational or unprotected phase of design.

In *Stewart v. State*, 92 Wash.2d 285, 597 P.2d 101 (1979), plaintiff and her husband were traveling through a snowstorm in the night hours when they entered upon an unlighted bridge, 1,600 ft in length, which crossed the Snohomish River in the State of Washington. Because of icy conditions their vehicle skidded, spun out of control, and came to a halt in such manner as to block the left lane and part of the middle lane of the three-lane highway carried by the bridge. Prior to the skid their vehicle had, because of the dangerous conditions, been proceeding at a rate of no more than 25 to 30 mph. Suddenly cars in all three lanes bore down on their disabled vehicle, and a multi-car collision ensued. As a result of the crash plaintiff's husband was thrown into the river below where his body remained undiscovered for a period of months. Plaintiff received injuries of such severity as to require the amputation of one of her limbs. Multiple law suits ensued, the only one with which we are concerned being an action brought by plaintiff against the State of Washington charging negligence in the design and lighting of the bridge. Judgment was entered against the plaintiff in the trial court on the ground that the discretionary exemption precluded judicial review of decision-making in respect to the design and lighting of the bridge.

On appeal the Supreme Court of Washington stated that four factors were to be taken into consideration in determining the applicability of

the discretionary exemption (these being the same as enumerated in *Evangelical United Brethren* (*supra*, p. 8)).

In holding that decisions in respect to the design and lighting of the bridge did not meet all of the requirements for immunity specified in the fourfold test, the Court stated:

*The decisions to build the freeway, to place it in this particular location so as to necessitate crossing the river, the number of lanes—these elements involve a basic governmental policy, program or objective. However, these are not the elements which are challenged by appellant. Rather, appellant argues that once those governmental decisions were made they had to be carried out without negligent design of the bridge or of the lighting system. Negligent design was not essential to the accomplishment of the policy, program or objective.*

The State argues that adoption of a design necessarily involves a judgmental choice. The ... test requires more. There was no showing by the State that it considered the risks and advantages of these particular designs, that they were consciously balanced against alternatives, taking into account safety, economics, adopted standards, recognized engineering practices and whatever else was appropriate. The issues arising from the evidence as to negligent design should have been submitted to the jury. (Emphasis added.)

Thus the Court ruled that, absent a clear showing that basic policy considerations were involved in the design of the bridge, matters pertaining to negligence in design were the proper subject of judicial cognizance and review.

*Andrus v. State*, 541 P.2d 1117 (Utah, 1975), was an action brought by property owners to recover for flooding caused by the construction of a new roadway. The highway in question was laid out to run on a descending grade, and at one point a "grade sag," or depression in the roadway, operated as a catch basin for runoff waters from higher elevations. A severe rainstorm took place prior to the completion of construction and the installation of curbing, which might have provided aid in water control. In addition, gratings had not been installed to connect with storm sewer laterals, and hydrostatic pressure blew the covers off manholes, allowing sewage waste, as well as accumulated rain water, to flood and seriously damage plaintiffs' property.

Suit was brought charging negligence in the design of the new highway, and the discretionary exemption of the Utah Tort Claims Act (which contained the usual language exempting discretionary activity "whether or not the discretion is abused") was asserted as a defense. In holding that the discretionary exemption of the Act did not extend to negligence in design, the Supreme Court of Utah stated:

The record supports the proposition that the State created a dangerous condition by its design of the highway project which allowed large quantities of rain water to accumulate in the basin, the banks of which eroded and washed away causing the water collected to be cascaded upon the properties of the plaintiffs and without taking proper steps to provide for proper and adequate drainage of the surplus water. The State by its design and specifications for the highway which was being constructed

under the supervision of the Highway Department resulted in diverting the water from former channels which had previously carried it to points beyond the plaintiffs' properties...

... The decision to build the highway and specifying its general location were discretionary functions, but the preparing of plans and specifications and the supervision of the manner in which the work was carried out cannot be labeled discretionary functions. (Emphasis added.)

Thus, the Court went so far as to limit the coverage of the discretionary exemption to the decision to build the new highway and the selection of its location, matters pertaining to design *including the drawing of plans and specifications* being excluded from the protection of the exemption.

Thus, the courts in the more recent cases have plainly and clearly rejected the argument that all design activities are discretionary in nature. In reaching this result the courts have squarely premised their holdings on the reasoning that only such design decisions as are based on broad *policy* considerations are entitled to the immunity contemplated by the discretionary function exception. Such reasoning is, of course, fully consistent with the cases previously set forth in this paper, holding that discretionary immunity only relates to decision-making involving broad policy considerations.

#### Construction

There is an absence of case law dealing squarely with the question whether construction, as such, constitutes a protected or unprotected activity. However, the applicable rules would appear plainly to be the same as those in respect to design. That is to say, if the activity is squarely based on policy considerations it will be exempt, but absent a showing that the activity grows directly out of such considerations, it will be treated as nonexempt. In any case of departure from an immunized plan or design, nonimmunization would appear clearly to follow.

#### Maintenance

Maintenance activities are generally classified as nondiscretionary, ministerial, or operational level activities. However, this is not for the reason that they are classifiable as "maintenance" activities, but rather for the reason that most maintenance activity is not based on policy decision-making, and for the further reason that once highway facilities are constructed, erected, or installed, discretion is said to be exhausted, and the nondiscretionary duty arises to keep the same in good working order.

That the mere labeling of activities as constituting "maintenance" functions does not serve to cast them in the ministerial or operational mold is illustrated by the decision in *Stevenson v. State Department of Transportation*, 290 Or. 3, 619 P.2d 247 (1980). This case involved an intersectional collision allegedly caused by the fact that a green traffic light showing on one of the two intersecting roads was also visible to drivers rounding a curve on the other of the intersecting roads—causing

confusion—and negligence was charged to the State in failing to shield the light once it was erected so as to render the same visible on only one of the intersecting roads. The Court declined to decide the case on the ground that the negligence charged involved a "maintenance" function necessarily ministerial in character, stating that in determining liability under the discretionary function exception "the inquiry is whether the function involves the exercise of . . . policy discretion." In holding that the complaint stated a good cause of action the Court posited its ruling on the finding that in failing to shield the light "there is nothing in the record to suggest that the responsible employees of the highway division made any policy decision of the kind we have described as the exercise of governmental discretion."

Although maintenance activities are thus to be treated in the same manner as design activities, and immunity made to depend on whether policy decision-making is involved, the great majority of the decisions involving maintenance activities fall into the category of activities conducted after protected discretionary decision-making has taken place, and are therefore readily classifiable as nondiscretionary, ministerial, or operational level activities.

Thus, in *State v. Abbott*, 498 P.2d 712 (Alaska, 1972), involving alleged negligence of the State in failing properly to maintain a highway during the wintertime, the Supreme Court of Alaska stated: "Once the initial policy determination is made to maintain the highway through the winter by salting, sanding and plowing it, the individual district engineer's decision as to *how* that decision should be carried out in terms of men and machinery is made at the operational level; it merely implements the basic policy decision. Once the basic decision to maintain the highway in a safe condition throughout the winter is reached, the state should not be given discretion to do so negligently. The decisions at issue in this case simply do not rise to the level of governmental policy decisions calling for judicial restraint. Under these circumstances the discretionary function exception has no proper application." (Emphasis by the Court.)

Other cases that involve the classification of maintenance activities as being operational in nature include the following.

*Commercial Carrier* (*supra*, p. 9) involved the failure to replace a downed or missing stop sign and the failure to repaint the obliterated word stop inscribed on the pavement before an intersection. In holding such omissions actionable the Court stressed that it was not dealing with a decision to omit the installation of any signing at the intersection, but rather with the failure to maintain in good working order signing that was already in place.

A similar fact situation was before the Supreme Court of Nevada in *Crucil v. Carson City*, 600 P.2d 216 (Nev., 1979). Action was brought against defendant Carson City charging negligence in failing to have replaced a missing stop sign at a street intersection. In holding that the discretionary function exception of the State Tort Liability Act (N.R.S. 41.032(2)) was inapplicable, the Court stated: "While the respondent city's initial decision to provide traffic control was a discretionary act



... once the decision to install the stop sign had been made and acted upon, the city's duty to maintain that sign became an operational one."

*Rodrigues v. State*, 52 Haw. 156, 472 P.2d 509 (1970), was an action to recover for flooding damage caused by a blocked drainage culvert. The Supreme Court of Hawaii ruled that the discretionary function exception to the State Tort Liability Act did not have reference to the upkeep and maintenance of a culvert once installed.

And in *Smith v. Godin*, 61 Ill.App.3d 480, 18 Ill. Dec. 754, 378 N.E.2d 218 (1978), an action to recover for alleged negligence in failing to maintain a stop sign at an intersection, the Court stated: "The case law is plain that once having elected to erect devices to guide, direct or illuminate traffic, a city then has a duty to maintain those devices in a condition conducive to the safe flow of traffic."

Thus, the case law appears to be clear that if a maintenance activity can be shown to be based on policy considerations it is entitled to immunity, but that in the vast majority of instances maintenance activity takes place subsequent to the exhaustion of decision-making based on policy, and hence such activity is generally classifiable as being conducted at the unprotected ministerial or operational level.

Attention is now turned from a consideration of the impact of the discretionary function exception on the overall or general functions of State highway departments (i.e., design, construction, and maintenance) to an examination of the applicability thereof to particular or specific functions of the departments. First for consideration is the applicability of the exception to decision-making in respect to the installation and placement of warning signs and signals.

#### Warning Signs and Signals

There appears to be a clean split of opinion on the question whether decision-making with respect to the installation and placement of warning signs and signals is a protected discretionary function or an unprotected operational level activity. The cases dealing with this question are hereinafter grouped according to whether the holding is one of immunity or nonimmunity.

#### Held Discretionary

Representative of cases taking the view that such decision-making falls within the discretionary function exception is *Department of Transportation v. Neilson*, 419 So.2d 1071 (Fla., 1982). The action in this case grew out of an intersectional collision, negligence being charged to the Florida Department of Transportation in failing to install adequate traffic control devices. Plaintiffs contended that the rule of liability announced in *Commercial Carrier* (*supra*, at 9) with respect to upkeep of existing traffic control devices was controlling, arguing that no valid distinction can be drawn between the failure to maintain an existing traffic control device and the failure to install adequate traffic control devices in the first instance.

In rejecting this argument and drawing such distinction, the Supreme Court of Florida stated: "[T]he issue to be decided in this case is whether

decisions concerning the installation of traffic control devices ... constitute omissions or negligent acts which subject governmental entities to liability. We answer the question in the negative, holding such activities ... are judgmental, planning-level functions.... With regard to the installation and placement of traffic control devices, we find the argument that such placement is exclusively the decision of traffic engineers and, as such, an operational-level function, to be without merit. Many municipalities and counties make these decisions, including even the installation of single traffic lights, within the ambit of their legislative function. Moreover, traffic control is strictly within the police power of the governmental entity. Questioning this function necessarily raises the issue of the government's proper use of its police power.... In our view, decisions relating to the installation of appropriate traffic control methods ... are discretionary decisions which implement the entity's police power and are judgmental, planning-level functions."

A Florida District Court reached the same result in *Harrison v. Escambia County School Board*, 419 So.2d 640 (Fla.App., 1st Dist., 1982), involving alleged negligence in failing to place warning signs before a school bus stop, the Court stating with respect thereto: "We accordingly decide ... that the decision to place or not to place traffic control or warning devices at a given school bus stop location involves policy making, planning or judgmental government functions, rather than operational."

Thus the Florida law appears to be clear that decision-making with respect to the installation and placement of warning signs and signals is a protected planning level activity. However, a different result has been reached in other cases.

#### Held Nondiscretionary

In the following cases decision-making with respect to the installation and placement of warning signs and signals was held to be an activity conducted at the unprotected operational level.

*Rogers v. State*, 51 Haw. 293, 459 P.2d 378 (1969), involved an intersectional collision, negligence being charged in respect to signing of the intersection. The State contended that decision-making with respect to the erection of signing and the painting of centerline striping was an activity protected by the discretionary function exception of the State Tort Liability Act. In rejecting this contention, the Court employed the planning/operational test and concluded that "such matters as the kinds of road signs to place and where to place them, and which center line stripings to repaint and when to repaint them, did not require evaluation of policies but involved implementation of decisions made in everyday operation of governmental affairs. Consequently, the circuit court did not err in holding that the State's negligence in this case did not come within the discretionary function exception."

A like result was reached in *State v. L'Anson*, 529 P.2d 188 (Alaska, 1974). This case involved an automobile collision occurring at a point where an access road entered a main highway, and negligence was charged to the State in failing to have erected signing warning of such road

juncture, and in failing to have painted no-passing striping on the main roadway at the locus of the accident. The State contended that the decision not to erect a warning sign or paint no-passing striping was protected by the discretionary function exception of the Alaska Tort Claims Act. In holding to the contrary the Court invoked the planning/operational test and ruled that the activities in question fell within the operational half of the dichotomy, stating: "In our view, functions of this nature do not involve broad basic policy decisions which come within the 'planning' category of decisions which are expressly entrusted to a coordinate branch of government. We are further persuaded that resolution of questions such as whether or not the state properly striped or marked a portion of highway as it relates to the state's duty of care to users of the highway presents facts that courts are equipped to evaluate within traditional judicial fact-finding and decision-making processes."

Thus the Court posited its holding on the conclusion that the judiciary is at least as well equipped as are coordinate branches of government to make determinations with respect to the need for or the sufficiency of signing at a given location on a particular highway, and hence that this is an area of decision-making in which the need for judicial restraint is not shown.

The decision in *Metier v. Cooper Transport Co., Inc.*, 378 N.W.2d 907 (Iowa, 1985), takes a similar view in respect to the propriety of judicial review by holding that although decision-making with respect to the erection of deer warning signs throughout the entire State of Iowa *might* be discretionary in nature, decision-making with respect to the erection of a deer warning sign at a *particular* location on the highways was not inappropriate to the traditional judicial fact-finding process, and hence did not fall within the ambit of the discretionary function exception of the Iowa Tort Claims Act.

A similar view was adopted by the Supreme Court of Nevada in *Foley v. City of Reno*, 680 P.2d 975 (Nev., 1984), wherein it was held that although the decision to construct a pedestrian crosswalk in the City of Reno *might* have been discretionary in nature, once that decision was made the courts were invested with authority to determine whether the City had been negligent in failing to erect warning signs adequate for the protection of pedestrians using the crosswalk, and hence the trial court was held to have committed error in ruling that the failure to provide adequate warning signs was an omission protected by the discretionary function exception of the Nevada Tort Claims Act.

Thus it is wholly apparent that the cases relating to the installation and placement of warning signs and signals have reached divergent results in respect to the applicability of the discretionary function exception to such activity.

#### Guardrails and Barriers

Much the same may be said of the cases relating to the installation of guardrails and barriers, that is, in some cases decision-making with respect to the erection of such safety devices has been held to be discre-

tionary in nature, whereas as in others it has been held to be nondiscretionary in character.

#### Held Discretionary

*Patrazza v. Commonwealth*, 398 Mass. 464, 497 N.E.2d 271 (1986), involved a fatal accident in which the driver of an automobile veered from the paved surface of a highway, and the car struck the blunt unburied end of a guardrail, which penetrated the vehicle and crushed the driver with a mortal stroke. The adduced evidence established that the Massachusetts Department of Transportation had two separate policies with respect to burying the ends of guardrails. The policy in respect to limited access highways was to bury the ends of guardrails, and the policy in respect to all other roads in the State road system was to leave the ends of guardrails unburied. It was clear that either choice presented danger to the motoring public, i.e., by leaving the ends of guardrails unburied spearing could occur, and by burying the ends of guardrails vaulting could take place, causing the possibility or likelihood of vehicle overturn. The accident occurred on an unlimited access highway and hence there was no question but that established policy had been followed. The complaint charged negligence in adopting a policy of not burying the ends of guardrails on unlimited access highways.

The discretionary function exception of the Massachusetts Tort Claims Act was patterned on the language of 28 U.S.C. § 2680(a). In holding that judicial review was precluded by the language of the exception the Supreme Judicial Court of Massachusetts stated: "The claim in this case is not that the department or its employees failed to follow the policy as adopted by the department. . . . At issue is the choice by the department to employ the policy of using unburied guardrail ends on unlimited access highways. The decision to adopt and implement that policy is precisely the kind of discretionary function which [the statute] was designed to protect."

*Friedman v. State*, 67 N.Y.2d 271, 502 N.Y.S.2d 669, 493 N.E.2d 893 (1986), involved consolidated appeals from three lower court decisions, the case with which we are concerned being an action brought by one Cataldo against the New York State Thruway Authority. It appeared that plaintiff Cataldo was traveling across the middle section of the Tappan Zee Bridge, which extends across the Hudson River for a distance of some 3 miles between Nyack and Tarrytown, when a car swerved from the opposite lane of travel and a collision took place which caused devastating injuries to the plaintiff. The action against the Thruway Authority charged negligence in failing to have constructed median barriers to separate the opposing lanes of two-way travel. The evidence disclosed that (as in *Patrazza (supra)*, p. 14)) the Authority was confronted with a choice between evils, studies having established that the absence of barriers on the bridge tended to cause cross-over accidents, but that the presence of barriers tended to cause rear-end collisions and multiple "pile-up" accidents. The facts further disclosed that a comprehensive 10-year review of the accident history of the bridge had been made shortly before plaintiff's accident took place, and that such review



recommended against the use of barriers on the middle portion of the bridge on which plaintiff was traveling (although recommending that barriers be used at the westerly end of the bridge). The Court of Appeals concluded that the Thruway Authority had fulfilled its obligation in the making of the 10-year review and recommending therein against the use of barriers on the middle section of the bridge, and that the facts and circumstances hence brought the case within the umbrage of the discretionary function exception (as previously announced in the case of *Weiss v. Fote*, *supra*, at 7).

*Industrial Indemnity Company v. State*, 669 P.2d 561 (Alaska, 1983), was a wrongful death action to recover for the demise of a driver killed when his automobile went off the road at an allegedly dangerous location which was not protected by the installation of a guardrail. Negligence was charged to the State in failing to have erected a guardrail at the site. The State asserted as a defense that the decision not to install a guardrail was the product of discretionary decision-making, and hence protected by the discretionary function exception of the Alaska Tort Claims Act. In upholding the State's position the Court recognized that for a decision to be discretionary it must relate to "planning or policy formulation." The policy consideration that was made the basis of the holding in this case was economic policy, the Court stating: "There is no dispute that the proposed Glenn Highway guardrail installations were cut back because of a lack of funding from the Department of Transportation. Decisions regarding the allocation of scarce resources are usually discretionary, and thus immune from judicial inquiry." It continued that "guardrails are expensive and a decision by the state to place guardrails along the Glenn Highway would necessarily affect the state's ability to provide other governmental services. We would be engaging in precisely the type of policy evaluation that the discretionary function exception is designed to foreclose if we were to inquire into the wisdom of the state's guardrail policy in this case."

Thus, out of the triumvirate of "social, economic, and political policy" considerations generally agreed to be the basis of discretionary immunity, the holding in this case was squarely based on economic considerations.

However, the decision in *State, Department of Transportation v. Vega*, 414 So.2d 559 (Fla.App., 3d Dist., 1982), was not tied to an identifiable policy consideration, the holding apparently resting on the conclusion that all decision-making with respect to the installation of guardrails is made at the planning level and is therefore discretionary in nature. This was an action to recover for personal injuries sustained when a vehicle on an expressway went out of control and plunged down an unguarded embankment onto the porch of plaintiff's home, pinning her under the wreckage. She was joined in suit by her husband for his derivative claim. In ruling in favor of the Department of Transportation the Court said: "DOT correctly contends that it was immune from liability for the injuries to the Vegas. The Department's decision as to whether to erect a guardrail as a barrier on the expressway was a planning level decision. . . . The plans and designs for the expressway did not include the installation of a guardrail to either insulate or act as a barrier

between the highway and the adjacent property. We have recognized that the placement or nonplacement of traffic control signals and pedestrian control signals is a discretionary planning level function. . . . DOT enjoyed sovereign immunity in its decision not to erect a guardrail. . . ."

A similar result was reached in *Payne v. Palm Beach County*, 395 So.2d 1267 (Fla.App., 4th Dist., 1981). This was a wrongful death action in which an automobile overran a "T" intersection and plunged into a canal beyond resulting in the death by drowning of two passengers. Negligence was alleged, *inter alia*, in failing to extend the pavement beyond the intersection and in failing to erect a guardrail before the dangerous water. In ruling in favor of the State the Court said: "Whether to extend a road or build a guard rail are classic examples of the type of planning level decisions which remain in the protected sphere of sovereign immunity."

See the further Florida decision in *Hyde v. Florida Department of Transportation*, 452 So.2d 1109 (Fla.App., 2d Dist., 1984), also involving death by drowning of a passenger in an automobile that left the highway and submerged in an adjacent body of water not guarded by a barrier, wherein the Court held that the decision not to erect a barrier or guardrail to protect against the nearby water was an immunized discretionary decision.

See also *Cobb v. Waddington*, 154 N.J.Super 11, 380 A.2d 1145 (1977), wherein it was held that statutory discretionary immunity precluded judicial review of decision-making with respect to the type of barricade used to channelize traffic during construction work.

And see *Stanford v. State Department of Highways and Public Transportation*, 635 S.W.2d 581 (Tex.App., 1982), where it was contended that the failure to erect guardrails on an overpass constituted the breach of a nondiscretionary maintenance duty, and the Court, in rejecting the argument, ruled that decision-making with respect to the erection of guardrails was immunized by the discretionary function exception of the Texas Tort Claims Act.

#### *Held Nondiscretionary*

In the following cases a different result was reached, and decision-making with respect to the installation and erection of guardrails and barriers was held to be nondiscretionary in nature.

In *Butler v. State*, 336 N.W.2d 416 (Iowa, 1983), plaintiffs were eight members of a family traveling in a mobile home on I-80, who were injured, with varying degrees of severity, when because of high winds their mobile home was forced onto the shoulder of the road, where it struck the end of a guardrail which penetrated their vehicle. Suit was instituted against the State of Iowa charging negligence in the design and placement of the guardrail. The State defended on the ground that the decisions with respect thereto were immunized by the provisions of the Iowa Tort Claims Act, which, in language paralleling the Federal Tort Claims Act, excluded from waiver of governmental immunity claims based upon "the exercise or performance or the failure to exercise or perform a discretionary

function or duty on the part of a state agency or an employee of the state, whether or not the discretion be abused."

In holding that the State's decisions in respect to the design and placement of the guardrail were not immunized under the above quoted provisions of the Iowa Tort Claims Act, the Court took the position that discretion was exhausted with the decision to build I-80, and that all subsequent decisions were made at the operational level in implementation of that basic policy decision. Decisions with respect to the guardrail in question were characterized as being "necessary to implement the policy decision to construct I-80..." The Court upheld the trial court's action in hearing the case on ordinary negligence grounds, and sustained its finding that on the facts there had been no negligence in the design, placement, maintenance and upkeep of the guardrail. Expressly stating that it adopted the planning/operational dichotomy announced in *Dal-ehite*, the Court separated all decisions with respect to the guardrail from the planning sphere of activity and cast them in the operational mold.

A similar result was reached in *State v. Webster*, 88 Nev. 690, 504 P.2d 1316 (1972), which, however, involved the protective device of a cattle guard rather than a guardrail. In this case several horses wandered from a pasture contiguous with a frontage road, and escaped therefrom, through an unguarded entrance, onto the paved surface of a newly constructed limited access highway. During the hours of nighttime the automobile being operated by plaintiff's decedent struck one of these horses and the driver suffered death as a result of the injuries sustained in the collision. Suit was brought on the theory of negligence on the part of the State in failing to have constructed a cattle guard at the entrance to the controlled access highway. In affirming the action of the lower court (sitting without a jury), in rendering judgment in favor of the plaintiff, the Supreme Court of Nevada stated:

The State claims total immunity from suit, on the ground that the failure to install a cattle guard at the point where U.S. Highway 395 joined the controlled-access freeway was an act of discretion for which the State was exempted from liability. The citizens of the State of Nevada, acting through the Legislature, have conditionally waived sovereign immunity, NRS 41.031. Such immunity, however, was not waived if the act complained of was a discretionary function of government.... Here the governmental function to be considered was the construction of a controlled-access freeway. It was not mandatory upon the State to construct the freeway.... Whether or not, for the convenience of the traveling public, the State would construct a controlled-access freeway... was an exercise of discretion based upon policy. Its decision to do so was a discretionary act. Once the decision was made to construct a controlled-access freeway... the State was obligated to use due care to make certain that the freeway met the standard of reasonable safety for the traveling public. This is the type of operational function of government not exempt from liability....

... To accept the State's position would effectively restore sovereign immunity. (Emphasis added.)

Thus, the Court took the position that discretion was exhausted with the decision to construct the controlled access highway, and that decisions subsequent thereto fell within the operational sphere of activity.

In *Johnson v. County of Nicollet*, 387 N.W.2d 209 (Minn.App., 1986), plaintiffs, husband and wife, were traveling in an automobile along a roadway made slippery by reason of snowfall. Their vehicle skidded off the paved surface and ran down an embankment crashing into a tree. Suit was brought against defendant County alleging negligence in failing to have erected a guardrail at the scene of the accident. Judgment was rendered in the lower court in favor of the County on the ground that the administrative determination not to erect a guardrail was an immunized discretionary decision.

The Court of Appeals reversed. In so doing it relied on *Butler v. State* (*supra*, p. 15), stating that "decisions made concerning the design and placement of [a] guardrail are not discretionary." However, in this case the Court extended the limits of discretionary activity beyond the decision to construct the highway (as in *Butler*, and in *State v. Webster* (*supra*, p. 16), terminating the same with the "policy decision to permit public use of the road." Decisions beyond this point, including the decision not to erect a guardrail at a particular location, were held to fall within the unprotected operational field of activity, rather than the protected planning stage, the Court ruling that the "county is not entitled to discretionary act immunity in this action...."

*Carroll v. State of Utah By and Through its Road Commission*, 27 Utah 2d 384, 496 P.2d 888 (1972), was an action to recover for injuries sustained in a motor vehicle accident allegedly due to the negligence of the State Road Commission in using an earthen berm as a barrier to block off an abandoned road. It appeared that on the date of the accident the earthen berm had (for unaccounted reasons) disappeared, causing the operator of the injured plaintiffs' vehicle to drive into a wash in the roadway. On appeal the Road Commission urged that the trial court committed error when it refused to rule, as a matter of law, that the Commission was immune from liability because the alleged negligence arose out of the exercise of a discretionary function. In upholding the action of the trial court, the Supreme Court of Utah stated: "In the instant action, the decision of the road supervisor to use berms as the sole means of protection for the unwary traveler was not a basic policy decision essential to the realization or accomplishment of some basic governmental policy, program, or objective. His decision did not require the exercise of basic policy evaluation, judgment, and expertise on the part of the Road Commission. His determination may properly be characterized as one at the operational level of decision-making, and the trial court did not err in its ruling that the discretionary exception of Section 63-30-10(1) of the Governmental Immunity Act was not a defense to the alleged acts of negligence."

In *State v. Magnuson*, 488 N.E.2d 743 (Ind.App., 1st Dist., 1986), an action to recover for injuries suffered when plaintiff's automobile struck an unprotected culvert headwall extending 1.3 ft into the traveled portion of the highway, the Court held that the decision not to erect a



guardrail to protect against the protruding obstruction was a decision made at the operational level, and hence was not protected by the discretionary function exception of the Indiana Tort Claims Act.

Thus it is seen that in the cases dealing with the question whether decision-making in respect to the installation of guardrails and barriers is a discretionary or nondiscretionary activity, opposing results have been reached by the courts.

#### Traffic Lights

Next for consideration are cases dealing with the installation of electronically controlled traffic lights.

The facts in *Weiss v. Fote* have already been set forth (see p. 7, *supra*). The New York Court of Appeals found in this case that the Board of Safety of the City of Buffalo had conducted extensive studies of traffic conditions at the intersection where the traffic light in question was located, and had, on the basis of these studies, determined that 4 sec represented a safe interval to allow for the clearance of traffic. In holding that this determination of the Board constituted a discretionary decision immune to judicial review, the Court stated that "there is nothing to suggest that its decision was either arbitrary or unreasonable... [A]bsent some indication that due care was not exercised in the preparation of the design or that no reasonable official could have adopted it—and there is no indication of either here—we perceive no basis for preferring the jury verdict, as to the reasonableness of the 'clearance interval', to that of the legally authorized body which made the determination in the first instance."

*Davis by Davis v. City of Cleveland*, 709 S.W.2d 613 (Tenn.App., 1986), was an action to recover for injuries suffered in an intersectional collision allegedly caused by the negligence of the City of Cleveland in setting the yellow caution light in a traffic signal at such short interval as not to allow sufficient time for the clearance of traffic. The City defended on the ground that the decision as to the length of the clearance interval was rendered immune by T.C.A. 29-20-205(1), the discretionary function exception of the Tennessee Governmental Tort Liability Act. In sustaining the City's position the Court said: "Since the record in this case clearly shows that the timing sequence for the yellow caution interval on this particular traffic light was set within the range prescribed by the state manual on traffic devices, we think that both the original setting of the yellow caution interval and any failure to reset such timing sequence in this instance represented a judgment call by the person responsible for such setting in the exercise of his professional judgment, and is thus a discretionary act within the meaning of T.C.A. 29-20-205(1) for which immunity has not been removed by the legislature."

In *Bjorquist v. City of Robbinsdale*, 352 N.W.2d 817 (Minn.App., 1984), it was charged by plaintiff bicyclist, injured in an intersectional accident, that the timing of the clearance interval between change of traffic lights from red to green was unduly brief, and that the improper timing of the light change was the proximate cause of his being struck down by an automobile at the intersection. Plaintiff contended that the

decision as to the length of the clearance interval was made at the operational level of decision-making, and hence was not protected by the discretionary function exception (Minn.Stat., 466.02) of the State statute waiving tort immunity for municipalities. In rejecting this contention the Court based its decision squarely on the holding of the New York Court of Appeals in *Weiss v. Fote* (*supra*, p. 7), and ruled that the determination as to the length of the clearance interval was a protected discretionary decision.

The question presented in *Wainscott v. State*, 642 P.2d 1355 (Alaska, 1982), did not involve the timing of traffic lights, the issue instead being whether the decision to use a flashing yellow light and a flashing red light as traffic control devices at an intersection instead of a mechanism operating in the usual red, yellow, and green change of light sequence, was an operational level decision open to challenge, or a decision made at the planning level and hence protected by the discretionary function exception of the Alaska Tort Claims Act. In opting for the latter the Supreme Court of Alaska said: "If we were to assess the propriety of this decision, we would be engaging in just the type of judicial review that the discretionary function exception seeks to prevent. The selection of a traffic control device for the ... intersection was not a purely ministerial decision implementing a preexisting policy, but rather a decision that called for policy judgment and the exercise of discretion. In opting to retain the red and yellow flashers, the department considered the long term development plan for the New Seward Highway, the disruptive effect that a sequential signal might have on traffic flow, and the need to address more pressing safety problems elsewhere. We therefore hold that the department's selection of the traffic control mechanism came within the ambit of the discretionary function exception, entitling the state to immunity under A.S. 09.50.250."

#### Upgrading of Highways

Next for consideration are cases dealing with the upgrading of highways and decision-making with respect to bringing highways to a current state-of-the-art engineering status.

The action in *District of Columbia v. Pace*, 498 A.2d 226 (D.C.App., 1985), grew out of an automobile accident, negligence being charged to the District of Columbia in failing to improve or upgrade to a state-of-the-art status a portion of the Southeast Freeway running through the District. In holding that the failure to upgrade or improve the roadway was protected by discretionary immunity, the Court stated: "The District contends that decisions concerning ... freeway improvements are discretionary in nature. We agree. To hold otherwise would be effectively to impose a legal duty on the District to have 'state-of-the-art' streets. Neither courts nor juries can dictate ad hoc policy in this aspect of government. The implementation of evolving engineering standards is costly, requiring the allocation of limited governmental funds through a system of priorities. Imposing a duty to implement the latest engineering standards would create a prohibitive burden on the District and its taxpayers. Further, long-term planning in this area is essential but

would be thwarted entirely if it became the frequent subject of litigation. The District's decision on whether to establish a plan of improvement is within the area protected by sovereign immunity."

The same result was reached in *Julius Rothschild & Company v. State*, 655 P.2d 877 (Haw., 1982). This case involved a bridge designed to accommodate the passage of high waters beneath it that would be generated by a storm of such intensity as to occur only once in 25 years. A storm of greater magnitude took place and the bridge acted as a dam to back up flood waters which inundated plaintiffs' properties. Plaintiffs brought suit to recover for the flood damage and produced evidence to show that the State had made plans for the improvement of the flood resistant capacities of the bridge, but that such plans had never been implemented. In holding that the failure to upgrade the bridge did not constitute actionable misconduct, the Court said: "We are not here dealing with a project of relatively minor dimensions of importance. It does not require an engineer to appreciate the fact that not only the bridge itself would be affected. What the plaintiffs-appellants propose is the costly reconstruction or replacement of a two-span permanent concrete structure which is presently an integrated part of a heavily-travelled highway. Whether such a project should be authorized and implemented is addressed to the discretion not only of the State administration but also of the State legislature. It would require a weighing of priorities at the higher levels of government, and would surely entail evaluations based on financial, political, and economic considerations. The Governor, for example, must decide its order of priority. The legislature must decide whether to fund the project. These would be policy decisions immune from judicial review."

A similar result was reached in *Perez v. Department of Transportation*, 435 So.2d 830 (Fla., 1983), wherein it was alleged, *inter alia*, that an automobile accident was caused by the failure to upgrade and improve a bridge, and the Supreme Court of Florida, in holding that the decision not to upgrade the bridge was a protected discretionary decision, stated: "We agree with the holding of the trial court and the district court that . . . the failure to upgrade and improve the bridge arise at the judgmental, planning-level of government and are immune from suit. . . . [B]oth the basic design of a roadway and decisions concerning whether or not to upgrade and improve a roadway are judgmental, planning-level functions."

#### Speed Limits

It has been held that the determination by the State of maximum safe driving speed limits and the posting of a sign designating such speed limits are activities conducted at the protected planning level and are hence immune to judicial review.

*Kolitch v. Lindedahl*, 100 N.J. 485, 497 A.2d 183 (1985), involved the question whether the State could be held liable for posting a speed limit alleged to be excessive and inconsistent with safe driving on a particularly dangerous portion of highway.

The instant suit was heard on the appeal of consolidated wrongful

death actions growing out of a nighttime automobile collision between two vehicles on a segment of road known as a "vertical sag curve." The Supreme Court of New Jersey defined such term as meaning "a design in which, as applied to a roadway, a downgrade is followed by an upgrade, and the road surface between the two itself contains a curve along the horizontal plane." Such inherently dangerous condition was alleged to have been complicated by obscuring foliage at the scene of the accident and poor lighting during the nighttime hours. The posted speed limit for the vertical sag curve was 50 mph.

Suit was brought under a New Jersey statute providing for liability of public entities for maintaining their properties in a hazardous condition. The State asserted as a defense the discretionary function exception of the New Jersey State Tort Claims Act. Expert testimony was offered at trial to the effect that any speed limit greater than 30 mph at the scene of the accident was excessive and unsafe. The argument was made that the posted speed limit of 50 mph was tantamount to active deception of the traveling public, and, as such, might have directly contributed to the fatal accident.

In ruling for the State the Court applied the planning/operational test and concluded that the posting of the speed limit was a planning level decision protected by the discretionary function exception of the State Tort Claims Act.

*Ferla v. Metropolitan Dade County*, 374 So.2d 64 (Fla.App., 3d Dist., 1979), involved a head-on collision allegedly due to the fact that one of the vehicles involved in the accident became suddenly airborne upon striking a median strip or road divider and traversed the roadway into the path of plaintiffs' oncoming car. Negligence was charged to defendant County in having designed the median strip or divider in such manner as to bring about the airborne propulsion effect, and in failing to lower the speed limits on the roadway in order to protect against this condition. The Court ruled that the complaint stated a good cause of action in respect to liability for design defect, but reached a different conclusion with respect to lowering the speed limit. It stated: "We have no doubt whatever that an opposite conclusion is required as to the claim that the county set the speed limit on the causeway too high. Such a determination is obviously part of the 'planning' function of government which cannot be made the basis of tort liability."

#### Snow and Ice Removal

There is authority to the effect that although the decision whether or not to remove snow and ice from the highways may be a protected discretionary decision, once the determination is made to go forward with such services the implementation thereof is carried out at the unprotected operational level.

*Rochinsky v. State*, 214 N.J. Super. 525, 520 A.2d 766 (1986), involved the construction of the discretionary function exception of the New Jersey Tort Claims Act as it applied to snow removal, the Court stating that the issue before it was "whether a public entity has absolute immunity as to actions against it for negligent snow removal." The qualified answer given by the Court was that "the [Tort Claims] Act continued



absolute immunity for snow removal only as to the high-level policy decision making . . ." and ruled that "[o]nce the public entity decides to exercise that . . . policy decision in favor of snow removal . . . the snow removal undertaking becomes operational or ministerial and does not enjoy absolute immunity associated with a . . . planning decision."

The same result was reached in *State v. Abbott* (*supra*, p. 12), wherein the Supreme Court of Alaska ruled that once the State made the discretionary decision to go forward with winter maintenance of the Seward Highway, the operational duty arose to exercise due care in snow and ice removal operations.

#### Dust Control

*Freeman v. State*, 705 P.2d 918 (Alaska, 1985), presented the question whether the decision of the Alaska Department of Transportation and Public Facilities not to provide dust control procedures for the Dalton Highway was protected by the discretionary function exception of the State Tort Claims Act. The highway in question was a 374-mile dirt and gravel road running from the Yukon River Bridge to Prudhoe Bay. The Department considered the use of calcium chloride, and other alternatives, to minimize the dust hazard on this long stretch of roadway, but decided against it. The action in this case arose out of a rear-end collision allegedly caused by the inability of the operator of the offending vehicle to see through heavy clouds of dust. In holding that the decision not to provide dust control procedures was immunized by the exception, the Court said that the decision appeared "to be one involving such basic policy factors as the cost of such a program, alternative uses for the money that would be needed for such a program, and the physical and environmental detriments which would be inherent in the several dust control alternatives under consideration. The decision seems to have been clearly on the planning side of the sometimes vague and wavering line which separates planning from operational functions in our state government. Therefore, State is immune from suit under the discretionary function exception."

#### Provisions of Driver's Manual

Decisions as to what matters to include in a State Driver's Manual have been held to be immune to judicial review.

*Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn.App., 1984), involved a head-on collision between two motor vehicles proceeding in opposite directions on a three-lane highway, the two westbound lanes of travel being separated from the single eastbound lane by a double yellow line. Negligence was charged to the State, *inter alia*, in failing adequately to explain in the Minnesota Driver's Manual the meaning of a double yellow line. Immunity was asserted by the State on the ground of the discretionary exemption contained in the State Tort Claims Act, and the Court ruled that the determination of the State as to what to include in and what to exclude from the provisions of the Driver's Manual was a protected discretionary decision within the meaning of the Tort Claims Act.

It was previously indicated in this paper that no cases have been found

which deal with the application of the exception to certain garden variety activities such as the repair of potholes, removal of obstructions, or other like ordinary, everyday activities. However, cases have been found dealing with the question of the personal liability of highway department officers and employees in connection with certain of these activities. For example, it has been held that decisions by public officers with respect to the repair of potholes are discretionary in nature, and hence such officers are not liable for the failure to repair a pothole.<sup>6</sup> It has also been held that decision-making with respect to the removal of obstructions is a discretionary and hence protected activity.<sup>7</sup> However, these decisions were arrived at by application of the common law rule of immunity of public officers and employees for acts discretionary in nature. They did not involve the interpretation of the statutory discretionary function exception.

*Quaere* whether the doctrine of these cases yields instruction with respect to the operation of the statutory exception. It would appear to be clear that in the formulation of social policy covering the distribution of risk for tortious conduct by government employees, that different policy considerations obtain where the State is to be held accountable, and the burden of risk thereby distributed among the public at large, and the situation where remedial action is confined to accountability on the basis of personal liability of individuals.

This paper now turns to a consideration of those rules that have the operative effect of broadly denying applicability of the discretionary function exception. The first of these relates to nonfeasance, or the situation where the evidence fails to establish that any kind of decision—discretionary or nondiscretionary—was actually made.

#### Effect of Absence of Decision-Making

The rule is now clearly established that in the construction of waiver of immunity statutes liability is deemed to be the rule and nonliability the exception.<sup>8</sup> Hence the burden rests on the State to produce facts establishing the applicability of the exception. It follows that in a situation where the State fails to introduce evidence showing that a conscious decision was in fact made, the State will be deemed to have failed to carry the burden of proof and immunity will be denied.

Thus, it was stated by the Supreme Court of California in *Johnson v. State* (*supra*, p. 8), that: "Immunity for 'discretionary' activities serves no purpose except to assure that the courts refuse to pass judgment on policy decisions in the province of coordinate branches of government. Accordingly, to be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place. The fact that an employee normally engages in 'discretionary activity' is irrelevant if, in a given case, the employee did not render a considered decision."

*Little v. Wimmer*, 303 Or. 580, 739 P.2d 564 (1987), was an action involving an intersectional collision in which negligence was charged to the State in having failed to make an allegedly dangerous intersection safe by means of warning signs. The State contended that under the terms of the Oregon discretionary function or duty exception (O.R.S.

30.265(3)(c)) the State was immune from liability "because the signing of the roadway was a discretionary function." The Court rejected this contention on the ground that no evidence was introduced to show that any conscious decision had ever been made in respect to the matter of signing the intersection. It stated that the burden was on the State to establish immunity, and pointed out that the State had acknowledged that the facts reflected a "continuing non-decision" in respect to the erection of warning signs. In holding that such "non-decision" precluded the application of the discretionary function exception the Court stated: "If it is a continuing *non-decision* which is in issue, then clearly the state has not met its burden to establish its immunity. In the absence of evidence that the decision was made as a policy judgment by a person or body with governmental discretion, the decision is not immune from liability." (Emphasis by the Court.)

A like result was reached in *Levin v. State*, 146 Cal.App.3d 410, 194 Cal.Rptr. 223 (1983), involving a wrongful death action wherein the State was charged with negligence in having failed to erect a guardrail at an allegedly dangerous location. Immunity was denied on the ground that the evidence failed to establish that anyone in the California DOT with discretionary authority ever considered the need for a guardrail and made a conscious decision not to erect such safety device at the particular location, stating that: "The defense does not exist to immunize decisions that have not been made."

The rule announced in these cases would appear to be plainly correct, i.e., that in the absence of a showing that someone clothed with authority to make a discretionary decision actually made a decision involving policy judgment or choice, the discretionary function exception can have no application.

#### Effect of Dangerous Conditions

Attention is now directed to a rule that, perhaps more than any other, is determinative of the question whether or not the discretionary function exception applies to a given set of facts. This is the rule, widely adopted and applied, that where the State has notice of a dangerous condition, discretion is at an end and the operational duty arises to correct the dangerous condition, or give adequate and sufficient notice thereof to the traveling public. At the outset of discussion of the cases announcing this rule attention is invited to the axiomatic principle that where a dangerous condition is not of the State's own making, it must have actual or constructive notice thereof and a reasonable opportunity to take remedial action with respect thereto, but where the dangerous condition is of the State's own making, notice is not required."

*City of St. Petersburg v. Collom*, 419 So.2d 1082 (Fla., 1982), involved two consolidated cases, both brought against the City of St. Petersburg, the one styled on appeal *City of St. Petersburg v. Collom* and the other entitled *City of St. Petersburg v. Matthews*. *Collom* was a wrongful death action wherein the complaint alleged that plaintiff's wife and daughter, while walking together during a rainstorm, stepped into a sewer drainage ditch located on a City drainage easement where they

were propelled by suction into a pipe and drowned. Negligence was charged to defendant City in failing to warn of a physical condition that would, during heavy rainfall, permit human beings to be dragged into a sewer system and drowned. In *Matthews* a 20-month old child fell into a water-filled concrete encasement maintained by the City as part of a drainage system, and suffered death by drowning. Negligence was charged to the City in failing to erect a fence, guardrail, or barrier around the encasement to protect against the obviously dangerous condition. In both actions the discretionary function exception of the Florida Tort Claims Act was asserted by defendant City of St. Petersburg as a defense. In holding that the exception was not applicable in either case the Supreme Court of Florida stated:

We find that a governmental entity may not create a known hazard or trap and then claim immunity from suit for injuries resulting from that hazard on the grounds that it arose from a judgmental, planning-level decision. When such a condition is knowingly created by a governmental entity, then it reasonably follows that the governmental entity has the responsibility to protect the public from that condition, and the failure to so protect cannot logically be labeled a judgmental, planning-level decision. We find it unreasonable to presume that a governmental entity, as a matter of policy in making a judgmental, planning-level decision, would knowingly create a trap or a dangerous condition and intentionally fail to warn or protect the users of that improvement from the risk. In our opinion, it is only logical and reasonable to treat the failure to warn or correct a known danger created by government as negligence at the operational level.

By way of illustration the Court continued that "if a governmental entity plans a road with a sharp curve which cannot be negotiated by an automobile traveling more than twenty-five miles per hour, the entity cannot be liable for building the road because the decision to do so is at the judgmental, planning level. If, however, the entity knows when it builds the road that automobiles cannot negotiate the curve at more than twenty-five miles per hour, then an operational-level duty arises to warn motorists of the hazard."

The holding of the Court was expressed in the language as follows:

We hold that when a governmental entity creates a *known* dangerous condition, which is not readily apparent to persons who could be injured by the condition, a duty at the operational-level arises to warn the public, or protect the public from, the known danger. The failure to fulfill this operational-level duty is, therefore, a basis for an action against the governmental entity. (Emphasis by the Court.)

The holding of the Supreme Court of Florida in *Collom* that the duty to protect against a known dangerous condition arises at the unprotected operational level, was reaffirmed by the same Court in the later decisions of *Perez v. Department of Transportation*, 435 So.2d 830 (Fla., 1983); *Department of Transportation v. Webb*, 438 So.2d 780 (Fla., 1983); and *Palm Beach County Board of County Commissioners v. Salas*, 511 So.2d 544 (Fla., 1987). Such rule has been followed and applied by the lower Florida courts, in cases holding that design immunity does not



extend to fact situations involving known dangerous conditions. See *Greene v. State, Department of Transportation*, 465 So.2d 560 (Fla.App., 1st Dist., 1985); *State Department of Transportation v. Brown*, 497 So.2d 678 (Fla.App., 4th Dist., 1986); and *Clarke v. Florida Department of Transportation*, 506 So.2d 24 (Fla.App., 1st Dist., 1987).

Thus the Florida law appears to be clear that discretionary immunity cannot be invoked to protect the State against liability in a fact situation that reflects the existence of a known dangerous condition.

Similar views with respect to the exclusion of discretionary immunity in the case of known dangerous conditions have been adopted and expressed by courts of last resort in other jurisdictions.

*Gavica v. Hanson*, 101 Idaho 58, 608 P.2d 861 (1980), was a wrongful death action brought to recover for the demise of decedents who were killed in a rear-end vehicle collision allegedly caused by the presence of a thick haze or smog on the highway which seriously impaired visibility. The haze or smog had been an infrequent but continuing condition for a number of years and was produced by a combination of local atmospheric conditions and emissions from nearby industrial plants. Negligence was charged to the State of Idaho in failing to have erected signing warning motorists of this condition. The discretionary function exception of the Idaho Tort Claims Act (I.C. 6-904(1)) was interposed as a defense. In holding the statute inapplicable in the case of a known dangerous condition the Court said:

It is the contention of the respondent State of Idaho that the State's decision not to place signs in advance of this particular area of the highway which would warn motorists that they were approaching a haze area was a discretionary decision and thus the State continued to be immune from liability.

If a private person or business negligently allowed a dangerous condition to exist in a stairway or elevator and thereby caused injury, we would find the breach of a duty. No less so should we find a breach of a duty on the part of the state or a county which negligently maintained a dangerous condition on a stairway or elevator of a statehouse, courthouse, or other government operated building. We see no distinction between those situations and the negligent maintenance of a known dangerous condition of a highway, owned, operated and maintained by the State and upon which the public is invited to travel... Hence, we hold that the State's alleged negligence is not immunized by the "discretionary function or duty" exception to governmental liability found in I.C. Sec. 6-904(1).

The same result was reached in *McClure v. Nampa Highway District*, 102 Idaho 197, 628 P.2d 228 (1981), wherein it was held that the statutory discretionary function exception did not apply to a fact situation involving alleged negligence of the State in failing to post a sign warning of the known dangerous condition created by an abrupt curve in the roadway. And in *Liefeld v. Johnson*, 104 Idaho 357, 659 P.2d 111 (1983), involving alleged negligence in failing to post signing warning that a bridge was 2 ft more narrow than the roadway approaches thereto, the Court, in ruling that the discretionary function exception did not

apply, said that: "*McClure and Gavica* make it clear that the State is not immunized from liability when with respect to a public highway, the State maintains a known dangerous condition on the highway and fails to properly warn motorists of such a condition."

As examples of cases in other jurisdictions announcing and applying the rule that the discretionary function exception of the State Tort Claims Act does not have application to a fact situation involving the presence of known dangerous conditions see: *Carlson v. State*, 598 P.2d 969 (Alaska, 1979); *Peavler v. Board of Commissioners of Monroe County*, 492 N.E.2d 1086 (Ind.App., 1st Dist., 1986); and *Shuttleworth v. Conti Construction Co., Inc.*, 193 N.J. Super. 469, 475 A.2d 48 (1984).

Thus, the foregoing cases make clear the rule that planning level activity ceases and operational level activity begins when the State has actual or constructive notice of a dangerous condition.

This concludes the review of representative cases illustrating the application of the discretionary function exception to various activities of State highway departments. There follows next a summary of the rules announced in these cases, and such editorial comment by the writer of this paper in respect thereto as is deemed pertinent and permissible.

#### SUMMARY AND COMMENT

There is broad agreement in the cases, both at the Federal and State levels, as to the purpose and meaning of the discretionary function exception as it relates to the *entirety* of governmental activities. This consensus can be expressed in terms of the following:

1. A semantic approach to the distinction between discretionary and ministerial activities is to be rejected because almost all human activity involves the exercise of judgment, choice, or discretion.

2. A proper approach to ascertainment of the purpose and meaning of the exception will be centered on the reasons that lie behind the exception. These reasons are: (a) to ensure the constitutionally required separation of powers; and (b) to ensure that the judiciary will exercise restraint in undertaking review of decision-making that has been entrusted to a coordinate branch of government. The courts are enjoined by the exception from "second-guessing" the deliberations of a coordinate branch of government in respect to matters that are peculiarly within their province.

3. The matters that are peculiarly within their province are those that relate to broad policy decision-making. Broad policy decision-making is concerned with the formulation of *social, economic, and political* policy.

4. The planning side of the planning/operational dichotomy hence relates to matters of social, economic, and political policy formulation, whereas the operational side relates to implementation or execution thereof.

Although there is broad consensus with respect to the foregoing rules, there is less than a broad consensus in the application thereof to the traditional activities of State highway departments.

While a fair amount of agreement exists in respect to the capital functions of design, construction, and maintenance, the consensus breaks down in the application of the exception to particular activities, such as the installation of warning signs and signals, and guardrails and barriers. Here it is seen that opposing results have been reached, some cases taking the view that decision-making with respect to the installation of these safety devices is within the ambit of the exception, and others adopting the view that it is not within the umbrage thereof. It has also been seen that some cases take the position that the exercise of discretion is exhausted with the decision to build the highway, and hence all subsequent activities are operational in nature, and others reject this view, holding that discretion exists with respect to subsequent activities, such as the upgrading of highways, setting of speed limits, etc.

However, the most surprising aspect of the application of the discretionary function exception to highway activities lies elsewhere. It is the conclusion of this writer that although it is basic to the concept of discretionary immunity that tort principles *not* be applied in the determination thereof, many of the cases are in fact decided by the application of tort principles. Although this fact is widely ignored by the courts, it has not escaped the attention of eminent scholarship.

Thus, it is stated in PROSSER AND KEETON ON TORTS, at Section 131, that: "[C]ourts have confused the issue of duty and negligence on the one hand with the issue of the discretionary immunity on the other. It seems fairly clear . . . that courts have decided negligence or duty issues under the guise of 'discretion' . . . In practise the calculated risk involved in conscious decision-making often amounts to a case of no negligence because the risk taken, though real enough, is a reasonable one. . . . For this reason analysis of the cases in terms of discretionary or basic policy immunity may obscure rather than reveal the issue. Thus a program in which prisoners are left with minimum security, or placed on work-release, or paroled, is obviously a program fraught with danger to innocent citizens, but it is not necessarily negligent to adopt such a program, and the state protected from liability in such cases on the stated ground that there is an immunity may in fact be protected on the ground that it is not at fault."

It is submitted that this observation is indisputably correct, and that it has full or even particular application to cases involving the application of the exception to highway activities.

As an example of cases decided on the application of negligence principles, but under guise or cloak of discretionary immunity, see the cases involving traffic lights (set forth on p. 17, et seq., *supra*). In these cases the courts found that the length of the clearance interval, as determined by the administrative branch of government (4 sec in *Weiss v. Fote*), constituted a reasonable period of time, and hence declined to interfere with such determination. Suppose, however, that the length of the clearance interval had been such that it would have been a physical impossibility for vehicles to come to a full stop before the light changed from yellow to red or green. It is unthinkable that any court would accord immunity to a decision producing this result on the basis of the discre-

tionary function exception. The phrase "whether or not the discretion involved be abused," which appears in the FTCA and many State statutes, could not be invoked to accord immunity in such situation. It follows that in the traffic light cases the decisions were plainly based on a finding that *reasonable care* had been exercised in the determination of the length of the clearance interval. The discretionary function exception was unnecessary and even extraneous to the result reached, the holdings being in fact arrived at by the application of negligence principles.

At the risk of belaboring this point unnecessarily, consider also the cases of *Patrazza v. Commonwealth* (*supra*, p. 14) and *Friedman v. State* (*supra*, p. 14). In *Patrazza* the Court found that the highway authorities were faced with a choice between burying the ends of guardrails, which produced vaulting, and leaving the ends of guardrails unburied, which produced spearing. In *Friedman* the Court found that the use of barriers on the bridge prevented cross-over accidents but also produced rear-end collisions. In both of these cases the authorities were confronted with foreseeable risk of harm whichever way they decided, and the decisions arrived at were therefore not unreasonable. To employ the language of Professors Prosser and Keeton, the decisions reached, although fraught with danger to innocent citizens, were not necessarily negligent, and the State protected on the ground of immunity, was in fact protected on the ground that it was not at fault. Had one of the alternatives in these cases not involved the risk of foreseeable harm, the result would have been otherwise.

The question thus arises as to why courts are applying negligence or duty principles when the basis of the discretionary function exception is the exact opposite, i.e., the exclusion of consideration of negligence or duty principles because the judiciary is enjoined by the exception from review of administrative decisions through the medium of an action in tort.

In the judgment of this writer the answer is to be found in the fact that the courts have found it impossible to consider highway activities without at the same time taking into account the fundamental rule in existence since time immemorial that the State, although not an insurer of the safety of its highways, is at all times under a duty to provide reasonable care for the safety of travelers who are themselves exercising ordinary prudence. The activities of highway departments may be broadly distinguished from the functions of other governmental agencies, such as regulatory or licensing bodies, in that the question at the epicenter where highway departments are concerned is what happens when there is a conflict between immunity and the overriding duty of reasonable care.

Perhaps this conflict between discretionary immunity and the duty of reasonable care could best be resolved by firmly elucidating those areas of policymaking in respect to highway activities that do not involve foreseeable risk of harm. It is suggested that the following areas of highway activity clearly involve broad policy decision-making but at the same time do not involve risk of foreseeable harm; (1) the decision to build the highway; (2) decisions with respect to the apportionment and



allocation of funds for the construction of the highway; (3) decisions with respect to the route to be followed; (4) decisions with respect to the type of construction materials to be used; (5) decisions as to where the highway is to connect with other roads and streets in the highway system; and (6) decisions with regard to whether the highway is to be limited or open access. If the scope of broad policy decision-making were confined to the foregoing, or others of like nature, there would be no conflict with the duty of reasonable care.

However, unfortunately, such has not been the case, and hence there has been both conflict and lack of clarity in applying the discretionary function exception to highway activities.

The purpose of the foregoing discussion has, of course, been to suggest to highway lawyers preparing the defense to an action against the State, that the case may well be decided on ordinary negligence grounds notwithstanding the discretionary function exception has been asserted as a defense. The case should therefore be prepared and presented, insofar as possible, within the framework of establishing that the State is not liable on ordinary negligence grounds, irrespective of the plea of the exception as a defense.

In pleading the defense of the discretionary function exception, it is suggested that out of the triumvirate of "social, economic, and political" policy considerations generally agreed to constitute the basis of the exception, the most useful will be that of "economic" considerations. It is obviously difficult to relate "social" or "political" policy considerations to a decision in respect to erecting a single warning sign or a single guardrail at a particular location on the highways. The courts have been sensitive, however, to "economic" considerations in the form of budgetary constraints, and the establishment of priorities in response to financial limitations should be strongly urged.

In conclusion it can be said the discretionary function exception, when pleaded and proved, is a formidable defense, it being nothing less than the retention of sovereign immunity. There is broad agreement as to its general scope, but there is less than broad agreement in its application to highway activities. The task of the highway lawyer is to make it fit the particular brand of highway activity with which he is concerned.

## APPENDIX

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<sup>1</sup> 28 U.S.C. 2674.

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<sup>3</sup> See the classic statement of this policy by Judge Learned Hand in *Gregoire v. Biddle*, 177 F.2d 579 (CA2, 1952).

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<sup>5</sup> See, for example, *Smith v. Cooper*, 256 Or. 485, 475 P.2d 78 (1970).

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## APPLICATIONS

The foregoing research should prove helpful to state and local highway and transportation administrators, their legal counsel and state highway and transportation employees involved in suits brought against them to recover damages for alleged negligent conduct in the

performance of their duties. Officials are urged to review their practices, procedures and conduct to determine how this research can effectively be utilized to mitigate or eliminate damage claims. Attorneys should especially find this paper to be useful in preparing their defense in claims against agency officers and employees.

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