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Howard A. Cole S.Ed.
University of Michigan Law School

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TORTS—THE DISCRETIONARY FUNCTION EXCEPTION IN THE FEDERAL TORT CLAIMS ACT—The doctrine of the immunity of the sovereign in tort has long been the subject of attack by statesmen and legal writers.¹ In response to these attacks and with a view to eliminating the unjust, expensive, and time-consuming method of settling tort claims against the federal government by the private bill method,² Congress passed the Federal Tort Claims Act in 1946.³ The act contained a number of exceptions,⁴ the most important of which preserved the immunity doctrine as to any claim arising out of a "discretionary function" of government.⁵ A recent decision of the United States Supreme Court illustrates the problems presented to the tort claimant by the exception as well as the confusion which has characterized judicial attempts to define it. *Dalehite v. United States*⁶ was a test case representing some three hundred separate claims arising out of the disastrous explosions in the harbor of Texas City, Texas in April 1947.⁷ The substance giving rise to the explosions was a government-manufactured fertilizer, FGAN, cargoes of which had been loaded on French vessels preparatory for shipment abroad. The decision to manufacture

¹ Repko, "American Legal Commentary on the Doctrines of Municipal Tort Liability," 9 LAW AND CONTEMP. PROB. 214 (1942). For a history of the gradual erosion of government immunity in tort, see Yankwich, "Problems Under the Federal Tort Claims Act," 9 F.R.D. 143 (1949); H. Hearings before the Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d sess., pp. 37-42 (1942).

² A summary of congressional criticism of the private bill procedure is contained in H. Hearings before the Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d sess., pp. 49-55 (1942). For a description of the procedure, see Holtzoff, "The Handling of Tort Claims Against the Federal Government," 9 LAW AND CONTEMP. PROB. 311 at 323-325 (1942).

³ 28 U.S.C. (Supp. V, 1952) §§1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680. Sec. 1346(b) provides that ". . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

⁴ 28 U.S.C. (Supp. V, 1952) §2680.

⁵ "The provisions of this chapter and section 1346(b) of this title shall not apply to— (a) 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 employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. (Supp. V, 1952) §2680. A somewhat comparable provision may be found in the "prerogative of the crown" exception of the British Crown Proceedings Act, 10-11 Geo. VI, c. 44 (1947). See Barnes, "The Crown Proceedings Act, 1947," 26 CAN. B. REV. 387 (1948); Street, "Tort Liability of the State: the Federal Tort Claims Act and the Crown Proceedings Act," 47 MICH. L. REV. 341 (1949).

⁶ 346 U.S. 15, 73 S.Ct. 956 (1953).

⁷ The explosions and the fires which followed destroyed much of the city, killed more than 560 persons and injured over 3,000. See N.Y. TIMES, April 17, 1947, §1, p. 1:8.

FGAN for overseas use was made at the cabinet level⁸ and was designed to implement the government policy of increasing food production in war-devastated countries. Responsibility for carrying out the program was delegated to the Army's Chief of Ordnance, and he in turn appointed the Field Director of Ammunition Plants as general administrator of the program. The office of the latter official drafted specifications for manufacture. The petitioner alleged negligence on the part of government employees in the original formulation of the program, in the manufacture of the FGAN, in the shipment of the product to a congested area without adequate warning of its explosive potentialities, in the failure to police the loading operations, and in the failure to fight the fire that resulted from the explosion.⁹ The district court's judgment for the petitioner was reversed by the Court of Appeals for the Fifth Circuit,¹⁰ and the Supreme Court granted certiorari.¹¹ In a four-to-three decision¹² the Court found the alleged negligent acts and omissions to be "discretionary functions" and therefore within the exception to the waiver of sovereign immunity. While finding the acts and omissions involved in the case before it to be matters undertaken at the "planning" rather than the "operational" level, the majority did not suggest a clear test for so classifying other activities of government. It was simply held that the exception included not only the "initiation" of programs but also the establishing of "plans, schedules, and operations."¹³

The lower federal courts have been in sharp disagreement as to the proper method of applying the discretionary function exception.¹⁴ They have generally followed an ad hoc approach and have refrained from formulating a test for applying the exception uniformly.¹⁵ The

⁸ The plan was suggested by the Under-Secretary of War, ordered into operation by the Director of the Office of War Mobilization, and approved by the cabinet. Funds were allocated to the project by the War Department, and a direct appropriation for relief in occupied areas was made the following year by Congress.

⁹ A claim that the United States was liable without fault by virtue of its engaging in an "extra hazardous activity" was rejected by the Court. It has been suggested that government should assume the liability of an insurer in projects involving extreme risk. See, e.g., Blachly and Oatman, "Approaches to Governmental Liability in Tort: A Comparative Survey," 9 *LAW AND CONTEMP. PROB.* 181 at 213 (1942). France has adopted this view. *Id.* at 205-211. Cf. *Evans v. Berry*, 262 N.Y. 61, 186 N.E. 203 (1933).

¹⁰ *In re Texas City Disaster Litigation*, (5th Cir. 1952) 197 F. (2d) 771.

¹¹ *Dalehite v. United States*, 344 U.S. 873, 73 S.Ct. 166 (1952).

¹² Justices Jackson, Black and Frankfurter dissented. Justices Douglas and Clark did not participate in the case.

¹³ *Dalehite v. United States*, 346 U.S. 15 at 35-36, 73 S.Ct. 956 (1953).

¹⁴ See cases collected in 19 *A.L.R.* (2d) 845 (1951); 66 *HARV. L. REV.* 488 (1953).

¹⁵ For an expression of the view that a vague standard is desirable in this field, see Street, "Tort Liability of the State: the Federal Tort Claims Act and the Crown Proceedings Act," 47 *MICH. L. REV.* 341 at 364-368 (1949).

resulting uncertainty necessarily undermines the effectiveness of the remedy provided by the act. The likelihood of lengthy litigation, the outcome of which may depend upon the personal approach of a particular judge, and the prospect of eventually having to rely upon the old private bill procedure are not likely to encourage the vigorous prosecution of just claims against the government.¹⁶ It becomes important therefore to re-examine the various tests that have been suggested by courts and legal writers for applying the exception and to determine which would best effectuate the purposes of the lawmakers.

I. Possible Tests for Applying the Exception

Judgment. A simple definition of discretion would be "judgment." It could be said that whenever a person has the "power to do or to refrain from doing a certain thing,"¹⁷ he has discretion. Such a definition would of course encompass almost every activity engaged in by government employees and would make the Tort Claims Act itself meaningless.¹⁸

Reasonable or honest judgment. Some courts have attempted to temper the effects of such a literal definition of "discretion" by implying the limitations of reason, good faith, and the law.¹⁹ Such limitations have little utility, however, because the exception includes not only acts of discretion, but also acts involving the "abuse of discretion."²⁰

Expert judgment. The majority opinion in the *Dalehite* case refers to the acts involved as pertaining to matters that required the use of "expert judgment."²¹ It is to be hoped that this statement is not intended as a test for determining when an act is discretionary.

¹⁶ Shortly after the decision in the *Dalehite* case, the House Committee on the Judiciary was authorized to investigate the merits of the claims arising out of the Texas City disaster. H. Res. 296, 83d Cong., 1st sess. (1953). The action was taken to avoid individual consideration of approximately one thousand private bills, as estimated by Representative Thompson of Texas. 99 CONG. REC. 10187-10188 (July 27, 1953). It is not pleasant to note that it took the disaster victims over six years merely to discover their remedy.

¹⁷ BLACK, LAW DICTIONARY, 4th ed., 553 (1951).

¹⁸ 66 HARV. L. REV. 488 (1953).

¹⁹ 12 WORDS AND PHRASES 587-602 (1940).

²⁰ 28 U.S.C. (Supp. V, 1952) §2680. The term "abuse of discretion" is a confusing one. If there are no limits at all to an official's discretion, his discretion can never be abused. However, if there are limits, and the official goes beyond them, it might be said that he is not really abusing his discretion since he is no longer exercising discretion. Perhaps the term is meaningful only if acts in the "abuse of discretion" are thought of as acts "beyond discretion."

²¹ *Dalehite v. United States*, 346 U.S. 15 at 40, 73 S.Ct. 956 (1953).

Few federal employees may be said to lack a degree of expertness in their fields, be they generals, typists, tank drivers, pilots, physicians, or air control tower operators, but the lower federal courts have often found liability in cases involving such employees.²² There is an element of unreality in the view that "the experts can do no wrong," and there is nothing in the Tort Claims Act to indicate a congressional intent to disclaim liability for the wrongful acts of experts or to assume liability for the wrongful acts of non-experts when they are engaged in activities of a true policy-making character.

Personal liability of the employee. It has been suggested that Congress intended to use the word "discretionary" in the Federal Tort Claims Act in the same sense in which the term has been used in other contexts,²³ such as actions for damages or mandamus against government employees personally. Such an approach would make the liability of the United States derivative from the liability of an employee. While this view has been expressed by some courts,²⁴ it appears founded upon the erroneous notion that the Tort Claims Act was designed to protect government employees rather than the victims of their wrongful acts.²⁵ Moreover, there is little relation between what might be proper policy in mandamus actions, or in damage suits against individual employees, and the policy question involved in a tort action against the government. In any event, such a test simply postpones and does not answer the problem, since judicial definitions of "discretion" in these contexts have been hopelessly confusing.²⁶

Language of the statutory authority. If the statute under which the official acts contains words of discretion, it might be considered evidence of an intent to exclude his actions from review by the courts in a damage action.²⁷ It does not follow, however, that whenever Congress uses such words to define the official's place in the

²² See, e.g., *Parcell v. United States*, (D.C. W.Va. 1951) 104 F. Supp. 110; *Gilroy v. United States*, (D.C. D.C. 1953) 112 F. Supp. 664; *Costley v. United States*, (5th Cir. 1950) 181 F. (2d) 723; *Wilscam v. United States*, (D.C. Hawaii 1948) 76 F. Supp. 581.

²³ See, e.g., *Coates v. United States*, (8th Cir. 1950) 181 F. (2d) 816.

²⁴ *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153 (1950); *Smart v. United States*, (D.C. Okla. 1953) 111 F. Supp. 907; *Kendrick v. United States*, (D.C. Ala. 1949) 82 F. Supp. 430.

²⁵ It is at least doubtful whether even the principle of respondeat superior is founded upon the principle of derivative liability. *Schubert v. August Schubert Wagon Co.*, 249 N.Y. 253, 164 N.E. 42 (1928); *SEAVEY, STUDIES IN AGENCY* 1-27 (1949).

²⁶ *Patterson*, "Ministerial and Discretionary Official Acts," 20 MICH. L. REV. 848 (1922).

²⁷ *Denny v. United States*, (5th Cir. 1948) 171 F. (2d) 365; *Boyce v. United States*, (D.C. Iowa 1950) 93 F. Supp. 866.

administrative structure, it is intending to withdraw his actions from the coverage of the Tort Claims Act. The policy considerations involved in these two legislative problems are entirely different, and it would not be strange if Congress was to use such a vague term as "discretion" to mean different things in different laws. Such a test, moreover, would be helpful only in cases involving a selected group of public officials. The great mass of government employees do not function under any direct statutory authority.

Position of the employee. In determining whether a discretionary function is involved in an action against an individual employee, the courts customarily look to the act performed rather than to the position of the employee performing it.²⁸ Despite this general rule, there has been a tendency in some cases to give the official position of the employee considerable weight in applying the discretionary function exception.²⁹ It would seem that reliance should be placed upon the employee's rank only when necessary for the determination of the issue of the existence of a discretionary function. At the most, the employee's position should be a mere evidentiary factor and not an independent test for applying the exception.

Governmental v. proprietary function. In cases involving the issue of municipal tort liability, the general practice has been to find liability in cases involving traditional functions of government and to deny liability in cases where the government is acting as a private person.³⁰ This is an arbitrary doctrine and appears to have been formulated as a convenient loophole in the sovereign immunity doctrine rather than as an instrument of justice in all cases. With the increasing acceptance of the broad scope of governmental activity in modern times, the "governmental-proprietary" distinction has become almost meaningless. The distinction, although long known to the

²⁸ 43 AM. JUR., Public Officers §372 (1942).

²⁹ Dalehite v. United States, 346 U.S. 15 at 40, 73 S.Ct. 956 (1953); Boyce v. United States, (D.C. Iowa 1950) 93 F. Supp. 866; Cromelin v. United States, (5th Cir. 1949) 177 F. (2d) 275, cert. den. 339 U.S. 944, 70 S.Ct. 790 (1949). The latter case involved a charge of judicial misconduct; the court found it unnecessary to apply the discretionary function exception since judges were held not to be "employees" under the act.

³⁰ 38 AM. JUR., Municipal Corporations §§571-577 (1941); 120 A.L.R. 1376 (1939). The minority opinion in the Dalehite case seems to espouse this view. 346 U.S. 15 at 60, 73 S.Ct. 956 (1953). For an example of the harsh application of the doctrine, see Hodges v. City of Charlotte, 214 N.C. 737, 200 S.E. 889 (1939), where the plaintiff was denied recovery for injuries suffered when he was hit by a city truck, because the truck driver was on his way to install a new bulb in a traffic light.

lawmakers, was apparently rejected by them in the drafting of the act.³¹

Initiation v. performance. Many courts have held that while government is not responsible in tort for programs and policies wrongfully conceived and initiated, it is responsible for wrongful acts in the carrying out of such projects.³² The Court in the *Dalehite* case rejected this distinction.³³ In many cases, the manner of the performance of a program may be vital to the program itself. Decisions made in the carrying out of a project may involve weighty considerations as important as the original decision to embark on the policy. It is doubtful, therefore, that such a distinction is in harmony with the purpose of the discretionary function exception.

II. *Suggested Test for Applying the Exception*

The preceding tests have their origins in a formalistic or expedient construction of the statutory exception, which gives little attention to the fundamental purpose of the exception and often ignores the purpose of the Tort Claims Act. An attempt must be made to formulate a test which will achieve both the purpose of the exception and the purpose of the act as a whole. By passing the Tort Claims Act, Congress clearly intended to provide a more effective and convenient remedy for the victims of governmental wrongdoing. To provide a brake on the legislative desire expressed in the act generally, the discretionary function exception must have been supported by momentous policy considerations. Congress could not have intended to destroy the essential fabric of the act by including an exception based upon arbitrary or verbalistic distinctions or designed merely to preserve the dignity of public officials having high rank and expert reputation. The primary purpose of the exception appears to be simply a recognition of the long established doctrine that there should be preserved a reasonable independence in executive and legislative action in accordance with the spirit of the separation of powers system.³⁴ This purpose is indicated by the

³¹ Gottlieb, "The Federal Tort Claims Act—a Statutory Interpretation," 35 Gzo. L.J. 1 (1946).

³² *Johnston v. District of Columbia*, 118 U.S. 19, 6 S.Ct. 923 (1886); *Somerset Seafood Co. v. United States*, (4th Cir. 1951) 193 F. (2d) 631; *Costley v. United States*, (5th Cir. 1950) 181 F. (2d) 723. But compare *Boyce v. United States*, (D.C. Iowa 1950) 93 F. Supp. 866; *Mid-Central Fish Co. v. United States*, (D.C. Mo. 1953) 112 F. Supp. 792.

³³ *Dalehite v. United States*, 346 U.S. 15 at 35-36, 73 S.Ct. 956 (1953).

³⁴ In *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 at 170 (1803), Chief Justice

nature of the other exceptions in the act³⁵ and by the inclination of the judiciary to infer something like the discretionary function exception even without express statutory language.³⁶ There must inevitably be some degree of conflict between the general purpose of the act and the purpose of the exception, but a careful balancing of their respective requirements is necessary to the discovery of an adequate standard of interpretation. To achieve this balance, it is suggested that two types of governmental activity should be immune from judicial review through the medium of an action in tort: (a) original decisions to embark upon general governmental programs and policies; and (b) subsidiary policy decisions made in the carrying out of such programs and policies, which are essential to the feasibility of the general program. But there is no need for preserving this immunity as to particular functions, whether they be of a policy-making or ministerial nature, which are not essential to the successful execution of general executive or legislative policy.

The test for determining whether a particular function is "discretionary" might therefore be stated in this manner: must this particular function be performed at this particular place, at this particular time, and in this particular manner if the general policy or program decided upon is to be feasible? If the answer is in the affirmative, the function is discretionary. Such a test would not require the courts to determine the wisdom or desirability of basic policy. It would not invest the courts with virtual power to veto top-level decisions to undertake certain governmental projects. However, it would require that any such project be undertaken in a manner which would cause the least possible wrongful injury to individuals. It would accept Justice Jackson's declaration that "it is not a tort for government to govern,"³⁷ but it would require that whatever governing is done be characterized by as high a degree of care for the safety of private property and person as is consistent with

Marshall made the following comment: "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."

³⁵ 28 U.S.C. (Supp. V, 1952) §2680.

³⁶ In a statement made during hearings on the Tort Claims Bill, Assistant Attorney General Francis M. Shea expressed the opinion that the exception would be read into the act by judicial construction if it were not specifically included by Congress. H. Hearings before the Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d sess., p. 29 (1942). Similar exceptions have been judicially formulated in *New York, Goldstein v. State*, 281 N.Y. 396, 24 N.E. (2d) 97 (1939), and by the federal courts in the *T.V.A.* cases. See, e.g., *Pacific Nat. Fire Ins. Co. v. T.V.A.*, (D.C. Va. 1950) 89 F. Supp. 978.

³⁷ *Dalehite v. United States*, 346 U.S. 15 at 57, 73 S.Ct. 956 (1953).

the success of the project. Nearly every governmental activity will of course react to the detriment of certain individual citizens. But it should be incumbent on every government official at every level to minimize such injury as far as possible. Thus, for example, Congress should be free to initiate a federal power project in a given area, and the wisdom of such a governmental function should not be attacked through the device of an action in tort. A decision to change the channel of a river might be vital to the feasibility of the project and thus should be similarly immune from collateral attack. But a decision to use defective materials in the construction of the flood gates, for example, would not be essential to the feasibility of the project and should be grounds for a tort action by one wrongfully injured by it. Similarly, an executive decision to develop a new type of atomic weapon should not be attacked in a tort action, and decisions to conduct tests of the new device, being essential to the success of the program, should be likewise immune, even though the performance of such tests might inevitably cause injury to certain people. The stockpiling of such weapons in the center of a metropolitan area, however, would not be necessary for the success of the program, and should therefore be subject to attack in a tort action.

This test would allow the determination of legislative and executive policy to be made by those constitutionally responsible for such decisions. In applying the test, a court would be required to make a preliminary determination as to whether the function involved consists in the formulation of a general program or whether it is merely a tool for implementing some general program. Then, if it found the activity in question to be of the latter type, the court would be confronted with a question of fact as to the essentiality of the particular function to the effectuation of the program as a whole. The application of the test would of course often involve difficult issues of fact. But difficult fact issues are not novel in our judicial system and are often a characteristic of ordinary private tort actions. A fair and objective test that will accomplish the legislative purpose is worth the price of hard questions for the trier of facts.

Some hint that the Supreme Court has given consideration to such a test is indicated by the majority opinion in the *Dalehite* case.³⁸ However, the result in the case does not appear to be in harmony with this approach.³⁹ It is to be hoped that future decisions rendered

³⁸ *Id.* at 40, 42.

³⁹ If it had been shown, for example, that shipment of the FGAN could have been

on this issue by the Court will conform to the principle suggested in the *Dalehite* case rather than to the actual result reached. The purpose of the discretionary function exception would be thereby preserved, while the remedy provided by the act would suffer a minimum loss of vitality.

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made safely only by packing the product in heavy metal containers, the cost of which would have made the entire project unfeasible, the government could have sustained, in accordance with this proposed test, its decision to pack the FGAN in paper bags. But it does not appear that it would have been impracticable to have shipped the FGAN in some safer container. And certainly the failure to give adequate warning of the explosive nature of the product was not necessary to the success of the program. In this connection, see *Hernandez v. United States*, (D.C. Hawaii 1953) 112 F. Supp. 369, where it was held a discretionary act to erect a road block, but not a discretionary act to fail to give warning of its existence.