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The Discretionary Exception and Municipal Tort Liability: A Reappraisal

I. INTRODUCTION

Emerging early in the development of English law, the doctrine of sovereign immunity was premised on the concept that neither the king nor Parliament was capable of doing any wrong.¹ The doctrine was later incorporated into American law, many feel more by mistake than by conscious choice.² To accommodate a democratic form of government the premise was advanced that the state shall not be compelled to defend itself from assault in the courts of its own creation.³

Notwithstanding its long though checkered acceptance,⁴ the doctrine of sovereign immunity has increasingly fallen subject to attack by the courts⁵ and commentators.⁶ It has been argued that the reasons which once justified governmental immunity from suit have little or no relevance today, and that public policy and popular sentiment now require that a government submit to suit by its citizens for torts committed by its officers.⁷ In

2. 3 K. Davis, Administrative Law Treatise § 25.01, at 438 (1958).
3. See Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907); Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850); Blachly & Oatman, supra note 1, at 188.
4. The courts, until recently, were generally reluctant to disturb the doctrine. Judicial responsibility for sovereign immunity in tort goes far beyond the original invention and elaboration of the immunity doctrine. Even where legislative bodies become convinced that tort sufferers should be allowed to sue the sovereign, and even when clear and unequivocal statutes are enacted authorizing such suits, the courts have frequently nullified such legislation by interpreting it to mean that sovereign immunity must continue. Borchard, supra note 1, at 9; Davis, Tort Liability of Governmental Units, 40 MINN. L. REV. 751, 770 (1956). However, numerous methods of avoiding the effect of the doctrine were developed by both courts and legislatures. See K. Davis, supra note 2, §§ 25.02-.05.
5. See Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955); cases cited note 35 infra.
response to this feeling, many jurisdictions have moved to restrict or eliminate sovereign immunity.8

Prior to 1962, the Minnesota courts struggled with this doctrine. In that year the Minnesota Supreme Court, in Spanel v. Mounds View School District,9 prospectively overruled the doctrine of sovereign immunity as applied to state subdivisions, on the condition, however, that the state legislature not act to the contrary by the end of the legislative session in 1963.10 In apparent response to this pronouncement, the Minnesota legislature enacted chapter 466 of the Minnesota Statutes, which subjects municipalities,11 though not the state itself, to tort liability.12

Both the Federal Tort Claims Act,13 enacted in 1946, and the Minnesota statute, modeled after the federal law, contain a number of exceptions. One exception common to both enactments is immunity for discretionary functions or duties.14 The Minne-
sota statute provides that every municipality is immune from liability on "[a]ny claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." The term "discretionary function or duty" is not defined in either statute and, while there are numerous cases interpreting this exception under federal law, the Minnesota Supreme Court has not yet spoken.

It is the purpose of this Note to examine the applicability of the discretionary exception to the area of municipal tort liability. The interests of government in being free from liability, in certain instances, will be balanced against a strong public policy, implicit in the passage of the statute, toward compensating members of society who fall victim to governmental torts.

It will be argued that the standard which has been developed in federal case law, for application to the federal government, is an inappropriate tool for balancing the various interests involved at the municipal level. Finally, it will be argued that the tests utilized to determine the initial existence of a tort will provide sufficient protection to government at the municipal level and that, therefore, the discretionary duty exception is unnecessary in a statute covering municipal tort liability. Moreover, if some protection of certain types of municipal decisions is deemed necessary, it will be shown that this can be accomplished through the use of specific statutory exemptions, thus avoiding the amphiboly of "discretionary function or duty."

16. However, the Minnesota legislature felt it necessary to specifically exclude liability based on "... an act or omission of an officer or employee, exercising due care, in the execution of a valid or invalid statute, charter, ordinance, resolution, or regulation." Minn. Stat. § 466.03(5) (1965). Under the Federal Tort Claims Act which contains both the exception above for federal officers and the discretionary exceptions within one subsection, 28 U.S.C. § 2680(a) (1964), courts have held that this refers to a statutory direction to do a specific thing but not the statutory grant of power to exercise discretion. Compare Somerset Seafood Co. v. United States, 193 F.2d 631 (4th Cir. 1951), with Denny v. United States, 171 F.2d 365 (5th Cir. 1948).
17. See Section V infra.
18. A recent Minnesota Attorney General's Opinion, however, has held that the issuance of a building permit by a city engineer is a discretionary act. Op. Minn. Att'y Gen. 590-32(6A) (1965).
19. The author deems this clause an amphiboly because it not only encompasses a contradiction in terms, see Annot., 99 A.L.R.2d 1016, 1020 (1965), but is also grammatically imprecise. See note 100 infra.
II. BACKGROUND

Prior to the enactment of the Minnesota statute, the sovereign immunity enjoyed by the state had been extended in a restricted fashion to the local governing units.20 This incomplete extension of sovereign immunity results from a distinction between municipal corporations and quasi-municipal corporations. A municipal corporation, such as a city or village, may be described as a “legal institution . . . established . . . primarily to regulate the local or internal affairs of the territory . . . , and secondarily, to share in the civil government of the state in the particular locality.”21 On the other hand, a quasi-corporation, such as a county, town, school district, or the like is treated as an agency of the state22 established for the purpose of facilitating the administration of state power or authority at the local level.23

Since quasi-corporations are viewed as rather direct extensions of the state government, they are generally given immunity coextensive with that enjoyed by the state.24 Municipal corporations, however, have been allowed to participate in the state’s sovereign immunity in only a limited number of situations.25 These latter governmental units are viewed as possessing a dual character. On the one hand, the municipal corporation has subordinate legislative powers which have been delegated by and are exercised on behalf of the state.26 When injury results from an exercise of these “public” or “governmental” functions, there is no logical reason for imposing liability when the state itself would not be held similarly responsible.27 In

20. See, e.g., Hahn v. City of Ortonville, 238 Minn. 428, 57 N.W.2d 254 (1953).
21. 1 E. McQuillan, MUNICIPAL CORPORATIONS § 126, at 365 (2d ed. 1937) [hereinafter cited as McQuillan].
22. 6 McQuillan § 2775, at 1018-21.
23. It should be noted that the Minnesota statute groups all of the above described governing bodies under the term “municipal corporations.” See note 11 supra.
24. See, e.g., Hitchcock v. Sherburne County, 227 Minn. 132, 34 N.W.2d 342 (1948); cases cited in 6 McQuillan § 2775, at 1021.
25. See Hahn v. City of Ortonville, 238 Minn. 428, 57 N.W.2d 254 (1953); Blachly & Oatman, supra note 1, at 189; Fuller & Casner, supra note 6. For an argument against distinguishing between the two classifications of local governmental entities see J. Fordham, LOCAL GOVERNMENT LAW 16 (1949).
26. See, e.g., Thiede v. Scandia Valley, 217 Minn. 218, 14 N.W.2d 400 (1944); cases cited in 1 McQuillan § 126, at 369.
this capacity the municipal corporation is identical to the quasi-
municipal corporation. On the other hand, a municipal corpora-
tion has functions which are performed not as a mere agent of
the state, but in its more independent nature as a corporation
serving local inhabitants.28 Thus, where a municipal corporation
is involved in activities which are characterized as private or
commercial or profitmaking,29 or of benefit primarily
to the locality and its inhabitants,30 the courts have not ex-
tended governmental immunity.31

While the above distinction has a look of certainty, there
has been wide variation in the treatment of activities which
appear to be identical. Functions held to be governmental in
one jurisdiction are viewed as nongovernmental in others,32 and
the whole area is fraught with confusion and ambiguity.33 Thus,
the courts in many jurisdictions have abandoned this distinction
in favor of totally abolishing sovereign immunity for municipal
corporations.34

However, the courts have resorted to a different distinction
in cases determining the scope of liability of government officials.
They have been held immune from tort liability for acts found to

1914).
29. E.g., Tillman v. District of Columbia, 58 App. D.C. 242, 29 F.2d
442 (1926); Roumblis v. Chicago, 332 Ill. 70, 163 N.E. 361 (1928).
30. E.g., Davoust v. Alameda, 149 Cal. 69, 84 P. 760 (1906) (main-
App. 792, 116 S.E. 346 (1922) (marking property boundaries and receiv-
ing consideration therefor).
32. See Hahn v. City of Ortonville, 238 Minn. 428, 57 N.W.2d 254
(1955); see generally 6 McQuillan §§ 2792-822.
33. See 6 McQuillan § 2792, at 1040. The distinction is probably
one of the most unsatisfactory known to the law for it has caused confu-
sion not only among the various jurisdictions but almost always
within each jurisdiction. Davis, supra note 4, at 774. See Indian Towing
Co. v. United States, 350 U.S. 61, 65 (1955); Brush v. Commissioner,
300 U.S. 352, 362 (1937).
34. See Blachly & Oatman, supra note 1, at 190; Kennedy & Lynch,
supra note 6, at 165; Lawton, Disintegration of Governmental Immunity,
30 Ins. Counsel J. 251, 252 (1963); Comment, 38 WASH. L. REV. 312, 316
(1961).
35. E.g., Stone v. State Highway Comm’n, 93 Ariz. 384, 381 P.2d
107 (1963); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d
457, 11 Cal. Rptr. 89 (1961); Harragve v. Town of Coca Beach, 96 So. 2d
130 (Fla. 1957); Kamau & Cushnie v. Hawaii County, 41 Hawaii 527
(1957); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163
N.E.2d 89 (1959); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d
1 (1961); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618
(1962). For a complete and recent presentation of the judicial activity
in the various states, see 3 K. Davis, supra note 2, § 25.01 (1968 Supp.).
be "discretionary,"36 while liability has been imposed for acts found to be "ministerial"37 or "mandatory."38 However, attempts to define what constitutes a "discretionary" act for the purposes of determining an officer's liability, have resulted in no more consistency than the proprietary-governmental distinction.39

III. THE GOVERNMENTAL INTERESTS UNDERLYING THE DISCRETIONARY DUTY EXCEPTION

Since 1946 the federal courts have been faced with the problem of interpreting the Federal Tort Claims Act40 and its exception for discretionary functions or duties.41 In seeking to understand and evaluate the discretionary duty exception the following considerations must be looked to: the statutory meaning of discretion, the concern for the effect of liability on the official, and the maintenance of the separation of powers.

Regarding the meaning of "discretion" itself, the legislative history of the federal discretionary exception, along with the exception for "claims based upon the act or omission of a Government employee exercising due care in the execution of a statute or regulation, whether or not valid . . . ," which is contained in the same section, consists basically of one, often repeated, paragraph.

... This is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government: growing out of an authorized activity, such as a flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid. It is also designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commis-

39. E.g., compare Fergus v. Brady, 277 Ill. 272, 115 N.E. 393 (1917) (duties of the auditor and treasurer in issuing and paying warrants are purely ministerial), with Hicks v. Davis, 106 Kan. 4, 163 P. 799 (1917) (the functions of a state auditor are more than those of a mere ministerial officer). See Jaffee, supra note 38.
sion or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. To take another example, claims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted. The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion. Nor is it desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort. However, the common-law torts of employees of regulatory agencies would be included within the scope of the bill to the same extent as torts of nonregulatory agencies.42

Since this statement uses the term “discretionary” several times, it is of limited aid in defining that term. The examples and general tenor of the paragraph give some indication that administrative decisions establishing governmental policy, or decisions of a broad, general nature are not to be the basis of liability. However, these things are a matter of degree and the problem is to determine where the line should be drawn in a particular case.

Generally speaking, every act involves some element of discretion as that term is commonly understood.43 However, it is evident from the statute’s sweeping imposition of liability that the term “discretion” is not used in its common, broad sense, but rather as a term of art used to include less than all decisions. The discretionary duty exception differs from the older tests of municipal liability in a rather basic manner. Under the governmental-nongovernmental or corporate-proprietary tests of municipal liability, the judicial focus was on the nature of the activity out of which the injury in question arose.44 The court would categorize the purpose for which the government was acting and choose whether to impose liability or not, depending on the categorization.45 However, under the discretionary ex-

42. *Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary, 77th Cong., 2d Sess. 33 (1942).*

43. *Ham v. Los Angeles County*, 46 Cal. App. 148, 162, 189 P. 462, 468 (1920); see also *Eastern Air Lines v. Union Trust Co.*, 221 F.2d 62, 78 (1955) (suggesting that even a driver of a mail truck exercises discretion as to how to drive); *Patterson, Ministerial and Discretionary Official Acts*, 20 Minn. L. Rev. 848, 854 (1922). Patterson also suggests that every official act includes, broadly speaking, the interpretation of a statute.

44. See Section II *supra*.

45. Many argue that the process is the reverse, the label being applied after it has been determined whether or not liability should obtain. See, e.g., *Jaffee, supra* note 38, at 218.
ception provision of the federal statute, analysis in terms of the nature of the governmental activity involved was dropped. Instead, the statute compels a focus on the nature of the decision involved. Thus, in determining governmental liability for tort, the courts are faced with the task of identifying which characteristics should control the classification of decisions as discretionary.

In addition to the foregoing, the courts must consider which interests of government the discretionary exception was intended to protect. One such interest of government requiring protection is the effective, unfettered performance of its officials. In the past, the extension of tort immunity to governmental officials has been based upon two considerations. First, it is felt that an injustice results when an officer, under a duty to exercise his judgment, is found liable when that judgment is erroneous. More important, however, is the pragmatic concern that his consideration of potential liability, whether personal or governmental, will interfere adversely with the officer's ability to exercise his judgment when needed. Although the statutes with which this Note is concerned impose liability on the government and not the official, there are circumstances in which the imposition of liability upon the government may affect the behavior of the official, thus leading to the same dangers discussed above with regard to the consequences of direct liability of such officials. Because the liability of the government is vicarious, stemming from the respondeat superior relationship with its officials, governing bodies have, in the past, sometimes been allowed indemnification from the official. Such indemnification is consistent with the traditional theories of respondeat superior. To the extent that indemnification is still permitted,

46. Minn. Stat. § 466.02 (1985) imposes liability for torts "whether arising out of a governmental or proprietary function." Since 28 U.S.C. § 2674 imposes liability "in the same manner and to the same intent as a private individual under like circumstances," it has been argued that the Federal Tort Liability Act was meant to exclude activities in which only the government engages, and thus retained the governmental-proprietary distinction. See Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955). However, this argument has been rejected. Id.

47. E.g., Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949).

48. A negligent employee who commits a tortious act against a third person (as well as one who looses or damages government property of which he is in charge) commits a breach of his contract of employment and, whether or not an action for indemnity would lie, an action for breach of contract or for tort would lie. Restatement of Agency §§ 400, 401 (1938); Seavey, "Liberal Construction" and the Tort Liability of the Federal Government, 67 Harv. L. Rev. 994, 1002 (1954).
the official's actions will be affected by considerations of personal liability, and, a fortiori, government's ability to act is impeded since it can act only through such officials. However, there has been a trend away from indemnification of the government. In fact, legislation now often provides that governmental units may or must indemnify the official for liability to which he is subjected as a result of his official duties. In this situation the official's decisions will not be affected by a concern for personal liability. Nevertheless, it has been argued that a concern for his reputation, rating, and a sense of responsibility to the government may tend to have the same effect. Thus, although of somewhat limited application, one reason for the discretionary exception is that the danger of potential liability, through its effect on officials, will indirectly hinder the effective operation of government.

Another interest of government requiring protection is the maintenance of the separation of powers. It is arguable that the imposition of tort liability will have a direct effect on the governing process. For example, the official to whom the duty to make a particular decision has been entrusted often has a special expertise to make that decision. He may also have access to information, not generally available, which is necessary to making the decision. Whenever either special expertise or information have been part of the decision-making process, it is probable that a court would be unable to make a decision which would be any better, if indeed as good, or to evaluate correctly the decision which was initially made by the official. At some point judicial interference with executive or legislative decisions becomes violative of the separation of powers. It seems likely

50. E.g., Minn. Stat. § 466.06 (1965) (municipality may insure against liability of municipality, officers, employees, and agents); Minn. Stat. § 466.07 (1965) (municipality may indemnify officers and employees).
51. Jaffee, supra note 38, at 233. However, this effect would appear to be quite limited since, realistically, only repeating offenders are likely to be concerned.
52. The second guess of a court in a damages suit is about as likely to be wrong in an absolute sense as the first guess of the Federal Reserve Board in adjusting interest rates or of the President and the State Department in conducting foreign relations. Much business of governmental units is beyond the competence of the courts.

K. Davis, supra note 2, at 799.
53. See Dalehite v. United States, 346 U.S. 15, 27 (1953); Coates v. United States, 181 F.2d 816, 818 (8th Cir. 1950); Davis, supra note 2, at
that Congress, when considering passage of the Federal Tort Claims Act, recognized a danger of judicial encroachment\textsuperscript{4} into the spheres of the other branches of government. Primarily in order to prevent such encroachment, Congress drafted the two-fold exclusion of claims based either on the officer's execution of a regulation or statute or on the exercise of a discretionary function. The Minnesota statute contains the same two exceptions, albeit in separate sections.\textsuperscript{5} Although no legislative history is available for the state section, arguably it was either incorporated for the same reasons advanced by Congress, or was uncritically adopted together with the rest of the Federal Act.

IV. THE INTERESTS OF THE PUBLIC

Any cost imposed by governmental activity in the form of an injury to a member of society which is not paid by the government will obviously be borne by the person injured. As governmental activities increase in scope, the opportunities for injury increase, thereby making the need for compensation more acute.\textsuperscript{6} Governmental liability for injury resulting from government activity is not a novel concept. In fact, it has even been suggested that the government should compensate all extraordinary losses or injuries suffered by individuals.\textsuperscript{7} Regardless of whether one accepts the insurance theory implicit in the concept of governmental liability without fault, there are strong policy reasons why individuals should not bear the loss where the government is clearly at fault. Such interests are partially recognized by the legislature through these statutes which subject the government to liability in many situations.

A traditional function of civil liability for negligence is to supply a sanction which encourages care appropriate to the needs

\textsuperscript{793; B. WYMAN, ADMINISTRATIVE LAW 130 (1903).}

In New York, the state has waived immunity without expressly reserving a discretionary exception. However, several courts have held that the need for the "separation of powers" is a defense. See Weiss v. Fote, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960); Comment, 26 ALBANY L. REV. 75 (1962).

\textsuperscript{54. See note 42 supra and accompanying text.}

\textsuperscript{55. MINN. STAT. §§ 466.03 (5), 466.03 (6) (1965).}

\textsuperscript{56. Kennedy & Lynch, supra note 6, at 170; Nutting, Legislative Practice Regarding Tort Claims Against the State, 4 Mo. L. Rev. 1 (1939); Note, Municipal Tort Liability, Purchase of Liability Insurance as Waiver of Immunity, 18 Wyo. L.J. 220, 225 (1964); Comment, 21 OHIO ST. L.J. 648 (1960).}

\textsuperscript{57. See Borchard, Government Liability in Tort, 28 COLUM. L. REV. 577, 741 (1928) (pts. 7-8); Kennedy & Lynch, supra note 6, at 169.}
of society and the circumstances of the case. Therefore, where governmental immunity has had the effect of encouraging laxness and a disregard of potential harm, exposure of the government to liability for its torts will have the effect of increasing governmental care and concern for the welfare of those who might be injured by its actions. This increased concern would cause government officials to evaluate proposed activities in light of their total costs, both those paid directly and those paid indirectly in the form of compensation for injuries to individual members of society. Otherwise stated, government liability forces the official to balance the total social utility of the action undertaken against the total risks and costs to society. The government will thus be encouraged to take the course which is ultimately the most economical to society. Since the risk of loss arising out of governmental activity is, in a real sense, a cost of such governmental activity, such loss should not be borne by the individual upon whom it chances to fall, but by society generally which benefits from the activity.

The foregoing value premise is explicitly recognized, at least with respect to real and personal property rights, in the fifth and fourteenth amendment prohibitions against public taking of private property without just compensation. Governmental imposition of a risk of damage or loss is very similar to public taking under the laws of eminent domain. The difference between the decision to take private property and the decision to impose a risk of damage to property is a matter of degree; the decision to take private property can be analogized to the imposition of a one hundred per cent risk of loss of some

59. Id. at 60.
60. An example of the need for such considerations is available in the facts of United States v. Ure, 225 F.2d 709 (9th Cir. 1955). This case involved two suits against the United States under the Federal Tort Claims Act to recover for flooding of land following a break in an irrigation canal operated by the federal government. Testimony indicated that the United States Reclamation Service had decided that the construction of the canal in question would have been too expensive if it had been lined with concrete along its entire length. 225 F.2d at 212. The service evidently ignored the possible costs to the public if the unlined canal should break as it did.
61. See Douglas, Vicarious Liability and Administration of Risk II, 38 YALE L.J. 720 (1929); Freezer, Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases, 78 U. PA. L. REV. 805 (1930); Kennedy & Lynch, supra note 6, at 176.
62. See 3 K. Davis, supra note 2, § 25.05; Borchard, supra note 57, at 742.
property rights. The similarity between a taking and the imposition of a risk is obvious when such risk is relatively certain. But the similarity is present whenever the individual loss is, in fact, the result of governmental activity, whatever the theoretical risk created. Indeed, the loss to the private individual is as great whether his property is physically appropriated through an outright decision to do so, or whether it is injured as a result of a risk imposed by the government. This view is implicit in the constitutions of many of the states, including Minnesota, which prohibit not only taking but "damaging" private property for public use without just compensation. Just as government is required to pay for property it deliberately takes for public purposes, government should be required to pay for the "takings" which result from the imposition of less certain risks which in fact result in injury. The failure to do so is, arguably, an uncompensated taking within the prohibitions of the Federal Constitution and the provisions of nearly all state constitutions.

The uncertain nature of the distinction, if any, between loss of private property through a taking under the powers of eminent domain and losses arising through governmental tort is evident in case law. Claims for either tort or a taking under eminent domain may often be available in a situation involving a loss to private property as a result of governmental action. In fact, cases in tort are sometimes lost because practitioners fail to recognize the alternative theory of liability based on eminent domain. The overlapping nature of eminent domain and tort is further evidenced by the historic fact that, in order to avoid the distasteful doctrine of sovereign immunity, courts have frequently relied on the constitutional prohibitions against taking to

63. For a list of such jurisdictions, see 2 P. Nichols, Eminent Domain § 6.44 (1963).
64. See Davis, supra note 4, at 812; Kennedy & Lynch, supra note 6, at 176.
66. Davis, supra note 4, at 766.
67. Id. at 767. Compare United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950) (permanent flooding held to be a taking), and United States v. Dickinson, 331 U.S. 745 (1947) (intermittent flooding is taking of easement), with United States v. Ure, 225 F.2d 709 (9th Cir. 1955) (damages for flooding not allowed because of failure to prove negligence), and Thomas v. United States, 81 F. Supp. 881 (W.D. Mo. 1949) (damages for flooding of land barred by discretionary exception).
grant recoveries when a tort theory would appear more appropriate.\textsuperscript{68}

Takings under eminent domain have been held to include a wide variety of interests in property which are not, strictly speaking, taken by the sovereign, but rather, merely destroyed as to the owner thereof.\textsuperscript{69} However, eminent domain has not yet been extended to cover personal injuries.\textsuperscript{70} Thus, if a particular governmental activity, such as the flooding of land, results in an injury to both property and person, the recovery for the personal injury may be barred by the doctrine of sovereign immunity while that for the property may be allowed under the doctrine of eminent domain.\textsuperscript{71} However, when the government undertakes an activity which imposes risk of both property and personal injury, the arguments in favor of compelling the government to provide compensation for the property damage are equally applicable to the personal injury. Such governmental liability is in line with modern developments and is implicitly

\textsuperscript{68} For a recent discussion of inverse condemnation and its relation to tort and the spreading of risks in general, see Aestyne, \textit{Modernizing Inverse Condemnation: A Legislative Prospectus}, 8 SANTA CLARA LAW. 1 (1987).

The availability of alternative remedies and the difference of opinion as to which should be applied are demonstrated in two decisions concerning claims for losses to property situated adjacent to an airport. In both United States v. Causby, 328 U.S. 256 (1946), and Griggs v. Allegheny County, 369 U.S. 84 (1962), a glide path for an airport passed over plaintiff's property at a low level. In Causby the noise and landing lights from the military planes, owned and operated by the federal government destroyed the use of the property as a chicken farm and caused loss of sleep, nervousness, and fright to the plaintiff. The Court held that the government had taken a property right—easement—and was constitutionally required to pay for it. Dissenting, Justice Black joined by Justice Burton argued that the facts did not constitute a taking within the prohibitions of the Constitution but "at best an action in tort where there might be recovery if the noise and light constituted a nuisance, a violation of a statute, or were the result of negligence." 328 U.S. at 270.

In Griggs, the noise, vibrations, and danger caused by planes taking off and landing forced plaintiff and his family to move from their home. The Court held that the county, which owned and operated the airport, had taken an air easement over the property for which it had to pay just compensation as required by the fourteenth amendment. The dissent in Griggs argued that there was a taking within the holding of Causby, but that the United States, through the supervision and approval of the Civil Aeronautics Administrator, rather than Allegheny County had done the taking.

\textsuperscript{69} See, e.g., United States v. General Motors Corp., 323 U.S. 373 (1945).

\textsuperscript{70} See Brandenburg v. Los Angeles County Flood Control Dist., 45 Cal. App. 2d 306, 114 P.2d 14 (1941).

\textsuperscript{71} See cases cited note 67 supra.
recognized in the statutes which abrogate sovereign immunity. The problem faced by the courts in interpreting the discretionary exception of such statutes is to balance the interest the public has in being protected from losses resulting from governmental activity against the interests of government in being free from such liability. Differentiation is required which will prohibit judicial review of decisions requiring administrative independence while not extending immunity further than necessary for this purpose.72

V. THE FEDERAL APPROACH TO THE DISCRETIONARY EXCEPTION AND ITS INAPPLICABILITY TO MUNICIPAL TORTS

In imposing or refusing to impose tort liability upon the federal government, the federal courts have evidenced two related approaches: the nature of the decision itself and the level of government at which the decision is made. The first approach evolved to handle liability for the injurious effects of decision making is to characterize the decisions in question as planning decisions, those for which the government will be protected under the discretionary duty exception, or operational decisions, those for which the government will be held liable.73 The characterization as planning or operational has involved an analysis of the nature of the decision involved.74 While the decisions do not lend themselves to consistent generalization, some common characteristics are evident. Actions which have been held to be of a planning nature have tended to be those which initiate programs,75 deal with general policy, or are directly and vitally related to a governmental program or project.76 Illustrative of these planning decisions have been the approval of a highway plan by the Secretary of Commerce,77 the decision to activate an air base,78 a general goal of maximum freedom for mental pa-

73. The governmental-proprietary distinction which long confused the law of sovereign immunity has been abandoned. See note 12 supra.
75. Coates v. United States, 181 F.2d 816 (8th Cir. 1950); Sickman v. United States, 184 F.2d 616 (7th Cir. 1950), cert. denied, 341 U.S. 939 (1951).
76. United States v. Hunsucker, 314 F.2d 98, 105 (9th Cir. 1962).
78. United States v. Hunsucker, 314 F.2d 98 (9th Cir. 1962).
tients, and the decision as to whether and where to build a post office. Actions held to be operational have tended to be of a specific and detailed type, dealing with the implementation of programs and policies. Typically, these decisions could be eliminated or replaced without significantly disrupting the program or policy. Illustrative of these are the decisions of airport tower operators, the decision of whether or not to install a handrail, and the decision to allow freedom to a particular mental patient. However, the courts' characterizations of the decisions or activities as planning or operational have not been accomplished solely through an analysis of the particular decision.

The courts have also given much weight to the level of the governmental organization where the decision making or activity in question occurred. If decisions of a detailed and specific nature are made by executives or administrators situated in the higher echelons of government, the courts have tended to treat this fact as compelling a finding that the activity in question was of a planning nature. In such a situation, the government can be held liable only where there has been an unauthorized deviation from such high level decisions. Similarly, courts have emphasized the absence of such high level activity when classifying decisions made at lower levels as operational. This distinction based on the level at which the decision was made is set forth in Dalehite v. United States:

The "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initia-

85. White v. United States, 317 F.2d 13 (4th Cir. 1963); Sullivan v. United States, supra.
86. See note 84 supra.
tion of programs and activities. It also includes determination made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.\textsuperscript{87a}

This statement indicates that the Court felt that the type of decision which requires protection is most likely to occur in the higher levels of government.\textsuperscript{88}

The fundamental difficulty with the planning-operational approach is that it is likely to become a mere labeling approach. This immediately creates the further problem of setting up criteria for determining what activity is operational and what is planning.\textsuperscript{89} As with the case of the older governmental-proprietary test of municipal liability, it is evident that either term may be applied in a given situation, depending on how expansively or narrowly one interprets the problem or on the result desired. Moreover, the content which has already been given these terms in the process of applying them to the activities of the federal government is substantially inapplicable to the activities of a municipal government. Federal activities relating to foreign relations, national defense, trade regulation, or the setting of interest rates have no counterpart at the municipal level. Municipal activities tend more to concern the day-to-day affairs of the people living in the area governed and are more closely analogous to the types of activities carried on by private enterprise. Because of these general differences in the nature of the activities of the two governing bodies, federal court decisions made with respect to the federal government will have little or no relevance at the municipal level.

A municipal government might, of course, make some decisions similar to those which have been protected under the federal case law. However, even in these situations the federal cases may be inappropriate. As discussed above, one of the most important reasons for sovereign immunity is the desire to pre-

\begin{footnotesize}
\textsuperscript{87a} Id. at 36 (emphasis added). See James, supra note 72, at 189.
\textsuperscript{88} See Davis, supra note 4, at 789; Jaffee, supra note 38, at 219.
\textsuperscript{89} An approach based on level has also been taken with respect to the liability of the officers. Here a distinction has been drawn between those of high and low rank. See Blachly & Oatman, supra note 1, at 192; Patterson, supra note 43, at 862.
\end{footnotesize}
serve the separation of powers. However, the doctrine of separation of powers has enjoyed a much broader application in matters pertaining to the federal government than with respect to municipal government. Generally speaking, a municipal government is not considered a sovereign government and may be compelled to accept responsibility in tort by both the legislature and the judiciary.\(^9\) Although the doctrine of separation of powers may place a limit on the degree to which the federal courts or legislature may impose liability on the executive branch of government\(^8\) there is no similar restraint with respect to municipal corporations. Thus, to the degree that considerations of the separation of powers are given effect in the federal decisions applying the federal discretionary duty exception, these decisions are inappropriate in the application of this exception to municipal corporations.

Furthermore, the reliance placed by the federal courts upon the level at which a decision was made also renders federal case law inapplicable to the municipal situation. In the first place, it is evident that decisions of varying degrees of importance to the governmental policy and function may, in particular instances, be made at all levels of government. Therefore, to the extent that the level is relied upon as dispositive of the issue, that reliance may be misplaced\(^2\) whether it is the federal

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90. See Hahn v. City of Ortonville, 238 Minn. 428, 57 N.W.2d 254 (1953); Blachly & Oatman, supra note 1, at 180.

It should be remembered that the Minnesota statute defines “municipal corporations” for purposes of the statute as including those entities which would normally fall within the classification quasi-corporations. As discussed above, such are extensions of the state and normally enjoy immunity coterminous with that of the state. However, as creatures of the state legislature, it would seem that quasi-corporations could be subjected to liability, at least by the legislature. Thus, even with respect to quasi-corporations, the separation of powers doctrine has less application than in the case of the federal government where the legislature is powerless to interfere with the rights and powers of the executive.

91. That the discretionary exception is aimed at the executive branch is implicit in the fact that both the federal, 28 U.S.C. § 2680 (a) (1964), and the state, Minn. Stat. § 466.03(5) (1965), statutes contain a separate exception which is evidently aimed at providing protection only for the legislative branch.

92. “[L]ooking solely to the echelon of the official rather than to the . . . nature of his conduct, may be useful as a general guide . . . but seems unsound as a conclusive test . . . .” Jayson, supra note 89, at 154. This sentiment was evident in the minority opinion in Dalehite: “[T]he decisions are being made at Cabinet levels as to the temperature of bagging explosive fertilizers, . . . perhaps an increased sense of caution and responsibility even at that height would be wholesome.” 346 U.S. at 58.
government or a municipality that is involved. However, the level of government at which a decision was made may be a valid guide in the analysis of that decision. There is no necessary correlation between the levels or hierarchy in the administrative branch of the federal government and that of a municipal government, nor indeed between municipal governments themselves. Therefore, federal cases which often rely on the level of government, even if only as a guide to the proper decision, can be translated into the municipal situation only in rough fashion.

Finally, there is a danger that application of the federal cases, especially those which have found discretionary activity in the border area of the planning-operational distinction, may classify as discretionary those activities for which the municipal government would have been liable under the governmental-proprietary distinction. For example, the federal courts have held that the decision as to whether or not an individual should be admitted to a government hospital is discretionary and therefore no liability attaches. However, where a municipal hospital, although nonprofit, is characterized as a revenue-producing institution, the government has been held to be involved in a proprietary activity and, therefore, liable for torts arising therefrom. In such a situation, municipal liability would probably attach to a negligent decision concerning admission. However, if the federal case law were applied in this instance, the effect would be to expand rather than restrict sovereign immunity as applied to municipalities.

Thus, for a variety of reasons, application of the federal approach to the discretionary exception is inappropriate. To follow decisional law would only have the effect of adding confusion to the law of municipal liability in tort. Indeed, the same reasons suggest that immunity for discretionary acts may not be as important to municipalities as it is to the federal government.

VI. CRITICISM OF APPLICATION OF DISCRETIONARY DUTY EXCEPTION TO MUNICIPALITIES

Recent years have seen a significant move away from the

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93. E.g., Costley v. United States, 181 F.2d 723 (5th Cir. 1950).
94. E.g., Borwege v. City of Owatonna, 190 Minn. 394, 251 N.W. 915 (1933). However, the operation of a hospital by a municipality may be characterized as directed towards the preservation of public health of indigents and, as such, it may be held to be activity of a governmental nature. See, e.g., Gillies v. City of Minneapolis, 66 F. Supp. 467 (D. Minn. 1946) (applying Minnesota law).
application of the doctrine of sovereign immunity to the municipality, as evidenced by the Minnesota statute. It is therefore appropriate to examine the need for the discretionary duty exception in the context of this movement away from municipal immunity and in light of the strong public policy favoring compensation of individuals injured through municipal activity. Since the statutes in question grant courts the power to adjudicate governmental tort liability in a vast assortment of situations, it is evident that the concern giving rise to the discretionary exception was not that the mere imposition of liability, in itself, would be overly destructive of the governmental interests involved. Rather, the evil sought to be overcome must have been the governmental interest involved in freeing the official from the coercion which may be present in the imposition of liability and in avoiding excessive violation of the separation of powers.

The first problem, the undesirable effect of the imposition of liability in certain instances, would appear to be adequately protected by the traditional tort requirement of foreseeability. It is evident that the decisions made by government officials will involve risks which range from those which are completely indefinite and speculative to those which are, in essence, practical certainties. When the risks which inhere in a particular governmental decision are relatively indefinite they are not susceptible to reasonable evaluation by the official making the decision. In such instance it is difficult or impossible to balance such uncertainty against all of the other considerations which may be involved in a particular decision. In such a situation, requiring the "correct" decision, under a threat of judicially imposed liability, might well inhibit the activity of a government official. If government is to act, its official must be free to do so pursuant to the best decision possible under the given circumstances. Thus, where the risks involved are speculative, it may be necessary for an official to be free to disregard considerations of these imponderables and make a decision on the basis of more certain elements. Moreover, if the government ignores or is unaware of the unevaluable risk, the imposition of liability will operate to defeat governmental prediction or expectation. From the government's point of view, the liability may alter, perhaps drastically, the desirability of a chosen course of action. Such result would present a substantial impediment to the gov-

95. For a comprehensive survey of the course of the law in a great many jurisdictions, see 3 K. Davis, Treatise on Administrative Law § 25.01, at 95 (1966 Supp.).
ernment's ability to act effectively and would be a substantial interference by the judiciary with the functions of the other branches of government.

An example can be drawn from the facts of Dalehite v. United States, which involved a series of decisions ranging from the broad policy decision to produce fertilizer with which to aid the rebuilding of postwar Germany and Japan, to specific and detailed plans by which to implement the program. The decision to produce fertilizer involves a great many indefinite risks, many of which are impossible to evaluate and hence cannot be considered along with the other factors which are a part of the decision-making process. To require the decision maker to attempt to take into consideration these imponderables might indeed hinder the making of the decision. Moreover, if the decision to produce and ship the fertilizer is made through consideration of the evaluable factors involved, ignoring potential but uncertain risks, the desirability of such course of action will be substantially altered if costs which could not have been foreseen are imposed.

On the other hand, as risks shift from the speculative to the certain, they become increasingly susceptible to reasoned evaluation. In this situation, it is possible for the officer to weigh the risk along with the other factors involved in a particular decision. To require that they do so, just as a private individual must with respect to possible tortious acts, would seem to be a desirable result and would encourage the making of decisions which do not impose unnecessary costs on society as a whole. Moreover, it does not require officials to do that which is impossible and thus does not constitute unreasonable interference with the decision making process. In addition, the government will, presumably, have been aware of the foreseeable potential loss when it undertook to act and the imposition of liability will neither interfere with the original decision nor operate to defeat the decision maker's reasonable expectations. By thus applying traditional concepts of tort liability, the administration is not being told that it may not make a particular decision and act pursuant thereto. It is merely being made to pay the entire foreseeable costs of its activities. Again, by way of example, the facts of Dalehite involved specific decisions as to the method of storage, the temperature at which the fertilizer was to be packaged, and other similarly detailed decisions. Such decisions involved what reasonably should be regarded as fairly predictable
and substantial risks of explosion.\textsuperscript{96} When making these detailed decisions, it should have been possible to evaluate such risks in order to arrive at a decision as to the course which offered the greatest utility to society as a whole. The expectations of government would not be frustrated in such a case when it is made to pay for the costs of the foreseeable, resulting explosions.

Thus, any undesirable effect which the imposition of liability might have on the functioning of government would appear to be avoided by the requirement of foreseeability since it is necessary to the liability of the government as a part of the initial determination that a tort in fact exists. Moreover, the imposition of liability for foreseeable loss will have the positive benefit of requiring government officials to consider such risks, and thereby evaluate alternative courses of action. Therefore, it is arguable that the exception for discretionary duties is not required in order to protect government from the undesirable effects of the imposition of liability for foreseeable risks. In this regard, it is interesting to note that an examination of the federal cases reveals that, generally speaking, situations in which discretionary functions have been found would probably not have involved tort liability had the court gone on to make that determination.\textsuperscript{97} Such a fact urges the conclusion that the federal cases are primarily concerned with the undesirability of allowing the judiciary to become involved in an evaluation of the decision, rather than the effects of such evaluation or the possible imposition of liability.\textsuperscript{98}

Since both the federal and Minnesota statutes impose liability in many instances, and thus will subject many decisions to judicial evaluation, it is evident that only with respect to cer-

\textsuperscript{96} The minority in Dalehite evidently felt that the dangers of explosion should have been foreseen. See 346 U.S. at 55 (Jackson, J., dissenting).

\textsuperscript{97} For example, it would require an extraordinary set of circumstances in order to imagine liability arising solely out of the decision to change the course of the Missouri River, Coates v. United States, 181 F.2d 816 (8th Cir. 1950), or the decision not to operate a seized coal mine, Old King Coal Co. v. United States, 88 F. Supp. 124 (S.D. Iowa 1949), or a decision to conduct a survey, Dahlstrom v. United States, 228 F.2d 819 (8th Cir. 1956). However, in those decisions where the discretionary exception has been held to apply because of the level at which a decision occurred, liability might well be found. E.g., Dalehite v. United States, 346 U.S. 15 (1953). This, however, does not evidence a concern for the effect of judicial review or the imposition of liability, but with the review of the decisions of high level decision makers.

\textsuperscript{98} This is also evidenced in the legislative history of the Federal Tort Claims Act. See note 42 supra and accompanying text.
tain kinds of decisions is judicial evaluation undesirable. Moreover, as discussed above in connection with the inapplicability of the federal standard to the municipality, decisions which require protection from judicial evaluation are likely to occur less frequently at the municipal level than at the federal level. Neither the separation of powers nor the high level policy nature of the decision involved is likely to require protection in cases involving municipal liability.\textsuperscript{99}

The use of a broad term such as "discretionary duty" may be appropriate when dealing with the great number of governmental policy type decisions which occur at the federal level. It would be difficult, if not impossible, to list all of the specific activities which the term was designed to protect. In such a circumstance, the only practical course may well be to leave it to the judiciary to handle specific situations on the basis of a case to case determination.

This is not necessarily true at the municipal level. Since the powers and duties of municipal governments are not nearly as broad as those of the federal government, it would appear that there would be fewer types of decisions which will require protection. The use of an exception for "discretionary functions or duties" adds confusion to the law of municipal tort liability both because it is difficult to determine what is intended to be subsumed thereunder\textsuperscript{100} and because of the gloss which has

\textsuperscript{99}. Neither of these factors was apparently felt to be important under the governmental-proprietary test of municipal liability since they could both exist in a decision concerning a proprietary activity and liability could, nevertheless, be imposed. See notes 93 & 94 supra and accompanying text.

\textsuperscript{100}. For example, since the statutory language protects the performance or the failure to exercise or perform a discretionary function or duty, it could be argued that these statutes are meant to protect the nonexercise as well as the exercise of discretion. In other words, if an official has been given the duty of making a decision between X and Y—both being valid, governmental alternatives—arguably it is not necessary that he actually make that decision. Injury-producing, but immunized, governmental activity might result merely from the default of the official who was to make the determination as to the action to be pursued. However, the better view is that the discretion should actually have been exercised. This has been required in actions seeking mandamus where the official must prove either that the decision was made in the exercise of discretionary powers given him, or that, in the exercise of the discretion given him, he decided to take no action. See Peck, The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function Exception, 31 WASH. L. REV. 207 (1956). The discretionary exception should be available not where discretion merely might have been exercised, but where it was, in fact, exercised. If the official has not exercised discretion, as opposed to exercising it in favor of nonaction, there is no decision which requires pro-
been put on the term as applied to the federal government. In order to avoid this confusion, it is submitted that the use of terms which designate more specifically the activity which is to be protected is desirable.

When discussing the dangers of exposing municipalities to tort liability in all instances, examples are generally drawn from the areas of zoning, licensing, and legislative, quasi-legislative, judicial, or quasi-judicial functions. The exception, contained in both the federal and state statutes for acts or omissions in the execution of a valid or invalid statute, charter, ordinance, resolution, or other regulation by an officer or employee exercising due care is obviously aimed at protecting most, if not all, of the above municipal activities. Therefore, an additional exception for discretionary duties would appear to be unnecessary and superfluous. However, if these or other interests are not deemed sufficiently protected by the general requirements of tort liability and the exception for legislative decisions, an additional exception stating them specifically should be contained in the statutes defining municipal tort liability.

The statutory language "or the failure to perform" may have been thought necessary in order to insure that no classification based on a misfeasance-nonfeasance distinction would be read into the statute. Such a test has sometimes been applied to the determination of the liability of the officer or municipality. See Stevens v. North States Motor, Inc., 161 Minn. 345, 346, 201 N.W. 435, 436 (1925); Bolland v. Gihsiiaf, 134 Minn. 41, 42, 158 N.W. 725 (1916); Blachly & Oatman, supra note 1, at 186. If the word "discretionary" is implied before the phrase "failure to exercise" this interpretation becomes evident. The discretionary exception then protects the discretionary decision to undertake a particular course of action or the discretionary decision to take no action at all.

101. See Section V supra.
102. See 3 K. Davis, supra note 95, at 484.
103. See, e.g., Op. MINn. ATT’Y GEN. 59a-32(6A) (1965) (issuance of building permit classified as discretionary under MINn. STAT. § 466.03(6) (1965)).
104. See, e.g., Hargrove v. Town of Cocoa Beach, 95 So. 2d 130 (Fla. 1957).
VII. CONCLUSION

There are strong public interests which urge the compensation of those individual members of society who suffer injury through government negligence. Consistent with this policy, municipal tort immunity should be extended no further than is necessary to the protection of the governing process. The federal discretionary duty exception is both inappropriate and unnecessary at the municipal level. Indeed, the exception only adds confusion to the law of municipal tort liability. Therefore, it is submitted that the legislature should reconsider its acceptance of the discretionary exception. If protection for some particular type of activity is deemed necessary, such immunity could be supplied specifically. Moreover, if the discretionary exception remains in the statute, any court called upon to construe it should do so strictly, retaining the widest possible latitude of municipal tort liability.

107. That the exception is unnecessary is demonstrated by the fact that since the enactment of the statute in 1963, no decisions have required the interpretation of the discretionary function exception.

108. One step in the direction of strict construction is the requirement of an actual exercise of discretion rather than the mere opportunity or authority to do so. See note 100 supra.

Another approach might be to require a showing that the course of action, in favor of which discretion was exercised, was supported by governmental necessity or reason. See Blyhl v. Village of Waterville, 57 Minn. 113, 58 N.W. 817 (1894), where, in a suit involving a defect in the sidewalk, the court, focusing on the fact that there was no reason or necessity for the defect, held the city liable.

Thus, it is not the "discretion" of a government driver to exceed a speed limit [Sullivan v. United States, 123 F. Supp. 713 (N.D. Ill. 1955)] or to make a left turn from the wrong lane of a highway, [Crouse v. United States, 137 F. Supp. 47 (D. Del. 1955)] for there are no special considerations relating to public policy or involving government interests in making these decisions . . . .

Jayson, supra note 89, at 160.