June 2012

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THE CONVERGENCE OF THE DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT WITH LIMITATIONS OF LIABILITY IN COMMON LAW NEGLIGENCE†

by William P. Kratzke*

The Federal Tort Claims Act was passed by Congress in 1946 as a means of providing compensation to those injured by the negligent acts of government employees without continually imposing upon Congress and the President the burden of “disposing of such matters by private claim bills.” 1 Congress preserved the government’s common law immunity from tort liability by excepting the applicability of the Federal Tort Claims Act to any claim “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 any employee of the government, whether or not the discretion involved be abused.” 2 This single statutory phrase has generated a considerable amount of case law 3 and commentary. 4 In

† The author gratefully acknowledges receipt of a summer research grant from Memphis State University.

* Professor of Law, Memphis State University; Visiting Professor of Law, Santa Clara University, 1986-87. B.A., 1971, University of Washington; J.D., 1974, Valparaiso University; LL.M., 1977, Georgetown University Law Center.


4 See, e.g., Comment, Discretion and the FAA: An Overview of the Applicability of the Discretionary Function Exception of the Federal Tort Claims Act to FAA Activity, 49 J.
fact, the words may be shrouded in more confusion and mystique than necessary.

The logical implication of this phrase is that liability of the federal government must rest upon an initial determination that no discretionary function or duty was involved in the conduct giving rise to the injury, and upon a second determination that the government official acted negligently. A two-level analysis, however, is needless at best and confusing at worst. The discretionary function exception to the Federal Tort Claims Act contributes little to the determination of tort claims against the government that is not already amply provided by the common law of negligence. The development of the law of discretionary functions or duties so closely parallels the development of policy limitations upon tort liability generally that they are indistinguishable, except for the

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6 Id. at 883 ("The Act waived the United States' immunity from suit for claims arising out of negligent conduct of government employees...") (emphasis added).

7 See Reynolds, supra note 4, at 120. Concerning the discretionary function of the Federal Tort Claims Act, Reynolds states that "good arguments have been proffered that the confusing exception should simply be abolished, leaving to the courts the task of carving out the areas in which governmental immunity should remain. After all, if the exception is no help to the courts in this task, and only produces immunity where there seems no sound reason for it, we would be better off without the troublesome phrase." See id.

8 See Street, Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act, 47 MICH. L. REV. 341, 353 (1949) (exception restates "existing law with regard to public officers").

9 General "policy limitations upon tort liability" pass under the various terminologies of "proximate cause." See generally W. PROSSER & W. KEETON, THE LAW OF TORTS §§ 41-45 (5th ed. 1984). "Proximate cause" is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct. Some boundary must be set to liability for the consequences of any act, upon the basis of some
critical fact that a jury is given a part to play in tort claims not made under the Federal Tort Claims Act. It goes too far to say that the discretionary function exception should be repealed, special tests can be contrived to determine whether a particular decision is discretionary.

A considerable number of federal courts in federal tort claims cases discuss whether discretionary functions or duties are present when they could just as easily discuss whether the government owed a particular plaintiff a duty, acted unreasonably, or inflicted an injury of a sort that is compensable under tort law. In all such cases, the issue of government liability in torts cases has come down to a question of the proper allocation of losses, the same question that is presented in every tort case. The judgment that a court must exercise in making this allocation of losses is similar to that which must be exercised by a court in deciding to send a case to a jury rather than to direct a verdict for the defendant or to grant summary judgment.

Initially, this article will discuss some basic principles that define the scope of negligence liability. A comparison of developments in specific areas of conduct will be made between cases brought against private defendants and those brought against the government. The article will conclude that these developments are essentially the same and that little is gained, therefore, by stating that discretionary functions must be examined when tort claims are made against the government. The leading cases of the United States Supreme Court in which the discretionary function exception was a factor will be reviewed, emphasizing the Court’s treatment of discretion in terms applicable to all negligence claims. It will be observed that the tests for the discretionary function that court interpretation of the Federal Tort Claims Act has generated, while useful in some instances, have come up short as devices to inform whether discretion is present. A finding of discretion in fact turns only upon the ability of a court to evaluate the government’s conduct against an objective standard of negligence. Beyond this, it is not possible to conceive a more sophisticated test of discretion.

social idea of justice or policy.” Id. at 264.


11 See generally W. Prosser & W. Keeton, supra note 9, at 164 (discussing elements of negligence cause of action). Failure to prove any one of prima facie elements of a negligence case would cause its dismissal. Id. at 164-65.
tion. In light of the fact that negligence cases do not generally arise from planned transactions, this is really neither surprising nor particularly alarming.

I. GENERAL POLICY LIMITATIONS UPON TORT LIABILITY

Tort law functions as a means of allocating losses that arise out of human activities. In negligence law, losses are allocated in accordance with various stated determinative factors including, among others, whether defendant acted in accordance with an objective standard of care and whether the acts of defendant were the legal cause of plaintiff’s injury. No one factor necessarily provides the exclusive rationale for a court’s denial of liability. Moreover, the statement that a particular factor applies in a given case may in fact mask the fact that a policy is controlling.

A. Standard of Care

Tort law will shift a loss from the plaintiff to the defendant only if the defendant’s conduct has created an unreasonable risk of injury.

[T]he standard of conduct which is the basis of the law of negligence is usually determined upon a risk-benefit form of analysis: by balancing the risk, in the light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest which the actor is seeking to protect, and the expedience of the course pursued.

Judge Learned Hand expressed a quantification of unreasonable conduct in United States v. Carroll Towing Co. If the probability of injury occurring be called P; the gravity of the injury L; and the burden or cost to the defendant of adequate precautions to avert the injury B; “liability depends upon whether B is less than L multiplied by P: i.e., whether B < PL.” This formula, if it could be rigorously applied in all circumstances, would create efficiency by “exploiting economic resources in such a way that ‘value’ —

12 Id. at 6.
13 Id. at 169.
14 Id. at 173.
15 159 F.2d 169 (2d Cir. 1947).
16 Id. at 173. Frequent reference will be made to B, P, and L, as defined by Judge Learned Hand, throughout this article.
17 R. POSNER, ECONOMIC ANALYSIS OF LAW §§ 6.2-6.3 at 122-23 (2d ed. 1977).
human satisfaction as measured by aggregate consumer willingness to pay for goods and services — is maximized.\textsuperscript{18} Unfortunately, the three variables (B, P, and L) are rarely susceptible to precise quantification.\textsuperscript{18} It is possible, however, to ascribe relative values to B and to the product PL in order to apply the formula. The formula's value is that it directs the thinking of the fact-finder, even if it cannot be used to evaluate the reasonableness of a course of conduct with certainty. It is the fact-finder who in effect ascribes relative values to these immeasurable variables.\textsuperscript{20} Of course, any time a court makes a determination of negligence, it has implicitly recognized that it is indeed competent to make a judgment of the relative values of B and PL. Negligence will hereinafter include those occasions when B < PL.

It should be observed that the values ascribed to B, P, and L are subject to change over time. Hence, conduct that does not entail an unreasonable risk of injury at one point in time might later create an unreasonable risk of harm.\textsuperscript{21}

A second observation is that there will be occasions when the relative values to be ascribed to B and PL are so immeasurable, indeed imponderable, that no evaluation of an appropriate standard of care is possible. Such an occasion arises — in the view of some state courts — in cases in which it is alleged that a parent should be liable for the "negligent" supervision of his child. One example is the case of Holodook v. Spencer,\textsuperscript{22} in which infant Holodook was injured when struck by an automobile driven by de-

\textsuperscript{18} Id. at 10 (emphasis original).
\textsuperscript{19} Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940).
\textsuperscript{20} Cf. id. at 612 (choice consigned to jury).
fendant. Holodook’s father brought an action against defendant, who counterclaimed and commenced a third-party action against Holodook’s mother for indemnification, contending that the parents’ “lack of attention, care and control of . . . [their] son was the proximate cause of the accident and resulting injuries.”33 The parents’ motion to dismiss these claims was denied by Special Term.34 The Appellate Division reversed, holding that the defendant’s right to indemnification would depend upon the existence of a legal duty owed by the parents to their son35 and that such a duty did not exist. The reasons for such a conclusion include the difficulty of measuring the relative values of B and PL in the context of parental supervision of a child.

The duty to supervise a child in his daily activities has as its objective the fostering of physical, emotional and intellectual development, and is one whose enforcement can depend only on love. Each child is different, as is each parent. . . . [T]here are so many combinations and permutations of parent-child relationships that may result that the search for a standard would necessarily be in vain — and properly so. Supervision is uniquely a matter for the exercise of judgment. . . . Unfortunately, it is only when injury occurs that that judgment will be called into question — and the parents themselves will be the first to do so. Surely there can be no place in such a natural scheme for second-guessing by a jury whose members’ views on the subject will be unavoidably influenced by their own unique and inimitable experiences, both as children and parents.36

When the relative values of B and PL cannot be assessed — even by hunch or preference by a court’s fact-finder — then the necessary implication is that the actor is free to make his own choices without fear of later being found not to have performed in accordance with the appropriate standard of care. The actor has, in a word, discretion. The presence of such discretion means that there can be no review of the actor’s actions.37

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34 Id. at 131, 350 N.Y.S.2d at 200-01.
35 Id. at 131-32, 138, 350 N.Y.S.2d at 201, 207.
36 Id. at 135, 350 N.Y.S.2d at 204-05; accord Schneider v. Coe, 405 A.2d 682, 684 (Del. 1979).
37 Cf. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (“discretion” as used in Administrative Procedure Act, 5 U.S.C. § 701). In Overton Park, the United States Supreme Court noted that discretion exists when there is no law to apply. Id. at 410. The standard enunciated in Overton Park to define “discretion” is similar to the
In areas in which the relative values of B and PL are so immeasurable that courts give actors discretion to make whatever judgments they wish, there nevertheless remains the possibility that the variables B, P, and L will not forever be perceived as immeasurable. In such cases, it should be expected that courts will reach decisions that withhold the discretion previously accorded actors. This occurs, for example, when a court recognizes that a claim can be stated for negligent infliction of mental distress. The language of the courts in such cases is neither that of a standard of care nor that of B, P, or L; rather it is that of duty. But beneath the language of duty lies the fact that courts must be willing to attempt to measure the appropriate standard of care in a situation in which they were not previously so willing.

In Amaya v. Home Ice, Fuel & Supply Co., plaintiff witnessed the defendants run over her seventeen-month old son with a truck. She brought an action seeking damages for negligent infliction of emotional distress. The trial court dismissed the complaint and the California Supreme Court affirmed. The court expressed concern about the considerable administrative problems that could arise with the recognition of such a claim. It would be difficult to prove, for example, that the injury of mental distress had indeed been caused by the acts of the defendant. If a court cannot make even the roughest assessment of the value of the L element of the negligence formula, then the formula simply cannot be applied and discretion follows. Nevertheless, "simply because 'naivete about the problem of proof has caused injustice in times past does not necessarily settle the matter for the future' . . . ." Only five years after having expressed doubt in the courts' administrative capacity to handle cases of negligently inflicted emotional distress, the California Supreme Court decided the case of Dillon v. Legg which was factually similar to Amaya. The court noted the frequently advanced and frequently rejected argument that courts would be unable to discern adequate proof of causa-

one enunciated by the appellate division in Holodook. See Holodook, 43 App. Div. 2d at 135, 350 N.Y.S.2d at 204-05.


29 Id. at 310-13, 379 P.2d at 522-24, 29 Cal. Rptr. at 42-44.

30 Id. at 311, 379 P.2d at 523, 29 Cal. Rptr. at 43.

31 Id. at 311-12, 379 P.2d at 523, 29 Cal. Rptr. at 43 (quoting Smith, Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli, 30 Va. L. Rev. 193, 285 (1944)).

32 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
tion, to sift the fraudulent claims from the meritorious claims.\textsuperscript{33} The \textit{Dillon} court noted that courts are just as capable of deciding this type of case as they are of deciding many other types of cases in which they do not confess inability to determine the magnitude of \textit{L}.

In the five years that elapsed between \textit{Amaya} and \textit{Dillon}, the values to be ascribed to \textit{B}, \textit{P}, and \textit{L} did not undergo a sudden transformation. Rather, from an analytical standpoint, the \textit{Dillon} court was willing to measure in some manner the relative values of \textit{B} and \textit{PL}. When courts decide that they are able to review the actions of a defendant to determine whether losses should be shifted from plaintiff to defendant, they do so, and discretion is correspondingly reduced.

\subsection*{B. \textquote{Proximate Cause}}

"Proximate cause" is the short-hand phrase which a court may use to limit the liability of a defendant who, through his conduct, has caused injury to a plaintiff.\textsuperscript{35} Limitations are placed upon the liability of a defendant for reasons of policy, so that losses that have been incurred will not always be reallocated from the plaintiff to the defendant.\textsuperscript{36} The phrase "proximate cause" is a poor choice for expressing this limitation function because the doctrine does not describe a rule of causation or a rule ofximity. More appropriate phrases would be "legal cause" or "responsible cause."\textsuperscript{37} Courts handle questions of legal causation through at least two approaches: the foreseeability approach and the direct causation (or directly traceable consequences) approach.\textsuperscript{38}

\subsubsection*{1. Foreseeability Approach. —} Under the foreseeability approach, liability for negligence is limited "to the scope of the original risk created, with the test of responsibility for the result identical with the test for negligence."\textsuperscript{38} The foreseeability test has been restated in terms of duty, the important point being that a duty is

\begin{itemize}
  \item \textsuperscript{33} \textit{Id.} at 737, 441 P.2d at 918, 69 Cal. Rptr. at 77-78.
  \item \textsuperscript{34} See \textit{id.} at 737-38, 441 P.2d at 918-19, 69 Cal. Rptr. at 78-79 (courts have already decided many other types of cases in which similar argument was advanced).
  \item \textsuperscript{35} \textsc{W. Prosser} & \textsc{W. Keeton, supra} note 9, at 273.
  \item \textsuperscript{36} \textit{Id.}
  \item \textsuperscript{37} \textit{Id.}
  \item \textsuperscript{38} \textsc{W. Prosser}, \textsc{J. Wade} & \textsc{V. Schwartz, Cases and Materials on Torts} 364-65 (7th ed. 1982).
  \item \textsuperscript{39} \textsc{W. Prosser} & \textsc{W. Keeton, supra} note 9, at 281 (footnote omitted).
\end{itemize}
owed only to the plaintiff who is foreseeable. 40 "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." 41 By conceptualizing the problem as one of duty, the issue of causation is avoided altogether. 42

The foreseeability approach offers little in the way of certainty in determining how losses should be allocated. Stating issues in terms of foreseeability may eliminate the need for reference to causation as an issue, but it does nothing to help eliminate the fundamental question of how liability is to be limited. 43 "[L]egal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done." 44 Whether a duty exists is really dependent upon several factors, such as, "the hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall." 45 Duty is "a legal device . . . designed to curtail the feared propensities of juries toward liberal awards." 46 This curtailment occurs because the initial question of whether there is a duty is one for the court, 47 whose role in this analysis is actually greater than judges who give

40 Id. at 284.
42 See id. at 346, 162 N.E. at 101 (question of liability anterior to question of measure of consequences accompanying liability).
43 W. Prosser & W. Keeton, supra note 9, at 287 ("unlimited liability is plainly unjustified, and this approach does nothing to solve the problem of a place to stop short of infinite liability").
45 Prosser, Palsgraf Revisited, 52 Mich. L. Rev. 1, 15 (1953); see also W. Prosser & W. Keeton, supra note 9, at 287 ("The real problem . . . would seem to be one of social policy: whether the defendants in such cases should bear the heavy negligence losses of a complex civilization, rather than the individual plaintiff").
47 See W. Prosser & W. Keeton, supra note 9, at 236. The federal courts of appeals maintain that the existence of a legal duty is for the court to determine as a matter of law. See, e.g., Carrier v. Riddell Inc., 721 F.2d 867, 868 (1st Cir. 1983)(as a matter of law court found defendant did not breach a duty); Ruhs v. Pacific Power & Light, 671 F.2d 1268, 1271 (10th Cir. 1982)(determination of defendant's duty under particular circumstances is a matter of law for the court); Welch v. Heat Research Group Corp., 644 F.2d 487, 490 (5th Cir. 1981) (court correctly ruled defendant breached no duty as a matter of law).

The Restatement has reiterated this procedure by stating that it is for the courts to decide whether the facts give rise to a legal duty. See Restatement (Second) of Torts § 328 B(b) (1977).
all cases to juries.\textsuperscript{48} To the extent that a court determines that there is no duty, the defendant has discretion.

The allocation of losses is accomplished by the appropriate definition of duty. Foreseeability has proved to be a very elastic concept — one that really has not so much to do with prevision as it has to do with policy. Foreseeable risks can be defined narrowly or they can be defined broadly “as seems appropriate and just in the special type of case.”\textsuperscript{49} Duty imports relation,\textsuperscript{50} and relations change. As relations change, or are perceived to have changed, or are perceived differently by different courts, duties change. Duties can be expanded or contracted. Thus the person who is struck by the flying body of another person, who was struck by a negligently driven vehicle, may be deemed by some courts to be an unforeseeable plaintiff and by other courts to be a foreseeable plaintiff.\textsuperscript{51} Few judges would impose liability on one who had negligently knocked down a bridge over the Buffalo River, causing delay in the arrival of a doctor.\textsuperscript{52} But when the negligent derailment of a train blocks a crossing and causes delay in getting a seriously ill person to a hospital by automobile and such delay could have contributed to the ill person’s death, a jury should be permitted to pass upon whether or not the death was foreseeable.\textsuperscript{53}

Recent developments in tort law manifest a changing relation between those with power and those without it. Those with “political, economic, intellectual, [and] physical”\textsuperscript{54} power will find that more remedies exist for the abuse of that power than did previously.\textsuperscript{55} Increasingly, courts are confronted with “the question of what defendants representing significant clusters of different kinds of power owe to our civilization in the way of behaving in a civilized manner.”\textsuperscript{56} This trend reflects the elasticity of “foreseeability.”

2. Direct Causation Approach. — Under the so-called direct causation approach, liability for negligence is limited to conse-

\textsuperscript{48} L. Green, Rationale of Proximate Cause 122-31 (1927).
\textsuperscript{49} Marshall v. Nugent, 222 F.2d 604, 610 (1st Cir. 1955).
\textsuperscript{50} Prosser, Palsgraf Revisited, supra note 45, at 13.
\textsuperscript{51} See W. Prosser, J. Wade & V. Schwartz, supra note 38, at 324 n.7.
\textsuperscript{52} In re Kinsman Transit Co., 338 F.2d 708, 725 (2d Cir. 1964) (dictum).
\textsuperscript{53} Hall v. Atchison, Topeka and Santa Fe Ry., 504 F.2d 380, 382, 384 (5th Cir. 1974).
\textsuperscript{55} Id. at 333-35.
\textsuperscript{56} Id. at 335 (footnote omitted).
quences that are directly, rather than indirectly, caused by the negligent act of the defendant. This approach is arbitrary and artificial, since it usually cannot be stated with certainty whether a new force actually intervened or was simply a part of the landscape in which the defendant acted. Fantastic results can be directly traced to a negligent act. The problem, of course, is that limitation of liability is a matter of policy and not susceptible to a mechanical solution.

Application of the direct causation approach can lead either to expansive or contracted impositions of liability, and the results can change over time. Thus, the negligent motorist who caused a vehicle to collide with a power pole, thereby affecting the flow of power to a business that suffered economic loss, was held by one court not liable as a matter of law, while another court later upheld liability for such "natural, logical, and foreseeable" consequences. The subsequent suicide of one negligently injured by another has been deemed to be a superseding cause of death by some courts, and not a superseding cause of death by other courts. Under the direct causation approach, as under the others, losses are allocated on the basis of a policy choice rather than on the basis of a test that can be applied mechanically and with certainty.

C. Other Determinitive Factors

Courts can employ any number of approaches in determining the proper allocation of losses, and such approaches, of course, are not limited to those already noted. A court may simply decide, for reasons quite satisfactory to itself, that the type of unreasonable conduct of a defendant simply is not the type for which liability should be imposed, such as negligent infliction of mental distress.

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67 W. PROSSER & W. KEETON, supra note 9, at 293-94.
68 Id. at 294-95.
69 Id. at 295.
70 Id. at 294-95.
74 See generally W. PROSSER & W. KEETON, supra note 9, at 359-66 (citing cases in which no liability imposed but also mentioning cases holding otherwise); Miller, The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime," 1 U. HAWAI I. L. REV. 1, 3-9, 16-20 (1979) (discussing recent trends and policy considerations); Nolan & Ursin, Negligent Infliction of Emotional Distress: Coherence
negligent infliction of prenatal injuries, or the failure to act in various circumstances. Similarly, a court may decide that damages should not be awarded for certain types of injury, such as attorney's fees, reduced life expectancy, or economic loss when there is no personal injury or property loss. Considerations of policy, rather than application of meaningful tests of liability, lead to such conclusions.

D. Policy Limitations on Negligence Liability

The precise factors that affect liability determination in common law negligence cases defy complete articulation. The common law of negligence, however, does function in a manner that can be regarded as satisfactory. Over time, some fact patterns do recur and courts become accustomed to dealing with them. These fact patterns arise, for example, in automobile cases, defective products cases, and landowner liability cases. As a result of these recurring patterns, a satisfactory degree of consistency has developed from case to case. It should also be noted that negligence cases are "fact-intensive", that is, much depends on the findings of fact. Some of those facts have determinitive legal implications, for example, a finding of unreasonable conduct of a party. If such findings are shielded from intensive outside scrutiny, such as by having a jury render a general verdict subject to review only upon the question of whether substantial evidence supports the verdict, an illusory degree of consistency is achieved from one case to the next. While


See generally D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES § 3.8 (1973) (stating general rule that prevailing party in litigation is not entitled to attorneys' fees); see also RESTATEMENT (SECOND) OF TORTS § 914(1) (1977) (damages for tort action "do not ordinarily include compensation for attorney fees").

See, e.g., W. Prosser, J. Wade & V. Schwartz, supra note 38, at 542 n.4 (discussing general rule and policy issues keeping it extant); D. Dobbs, supra note 67, at 549 (discussing American rule against recovery).

this consistency may be illusory, the means of achieving it have proved sufficiently palliative that the torts process as it presently exists has demonstrated a remarkable capacity to endure.

II. A COMPARISON OF FACT PATTERNS IN WHICH DISCRETION IS AN ISSUE IN CASES ARISING UNDER THE FEDERAL TORT CLAIMS ACT WITH COMPARABLE FACT PATTERNS IN ORDINARY NEGLIGENCE CASES

The following is an examination of a number of fact patterns in cases in which the discretionary function exception to the Federal Tort Claims Act was construed. These fact patterns will be compared with the fact patterns of comparable ordinary negligence cases in which the government was not a defendant. The purpose of this comparison is to demonstrate the parallel development of liability limitations in these areas. It will be observed that analysis of cases for the presence of discretion in a government official does little to alter the pattern of liability that would have occurred if the defendant had been a private party and the case had been one of ordinary common law negligence.

A. Freedom from Contract

At common law, an individual has the freedom to contract or not to contract. No liability will be imposed on an individual or an entity for not entering into a contract except in special circum-

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70 The facts of many negligence cases can be characterized in different ways. For example, one observer may see a case as involving the question of whether there has been negligent performance of an activity undertaken, while another observer may see the same case as involving the question of whether a duty arises from the act of inspection. No effort is made to characterize each case in every manner possible. Rather it is simply acknowledged that this is an inherent characteristic of negligence cases.

No claim is made that every court decision in which 28 U.S.C. § 2680(a) was construed is included in this analysis. Nor is it claimed that every aspect of tort law is exhaustively examined; rather, each area is considered only to the extent necessary to demonstrate the convergence of common law limitations on negligence liability and interpretations of the discretionary function exception to the Federal Tort Claims Act.

71 In this article, reference to the “government” refers to whatever federal entity is the defendant in a suit. It is also assumed that all legal obstacles to a suit such as presentation to and rejection by the appropriate federal agency have been cleared. See 28 U.S.C. § 2675(a) (1982).

72 28 U.S.C. § 2680(h) (1982) provides several exceptions to liability under the Federal Tort Claims Act. For purposes of isolating analysis of the discretionary function exception, these exceptions will be ignored.
The same is true of the federal government. It does not have to enter into a contract that it does not wish to enter, and there should be no liability for such a refusal. But the cases in which this point could be dispositive are frequently resolved, at least in part, under the heading of discretion; a determination is made that there is no liability because the refusal to enter a contract constitutes discretionary conduct.

Thus the government has the discretion, in the sale of lands or other properties, to accept or reject any offers it deems proper. Awarding a government contract to one person instead of another is described as a discretionary act because a number of factors are considered in making such a decision. Such discretion exists even if the reasons for not entering a contract with the plaintiff are based on inaccurate information. The government has discretion with respect to whom it hires, and to whom it loans money. It also has the discretion to do business with as many persons as it

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73 Austin v. Burge, 156 Mo. App. 286, 289, 137 S.W. 618, 618 (1911). "It is certain that one cannot be forced into contractual relations with another..." Id. Even when a federal statute creates a process of contract formation and creates the means by which the identity of parties to a contract is determined, it would be most unusual — aside from certain well-known exceptions such as obligations imposed upon common carriers or the obligation not to discriminate on the basis of race — to compel one to enter a contract he does not wish to enter. See, e.g., H.K. Porter Co. v. NLRB, 397 U.S. 99, 102, 108 (1970) (NLRB without authority to prescribe terms of collective bargaining agreement, even to remedy refusal to bargain in good faith).


75 See, e.g., Myers & Myers, Inc. v. United States Postal Serv., 527 F.2d 1252, 1256 (2d Cir. 1975) (failure of Postal Service to renew contracts for star routes involved consideration of past performance, nature of routes, cost, and public interest); Scanwell Laboratories, Inc. v. Thomas, 521 F.2d 941, 948 (D.C. Cir. 1975) (awarding contract to party arguably not in compliance with contract requirements involved consideration of degree of deviance from contract requirements and whether to hold new bidding, thus discretionary), cert. denied, 425 U.S. 910 (1976); Taxay v. United States, 345 F. Supp. 1284, 1286 (D.D.C. 1972) (failure to renew appointment as FAA physician involved consideration of qualifications and thus discretionary), aff'd mem., 487 F.2d 1214 (D.C. Cir. 1973); cf. Madison v. United States, 679 F.2d 736, 739 (8th Cir. 1982) (negligent award of government contract immune within discretionary function exception).

76 See Myers & Myers v. United States Postal Serv., 527 F.2d 1252, 1257 (2d Cir. 1975) (failure of postal service to renew contracts for star routes).


wishes unless it expressly agrees otherwise, even if this makes a deal less profitable than anticipated.\textsuperscript{70} The Federal Deposit Insurance Corporation has wide discretion to grant or not to grant an application for insurance.\textsuperscript{80}

In the situations noted above, the government's obligations would not change if the discretionary function exception to the Federal Tort Claims Act did not exist. No statutory exception is necessary to give an individual the right to accept the offer he wishes to accept and to reject all others. No statutory exception is necessary to empower one to choose, for whatever reason, with whom he will do business. The statute establishes nothing new in the law insofar as hiring employees, selecting lendees, or insuring a business is concerned. In short, it does not alter the government's freedom not to enter into a contract.

\textbf{B. Interference with Prospective Advantage}

At common law, a prospective commercial advantage is protected when a certain degree of security in the commercial relationship is warranted. The performance of a contract is protected from intentional and improper interference,\textsuperscript{81} but not from negligent interference.\textsuperscript{82} Likewise one's interest in a prospective contractual relation is protected from intentional and improper interference,\textsuperscript{83} but not from negligent interference.\textsuperscript{84} Whether an interference is "improper" depends on a number of factors, including the nature of the interferer's conduct, the motive of the interferer, the interest of the plaintiff affected, the interest which the interferer advances, the social interest in protecting the interferer's


\textsuperscript{81} See W. Prosser & W. Keeton, supra note 9, at 978; see also RESTATEMENT (SECOND) of TORTS §§ 766, 766A (1979) ("intentionally and improperly" inducing non-performance or building performance actionable).

\textsuperscript{82} See W. Prosser & W. Keeton, supra note 9, at 982; see also RESTATEMENT (SECOND) of TORTS § 776c (1979) (negligence causing nonperformance, hindered performance or prospective performance not actionable).

\textsuperscript{83} See W. Prosser & W. Keeton, supra note 9, at 1008; see also RESTATEMENT (SECOND) of TORTS § 766B (1979) (inducing person not to contract or preventing person from acquiring the prospective interest actionable).

\textsuperscript{84} See W. Prosser & W. Keeton, supra note 9, at 1008; see also RESTATEMENT (SECOND) of TORTS § 766C (1979) (negligent interference with contractual relationship not actionable).
freedom to act compared with the contractual interest, the proxim-
ity of the interferer's conduct to the actual interference, and the
relationship between the parties.86

There have been many instances in which persons with gov-
ernmentally impaired commercial expectancies have brought an
action against the United States under the Federal Tort Claims
Act.86 The federal courts are often asked to determine whether the
governmental agent was performing a discretionary function. The
liability of the United States in these cases, however, could as eas-
ily have turned on whether the conduct of its agents was inten-
tional or negligent, or whether the intentional conduct was proper
or improper; the outcome of these cases would not have been dif-
ferent. In some cases, the interference of a government agent or
official was deemed discretionary, and hence immune from liabil-
ity; yet the conduct examined was not intentional, but negligent.87
In other cases, the conduct of the government official was not im-
proper under the factors noted above, yet the court determined
that a discretionary act was being performed. Certainly if a statute
gives a governmental agency the discretion to act in such a manner
that it upsets a private party's commercial expectancy, the statute
itself manifests the presence of (1) a substantial interest of the
agency and (2) a substantial interest in protecting the agency's
freedom of action. Thus, irrespective of the existence of the Fed-
eral Tort Claims Act, there would be no action for intentional in-
terference. It adds little to say that the acts of the governmental
agency were discretionary.88

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88 Naturally, no plaintiff is going to allege directly that an act of the United States has
interfered with a contract, for that would lead to immediate dismissal under 28 U.S.C. §
2680(h) (1982). However, the interests of plaintiffs in the cases examined herein are in the
nature of expectancies with which the government has interfered.
87 See, e.g., Emch v. United States, 630 F.2d 523, 528 (7th Cir. 1980) (plaintiff's allega-
tion of negligent regulation and supervision of bank holding company within discretionary
function exception), cert. denied, 450 U.S. 966 (1981); Barton v. United States, 609 F.2d
977, 979 (10th Cir. 1979) (denial of grazing permit in accordance with statutory policy as
discretionary and not actionable); Huntington Towers, Ltd. v. Franklin Nat'l Bank, 559
F.2d 863, 870 (2d Cir. 1977) (Federal Reserve Bank's failure to disclose bank's desperate
(backpay lost because of NLRB delay in seeking enforcement of order yet Board immune
from liability), cert. denied, 424 U.S. 954 (1976); Porter v. United States, 473 F.2d 1329,
1337 (5th Cir. 1973) (negligent taking of property by FBI pursuant to investigation not ac-
tionable) (dictum); Eastport Steamship Corp. v. United States, 372 F.2d 1002, 1011 (Ct. Cl.
1967) (plaintiff's claim would be dismissed either on discretionary function exception or
When an interference is intentional and improper, the discretionary function vanishes as an impediment to liability, even though consideration of the function does not.\(^8\) Knowing interference with another’s expectancy by refusing to follow an agency’s own regulations would be improper.\(^9\) There is no discretion to interfere with the rights of those with whom the government has elected to be tenants in common.\(^9\) There is no discretion to construct a dam and thereby divert water where the plaintiff has rights previously established by court decree.\(^9\) The existence of the discretionary function does not alter the outcomes of cases involving government interference with a prospective advantage. The results would be the same under the common law.

C. Law Enforcement Activities

The common law recognizes the existence of several privileges when law enforcement activities are at issue.\(^9\) There is a privilege to use force likely to cause death or serious bodily harm to suppress a riot that itself threatens death or serious bodily harm.\(^4\) There is a privilege “to interfere with person or property under legal process . . . so long as the warrant or writ to be served is ‘fair on its face.’”\(^9\) The server of legal process “is required to know at least the superficial characteristics of a valid warrant . . .”\(^9\) He

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\(^{8}\) Cf. Oman v. United States, 179 F.2d 738, 740-41 (10th Cir. 1949) (government aware that plaintiff entitled to exclusive grazing permits so no discretion to grant grazing permits to others). “No government employee is granted the discretion whether he shall induce or incite third persons to interfere with exclusive rights or privileges granted by the United States.” Id. at 740. Compare Kunzler v. United States, 208 F. Supp. 79, 84 (D. Utah 1961) (Oman distinguished because no exclusive right to permit), appeal dismissed per curiam mem., 307 F.2d 511 (10th Cir. 1962).

\(^{9}\) Cf. Weiss v. Lehman, 676 F.2d 1320, 1322 (9th Cir. 1982) (Forest Service failure to follow regulations for destruction of property not discretionary), cert. denied, 459 U.S. 1103 (1983). A determination of “propriety” is avoided simply by holding that such interference is not discretionary. See, e.g., Gross v. United States, 676 F.2d 295, 302-03 (8th Cir. 1982) (no discretion to deny participation in feed grain program); Donohue v. United States, 437 F. Supp. 836, 841 (E.D. Mich. 1977) (acts not at policy-making level).

\(^{10}\) See Preston v. United States, 696 F.2d 528, 541 (7th Cir. 1982) (government repudiation of duties as cotenant with depositors of grain not within discretionary function exception).


\(^{13}\) See id. at § 142(2).

may not depart from proper procedures nor may he arrest the wrong person or seize the wrong property.\textsuperscript{97} He must have the process in his possession.\textsuperscript{98}

The common law can be applied to law enforcement activities of the federal government with an appropriate degree of immunity provided the United States without reliance on the discretionary function exception to the Federal Tort Claims Act. Nevertheless cases involving the government are not resolved by applying the common law, but by making a finding concerning discretion. There is no discretion to use force likely to cause death or serious bodily harm for the purpose of suppressing a riot.\textsuperscript{99} There is no discretion to depart from procedures prescribed by federal law for the destruction of plaintiffs' chattels by government agents.\textsuperscript{100} There is no discretion to send inaccurate messages based on inadequate knowledge for the purpose of procuring an arrest.\textsuperscript{101} There is no discretion to seize property without a warrant.\textsuperscript{102} On the other hand, in the absence of negligence, the United States is not liable for damage to personal property occurring in the course of an FBI investigation of a presidential assassination.\textsuperscript{103}

The common law of malicious prosecution gives an absolute privilege to the public prosecutor.\textsuperscript{104} One would expect that the actions that must be taken prior to prosecution such as investigation would also be immune. This is the pattern that has emerged from cases decided under the Federal Tort Claims Act, except that immunity is granted, at least in part, on the basis of the statute's discretionary function exception rather than on the basis of the common law.

The decision to investigate (or not to investigate) or to prose-

\textsuperscript{97} Id. at 150.
\textsuperscript{98} Id.
\textsuperscript{100} Hatahley v. United States, 351 U.S. 173, 181 (1956) (rounding up plaintiff-Indians' horses without notice and opportunity to remove horses from rangeland as required by Federal Range Code).
\textsuperscript{101} See Sami v. United States, 617 F.2d 775, 777 (D.C Cir. 1979) (United States National Central Bureau, Department of Treasury; message sent to Interpol to procure arrest in Germany).
\textsuperscript{102} See DeBonis v. United States, 103 F. Supp. 123, 125 (W.D. Pa. 1952) (seizure of auto by tax agents without warrant; no discretion and failure to exercise due care).
\textsuperscript{103} See Porter v. United States, 473 F.2d 1329, 1337 (5th Cir. 1973).
\textsuperscript{104} W. PROSSER & W. KEETON, THE LAW OF TORTS 1058 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 656 (1977).
cute (or not to prosecute) a case particularly one that involves issues of national policy such as civil rights, is discretionary. Such issues should not be entrusted to resolution through private litigation, for the Constitution entrusts such decisions to other government branches. The decision when to arrest a bank robber and the plan to be used to effectuate the arrest are discretionary. The decision to utilize the service of informants and the choice of a communications system to be used between those informants and the government contacts are discretionary. The policy decision to implement a Witness Protection Program is discretionary, as is the selection of a person for the program, the decision to use relocation as the primary means of implementing the program, and the determination not to supervise the relocated witness constantly.

In such cases, even without the discretionary function exception, courts would not intervene because there is no way in which they could assess the relative values of B, P, and L. If the relative values of B, P, and L could be assessed, a court might be more willing to intervene.

department of Agriculture decision to investigate for violation of Meat Inspection Act discretionary.


Id. at 795.

Id.
ticular mission is not discretionary. Negligent implementation of the Witness Protection Program so that interference with the rights of a non-custodial parent occurs is not discretionary. The results of all the cases noted here would still be obtained in the absence of a statutory exception for the exercise of a discretionary function.

D. Duty to Provide Police Protection to Individuals

An individual injured through the violent conduct of another may seek recovery from the sovereign whose obligation it is to provide police protection. There is a strong inclination, however, to hold that providing police protection to the public does not create a duty to protect any one individual from harm. The court-created doctrine of "duty to all, duty to no one" is the common law equivalent of a statutory exception of discretionary acts from tort liability under a tort claims statute, because the duty analysis and the statutory exception serve the same policy interests. Even in the sphere of a distinctly governmental activity, such as providing police protection, competing policies have subjected the contour of legal duties to reexamination and change. The same process of reexamination and change is found in the federal courts' recent considerations of the term "discretion" in cases involving individual protection.

The tension that exists in the common law in this area is illustrated in the majority and dissenting opinions in the case of Riss v. City of New York. For six months, plaintiff in Riss had pleaded with the police for protection from a would-be suitor who had persistently threatened her. After she was eventually assaulted, plaintiff brought an action against the City of New York for failure to

373, 376-77 (D. Mo. 1979).


118 See W. Prosser & W. Keeton, supra note 9, at 1049-50.

119 See id. at 1049 n.81.

120 See Recent Cases, 30 Vand. L. Rev. 295, 302 (1977) (by dropping requirement of special relationship, Supreme Court of Alaska eliminated "duplication of effort that could only cause confusion").

provide special protection. The trial court dismissed the complaint and both the appellate division and the court of appeals of New York affirmed, indicating that the judiciary should not be the governing body that indirectly determines how limited police resources are spent. Since courts simply are not equipped with the wisdom necessary to dictate police budgets, such decisions should be made by other departments of government.

In his dissenting opinion, Judge Keating was much more willing to analyze the case under the negligence concept. He noted that "[t]o say that there is no duty is, of course, to start with the conclusion." Judge Keating rejected the factual conclusion that limitless liability will ensue from holding the city liable in a case such as this. Rather than creating a specter of unlimited strict liability, Judge Keating’s approach would limit the liability of a governmental entity for the failure of the police to protect the citizens through such traditional negligence concepts as fault, proximate cause, or foreseeability. When threats such as those made in this case become real and foreseeable, liability should be imposed for failure to take any measures to avoid the consequences. The denial of a court’s ability or wisdom to evaluate liability in such situations eventually encourages irresponsibility by other governmental departments. Losses that should properly be assessed to the city are externalized and imposed upon persons such as the plaintiff.

The competing policies identified in the Riss majority and dissenting opinions are the freedom of police departments to allocate scarce resources in the manner they deem appropriate and the reallocation of a loss when the burden of avoiding it has clearly become less than its magnitude discounted by the probability of its not occurring. These are the same policies that compete in any negligence case. A court should allow a police department to allocate scarce resources as it sees fit when it simply is not possible to

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122 Id. at 583-84, 240 N.E.2d at 862, 293 N.Y.S.2d at 899-900 (Keating, J., dissenting).
123 See id., at 582-83, 240 N.E.2d at 860-61, 293 N.Y.S.2d at 898.
124 See id. at 582, 240 N.E.2d at 861, 293 N.Y.S.2d at 898.
125 See id. at 583, 240 N.E.2d at 861, 293 N.Y.S.2d at 899.
126 See id. at 585, 240 N.E.2d at 862, 293 N.Y.S.2d at 901 (Keating, J., dissenting).
127 Id. at 585-86, 240 N.E.2d at 862-63, 293 N.Y.S.2d at 901 (Keating, J., dissenting).
128 See id. at 586, 240 N.E.2d at 863, 293 N.Y.S.2d at 902 (Keating, J., dissenting).
129 See id. at 587, 240 N.E.2d at 864, 293 N.Y.S.2d at 902 (Keating, J., dissenting).
130 See id., 240 N.E.2d at 864, 293 N.Y.S.2d at 903 (Keating, J., dissenting).
131 See id. at 590, 240 N.E.2d at 865-66, 293 N.Y.S.2d at 905 (Keating, J., dissenting).
reach any conclusion concerning whether B is less than PL. Correspondingly, the police department has discretion in such matters. But when a court is competent to determine that B is less than PL, a duty can be found and the scope of discretion narrows. Judge Keating sub silentio perceived on the part of the courts a greater competence to assess the relative values of B and PL.

Liability determinations made by federal courts under the Federal Tort Claims Act are essentially consistent with this resolution of competing policies. An increasing willingness on the part of federal courts to determine the relative values of B and PL can be discerned in the recent cases. Of course, federal court decisions are likely to rest not on a determination of whether negligence occurred, or on the court's ability to make such a determination, but rather on the presence or absence of discretion. There is no discretion, for example, to confine federal prisoners in facilities that are so inadequate that they cannot be adequately protected from foreseeable assaults by other federal prisoners; the government does not avoid this duty by negligently contracting with the keeper of a substandard, dangerous, and perhaps unconstitutional jail. 132 Similarly, when the government knows that a person's home is in danger because a dangerous suspect has stated that the plaintiff will never testify against him, there is no discretion not to provide police protection for the person. 133 Liability determinations in those cases would not change if there were no discretionary function exception to the Federal Tort Claims Act.

E. Medical Malpractice

In the area of medical malpractice, there is little reason to rely on the presence of discretion to exempt the government from liability for the acts of physicians in its employ, one court having gone so far as to say that "[n]o further leeway is required for the publicly employed doctor or the public hospital than for their private counterparts." 134 Certainly the sizeable experience of courts

133 Compare Swanner v. United States, 309 F. Supp. 1183, 1187 (M.D. Ala. 1970) (duty to protect government agent arises when government learns of facts leading to reasonable belief that agent endangered as result of performance of job) with Peck v. United States, 470 F. Supp. 1003, 1016-17 (S.D.N.Y. 1979) (no special relationship between FBI and freedom riders so no duty to provide protection). The Peck court's analysis turned entirely on the question of duty; discretion was not a factor. See Peck, 470 F. Supp. at 1017.
134 Jackson v. Kelly, 557 F.2d 735, 738 (10th Cir. 1977) (quoting Spencer v. General
with medical malpractice cases amply demonstrates that the judiciary perceives that it is able to say when liability for negligence should exist. The discretionary function exception does not change this. Likewise, decisions concerning informed consent should not be immune from liability because they do not fall within the discretionary function exception.

In *Hendry v. United States*, the United States Court of Appeals for the Second Circuit suggested factors that have proved relevant in reaching a determination of whether a decision of a medical official was discretionary. "First, it is pertinent to inquire whether the complaint attacks on the one hand the nature of [the] rules which a government agency has formulated, or on the other hand the way in which these rules are applied." Other factors include whether state law standards can adequately evaluate the

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136 See Jablonski v. United States, 712 F.2d 391, 396-97 (9th Cir. 1983) (decisions made by government doctors on daily basis on "operational" level not within discretionary function exception); Jackson v. Kelly, 557 F.2d 735, 738 (10th Cir. 1977) (common law of malpractice applied to private doctors and hospitals grants leeway properly left for expert judgment in relatively stringent requirements upon plaintiffs), citing *Spencer v. General Hospital*, 425 F.2d 479, 489 (D.C. Cir. 1969) (Wright, J., concurring); *Hendry v. United States*, 418 F.2d 774, 782 (2d Cir. 1969) (psychiatric examination determinative of whether license would be granted); *Costley v. United States*, 181 F.2d 723, 724 (5th Cir. 1950) (decision to provide medical care to dependents of military personnel discretionary but no discretion to perform care negligently); *Grigalauskas v. United States*, 103 F. Supp. 543, 548 (D. Mass. 1951) (same), aff'd, 195 F.2d 494 (1st Cir. 1952).


The validity of government regulations cannot be challenged in a tort suit. See *Baker v. United States*, 226 F. Supp. 129, 134-35 (S.D. Iowa 1964) (policy of fostering minimum restraint of mental patients discretionary but application of policy to individual case not discretionary), aff'd, 343 F.2d 222 (8th Cir. 1965).
course of action contemplated by a federal statute or regulation, as well as public policy. Questions that are political should be shielded from court review because courts are not capable of evaluating such decisions against standards with which they are familiar, and the same is true of policy decisions. The relative values of B, P, and L in such instances are immeasurable. Nevertheless, even application of a policy to an individual case is not discretionary when it involves substandard professional conduct.

F. Right of Privacy

In this century, the common law has recognized a right to privacy. While this right can be invaded in four distinct ways, it appears that the government has done so only by "unreasonable intrusion upon the seclusion of another." The discretionary function exception to the Federal Tort Claims Act is not a greater barrier to recovery for invasion of privacy than it would be in any other case. A number of cases brought under the Federal Tort Claims Act involving the FBI and the CIA have brought into question the opening of mail by these two agencies; opening private mail is an invasion of privacy at common law.

139 Hendry, 418 F.2d at 783. The Hendry court noted: This is not to imply that state tort standards, designed to remedy private wrongs, cannot apply to uniquely governmental decisions. However, state tort standards cannot adequately control those governmental decisions in which, to be effective, the decision-maker must look to considerations of public policy and not merely to established professional standards or to standards of general reasonableness.

140 Id.

141 See White v. United States, 317 F.2d 13, 17 (4th Cir. 1963) (no discretion for negligent application of VA policy allowing psychiatric patients maximum independence when patient previously displayed suicidal tendencies).

142 See RESTATEMENT (SECOND) OF TORTS § 652A comment a (1977).

143 Id. at § 652A (2). The four means of invading privacy noted by the Restatement are "unreasonable intrusion upon the seclusion of another," "appropriation of the other's name or likeness," "unreasonable publicity given to the other's private life," or "publicity that unreasonably places the other in a false light before the public." Id.

144 The infiltration and disruption of a political party might also be considered to be activity analogous to an intrusion upon seclusion except that any right would not be an individual one, but rather a right held by a group. One court held that such activities carried out by the government are actionable and not shielded from liability by the discretionary function exemption. Socialist Workers Party v. Attorney Gen. of the United States, 463 F. Supp. 515, 523, 526 (S.D.N.Y. 1978) (disruption of political party by FBI; prima facie tort claim stated under New York law; program of disruption beyond agency's authority).

In _Birnbaum v. United States_, the CIA had opened and read plaintiffs’ mail to and from the Soviet Union, pursuant to a program that had existed for several years. Plaintiffs’ mail was shared with the FBI. In an action brought for invasion of privacy, the government contended that it could not be held liable because the mail-opening activities fell within the discretionary function exception to the Federal Tort Claims Act. The federal district court, however, held that the discretionary function exception did not apply because “[t]here is no discretion under our system to conceive, plan and execute an illegal program.” The United States Court of Appeals for the Second Circuit affirmed this holding and noted that “[a] discretionary function can derive only from properly delegated authority. . . . An act that is clearly outside the authority delegated cannot be considered as an ‘abuse of discretion.’” The CIA acted far beyond its authority and so the decision to open another’s mail could not have been a permissible exercise of discretion.

Certainly the decision to initiate and execute a program of opening certain mail is a policy-making decision. Nevertheless, the courts perceive that they are competent to assess the relative values of B, P, and L when L consists of such an intrusion upon seclusion. Once such competence is asserted, a mail-opening case is no different from a common law case of intrusion upon seclusion. Other cases are in accord.

_G. Negligent Performance of Services or Activities Undertaken_

The common law ordinarily would not impose a duty upon a defendant to aid or protect another absent some special circumstance. But once the defendant undertakes to perform services for another that are necessary for his protection he is liable for physical harm resulting from failure to exercise reasonable care, if the risk of harm is increased or if harm is suffered because of the

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146 588 F.2d 319 (2d Cir. 1978).
148 _Birnbaum_, 588 F.2d at 329 (citations omitted).
149 _Id._ at 332.
other’s reliance. The same is true with respect to injured third persons who relied on the undertaking.

Construction of the discretionary function exception to the Federal Tort Claims Act mirrors these common law rules. When there is no undertaking, the discretionary function exception shields the government from liability, but when there is an undertaking, the discretionary function exception is not a bar to liability.

The leading case on this point is Indian Towing Co. v. United States. In Indian Towing, the United States Coast Guard undertook to provide lighthouse services, but the light failed and plaintiffs suffered damages as a result. The inapplicability of the discretionary function exception was assumed by the parties themselves, and the United States Supreme Court agreed that assumption of duty was the critical factor.

The rationale of Indian Towing has been extended to other mishaps on navigable waters, as well as to other activities of the

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102 Id. at § 323.
103 See id. at § 324A.
104 See Denny v. United States, 171 F.2d 365, 366 (5th Cir. 1948) (determination not to provide medical care discretionary, therefore no undertaking), cert. denied, 337 U.S. 919 (1949); Miller v. United States, 561 F. Supp. 1129, 1131 n.3 (E.D. Pa. 1983) (dictum) (decision to place person in witness protection program discretionary), aff’d mem., 729 F.2d 1448, 1449 (3d Cir. 1984); Medley v. United States, 543 F. Supp. 1211, 1218 (N.D. Cal. 1982) (decision to place particular air route on navigation map discretionary); Williams v. United States, 504 F. Supp. 746, 750 (E.D. Mo. 1980) (decision to predict weather discretionary); cf. Rappenecker v. United States, 509 F. Supp. 1018, 1023-24 (N.D. Cal. 1981) (mem.) (no undertaking to warn mariners of all dangers at sea, especially political-military hazards, therefore, omission of warning within discretionary function exception).
106 Id. at 64.
107 Id. at 69. The Court stated:
The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light . . . 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; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.
108 See, e.g., Chute v. United States, 610 F.2d 7, 10 (1st Cir.) (demarcation of ship wreck), cert. denied, 446 U.S. 936 (1979); United States v. Sandra & Dennis Fishing Corp., 372 F.2d 189, 195 (1st Cir.) (ill-equipped coast guard rescue ship), cert. denied, 389 U.S. 836 (1967); Somerset Seafood Co. v. United States, 183 F.2d 631, 635 (4th Cir. 1951) (placement of warning buoy).
government. Of course, the rationale can be applied only when a court can evaluate the actions of the government against the negligence standard; it must be possible to make some estimation of the relative values of B, P, and L. For example, the acts and omissions of air traffic controllers are not immune from liability under the Federal Tort Claims Act. There is no discretion to perform medical treatment negligently, once it has been undertaken. When the government contracts with local political subdivisions for the confinement of federal prisoners, there is no discretion to choose contractors who maintain a “substandard, dangerous, and perhaps unconstitutional jail.” Once the government takes control of a bank, there is no discretion to operate it negligently. After establishing medical standards for certification as an airline pilot, the government has no discretion to apply those standards negligently. When “the Government devises and instructs as to a dangerous procedure, it is liable for the negligent direction thereof.” If the government decides to erect a road block, there is no discretion to do so negligently.

The discretionary function exception does not affect the government’s obligation in these situations. When there is no under-

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159 See, e.g., Butler v. United States, 726 F.2d 1057, 1063 (5th Cir. 1984) (repair of seawall); Wright v. United States, 719 F.2d 1032, 1035 (9th Cir. 1983) (implementation of decision to prosecute); Peterson v. United States, 673 F.2d 237, 240 (8th Cir. 1982) (flying at low altitudes).


taking, there is discretion. When there is an undertaking, there is no discretion. Of course the determination of whether there has been an undertaking is not always easily made, yet is often dispositive of the outcome. Since that is true of common law negligence cases as well, little is added by bringing the discretionary function exception into these cases.

H. Water and Flood Control

The diversion of surface waters is a problem that has generated inconsistent rules among the states. Under the common enemy doctrine, a landowner is permitted to dispose of surface waters from his land without liability to others. But under the civil law rule followed by many states, a landowner is entitled to have the natural drainage of surface waters maintained. Diversion of surface waters by agencies of the federal government has taken several forms, including flood control. Consideration of flood control activities necessitates an assessment of the interest of adjoining landowners as well as that of the public. Incorporation of the public interest into a negligence analysis, however, has proved difficult because courts are unable to assess the relative values of B, P, and L. Until this changes, and it will change, federal courts will refrain from passing upon the reasonableness of government activity in flood control projects. This restraint would occur with or without the discretionary function exception to the Federal Tort Claims Act.

The leading case on flood control is *Coates v. United States*. In *Coates*, various government agencies decided to create an avenue for waterway transportation by changing the flow, current, channel, banks, and course of the Missouri River. This alteration resulted in extensive damage to the plaintiff's crops because a newly created water current passed over the plaintiff's land. He brought an action claiming damages for negligently altering the course of the Missouri River. The complaint was dismissed by the

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169 181 F.2d 816 (8th Cir. 1950).
federal district court; the United States Court of Appeals for the Eighth Circuit affirmed.

Officials who have the power to consider projects on the scale of altering the course of the Missouri River, however, do not have their decisions immunized from liability by the fact that these decisions are somehow special or involve a massive undertaking. Rather, when the appropriate officials exercise their prerogatives, they consider a public interest that is so substantial that B, P, and L are altered beyond recognition. Those decisions are immune because courts are not capable of assessing in even the roughest sense, the relative values of B, P, and L. Not surprisingly, flood and water control projects have often been held to entail the exercise of discretionary functions and so are immune from liability under the Federal Tort Claims Act. But this can change as can the common law.

Efforts to control the flow of water on a smaller scale led to a different result in the case of Seaboard Coast Line Railroad v. United States. In Seaboard, a drainage system was installed around an aviation center owned by the United States. The system undermined plaintiff's railroad, causing a derailment. In an action brought by the railroad seeking recovery for damages to its railroad cars, the United States Court of Appeals for the Fifth Circuit held that there was no discretion in the construction of a drainage system. Seaboard of course did not involve a flood control or even a large scale water control project. Hence, the same public interest was not weighed by the court in reaching its conclusion. Without a public interest of great magnitude, B, P, and L are not

170 See id. at 818; see also In re Ohio River Disaster Litig., 579 F. Supp. 1273, 1281 (S.D. Ohio 1984) (fixed standards of engineering or technical expertise key to determination of discretion).

171 See, e.g., Spillway Marina, Inc. v. United States, 445 F.2d 876, 878 (10th Cir. 1971) (discretionary decision to erect dam as well as to release stored water because latter directly related to objectives of former); Chicago & Ill. Midland Ry. Co. v. Marsh, 577 F. Supp. 798, 809 (C.D. Cal.) (administrative decision to dam or release water discretionary), aff'd, 746 F.2d 1482 (7th Cir. 1984); Miller v. United States, 480 F. Supp. 612, 620 (E.D. Mich. 1979) (official decisions and directives requiring lake levels to be maintained within a certain range discretionary); see also Hearings on H.R. 5373 & H.R. 6463 Before House Comm. on Judiciary, 77th Cong., 2d Sess. 33 (1942) [hereinafter cited as Hearings] (Congress specifically recognizing flood control as within discretionary function exception).

172 473 F.2d 716 (5th Cir. 1973).

the immeasurable elements they are in certain flood control projects. Hence, there is less reason to defer to the discretion of government officials.

In determining whether the United States should be liable for its more substantial water and flood control activities, courts have focused on the fact that the decisions involved in those projects typically involved other branches of government. The courts concluded that such decisions must be discretion ary. Actually, the holdings turned on the competence of the courts to assess the relative values of B, P, and L. Government decisions of such magnitude typically are beyond what courts are able to evaluate by any known objective standard. They are polycentric. When less ambitious projects are at issue and the public interest does not dwarf all others, a court's ability to assess B, P, and L increases. Discretion disappears, as indeed it would in any negligence case.

I. Approval of Design of Construction Projects

The question of whether one should be liable for the approval of another's construction project arises most frequently in cases involving a government agency whose very approval is necessary for the construction project to proceed. There is, however, a counterpart in the private sector and that is the approval of construction projects by financing agencies. Without such approval, a construction project will not proceed. A suit may be brought by the injured ultimate purchaser of a unit whose construction was financed by the agency, but there will be no recovery if the activities of the lending institution go no further than to protect its own investment. On the other hand, if the activities go far beyond the normal activities of a lender, a duty will be imposed on the lender in favor of the ultimate purchaser, even though the lender does not actually engage in construction.

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175 See generally Connor v. Great Western Sav. & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968) (financing institution held liable to third party purchasers of home not in privity); Lefcoe & Dobson, Savings Associations as Land Developers, 75 Yale L.J. 1271, 1293-94 (1966) (association developers willing to construct quality structures only if it returns high yields); Comment, Financing of Building Construction: Liability for Structure Defects, 10 B.C.L. Rev. 932 (1969) (discussing legal foundation and ramifications of Connor decision).

Cases involving governmental approval of construction projects demonstrate that the concepts of "duty" and "discretion" are closely related, so much so that if one exists, the other does not exist. In such cases, courts frequently answer contentions concerning discretion in terms of whether a duty exists. In other cases, courts consider the issue of duty and discretion separately, but the ultimate outcomes of such cases would be no different if the applicability of the discretionary function were not considered at all.

In re Silver Bridge Disaster Litigation concerned the collapse of a bridge over a river flowing between Ohio and West Virginia. A number of deaths resulted. United States Engineers had made a crossing survey and had approved the design and construction of the bridge. In wrongful death actions brought against the United States, the plaintiffs alleged that there was actionable negligence on the part of the government in its approval and survey of the bridge and that this negligence was a direct cause of the deaths.

The federal district court held that the activities or omissions of the Chief of Engineers were within the discretionary function exception to the Federal Tort Claims Act since those activities
were at the "planning" rather than at the "operational" level.\footnote{Id. at 969.} But while paying lip-service to the planning/operational "test," the court in another section of its opinion gave considerably more attention to traditional tort analysis by asking whether defendant owed any identifiable duty to these plaintiffs. The court held that "whatever concerns Congress had with respect to commerce, such as providing for bridge travel at a certain location, those concerns did not include the structural safety of the bridge design for travelers over the bridge."\footnote{Id. at 960-61.} The court found that there was neither reliance on the part of the travelling public nor special knowledge on the part of the Corps of Engineers that created a duty to inform the builders of the bridge. Nor did the Engineers' power of inspection constitute such control that a duty was created. Cumulatively, no duty was created by these special factors.\footnote{Id. at 961-65.}

Other courts have utilized this "duty" analysis in design approval cases when determining whether discretion was present by finding that there was no failure to exercise reasonable care.\footnote{See, e.g., Wright v. United States, 568 F.2d 153, 156, 158-59 (10th Cir. 1977) (federal government not liable for approval and utilization of bridge design when bridge washed out or for design of approach roads because state responsible for placement of bridge), cert. denied, 439 U.S. 824 (1978); United States v. Ure, 225 F.2d 709, 712-13 (9th Cir. 1955) (when customary construction and inspection methods carried out without negligence, no duty on part of federal government to insure that canal would not break because choice of material used in construction discretionary); Valley Cattle Co. v. United States, 258 F. Supp. 12, 19-20 (D. Hawaii 1966) (approval of construction site and design of rain culvert discretionary).} When the connection between the alleged negligence in approving a design and the injury of the plaintiff is not close, there is discretion;\footnote{See Miller v. United States, 710 F.2d 655, 663 (10th Cir.), cert. denied, 464 U.S. 939 (1983); First Nat'l Bank v. United States, 565 F. Supp. 119, 122 (S.D. Ill. 1983); Fireman's Fund Am. Ins. Cos. v. United States, 482 F. Supp. 893, 895 (D. Or. 1979); cf. Patton v. United States, 549 F. Supp. 36, 38 (W.D. Mo. 1982) (design of road was discretionary).} very likely the legislative purpose of a government program was not to impose a duty on the government in favor of the injured plaintiff.\footnote{See Highway Safety Act of 1976 § 402(c) (codified at 23 U.S.C. § 402(c) (1976)). "Implementation of a highway safety program under this section shall not be construed to require compliance with every uniform standard, or with every element of every uniform standard, in every State." Id. Congress intended this provision to confer "broad discretionary authority upon the Secretary with respect to approval of State highway safety programs." H.R. REP. No. 716, 99th Cong., 2d Sess. 22, reprinted in 1976 U.S. CODE CONG. & AD.
conduct and injury is not close, courts are ill-equipped to make a
determination of the relative values of B, P, and L.

As the connection between the alleged negligence in approving
a particular design and the injury of the plaintiff gets closer, a duty
arises. When this occurs, the discretion of the government, which is
immune from liability under the Federal Tort Claims Act, disap-
pears. Moyer v. Martin Marietta Corp. is a case in point. In
Moyer, plaintiff's decedent was a test pilot who was killed when his
ejection seat fired while the airplane was still on the ground. Plain-
tiff alleged negligence on the part of the United States because the
Technical Order requesting the modification of the seat was
drafted in a vague, ambiguous, and negligent manner. The United
States Court of Appeals for the Fifth Circuit reversed the federal
district court's dismissal, which had been granted on the basis that
there was discretion in the drafting of the Technical Order. The
court of appeals said that while there was discretion in the Air
Force's selection of a particular type of airplane or in the determi-
nation of the number of such aircraft to be purchased, there was
no discretion to allow negligent design or construction that would
pose a safety hazard to an individual operating the aircraft.

Certainly there is not a close connection between the selection
of a particular type of aircraft and the ejection of a pilot at the
wrong time. However, the connection between specifications of an
ejection seat and the actual ejection of a pilot is much closer. For
this reason, the discretion of the United States is no longer im-
mune. A court can perceive that it is capable of making an as-
ssessment of the relative values of B, P, and L in such a case.

News 798, 819; see also Rayford v. United States, 410 F. Supp. 1051, 1052 (M.D. Tenn. 1976) (passive role of U.S. in highway design, construction, approval and maintenance of highway insufficient to cause liability under FTCA); Mahler v. United States, 306 F.2d 713, 721, 724 (3d Cir.) (no duty to member of travelling public created by federal-aid highway legislation), cert. denied, 371 U.S. 923 (1962); Delgadillo v. Elledge, 337 F. Supp. 827, 831-32 (E.D. Ark. 1972) (no duty to travelers due to federal laws relating to approval, inspections, and maintenance). But see First Nat'l Bank v. United States, 555 F. Supp. 119, 121-22 (S.D. Ill. 1983) (Secretary of Transportation has discretion to reject highway construction plan that fails to comply with statutory uniform standards).

185 481 F.2d 585 (5th Cir. 1973).
186 Id. at 598.
J. Release of Prison Inmates or Mental Patients

That discretion can change and evolve is well illustrated by the cases involving the release and supervision of mental patients or prison inmates who later cause personal injury or death to a member of the general public or to themselves. The common law has recently recognized that a duty to warn or protect a third person threatened by the patient may be imposed on one who treats a mental patient. In the treatment of mental patients or the housing of prisoners, the government runs the risk that the release of such persons will permit injury to occur to a third person. Yet, the government may make no effort to warn such persons.

The release of mental patients or prison inmates reflects a policy of how such persons should be cared for, and experts in the field disagree on the appropriateness of this policy. Early cases brought under the Federal Tort Claims Act involving this fact pattern shield the government from liability by holding that the release and supervision decisions were discretionary in nature. But gradually, discretion has disappeared and a duty has emerged. This change is not the result of courts distinguishing cases on their facts, but the result of a changed perception of a court’s ability to assess the relative values of B, P, and L.

In the 1953 case of Smart v. United States, a VA mental patient was released unaccompanied for a trial visit to his home. During the trip, he stole a car and crashed into plaintiff’s automobile, causing injury. The court held that the decision to release the patient from immediate custody and control for a trial visit was discretionary, as was the decision to permit the patient to go unaccompanied.

In vivid contrast to Smart is Underwood v. United States, decided in 1966. Underwood stands for the proposition that the discharge of a mental patient without adequate consideration of the patient’s history by the releasing psychiatrists is actionable negligence and not immune under the discretionary function ex-
ception. Dunn, a serviceman with a history of mental problems, was under the care of an Army psychiatrist who left the base. Dunn’s case and records were subsequently transferred to another Army psychiatrist who, without adequately reviewing Dunn’s record, released him to duty. Dunn obtained a .45 caliber pistol with which he shot and killed his former wife. In a wrongful death action against the Army, the federal district court ruled that the decision of the medical officers to return Dunn to duty was not a discretionary function. However, the court also determined that there was no negligence on the part of the medical officers and no causal relation between the release and the subsequent killing. The United States Court of Appeals for the Fifth Circuit agreed that there was no discretion to fail to transmit a complete history of Dunn’s mental illness from one psychiatrist to another, but reversed the determination that there was no actionable negligence on the part of the United States.

A close reading of the opinions in Smart and Underwood reveals that the Underwood court undertook a much closer examination of the factors that entered into the decision to release the patient. Hence, the point at which an unreasonable act might be found is easier to discern. This analysis reflects a greater willingness on the part of the courts to evaluate the conduct of the government for its reasonableness and to make findings encompassing determinations of the relative values of B, P, and L. Because of

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194 Id. at 98.
195 The Underwood court had to distinguish United States v. Shively, 345 F.2d 294 (5th Cir.), cert. denied, 382 U.S. 883 (1965), in which the same court had held that the negligent issuance of a .45 caliber pistol by Army personnel to an off-duty sergeant in civilian clothes in violation of regulations was not the proximate cause of injury to the sergeant’s former wife, whom the sergeant shot twice before taking his own life. The court in Underwood distinguished Shively on the facts in that the sergeant in Shively had no history of mental illness. Underwood, 356 F.2d at 99.
196 Cf. W. PROSSER, J. WADE & V. SCHWARTZ, supra note 38, at 368 (consideration of how proximate cause arguments ought to be made). In some cases, a plaintiff effectively argues a case in broad terms, contending that there should be a broad range of risks for whose occurrence the defendant should be liable. A close examination of the chain of events leading to liability is avoided. In other cases, a plaintiff more effectively argues a case in the narrow terms of each little bit of conduct that contributes to the end result. In such cases, there is apparently not a broad range of risks accompanying defendant’s activity for which he should be liable. Nevertheless, a close examination of the precise chain of causation reveals that each aspect of defendant’s conduct can be examined for its reasonableness. Courts can do the same thing in explaining their conclusions concerning negligence as well as in those concerning the presence or absence of discretion in a tort suit brought against the government.
this increased willingness of courts to examine conduct, the range of government discretion diminishes.

A similar trend can be discerned in cases involving injuries caused by released inmates. In Payton v. United States,\textsuperscript{198} the decision of a board of parole to release an inmate was deemed to involve the exercise of quasi-judicial power according to the federal district court. Hence, the government was immune from liability under the discretionary function exception for any of the rapes, maimings, or murders committed by the released convict. The court applied a risk-benefit test\textsuperscript{199} and determined that “[b]alanced against the possible harm to society the Board must have considered the possible benefits accruing from parole to both the prisoner and society.”\textsuperscript{200}

On appeal, the United States Court of Appeals for the Fifth Circuit stated that the “crux of the concept embodied in the discretionary function exemption is that of the separation of powers.”\textsuperscript{201} The court rejected the risk-benefit test and adopted what it termed a “pragmatic interest analysis,”\textsuperscript{202} under which it considered three factors: (i) the interest of the injured party;\textsuperscript{203} (ii) the government’s interest;\textsuperscript{204} and (iii) the court’s capacity to decide the case.\textsuperscript{205} Since the appellant’s allegations attacked only the parole


\textsuperscript{199} The risk-benefit test was stated in Gray v. United States, 445 F. Supp. 337 (S.D. Tex. 1978). Gray involved a suit against the FDA for its approval of DES without giving any warning of its harmful effects. See id. at 340.

\textsuperscript{200} Payton, 468 F. Supp. at 655.

\textsuperscript{201} Payton, 636 F.2d at 143; see Comment, supra note 193, at 1139 (“If sovereign immunity is viewed as a means of preserving separation of powers concerns, however, the discretionary function exception to the Federal Tort Claims Act makes sense”).

\textsuperscript{202} Payton, 636 F.2d at 143.

\textsuperscript{203} Id. at 144. “The more serious, in terms of physical or mental impairment, and isolated the loss the closer the question becomes as to whether the individual can be expected to absorb the loss as incident to an acceptable social or political risk of governmental activities.” Id.

\textsuperscript{204} Id. The court must “assess the nature and quality of the governmental activity causing the injury.” Id.

\textsuperscript{205} Id. “The Court should consider, whether the vehicle of a tort suit provides the relevant standard of care, be it professional or reasonableness, for the evaluation of the govern-
board's application of guidelines to the released inmate and not the guidelines themselves (the formulation of guidelines being within the discretionary function exception)\footnote{Id. at 146-47.} the court held that there was no discretion in this case. Drawing an analogy to the release of dangerous mental patients from hospitals or custody, the court noted that a "tort suit utilizing either the reasonable man standard or a professional standard would appear to be the classic vehicle for analysis."\footnote{Id. at 148. On rehearing, the en banc court did not consider the issue of separation of powers. The Payton court instead focused its attention on the controlling statute, 18 U.S.C. § 4203(a) (1970), which states that the "parolee in the discretion of the board" shall be allowed parole. \textit{Payton}, 679 F.2d 475, 481 (5th Cir. 1982). The court stated that the statute made the parole board's decision discretionary but did not "hold that the board has the discretionary power to ignore the required steps of the decision-making process." \textit{Id.}\@ The United States had an affirmative duty by virtue of a statute to examine the prisoner since he had been alleged to be insane or of unsound mind or otherwise defective. \textit{Id. at} 482-83.} 206

Separation of powers may be the "crux" of the discretionary function exception, but that separation immunizes quasi-judicial decisions only to the point that a court perceives that it has the capacity to assess the relative values of B, P, and L in the making of that decision. Discretion decreases as this capacity is increasingly asserted. The results of these cases would have been no different had there not been a discretionary function exception to the Federal Torts Claims Act.

\textbf{K. Independent Contractors and Nondelegable Duties}

When the United States has engaged the services of an independent contractor, its liability to others has proved to be the same as the liability of any private entity that engages the services of an independent contractor. A number of fact patterns recur in cases brought against private entities or against the government.

A person injured by the negligent act of an independent contractor may bring an action against the employer of the independent contractor on the ground that hiring that independent contractor was itself an act of negligence. Some common law decisions draw a distinction between claims made by injured employees of the independent contractor and those made by injured third persons, and deny the injured employee a claim,\footnote{See, e.g., Hess v. Upper Mississippi Towing Corp., 559 F.2d 1030, 1033 (5th Cir.} leaving him to pur-
sue his remedy under the workmen's compensation systems of the various states. The cost of such compensation is an element of the contract price. The holdings of the courts when the government "negligently" selects an independent contractor are quite similar, except the federal courts may base their conclusions on a determination that the selection of an independent contractor is a discretionary decision. This is not to say that the employer of an independent contractor should be free from liability to an employee of the independent contractor when it is the employer's own negligent conduct that has caused the injury. No special rules of agency or of independent contractors are necessary to reach this result. When a claim is made against the government as the employer of an independent contractor in such a situation, discretion

1977) (workers' compensation as exclusive remedy), cert. denied, 435 U.S. 924 (1978); Matanuska Elec. Ass'n v. Johnson, 386 F.2d 698, 704 (Alaska 1963) (employer not liable where independent contractor fails to make workers' compensation payments); see also RESTATEMENT (SECOND) OF TORTS § 411 (1965) ("an employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor"). But see Holman v. State, 53 Cal. App. 3d 317, 336-37, 124 Cal. Rptr. 773, 785-86 (1975) (error to sustain demurrer to action brought by injured employee of independent contractor hired by state). See generally W. PROSSER & W. KEETON, supra note 9, at §§ 70, 71.


In Toole v. United States, 443 F. Supp. 1204 (E.D. Pa. 1977), a wrongful death action was brought for the negligent hiring of decedent's employer, an independent contractor. The federal district court refused to consider whether the hiring of decedent's employer was negligent because the decision to hire that particular contractor was discretionary. Id. at 1222. The United States Court of Appeals for the Third Circuit reversed without deciding whether the hiring of an independent contractor is a discretionary act. Toole, 588 F.2d 403, 408 (3d Cir. 1978). Instead, the court applied Pennsylvania law and determined that state law imposes on an employer of an independent contractor a duty to employees of the independent contractor when the contract requires particularly risky employment. Id. at 407. But see Bramer v. United States, 595 F.2d 1141, 1146 (9th Cir. 1979) (no nondelegable duty owed by employer of independent contractor to employee of independent contractor).
is no shield to liability.212 Even when a claim is made by an injured
third person, on only very narrow grounds would the common law
impose liability on the employer of an independent contractor for
negligence in hiring. Recovery is available only if harm to the
plaintiff results "from some quality in the contractor which made
it negligent for the employer to entrust the work to him."213 This is
a narrow exception to a general rule of non-liability.214 The same
conclusion can be reached when an action is brought against the
government, simply by giving discretion a correlatively broad
scope.215 On the other hand, if harm to a plaintiff does result from
the quality of the independent contractor that made it negligent
for the employer to entrust the work to him, then liability can
be imposed. In suits brought against the government the same result
is achieved by holding that engaging such an independent contrac-
tor is not a discretionary act.216

The common law provides that the employer of an indepen-
dent contractor is liable for injury resulting from a peculiar unrea-
sonable risk of harm if special precautions are not taken, unless
the contract between the employer and the independent contractor
denotes who must take the necessary precautions.217 When the
government employs an independent contractor, the same result
is reached by holding that the provisions of the contract result from
an exercise of immune discretion.218

At common law an employer of an independent contractor is

212 See Madison v. United States, 679 F.2d 736, 740-41 (8th Cir. 1982) (negligently per-
mitting independent contractor to conduct ultra-hazardous activity without complying with
applicable safety regulations); Petznick v. United States, 575 F. Supp. 698, 703 (D. Neb.
1983) (permitting work on energized lines); McCormick v. United States, 169 F. Supp. 920,
923 (D. Minn.) (live wire exposed in government barracks where plaintiff, employee of inde-
pendent contractor, injured while painting barracks), appeal dismissed, 257 F.2d 815 (8th
Cir. 1958); Pierce v. United States, 142 F. Supp. 721, 733 (E.D. Tenn. 1955) (inadequate
precautions taken by government in furnishing high voltage power), aff'd, 235 F.2d 466 (6th
Cir. 1956).

213 RESTATEMENT (SECOND) OF TORTS § 411 comment b (1965).

214 See Hixon v. Sherwin-Williams Co., 671 F.2d 1005, 1010 (7th Cir. 1982). A contrac-
tor has a duty to select a subcontractor with reasonable care. See id.; Deitz v. Jackson, 57
N.C. App. 275, 277, 291 S.E.2d 282, 284-85 (1982). An employer's duty to select a contractor
carefully is uniformly applied across the nation. Western Stock Center v. Sevit, 195 Colo.

party claim against government for failure to control contractor dismissed as within discre-
 tionary exception).


217 RESTATEMENT (SECOND) OF TORTS § 413(a) (1965).

liable to injured persons only if he maintains a certain degree of control over the work. The power to inspect would hardly amount to the power to control. Therefore, the government's ongoing power to inspect work performed by an independent contractor does not lead to liability of the government when the work is negligently done.

In the area of independent contractors, the discretionary function exception does not affect what the outcome of cases would be in its absence. In fact, the discretionary function exception has served only as an alternative ground to reach the result that would have prevailed simply by applying the common law.

L. Products Liability

The government does not engage extensively in the marketing of products. However, there are occasions when the government does undertake marketing functions quite similar to those undertaken in the private sector. On those occasions when injury occurs, the liability of the government is the same as the liability of those in the private sector, irrespective of what the Federal Tort Claims Act says about the performance of discretionary functions, and irrespective of the fact that strict liability in tort cannot be the basis for such liability. When the government provides a product to a user, the discretionary function exception is no shield to liability if the product is negligently designed.

The government frequently undertakes labelling and inspection activities concerning private entities' manufacturing and selling of products. In so doing, the government occupies a role comparable to that of the third party endorser or warrantor of products who can be held liable on the basis of negligent misrepresentation. Similar liability can be imposed on the government

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220 Id. at comment c.
223 Medley v. United States, 480 F. Supp. 1005, 1009 (M.D. Ala. 1979) ("if the M-817 dump truck was negligently designed, the fact that federal employees designed it does not immunize the government").
224 See, e.g., Hempstead v. General Fire Extinguisher Corp., 269 F. Supp. 109, 118 (D. Del. 1967) (negligent approval of design of fire extinguisher); Hanberry v. Hearst Corp., 276
for negligent inspection or approval of products, irrespective of the arguments that such activities are immune from liability because they represent an exercise of discretion. When there is a professional standard of care that can be evaluated by a court, discretion is absent. In such cases a court can assess the relative values of B and PL.

There are some inspection and approval activities of the government for which there should be no liability. An applicable statute may simply provide for immunity, explicitly or implicitly, and in such cases there is no need to rely upon the discretionary function exception to the Federal Tort Claims Act. Moreover, the proper assessment of risks and benefits would result in a determination that the conduct is not negligent, whether termed discretionary or not.

The outcomes of the cases cited in this subsection do not depend on whether they are brought under the Federal Tort Claims Act or under the common law. The ability of courts to assess the relative values of B, P, and L is determinative of their position concerning the discretionary function.

M. Private Nuisance

There are occasions when the United States undertakes the performance of certain activities which result in injury to an individual’s quiet use and enjoyment of his land. A claim is then made that the government should be liable for a private nuisance. In pri-

Cal. App. 2d 680, 683, 81 Cal. Rptr. 519, 523 (1969) (negligent misrepresentation that shoes of third party are “good ones”).

See Loge v. United States, 662 F.2d 1268, 1273 (8th Cir. 1981) (failure to comply with specific regulatory licensing requirements negligent), cert. denied, 456 U.S. 944 (1982); Griffin v. United States, 500 F.2d 1059, 1066-67 (3d Cir. 1974) (government liable for failure to implement health regulations governing administration of polio vaccine when scientific evaluation and no policy judgment involved).


Cf. Henderson, Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication, 73 Colum. L. Rev. 1531, 1540 (1973) (courts not suitable bodies to review conscious design choices of products because such decisions based on polycentric considerations).

vate nuisance cases, the common law embodies a standard of reasonableness that imposes liability upon one who intentionally and unreasonably invades a neighbor's interest in the private use and enjoyment of his land.\textsuperscript{229} This involves a careful weighing of the respective interests of the plaintiff and of the defendant.\textsuperscript{230}

When the government is the defendant, a remarkably similar standard is applied by the court in evaluating the conduct of the defendant for the presence of a discretionary function. Thus, for example, the lengthening of a runway at an Air Force base that causes erosion of plaintiff's land is not activity shielded from liability by section 2680(a) of the Federal Tort Claims Act.\textsuperscript{231} The flying of B-52 bombers at such a low altitude that they interfere with the use of the land below is not discretionary.\textsuperscript{232} When a substantial public interest is involved, one that outweighs the sum of all competing private interests, courts can avoid the weighing process altogether simply by finding that a decision is discretionary.\textsuperscript{233} Thus, spraying a wildlife refuge with a dangerous herbicide to kill growths that seriously endanger the food supply of wildlife as well as to prevent the breeding of malaria mosquitoes is discretionary even though damage to plaintiff's property results.\textsuperscript{234} The decision regarding where to locate a drug treatment center is also discretionary.\textsuperscript{235} The outcomes in these cases would be no different if there were no discretionary function exception to the Federal Tort Claims Act because the interests pursued by the government would simply outweigh the private interests in the quiet use and enjoyment of land. There would, in short, be no private nuisance.

\textsuperscript{229} See \textit{Restatement (Second) of Torts} § 822 (1979).
\textsuperscript{230} See \textit{id.} at § 826.
\textsuperscript{231} See \textit{United States v. Hunsucker}, 314 F.2d 98, 101-105 (9th Cir. 1962).
\textsuperscript{232} See \textit{Peterson v. United States}, 673 F.2d 237, 238-40 (8th Cir. 1982).
\textsuperscript{233} See, \textit{e.g.}, \textit{Miller v. United States}, 583 F.2d 857, 867-69 (6th Cir. 1978) (opening and closing of dam gates covered by international agreement and falls within discretionary function of governments); \textit{Schubert v. United States}, 246 F. Supp. 170, 171-72 (S.D. Tex. 1965) (determination as to whether to use noise suppressors and when to make them available are policy decisions and thus within exception).
N. Misrepresentation

The Federal Tort Claims Act itself excepts from liability those claims based upon a misrepresentation, which can take the form of affirmatively making a false statement, or of failing to inform when there is a duty to inform. Misrepresentation itself is a conceptual notion, the parameters of which differ depending upon who is applying the term. In fact, the misrepresentation torts can be considered very broad, but certainly such considered judgment does not control the scope of the misrepresentation exception to the Federal Tort Claims Act. Hence, some misrepresentation cases involving the government are decided on another basis. When the government is involved as a defendant, an invitation to apply the discretionary exception function may be made. However, the


237 RESTATEMENT (SECOND) OF TORTS § 525 (1965).

238 See id. at § 511.

239 See Green, The Communicative Torts, 54 Tex. L. Rev. 1 (1975). This article begins:

The two great areas of tort law are based (1) affirmatively on the duty of care or negatively on the failure to use care, and (2) affirmatively on the duty to inform or negatively on the failure to give reliable information. The duty of care is for the protection of the interests of personality and property from the risks of physical injury; this protection is currently provided by the actions of trespass, nuisance, negligence, and ultrahazardous activity, all of which have expanded the common law trespassory actions. The duty to inform is primarily for the protection of relational interests against the risks of physical injury, appropriation, disparagement, and false communications; these interests are currently protected by actions of breach of contract and warranty, strict liability, deceit, defamation, and abuse of process, all of which have expanded the communicative actions.

Id. at 1 (footnotes omitted). All of these torts do indeed involve an element of false representation. But it is doubtful that exception from government liability of misrepresentation could have been meant to cover all of these torts. Hence some element of judgment remains in determining exactly what conduct constitutes misrepresentation. See 2 L. JAYSON, HANDLING FEDERAL TORT CLAIMS § 260.05, at 13-69 (1985) (misrepresentation exclusion of "Section 2680(h) reaches a wide and ill-defined category of types of actions").

240 See, e.g., Ware v. United States, 626 F. 2d 1278, 1283 (5th Cir. 1980) (negligent misdiagnosis of diseased cattle is not negligent misrepresentation under Federal Tort Claims Act); James v. United States, 483 F. Supp. 581, 584 n.1 (N.D. Cal. 1980) (negligent performance of operational duty resulting in failure to inform job applicant of tumor discovered at pre-employment examination not within misrepresentation exception).

241 See, e.g., General Pub. Util. Corp. v. United States, 745 F.2d 239, 240 (3d Cir. 1984) (responding to allegations that Nuclear Regulatory Commission failed to warn of equipment failure, government moved to dismiss asserting misrepresentation exemption and discretionary function), cert. denied, 105 S. Ct. 1227 (1985); Colorado Flying Academy, Inc. v. United States, 724 F.2d 871, 875 (10th Cir. 1984) (misrepresentation exception and discretionary function raised as defenses by government regarding mid-air collision of private planes in F.A.A. controlled area); United Air Lines v. Wiener, 335 F.2d 378, 392 (9th Cir. 1964) (ad-
common law of misrepresentation (or deceit) also frequently provides the very considerations that are necessary to dispose of such contentions.

At common law, liability for a negligently made misrepresentation is limited to that group of persons for whose benefit and guidance the misrepresentation was intended, a limited group of persons—far fewer in number than those who might “foreseeably” be injured by the misrepresentation. The same principle applies when a person relies upon a misrepresentation negligently made by the government, except that the same limitation on liability can be stated in terms of discretion. Nor is there common law liability for an inaccurate prediction that does not come true. The government is not liable for inaccurate representations concerning future events, since such representations are considered discretionary. The presence of the discretionary function exception to the Federal Tort Claims Act does not affect the outcomes of these cases in any way.

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<td>See, e.g., Farwell v. Colonial Trust Co., 147 F.2d 480, 483 (8th Cir. 1906) (statements that stock would be fully paid were “mere promises or prophecies concerning future events” not constituting misrepresentation); Kennedy v. Flo-Tronics, 274 Minn. 324, 327, 143 N.W.2d 827, 831 (1966) (erroneous prediction that stock value would triple within year not misrepresentation of fact); Campbell County v. Braun, 295 Ky. 96, 97, 174 S.W.2d 1, 2 (1943) (representation that one party will have nice buildings and lots on either side of highway constitutes mere expression of opinion); see also Keeton, Fraud: Misrepresentations of Opinion, 21 MINN. L. REV. 643, 650 (1937) (individualistic attitude of common law led to position that person should not rely on opinions of others).</td>
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<td>246</td>
<td>See Builders Corp. of Am. v. United States, 320 F.2d 425, 429 (9th Cir. 1963) (promise of anticipated need for army housing in remote area considered part of discretionary function), cert. denied, 376 U.S. 906 (1964); Western Mercantile Co. v. United States, 111 F. Supp. 799, 800 (W.D. Mo. 1953) (probable misrepresentation as to flood predictions considered discretionary), aff’d sub nom. National Mfg. Co. v. United States, 210 F.2d 263, 278 (8th Cir.), cert. denied, 347 U.S. 967 (1954).</td>
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O. Adoption of Plans, Specifications, Regulations, Etc.

Rarely is the United States held liable for adopting (or failing to adopt) plans, specifications, or regulations that result in injury; quasi-legislative or quasi-adjudicative actions of the government agency are immune from liability.\(^2\text{47}\) This is no doubt because governments are to govern, and they are to do so free from the fear of liability. Hence, it is not surprising that the government will be free of liability for adopting or failing to adopt plans, specifications, or regulations,\(^\text{48}\) no matter how egregious the exercise of discretion,\(^\text{49}\) as long as the action taken is not illegal\(^5\text{0}\) or beyond the scope of the authority delegated by statute or regulation.\(^\text{51}\) If the regulation enacted by a government agency is lawful, the choice of procedures to be followed in adopting that regulation is discretionary; if that choice of procedures does not comply with what is statutorily mandated, that choice is an abuse of discretion but still immune from liability under the Federal Tort Claims Act.\(^\text{52}\) The analysis in traditional negligence terms would be fairly straightforward: there simply is no duty breached in such cases. Any duty

\(\begin{align*}
\text{\textsuperscript{47}} & \text{See Jayvee Brand, Inc. v. United States, 721 F.2d 385, 390 (D.C. Cir. 1983) (adoption of tris ban by CPSC); cf. Dupree v. United States, 247 F.2d 819, 825 (3d Cir. 1957) (denial of security clearance by Commandant of Coast Guard).} \\
\text{\textsuperscript{48}} & \text{Jayson, supra note 239, at § 249.05 at 12-127 (1985). Various regulatory activities of government agencies have consistently been held by federal courts to be encompassed within the discretionary function exception. Id. The legislative history to the discretionary function section of the Federal Tort Claims Act indicates that acts of regulatory agencies are "examples of those covered by the [discretionary] exception." Id.; see also United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 820 (1984) (discretionary function plainly encompasses regulatory acts of government); Madison v. United States, 679 F.2d 736, 739 (8th Cir. 1982) (promulgation of Department of Defense Contractor's Safety Manual); Garbarino v. United States, 666 F.2d 1061, 1065 (6th Cir. 1981) (FAA failure to promulgate crashworthiness regulations).} \\
\text{\textsuperscript{49}} & \text{See 28 U.S.C.A. § 2680(a) (1982) (discretionary function exception applies whether or not discretion involved abused); Relf v. United States, 433 F. Supp. 423, 427-28 (D.D.C. 1977) (discretion applies to refusal to issue plans, specifications, or schedules of operations for sterilization program of black females at ages of 12 and 14), aff'd mem., 593 F.2d 1371 (D.C. Cir. 1979).} \\
\text{\textsuperscript{50}} & \text{See Birnbaum v. United States, 436 F. Supp. 967, 973-74 (E.D.N.Y. 1977), aff'd, 588 F.2d 319 (2d Cir. 1978).} \\
\text{\textsuperscript{51}} & \text{See Birnbaum v. United States, 588 F.2d 319, 329 (2d Cir. 1978) (act outside scope of authority not considered within discretionary function exception); United Air Lines, Inc. v. Wiener, 335 F.2d 379, 394 (9th Cir.) (no discretion to design flight procedures without following directions of Secretary of Air Force), cert. denied, 379 U.S. 951 (1964).} \\
\text{\textsuperscript{52}} & \text{See Jayvee Brand, Inc. v. United States, 721 F.2d 385, 392 (D.C. Cir. 1983) (failure of CPSC to follow mandated procedures in promulgating tris ban not within scope of FTCA); see also 2 L. Jayson, supra note 239, at § 247, at 12-17 (1988) (discussing Jayvee; discretionary function applies to procedures used to enact regulations).}
\end{align*}\)
that exists is owed to the public and not to the individual member of the public who happens to be injured by the non-negligent implementation of the plan, specification, or regulation. More to the point, courts simply are ill-equipped to assess the relative values of B, P, and L in such activity.

P. Obligations of Landowners

The common law imposed upon the landowner a duty to prevent injury to another according to the status of the one who was injured. An increasing duty of care was owed depending on whether the injured was a trespasser, licensee, or invitee. More recently, several states have abandoned these categories, and a duty of reasonable care has been imposed, dependent upon all of the circumstances. Cases decided under the Federal Tort Claims Act are basically in accord, although the reasoning may be couched in terms of discretion. Thus, there is no discretion not to put a handrail on the steps of a post office building if reasonable care requires that there be one. There is no discretion to maintain the Capitol Building negligently. The decision whether to warn of known dangers or to provide safeguards is not discretionary. On the other hand, a decision concerning the appropriate number of guards in a government building was considered discretionary in a case in which there was no duty under the circumstances to protect a member of the public. The law of discretion in this area has followed the common law.

353 See generally W. Prosser & W. Keeton, supra note 9, at §§ 58-61 (in depth discussion of categories of persons entering land).
354 See id. at § 62.
355 See American Exch. Bank v. United States, 257 F.2d 938, 941 (7th Cir. 1958) (decision whether to install handrails considered operational and not discretionary).
357 See Smith v. United States, 546 F.2d 872, 877 (10th Cir. 1976) (landowner/government's failure to warn of "known dangers or to provide safe guards" not exercise of discretion); United States v. White, 211 F.2d 79, 82 (9th Cir. 1954) (failure to warn of hidden danger not discretionary); Stephens v. United States, 472 F. Supp. 998, 1009 (C.D. Ill. 1979) (government's duty to warn of latent dangers not protected by discretionary function exception).
Q. Discretion as Surrogate for Contributory Fault of Plaintiff or Absence of Negligence of Defendant

On occasion, the discretionary function exception to the Federal Tort Claims Act has been relied upon to disguise the fact that plaintiff simply could not make a case, either because of the absence of negligence on the part of the defendant or because of the existence of a defense in favor of the defendant. For example, the issuance of a permit, in conformity with regulations, to operate a motorcycle race in which plaintiff was subsequently injured is not an unreasonable act, in contrast to the negligent laying out of course markers. The failure to make studies to determine where encroachment on private property would occur as the result of a congressionally approved waterway project is not negligent when the costs of such studies would exceed the cost of acquiring the private property outright. On the other hand, the visitor to Yellowstone Park who camped in an unauthorized area after paying no admission for the privilege should be found contributorily negligent when a grizzly bear attacked and killed him. The United States should be permitted to assume that knowledgeable purchasers of its surplus asbestos, sold without warning labels, have assumed the risks of hazards associated with asbestos exposure, including the risk of liability to employees of the purchasers. In none of these cases would decisions concerning liability have been different if there were no discretionary function exception to the Federal Tort Claims Act.

259 See, e.g., Carlyle v. United States, 674 F.2d 554, 556-57 (6th Cir. 1982) (plaintiff failed to establish negligence in failure of Army to supervise recruits).
261 See Payne v. United States, 730 F.2d 1434, 1437 (11th Cir. 1984).
R. Inspections for Benefit of Third Person

A recurring fact pattern is one in which a plaintiff is injured because an inspection for the direct benefit of another was performed negligently. In *Nelson v. Union Wire Rope Corp.*, plaintiffs, construction workers, were injured when a cable in a construction hoist broke. They sued, among others, their employer’s workmen’s compensation carrier, who had gratuitously undertaken a safety inspection for the employer. The jury returned a sizeable verdict against the carrier, but the state appellate court reversed. The Illinois Supreme Court reversed again and affirmed the judgment of the trial court, noting that the defendant insurance company had extensively advertised its gratuitous inspection program and the benefits that accrued to its customers from the program. Such services were performed for plaintiffs’ employer and failure to comply with the safety inspector’s urgent recommendations could have lead to cancellation of insurance. The court concluded:

[D]efendant did gratuitously undertake to make safety inspections and to render safety engineering services on the . . . project, and . . . such inspections were planned, periodic and directed to the safety of the employees on the project. Under these circumstances . . . duty devolved upon defendant, owed to the plaintiffs, to make its inspections with due care.

The court then rejected several of defendant’s contentions and concluded that defendant’s liability to persons for whom it did not believe it was performing the inspections extended to “such persons as defendant could reasonably have foreseen would be endangered as the result of negligent performance;” the court reached this conclusion because “plaintiffs, as workmen on the project, were the chief beneficiaries of the safety inspection and safety engineering services . . . [D]efendant could reasonably have . . . foreseen that they would be endangered by its failure to use due care.” The court concluded that the jury could reasonably have found that defendant’s agent failed to exercise due care in the in-

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264 31 Ill. 2d 69, 199 N.E.2d 769 (1964) (court applied Florida law).
265 Id. at 79, 199 N.E.2d at 776.
266 Id. at 80, 199 N.E.2d at 777.
267 Id. at 83, 199 N.E.2d at 778.
268 Id. (emphasis added).
269 Id. at 86, 199 N.E.2d at 779-80.
The analysis of the court in this common law case rather straight-forwardly turned upon the existence of duty and the exercise of due care. Under the Federal Tort Claims Act, a determination of whether there is discretion will turn on the same factors that determine whether there is duty or failure to exercise reasonable care.

In *Blessing v. United States* plaintiffs asked the court to impose liability for inspection undertakings comparable to those in *Nelson*. The Occupational Safety and Health Act of 1970, "enacted for the purpose of reducing . . . work-related illnesses and injuries," authorizes OSHA inspectors to enter places of employment to inspect pertinent conditions. Plaintiffs who were injured as the result of conditions that were permitted to continue after OSHA inspections brought suit, contending that liability should be imposed for a negligent inspection. The government contended that it should be immune from liability by virtue of the discretionary function exception to the Federal Tort Claims Act, arguing that it performs a regulatory function when OSHA inspects a workplace. The court responded:

> Statutes, regulations, and discretionary functions, the subject matter of § 2680(a), are, as a rule, manifestations of policy judgments made by the political branches. In our tripartite governmental structure, the courts generally have no substantive part to play in such decisions. Rather, the judiciary confines itself — or, under laws such as the FTCA’s discretionary function exception, is confined — to adjudication of facts based on discernible objective standards of law. In the context of tort actions, with which we are here concerned, these objective standards are notably lacking when the question is not negligence but social wisdom, not due care but political practicability, not reasonableness but economic expediency. Tort law simply furnishes an inadequate crucible for testing the merits of social, political, or economic

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270 Id. at 95, 199 N.E.2d at 784. Other courts confronted with facts similar to those in *Nelson* have held that the immunity from suit that is given to employers by the workmen’s compensation act should be extended to the employer’s insurer as well. See W. Prosser, J. Wade & V. Schwartz, *supra* note 38, at 445 n.4.


274 Id. at 1165-66.
decisions.275

The court further noted that the discretionary function "seems at first to have been designed simply to incorporate the basic tenets of judicial restraint and proper separation of powers."276 The nature of a decision is what is important, and, when policy considerations are involved, judgment is immune from liability.277 The establishment of priorities in OSHA inspections would be a discretionary function.278 But, if policy decisions would have required inspection of the equipment that injured plaintiffs, there is no discretion — even if professional judgment would dictate noninspection.279 Thus, if state law would permit imposition of liability in such situations, the discretionary function exception is no bar to possible liability.

The net impact of Blessing is that liability for injury to a third person is controlled by state law concerning liability for inspections made for the immediate benefit of one other than the one who is injured.280 Only when the nature of the decision involved itself is a policy decision does the discretionary function exception apply,281 though its application does not change the outcome of a case. When decisions concerning social wisdom, political practicability, and economic expediency are at issue, courts are certainly

275 Id. at 1170 (footnotes omitted).
276 Id. at 1171.
277 See id. at 1177-78.
278 See id. at 1178-79 (establishment of priorities "involve[s] balancing policy considerations").
279 See id. at 1184-85 (professional discretion not equivalent to discretionary function exception).
280 Cf. Hylin v. United States, 755 F.2d 551, 554 (7th Cir. 1985); Thompson v. United States, 592 F.2d 1104, 1110 (9th Cir. 1979) (mere provision for government safety inspections does not impose liability on the government for failure to stop an activity due to failure to comply with safety standards); Clemente v. United States, 567 F.2d 1140, 1144-45 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978). But cf. Rulli v. United States, 581 F. Supp. 1502, 1510-11 (W.D. Pa. 1984) (evaluative judgments in inspections were professional or scientific, not policy-weighing); Barron v. United States, 473 F. Supp. 1077, 1084 & n.3 (D. Hawaii 1979) (employee of independent contractor could recover from government, which inspected worksite, was aware of safety problems but did nothing about them, and had reserved general control over work), aff'd in part, rev'd in part, 654 F.2d 644 (9th Cir. 1981).
not capable of assessing the relative values of B, P, and L.

III. SOME TENTATIVE CONCLUSIONS

From the foregoing examination of a number of cases in which the discretionary function exception to the Federal Tort Claims Act was construed, some conclusions can be drawn. In certain well-defined and recurring situations in which common law rules of negligence liability are fairly well crystallized, a finding of the presence or absence of discretion may be invoked by a court for the purpose of making the same liability determination that would be made by applying the common law directly. When competing interests of the parties have not necessarily been resolved to the point of general acceptance or at least predictability, the discretionary function exception to the Federal Tort Claims Act is invoked to make liability determinations in the same manner as other liability limiting considerations are invoked in ordinary negligence cases. Frequently, difficult questions of policy are involved, and discretion is the device by which courts can beg the policy question — just as common law courts beg difficult questions by resorting to such terminology as foreseeability. Discretion, like foreseeability, is a term the decision-maker may "load up" or "unload."  

In yet other situations, courts have long acknowledged that certain functions of government must be immune. When a discretionary function rule is applied to cases involving such fact patterns, the results are the same as they would be under the common law. Additionally, "discretion" does seem to vindicate the principle of separation of powers; tort suits should not become a vehicle for reviewing the judgment of coordinate branches of government.

The broad theme of the cases involving discretion is that a court will judge only when it perceives that it is capable of assessing the relative values of B and PL in the conduct of the defendant, and that courts apply the same common law rules to the

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283 See Reynolds, supra note 4, at 111. In situations in which a government agency has gone to great lengths to choose the best alternative available, a court may be reluctant to step in and decide if there has been negligence. Id. Courts may also be adverse to interfering when amounts involved are high, or when the possibility of liability in related areas is great.
government as they apply to private party defendants. When courts believe themselves to be capable of making a judgment concerning the relative values of B, P, and L, there is no discretion; when they are not so capable, there is discretion. There are times when the public interest is so substantial in a particular governmental decision that it dwarfs other interests to the point that the relative values of B, P, and L cannot be ascertained; such a decision is discretionary.

When the ability of a court to make a relative assessment of B and PL changes, discretion no longer bars recovery. Discretion is the elastic concept that the doctrine of proximate cause is already acknowledged to be. As the proximity of conduct and injury gets closer, a court's ability to assess the relative values of B, P, and L increases, the probability of government liability for project-approval activities increases, and discretion decreases. When a government agency plainly exceeds its delegated authority, courts may assert the capability of assessing the relative values of B and PL.

This article has meted out little criticism for the decisions of various courts, despite the fact that some cases may deserve criticism and that many groups of cases may be inconsistent with one another. Rather, the purpose has been to discern the characteristic manner in which all courts treat the discretionary function exception to the Federal Tort Claims Act. That manner is equal to and is equally as broad as the common law limitations of negligence liability set forth in the doctrine of proximate cause.

IV. LEADING SUPREME COURT CASES CONSTRUING THE DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT

In the leading cases of the United States Supreme Court considering the scope of the "discretionary function" exception to the Federal Tort Claims Act, the approach has proved to be remarkably similar to that of courts called upon to limit liability in the garden variety tort case. These cases will be examined from the perspective of demonstrating that the Court itself treats traditional negligence limitations of liability identically to the discretionary function exception.

Id. However, in deciding not to interfere, courts may be most influenced by their "lack [of] experience and [of] standards in determining what is a 'reasonable and prudent government.'" Id.
A. Dalehite v. United States

In Dalehite v. United States, the United States Supreme Court decided — in terms that might easily have described proximate cause or a legal limitation of liability based upon policy in any other negligence context — that certain acts of government officials were discretionary in nature and therefore immune from tort liability. Plaintiffs were injured as the result of a huge explosion of Fertilizer Grade Ammonium Nitrate (FGAN), which the government had produced and distributed according to its own specifications. Clay plus a mixture called prp was added to prevent FGAN from caking through water absorption. The FGAN was then grained to fertilizer specification and packed in six-ply paper bags. The government had had substantial experience in producing and handling FGAN. Extensive planning and arranging at the cabinet level produced a plan in which private firms were to operate reactivated ordnance plants, subject to the direction, control, and approval of a Government Contracting Officer. Detailed specifications were drafted, and army personnel were present at each plant to assure that the specifications were followed.

The particular FGAN involved in Dalehite had been designated for shipment overseas and stored for three weeks before being loaded onto two ships at Texas City, Texas. Both of the ships exploded, leveling much of the city and killing many people. In the suit that followed, the government was charged with negligence for having used an ingredient in fertilizer known to be explosive in combination with other materials. Such material had been shipped to a congested area without warning of its true nature. The United States Federal District Court for the Southern District of Texas held that there was liability based upon negligent drafting and adoption of the fertilizer export plan, specific negligence in the various phases of the manufacturing process, and negligent failure to police the shipboard loading adequately. Although the United States Court of Appeals for the Fifth Circuit reversed, the United States Supreme Court considered the case as one coming to it from the district court unimpaired because of the nature of the decision of the court of appeals.

The first part of the Supreme Court’s decision was a consideration of the legislative history of the Federal Tort Claims Act in

general and the discretionary function exception to the waiver of immunity in particular. Testimony before the House Committee on the Judiciary indicated that cases excepted from tort claims by a discretionary function exception would have been dismissed in any event by judicial decision in the absence of such an exception. There is thus in the legislative history a strong indication that the discretionary function exception to the Federal Tort Claims Act adds nothing to the basic law of negligence as it would be applied in the context of a suit against the government. Quoting from the legislative history, the Court held that the discretionary function exception is

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 the suit is the contention that the same conduct by a private individual would be tortious. . . . 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 or involving an abuse of discretion.

The legislative history of the Federal Tort Claims Act examined by the Court makes the discretionary function exception of the Act the parallel of negligence itself. If discretion is present, there can be no finding of negligence. If there is no finding of negligence, there is discretion. In the second part of its opinion, the Court ostensibly applied appropriate considerations of the discretionary function exception to the facts of the case, asserting that section 2680(a) reveals a congressional intent “to except the acts here charged as negligence from the authorization to sue.” The Court stated that the discretion excepted from liability is “the discretion of the executive or the administrator to act according to [his] judgment of the best course, a concept of substantial historical ancestry in American law.” The Court offered the following explanation of why discre-

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285 Id. at 27 (quoting Hearings, supra note 1, at 29) (statement of Francis M. Shea, Assistant Attorney General).
286 Id. at 30 (quoting Hearings, supra note 1, at 33; S. Rep. No. 1196, 77th Cong., 2d Sess. 7; H.R. Rep. No. 1287, 79th Cong., 1st Sess. 5-6 (emphasis added)).
287 Dalehite, 346 U.S. at 32.
288 Id. at 34.
tion was present in this case and how its presence might be judged in other cases:

[A]cts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion. This does not really constitute an explanation of when discretion is present, but rather the rationalization of a conclusion already reached. The Court admitted that it did not decide anything with respect to discretion "apart from this case." Abstract statements about acts of subordinates carrying out the policy judgment and decisions of superiors say nothing about what discretion is. What the Court did, of course, was apply its own judgment on the policy question of where the legal limitation of liability for a negligent action of government officials should lie.

In the third part of its opinion, the Court considered whether certain specific acts were in fact negligent. It is, of course, rather unusual for the United States Supreme Court to make such a determination. The manner in which it decided that certain conduct is discretionary is instructive. The Court actually applied an economic model of negligence. Initially, the Court addressed the question of whether there should have been further testing of FGAN to determine the possibility of an explosion and stated that "[o]bviously, having manufactured and shipped the commodity FGAN for more than three years without even minor accidents, the need for further experimentation was a matter of discretion." A history of low probability of injury is an indication that

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289 Id. at 36 (footnotes omitted).
290 See W. Prosser, J. Wade & V. Schwartz, supra note 38, at 364. In describing tests for determining whether tort liability should be legally limited (that is, whether the doctrine of proximate cause should cut off the liability of the defendant), the authors of that text say the following of the various tests: "They do not help the court especially to reach a decision on a case before it, but they do help substantially in explaining the decision after it has been reached." Id.

Application of proximate cause tests involves reasoning backwards, from conclusion to reasoning. The United States Supreme Court used "discretion" in the same way.
291 See Dalehite, 346 U.S. at 41; see supra notes 279-85 and accompanying text.
292 Dalehite, 346 U.S. at 38 (emphasis added). The Court traced the prior government experience with FGAN to demonstrate that matters of this type of governmental duty are exempted from the Act. Query whether such actions are immune from liability because there was no failure to exercise reasonable care or because such actions were in pursuance of
P is to be accorded a relatively low value. In such a case, it is increasingly likely that B is more than PL. This is the same consideration that would be made in any other negligence case involving an explosion of fertilizer. Having concluded that the decision not to engage in further testing was not unreasonable, it follows, according to the Court, that the decision must have involved discretion. This is reasoning backwards, from conclusion to rationale.

The Court then considered the specifically alleged negligent acts, admittedly performed in accordance with plans adopted by the Field Director of Ammunition Plants. The government had specified the bagging temperature, the type of bagging, the labeling, and the prp coating so that caking would be avoided. Adoption of all these specifications involved judgment, which sometimes was exercised with respect to matters that went to the very feasibility of the whole project. As for the possibility of lowering the bagging temperature, the Court noted that it was known that there was a trade-off between production costs and the temperature at which FGAN was bagged. That trade-off was considered and the decision was made not to lower the bagging temperature. The Court thus professed an inability to assess the relative values of B and PL. Additionally, the labelling provisions for FGAN were found to have been made at a discretionary level. In reaching this conclusion, the Court relied on ICC regulations that had dictated the proper labels for this material and not solely on discretion. The Court also noted that:

The entirety of the evidence compels the view that FGAN was a material that former experience showed could be handled safely in the manner it was handled here. Even now no one has suggested that the ignition of FGAN was anything but a complex result of the interacting factors of mass, heat, pressure, and composition.

By indicating once again that the Government did not act unreasonably in any event, the Court equated the legal limitation of liability that passes under the name of proximate cause with the pre-exempted from the Act. Query whether such actions are immune from liability because there was no failure to exercise reasonable care or because such actions were in pursuance of a government policy adopted by the exercise of an appropriately high level of discretion.

293 See Dalehite, 346 U.S. at 38; infra note 314.
294 See Dalehite, 346 U.S. at 40-41.
295 See id. at 41-42.
296 Id. at 42.
ordained conclusion that liability does not exist in this case because the decisions involved were discretionary. The Court characterized the decisions as planning-level decisions rather than operational-level decisions. This has come to be an important distinction in later applications of the discretionary function exception to the Federal Tort Claims Act.

In the fourth part of its opinion, the Court addressed the question of whether the Coast Guard was negligent in supervising the storage of FGAN or in fighting the fire after it had started. The Coast Guard had not regulated the storage or loading of FGAN. The Court deemed this a matter of discretion and hence immune from liability. As for alleged negligence in fighting the fire, the Court said the Federal Tort Claims Act “did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights.” The Court then referred to the law of torts and said that “if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire.” Hence the absence of discretion would not alter the outcome on this issue since the limitation of liability imposed under traditional tort law would dictate the same result.

Justice Jackson in dissent equated discretion with negligence. He accurately indicated that discretion is an elastic concept designed to serve certain ends:

*Some* theory of liability, some philosophy of the end to be served by tightening or enlarging the circle of rights and remedies, is at the root of any decision in novel situations when analogies are equivocal and precedents are silent. So, we begin by avowing a conception of the function of legal liability in cases such as this quite obviously at variance with the approach of the Court.

Jackson argued that tort law serves as an inducement to prudence. *Dalehite* involved the shipment of a dangerous substance

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297 See id.
298 See id at 43.
299 Id.
300 Id. at 44.
301 Id. The fifth part of the Court's opinion concerned the possibility of imposing absolute liability on the government. The Court held that such liability could not be imposed under the Federal Torts Claims Act. See id. at 45.
302 Id. at 49 (Jackson, J., dissenting) (citing B. CARDOZO, *THE GROWTH OF THE LAW* 102 (1924) (emphasis original)).
303 Id. at 49 (Jackson, J., dissenting).
and conditions in the contemporary world have made the law of torts impose a high duty of care when such substances are manufactured and then shipped.304 The fact that such a large explosion occurred is a strong indication that there was negligence on the part of the Government. A private corporation certainly would have been held liable under the same circumstances.305 Justice Jackson then stated that discretion is a matter of policy, and that policy is to protect through immunity those decisions which should be shielded from liability in all events. He went on to say, however, that "a policy adopted in the exercise of an immune discretion was carried out carelessly by those in charge of detail. We cannot agree that all the way down the line there is immunity for every balancing of care against cost, of safety against production, of warning against silence."306 Jackson correctly determined discretion to be the word by which we allocate where the risk that certain decisions will cause injury should fall:

[c]ourts have long recognized the public policy that [a government] official shall be controlled solely by the statutory or administrative mandate and not by the added threat of private damage suits. . . . The exception clause of the Tort Claims Act protects the public treasury where the common law would protect the purse of the acting public official.

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

The Government's negligence here was not in policy decisions of a regulatory or governmental nature, but involved actions akin to those of a private manufacturer, contractor, or shipper.307

The dissenters concluded that the government should have borne the risk that injury would occur in Dalehite in the manner that it

304 Id. at 51-53 (Jackson, J., dissenting).
305 Id. at 57 (Jackson, J., dissenting).
306 Id. at 58 (Jackson, J., dissenting).
307 Id. at 59-60 (Jackson, J., dissenting).
did. The lengthy excerpts just quoted indicate an application of the planning/operation test that simply reaches a result contrary to that of the majority.

The factors that constitute discretion, articulated by either Justice Reed for the majority or Justice Jackson in dissent, do not differ substantially from the unarticulated factors that we call proximate cause. Out of Dalehite came the increased concern of lower courts whether decisions were made at the planning level or at the operational level.

B. Indian Towing Co. v. United States and Rayonier, Inc. v. United States

After Dalehite, the United States Supreme Court did little to explain what discretion is. Rather, it simply passed upon the appropriate application of the Federal Tort Claims Act to certain situations. In this way, the Court treated discretion in the manner that a state supreme court would treat a doctrine of proximate cause. Those courts allow lower courts to apply very generalized rules to concrete fact situations — and give guidance as to appropriate limitations only as a matter of review. Of course, the United States Supreme Court provides such guidance only occasionally, but this is sufficient. State supreme courts do not frequently reverse trial court decisions in negligence cases. By refusing to decide Federal Tort Claims Act cases, the United States Supreme Court gives the same effect to decisions of lower federal courts. Interestingly, most United States Supreme Court decisions involving the discretionary function exception are reversals of lower court decisions.308

In Indian Towing Co. v. United States,309 the government conceded that the discretionary function exception was not involved.310 The Court simply applied negligence principles to a case in which the Coast Guard had caused damage by negligently oper-

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310 Id. at 64.
ating one of its lighthouses. The Court, therefore, refused to apply the discretionary function exception to those functions considered to be governmental in the sense that only the government performs them.\(^{311}\)

In *Rayonier, Inc. v. United States*,\(^ {312}\) plaintiff's lands were destroyed when, allegedly, the United States negligently permitted a fire to start and then negligently failed to exercise its assumed responsibility to extinguish it properly. The United States Federal District Court for the Western District of Washington and the United States Court of Appeals for the Ninth Circuit dismissed plaintiff's claim stating that there was no recognized tort upon which plaintiff could sue, that Washington state law would not impose liability in such a situation, and that *Dalehite* precluded liability. The United States Supreme Court reversed, holding that the liability of the United States is not restricted to that of a municipal corporation at common law.\(^ {313}\) Rather, the policy of the Federal Tort Claims Act was clearly that in appropriate cases, losses should be shifted from private individuals to the government so that the resulting burden on each taxpayer would be relatively slight. Congress apparently decided that this would be most fair when the public as a whole benefits from the services performed by government employees.\(^ {314}\)

Clearly, the *Rayonier* Court has indicated that the Federal Tort Claims Act permits to be done what any tort suit accomplishes: losses may be shifted in appropriate circumstances. This determination was made without reference to the discretionary function exception, although the Court did indicate that this suit was not precluded by the *Dalehite* case.\(^ {315}\) It is up to the courts to determine when it is indeed appropriate to shift losses. The determination to be made in a suit against the government and the determination to be made in a suit against a private defendant are not different determinations.

In neither *Indian Towing* nor *Rayonier* did the United States Supreme Court make any effort to say what discretion is. Rather, it simply brought lower courts into line with what it determined discretion was not. In *Dalehite*, the Court stated the broad rule

\(^{311}\) See id. at 67-68.

\(^{312}\) 352 U.S. 315 (1957).

\(^{313}\) Id. at 319 (citing *Indian Towing*, 350 U.S. 61 (1955)).

\(^{314}\) *Rayonier*, 352 U.S. at 319.

\(^{315}\) See id.
that planning-level activities are discretionary functions and operational-level activities are not. Broad parameters of applications were thus given to lower courts. The manner of application is only gradually shaped by occasional Supreme Court pronouncements on very specific matters. The common law of negligence works in the same fashion.

D. United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)

The latest word from the United States Supreme Court concerning the scope of the discretionary function exception is the decision in United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines). The Court combined two cases for decision in which, allegedly, the Federal Aviation Administration negligently certified certain aircraft for use in commercial aviation. In one case, a specific regulation was violated: waste receptacles were not made of fire resistant materials nor covered for the purpose of containing possible fires. A mid-air fire broke out and many passengers were killed. In the other case, a supplemental type certificate was issued for the installation of a heater not in compliance with applicable regulations. A mid-air fire broke out and all occupants were killed. Suits were brought by several individuals and entities, and in both cases, the respective courts of appeals held that the discretionary function exception was not a bar to recovery. The question before the Supreme Court was whether the United States could be liable for negligent performance of certification activities by the Federal Aviation Administration. The Court concluded that the discretionary function exception barred liability.

The Court first examined the applicable legislation. Under the Federal Aviation Act of 1958, the Secretary of Transportation was authorized to prescribe rules and regulations governing inspections of aircraft; however, under the statutory scheme certain responsibilities for the safety of aircraft were to remain with the air carriers. The legislation established a multi-step certification pro-

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317 Id. at 800-01.
318 Id. at 802-03.
319 Id. at 804.
cess,\textsuperscript{320} in which the FAA acted as the Secretary's designee and promulgated a comprehensive set of regulations.\textsuperscript{321} Because the FAA had far too few engineers to conduct necessary inspections itself, the statute permitted the Secretary to delegate responsibilities to qualified private persons.\textsuperscript{322} Pursuant to regulation, such persons were appointed, "typically employees of aircraft manufacturers who possess detailed knowledge of an aircraft's design based upon their day-to-day involvement in its development."\textsuperscript{323} These persons acted as the surrogates of the FAA.

The \textit{Varig Airlines} Court then turned its attention to the Federal Tort Claims Act and the discretionary function, and stated that \textit{Dalehite} still represents "a valid interpretation of the discretionary function exception."\textsuperscript{324} "[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary exception applies in a given case." The Court also noted that the discretionary function exception "plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals," and 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.\textsuperscript{325} As a matter of fact, no FAA inspector actually inspected the items that caused such severe damage in the two consolidated cases.\textsuperscript{326} Essentially this is because of the type of inspection system that the FAA instituted for certification purposes.

"The FAA certification process [was] founded upon a relatively simple notion: the duty to ensure that an aircraft conforms to FAA safety regulations lies with the manufacturer and operator, while the FAA retains the responsibility for policing compliance."\textsuperscript{327} In essence, the decision of the FAA to institute a spot-check system of inspection itself was challenged as well as the application of that system to the particular facts of the case.\textsuperscript{328} However, the Court stated:

\begin{quote}
\textsuperscript{320} Id..
\textsuperscript{321} Id. at 804-05.
\textsuperscript{322} Id. at 807.
\textsuperscript{323} Id.
\textsuperscript{324} Id. at 811-12.
\textsuperscript{325} Id. at 814.
\textsuperscript{326} Id. at 814-15.
\textsuperscript{327} Id. at 816 (citation and footnotes omitted).
\textsuperscript{328} Id. at 819-20.
\end{quote}
Likewise, execution of the spot-checking program in accordance with agency directives is protected by the discretionary function exception. Calculated risks were taken for the advancement of a governmental purpose.

The fact that the Court was willing to say that the nature of conduct rather than the status of the actor governs the applicability of the discretionary function exception does represent something of a concession to Justice Jackson's dissenting view in Dalehite. It also is consistent with the view that the applicability of the discretionary function exception depends on a court's ability to assess the relative values of B, P, and L. The ability to make such an assessment does not depend upon the status of an actor. It most certainly does depend upon the nature of the conduct.

Beyond this, Varig Airlines fits the mold of cases such as Indian Towing and Rayonier in that the Court says little more about what discretion is other than to reaffirm Dalehite. In reaching its holding, the Court relied extensively on aviation legislation. The Court brought lower courts into line with its view on a particularly vexing problem and in so doing, it reversed liability determinations made by two courts of appeals.

V. COMMENTS ON THE DISCRETIONARY FUNCTION EXCEPTION

There has been no shortage of suggested "tests" by which to determine whether the discretionary function exception should apply. Some of these tests have been sufficiently discredited so that there is no reason to dwell upon them. The test of the discre-

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329 Id. at 820.
330 Id.
331 Id.
332 Id.
333 A list of discredited "tests" would include the "discretionary/ministerial" test, the "governmental/proprietary" test, the "no analogous private liability" test, and the "rank of the decisionmaker" test.
tionary function exception that has demonstrated the greatest durability is the Dalehite "planning/operational levels" test. If a decision is made at the planning level, the government cannot be held liable for it; if a decision is made at the operational level, the government can be held liable for it. Unfortunately, the planning/operational test is not one that provides meaningful guidance in determining whether the discretionary function exception should apply. As an analytical tool . . . the distinction is of marginal value in resolving all but the most obvious cases. Yet the test has remarkable durability, for at least two reasons. First, the United States Supreme Court provided it, and hence, irrespective of its wisdom, it is the law of the land. Second, and more importantly, the planning/operational test has proved to be sufficiently flexible to encompass many considerations; more tests are created to determine whether a decision is made at the planning level or at the operational level. When broad policy matters must be considered, a decision is more apt to be considered made at the planning level. Adoption of the policy is the extent of the exercise of discretion; application of a policy is considered routine and not the exercise of a discretionary function. Adoption of policy is the test for planning level activity, which in turn is the test for the exercise of discretion. These tests for the test are themselves subject to the criticism that they provide no answers to whether a decision is discretionary. Perhaps they do direct the thinking of one who must decide, but they hardly provide certainty.

Recently, a number of commentators have advocated that the discretionary function exception to the Federal Tort Claims Act should turn on the nature of the conduct or the decision evaluated

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333 Reynolds, supra note 4, at 104-05 (application of test requires large number of examples on whether negligence in choice of policy or negligence in carrying out policy caused injury).
335 See Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.")
336 See Comment, supra note 4, 49 J. AIR LAW AND COM. at 173. (planning/operational test manipulated by courts "to achieve results consistent with...[largely unarticulated] policy considerations...perceive[d]...[as] important"); Reynolds, supra note 4, at 128-32 (exclusion of policy matters from tort claims; distinction between formulation and implementation of policy).
337 See Reynolds, supra note 4, at 105.
338 Id. at 106.
in the context of the lawsuit, and more specifically on whether that conduct or decision involves the formulation of policy. This view, adopted by some courts, is no doubt superior to the cruder tests previously advocated. It is designed to function in a manner consistent with what Congress envisioned when it enacted the discretionary function exception. Various factors are to be considered such as the ability of the court to evaluate the reasonableness of the conduct or decision, the potential intrusion of the judiciary into matters appropriately left to another branch of government, the nature and seriousness of injury, and the relative worths of private and governmental interests. A test encompassing all these factors is less subject to the criticism that it is too rigid and mechanistic, a criticism that has been levelled at other tests.

But even this test for discretion offers the illusion of more certainty than it can deliver. This is because claims made against the government involve facts that constantly push the frontiers of tort liability outward. As activities of government affect citizens more, challenges to government conduct through tort claims can be expected to increase. What is a novel claim today will not be so novel tomorrow. What is policy formulation today will be capable of judicial evaluation tomorrow. Activity which definitionally constitutes policy formulation is itself fluid and subject to redefinition. Approval of the use of pesticides and substances such as agent orange or exposure of citizens to the dangers of nuclear radiation — occurs as the result of policy decisions made at a time when little is known about such activities. When more becomes known, such decisions are no longer considered to be policy decisions and the relative values of their B, P, and L are subjected to court evaluation. Courts increasingly demonstrate a willingness to evaluate the rea-

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339 See Harris & Schnepper, supra note 4, at 164 (1976); Note, Discretionary Function Exception: It is a Bar to Federal Jurisdiction?, 1983 Utah L. Rev. 117, 124-25; Comment, supra note 4, 2 Cum.—Sam. L. Rev. at 399.

340 See Clark, supra note 4, at 42; Harris & Schnepper, supra note 4, at 164; Wilkins, Tort Claims Against the State: Comparative and Categorical Analysis of the Ohio Court of Claims Act and Interpretations of the Act in Tort Litigation Against the State, 28 Clev. St. L. Rev. 149, 201 (1979).


342 See Neirn v. United States, 696 F.2d 1229, 1230 (9th Cir. 1983), cert. denied, 464 U.S. 815 (1984); Lindgren v. United States, 665 F.2d 978, 980 (9th Cir. 1982); Reynolds, supra note 4, at 118.

343 See Jaffe, supra note 4, at 219; Note, supra note 339, at 125 (citing Allen v. United States, 527 F. Supp. 476 (D. Utah 1981)).
sonableness of such specific types of conduct over time. This willingness both explains the changing nature of the discretionary function exception and provides a point of reference for a definition of what is discretionary at any point in time. Quite simply, discretion disappears when a court feels capable of assessing the relative values of B, P, and L.

The view that discretion is bounded only by a court’s inability to assess the relative values of B, P, and L is subject to the criticism that it provides no more certainty or predictability than other tests or formulas. Yet that is the ultimate point to be made. Negligence suits, including those brought against the government, are usually the result of unpredicted circumstances — at least when a decision on either foreseeability or discretion is the most difficult. “A rule for the unpredictable is itself a contradiction in terms.” There is no better test because “[t]he mule don’t kick according to no rule.” The best tests of the discretionary function exception are not those that provide ready but wrong results. Until the United States Supreme Court passes upon a particular point, we must be prepared to accept some inconsistency in results between the courts.

In common law negligence cases, the jury plays a substantial role in determining whether liability should be imposed upon a particular defendant. The reasoning process of the jury is hidden in the general verdict, which is reviewed for the assurance that it is supported by “substantial evidence.” Even if there is no jury, a deferential standard of review ensures that apparent consistency is achieved. This consistency is, however, illusory.

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344 See, e.g., Grunnet v. United States, 730 F.2d 573, 575 (9th Cir. 1984) (determining factors of test: planning or operational level, evaluative ability of judiciary and effect on government administration); Driscoll v. United States, 525 F.2d 136, 138 (9th Cir. 1975) (court capable of evaluating reasonableness of conduct); Medley v. United States, 543 F. Supp. 1211, 1218 (N.D. Cal. 1982) (court to use planning/operational test, evaluative ability of judiciary and its effect on administration of government).

345 W. Prosser, supra note 38, at 28.

346 Id. at 32.

347 See Sunderland, Verdicts, General and Special, 29 Yale L.J. 253, 262 (1920): The real objection to the special verdict is that it is an honest portrayal of the truth, and the truth is too awkward a thing to fit the technical demands of the record. The record must be absolutely flawless, but such a result is possible only by concealing, not by excluding mistakes. This is the great technical merit of the general verdict. It covers up all the shortcomings which frail human nature is unable to eliminate from the trial of a case. In the abysmal abstraction of the general verdict concrete details are swallowed up, and the eye of the law, searching anxiously for the realization of the logical perfection, is satisfied. In short, the general
in Federal Tort Claims Act cases.\textsuperscript{348} Much of the reasoning process that would occur in a jury room or in the mind of a judge is openly expressed in a written opinion addressing the question of whether the discretionary function exception should apply. The inconsistency latent in all negligence cases is thus there for all to see. Because common law negligence cases are reviewed only for sufficiency of evidence, it is thought that consistency is achieved; when the question of discretion is involved, consistency is expected, and there is no mask to hide behind if it is not present. This factor is compounded by the fact that liability under the Federal Tort Claims Act is determined by the law of the place where the act or omission occurred.\textsuperscript{349}

This inconsistency should not bother anyone any more than the fact that latent inconsistencies are tolerated in negligence cases. If improvement were possible, it would be sought. There is no groundswell of support for extensive revision of the discretionary function exception.\textsuperscript{350} Rather, it should simply be accepted that the limitations placed upon the government's liability under the Federal Tort Claims Act's discretionary function exception converge with the limitations imposed by the common law doctrine of proximate cause. No more than that can be expected.


\textsuperscript{349} 28 U.S.C. § 1346(b) (1982).

\textsuperscript{350} See Reynolds, supra note 4, at 113 (1968) ("no great dissatisfaction with the Federal Tort Claims Act as a whole").