#52 2/26/68

Memorandum 68-20

Subject: Study 52 - Sovereign Immunity (Discretionary Immunity)

Attached as exhibits to this Memorandum are two law review articles and a recent case discussing the discretionary immunity provision of the 1963 Governmental Liability Act.

Exhibit I (pink) is a Note from a recent issue of the Hastings Law Journal. This Note is concerned with the test that should be used by the courts in determining whether a particular act is or is not "discretionary."

Exhibit II (yellow) is a 1966 Note from the Southern California Law Review. This Note is critical of the discretionary immunity doctrine and suggests various changes in that doctrine as applied by the courts.

The staff believes that an examination of the decisions in recent cases demonstrates the courts are properly applying the discretionary immunity doctrine. The following list indicates the holdings in a number of recent cases involving the discretionary immunity provision.

NeCasek v. City of Los Angeles, 233 Cal. App.2d 131, 43 Cal. Rptr. 294 (1965), Hearing by Supreme Court denied. (Criticized in Exhibit II.)

> This case involved the negligence of a policeman in failing to use sufficient force to retain an arrestee, who in the course of his flight injured the plaintiff. In finding the officer and the city immune under Section 820.2 (discretionary immunity provision), the court expressed fear that to hold subject to judiciary scrutiny at a later date a decision as to the amount of force necessary to make an arrest would affect the zeal of officers. Such zeal, the court felt, is necessary to accomplish the goals of law enforcement. Further, if officers should be liable for decisions to use minimal force to effect an arrest, the tendency of the officer on the beat would be to use excessive force. "A rule of law which may encourage police brutality is not desirable." This case is correctly decided.

Scruggs v. Haynes, 252 A.C.A. 271, 60 Cal. Rptr. 355 (1967)

> Discretionary immunity does not protect officer from use of excessive force in arresting or retaining arrested person in custody. This case is correctly decided.

Exhibit II points out that a compelling but unspoken reason for the court's granting of blanket immunity where arrestees escape is the fear of practically unlimited damage which might be caused by suspects once again at large. (It was for this reason that the Commission included in the governmental liability act a provision providing immunity for injuries caused by escaped or escaping prisoners.) Exhibit II suggests that "an appropriate limiting principle for compensating injuries caused by escapees would be to confine liability to those injuries occurring during the immediate flight from negligent custody, for it is this flight which is the particular hazard which the negligence of the officers created. This is the distinction suggested by Professor Van Alstyne and the Commission rejected it when the no-liability-for-escape-of-prisoner immunity was included in the statute. Generally, the author of the Note set out in Exhibit II believes that the personal immunity from the financial burden of judgment enjoyed by employees (because the entity is ultimately responsible for payment of the judgment) should provoke a judicial reevaluation of the doctrine of discretionary immunity. As Judge Kaus notes in Exhibit III, n. 7, page 357: "The suggestion overlooks the fact that the intended beneficiary of the doctrine is not the guilty official who, but for the doctrine, would have to pay a judgment, but the innocent one who has had to go through the litigation process before being vindicated."

Glickman v. Glasner, 230 Cal. App.2d 120, 40 Cal. Rptr. 719 (1964), hearing by Supreme Court denied.

Held that alleged libelous statements by the State Kosher Food Law representative that certain kosher slaughterers had been disqualified under law as "schochtim" (slaughterers of poultry according to Orthodox Hebrew ritual) were exercises of "discretion." The statutory duties of the defendant specifically included advising interested persons on the application of the law and the court held that this included determining "what reports should be made to bring about compliance" with the Kosher Food Law. It was alleged that the defendant was unqualified and improperly disqualified the plaintiff. This is a clear case of discretionary immunity.

Wright v. Arcade School District, 230 Cal. App.2d 272, 40 Cal. Rptr. 812 (1964), petition for hearing by Supreme Court denied.

Held: School district has no duty to protect pupils at street crossings between home and school, despite forseeability of harm to pupils. Significant factors precluding such a duty include: the school district's character as a public agency; statutory expressions emphasizing that safety protection at street crossings outside schoolgrounds is a municipal rather than school district function; budget limitations; the governmental nature of the decisions to provide safety measures at some intersections and not at others; the situation that would result from imposing a duty on school districts to protect pupils at school crossings wherein juries would be in a position to approve or reject the accuracy of the school authorities' prediction of harm and the reasonableness of their governmental decision to confer or withhold a protective service. This case is correctly decided.

Shakespeare v. City of Pasadena, 230 Cal. App.2d 387, 40 Cal. Rptr. 871 (1964), petition for hearing by Supreme Court denied.

Action against city for false arrest, malicious persecution, and false imprisonment. Held: (1) Where, following a citizen's arrest, there is no detention of the arrested person other than that necessarily incident to the action of police officers in carrying out their statutory duty to accept custody and hold the person for appearance before a magistrate, the detention, with no independent wrongful act, imposes no liability on the officers or the city. (2) When an officer entertains a suspicion as to a citizen's conduct, the officer may, without making a formal arrest, detain the citizen for such reasonable time as is required to confirm or dissipate that suspicion, and such a detention does constitute false imprisonment. This case is correctly decided.

Morgan v. County of Yuba, 230 Cal. App.2d 938, 41 Cal. Rptr. 508 (1964)

> County held liable where had expressly promised to warn of prisoner's release on bail and prisoner upon release murdered woman whose life he had threatened. Although county not liable for release of prisoner (specific immunity provided by statute), the county is liable for negligence in performing duty it promised to perform. This case is correctly decided.

Sava v. Fuller, 249 A.C.A. 313, 57 Cal. Rptr. 312 (1967)

> Held that discretionary immunity did not apply where the negligence of a state botanist in analyzing a plant substance believed ingested by a child was "subsequent" to the discretionary act of offering plant analysis services to the public.

Generally speaking, the public agency is not liable under the governmental liability act for failure to make adequate inspections. However, for example, if it is determined after an exercise of "discretion" to admit a person to a county hospital, the county is liable for later negligence in treating the patient. The Sava case is analogous and appears to be correctly decided although a good argument could be made to the contrary.

Johnson v. State of California, attached as Exhibit III.

We suggest you read this case with care. Is this case correctly decided? It appears to be.

Heieck and Moran v. City of Modesto, 64 Cal.2d 229, 49 Cal. Rptr. 377, 411 P.2d 105 (1966).

> It was alleged that city was liable for fire loss caused by (1) lack of water in fire hydrants because city employee had closed a valve in the water main to permit relocation of water mains and left it closed for a month after completion of the relocation and (2) failure of city to summon tank trucks of county fire department. Held no liability--covered by specific immunities. Distinguished Morgan v. County of Yuba, pointing out that it was the failure to carry out an alleged earlier promise to give warning of release on bail of a dangerous prisoner, rather than the making or the decision to make the promise that resulted in liability in that case. Here, it was not alleged that any

employee promised that assistance would be summoned from county if lack of water in mains was discovered. This case is correctly decided. It falls within specific immunities.

The staff concludes that the courts are doing a good job in the cases that call for a possible application of the discretionary immunity provision. There have not been a great number of cases that do not involve a specific immunity. The few cases that are determined by whether the discretionary immunity provision applies appear to have been correctly determined. Hence, we believe that no action should be taken at this time to revise the discretionary immunity provision. Nor do we suggest the need for additional provisions covering specific types of fact situations.

Respectfully submitted,

John H. DeMoully
Executive Secretary

NOTES ON THE CALIFORNIA TORT CLAIMS ACT

THE DISCRETIONARY IMMUNITY DOCTRINE IN CALIFORNIA

It is a settled rule in California that governmental officials are not personally liable for harm resulting from "discretionary" acts within the scope of their authority.[1] This is the case even if it is alleged that they acted maliciously.[2] On the other hand, courts have repeatedly held that "ministerial" acts are not within the immunity rule, and liability will attach to public officers and employees should harm result from such acts.[3] The application of the discretionary immunity doctrine to the unusual sets of circumstances which find themselves the subjects of lawsuits has plagued the courts for years.

Currently the doctrine of discretionary immunity is codified in section 820.2 of the California Government Code:

> Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

Section 820.2 is part of the Tort Claims Act of 1963,[4] which contains provisions of general application to all activities of public entities and numerous specific immunities covering areas of governmental activity which the legislature deemed deserving of explicit coverage.[5] This note will seek to explore the discretionary immunity doctrine under section 820.2.

Background of Section 820.2

The trend in the United States in recent years has been to depart from strict adherence to the doctrine of sovereign immunity.[6] This departure has come about by both judicial[7] and legislative action.[8]

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[1] *E.g.*, Downer v. Lent, 6 Cal. 94, 95 (1856); Martelli v. Pollock, 162 Cal. App. 2d 655, 658-60, 328 P.2d 795, 797-98 (1953).

[2] *E.g.*, White v. Towers, 37 Cal. 2d 727, 730-32, 235 P.2d 209, 211-12 (1951).

[3] *E.g.*, Payne v. Bachr, 153 Cal. 441, 444, 95 P. 895, 896 (1908); Mock v. City of Santa Rosa, 126 Cal. 336, 344, 58 P. 826, 829 (1899).

[4] Cal. Stats. 1963, ch. 1681, § 1, at 3266 (CAL. GOV'T CODE §§ 810-996).

[5] *See, e.g.*, CAL. GOV'T CODE § 821 (failure to adopt or enforce enactments), § 846 (failure to arrest or to retain in custody), § 850 (failure to provide fire department), §§ 850.2-.4 (failure to provide adequate fire equipment, personnel and facilities), § 856.2 (injury caused by escape of mental patient).

[6] A good discussion of this trend may be found in Muskopf v. Corning Hospital Dist., 55 Cal. 2d 211, 213-17, 359 P.2d 457, 458-60, 11 Cal. Rptr. 89, 90-92 (1961).

[7] *E.g.*, Colorado Racing Comm'n v. Brush Racing Ass'n, 136 Colo. 279, 316 P.2d 582 (1957); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

[8] *E.g.*, Cal. Stats. 1949, ch. 81, § 1, at 259 (repealed 1963); Cal. Stats. 1959, ch. 2, § 3, at 622 (repealed 1963); Cal. Stats. 1959, ch. 3, § 2, at 1653 (repealed 1963).

Blanket sovereign immunity came to an end in California when the California Supreme Court on the same day handed down decisions in *Muskopf v. Corning Hospital District*[9] and *Lipman v. Brisbane Elementary School District*.[10] In *Muskopf*, the plaintiff's broken hip was further injured when she fell due to the negligence of the hospital staff. The California Supreme Court had previously held that the abrogation of the sovereign immunity doctrine was a legislative prerogative.[11] In the *Muskopf* decision, the court declared that the doctrine was a judicial creation, and it discarded the doctrine after finding that blanket immunity for public entities was "mistaken and unjust."[12]

In the *Lipman* decision, the doctrine of discretionary immunity of public employees was reaffirmed. It was ruled that the alleged acts of the school district's trustees to discredit the superintendent and to force her from her position were discretionary.[13] Although the court also denied the liability of the school district,[14] it was indicated in dictum that the immunity of a public agency from liability for the discretionary conduct of its officials was not necessarily as extensive as the immunity of the officials personally.[15] Various factors were suggested to determine if the particular agency should be immune, including the "importance to the public of the function involved, the extent to which governmental liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages."[16]

The radical departure of *Muskopf* from the settled case law of sovereign immunity apparently caused widespread fear among officials of state and local agencies that the judicial abrogation of the doctrine would subject public entities to a liability burden which they could not bear. The legislature swiftly enacted section 22.3 of the California Civil Code,[17] delaying the effectiveness of the *Muskopf* and *Lipman* decisions until the 91st day after the close of the 1963 legislative session. In the interim provided by the moratorium statute, the legislature enacted the Tort Claims Act of 1963,[18] which became effective with the expiration of the moratorium statute.

Legislative Intent

According to the legislative committee comment accompanying section 820.2, the statute purports to reenact the prior case law.[19]

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9 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

10 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961).

11 *E.g.*, Vater v. County of Glenn, 49 Cal. 2d 815, 820, 323 P.2d 85, 88 (1958).

12 55 Cal. 2d at 213, 218, 359 P.2d at 458, 461, 11 Cal. Rptr. at 90, 93.

13 55 Cal. 2d at 230, 359 P.2d at 467, 11 Cal. Rptr. at 99.

14 *Id.* at 230, 359 P.2d at 468, 11 Cal. Rptr. at 100.

15 *Id.* at 229, 230, 359 P.2d at 467, 11 Cal. Rptr. at 99.

16 *Id.* at 230, 359 P.2d at 467, 11 Cal. Rptr. at 99.

17 Cal. Stats. 1961, ch. 1404, § 1, at 3209.

18 Note 4 *supra*.

19 "This section restates the preexisting California law. [citation omitted] The discretionary immunity rule is restated here in statutory form to ensure that, unless otherwise provided by statute, public employees will continue to

However, apparently because of a certain amount of distrust of future judicial application to particular sets of circumstances, the legislature specifically spelled out in the following sections some activities which were to be deemed "discretionary."[20] The Law Revision Commission, which drafted the Tort Claims Act expressed hope that provisions of general application supplemented by specific immunities would "eliminate the need to determine the scope of discretionary immunity by piecemeal judicial decisions."[21] One finds that immunity for any governmental activity not within the coverage of the specific immunity provisions is dependent upon section 820.2. The codification of the discretionary immunity doctrine into a provision of general application did no more than to ratify a confusing body of case law and generally offered no new guidelines for distinguishing discretionary acts from others. Due to the precise language of the specific immunities, those activities which fall within these areas are more clearly defined as being discretionary. To this extent only has the confusion of the prior case law been alleviated.

Prior Case Law

Public employees who have been found to be within the discretionary immunity doctrine by the California courts include administrative board members,[22] building and loan commissioners,[23] building inspectors,[24] city councilmen,[25] city engineers,[26] city managers,[27] civil service administrators,[28] county surveyors,[29] court reporters,[30] game wardens,[31] grand jurors,[32] health officers,[33] judges,[34] legislators,[35]

remain immune from liability for their discretionary acts within the scope of their employment." CAL. GOV'T CODE § 820.2 comment; 1963 JOURNAL OF THE SENATE 1889.

[20] Statutes cited note 6 *supra*.

[21] 4 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS, & STUDIES 812 (1963).

[22] *E.g.*, Downer v. Lent, 6 Cal. 94 (1856).

[23] *E.g.*, Jones v. Richardson, 9 Cal. App. 2d 657, 50 P.2d 810 (1935).

[24] *E.g.*, Dawson v. Rash, 160 Cal. App. 2d 154, 324 P.2d 959 (1958); Dawson v. Martin, 150 Cal. App. 2d 379, 309 P.2d 915 (1957); White v. Brinkman, 23 Cal. App. 2d 307, 73 P.2d 254 (1937).

[25] *E.g.*, Ellis v. City Council, 222 Cal. App. 2d 490, 35 Cal. Rptr. 317 (1963); Martelli v. Pollock, 162 Cal. App. 2d 655, 328 P.2d 795 (1958).

[26] *E.g.*, Miller v. San Francisco, 187 Cal. App. 2d 480, 9 Cal. Rptr. 767 (1960).

[27] *E.g.*, Ellis v. City Council, 222 Cal. App. 2d 490, 35 Cal. Rptr. 317 (1963); White v. Brinkman, 23 Cal. App. 2d 307, 73 P.2d 254 (1937).

[28] *E.g.*, Hardy v. Vial, 48 Cal. 2d 577, 311 P.2d 494 (1957); Cross v. City of Tustin, 165 Cal. App. 2d 146, 331 P.2d 785 (1958).

[29] *E.g.*, Oppenheimer v. Arnold, 99 Cal. App. 2d 872, 222 P.2d 940 (1950).

[30] *E.g.*, Legg v. Ford, 185 Cal. App. 2d 534, 8 Cal. Rptr. 392 (1960).

[31] *E.g.*, White v. Towers, 37 Cal. 2d 727, 235 P.2d 209 (1951).

[32] *E.g.*, Turpen v. Booth, 56 Cal. 65 (1880); Irwin v. Murphy, 129 Cal. App. 713, 19 P.2d 292 (1933).

[33] *E.g.*, Jones v. Czapkay, 182 Cal. App. 2d 192, 6 Cal. Rptr. 182 (1960).

[34] *E.g.*, Haase v. Gibson, 179 Cal. App. 2d 259, 3 Cal. Rptr. 806 (1960) (chief justice of state supreme court); Reverend Mother Pauline v. Bray, 168 Cal. App. 2d 384, 335 P.2d 1018 (1959) (district court of appeal); Perry v. Meikle, 102 Cal. App. 2d 602, 228 P.2d 17 (1951) (superior court); Frazier v. Moffatt, 108 Cal. App. 2d 379, 239 P.2d 123 (1951) (justice of the peace).

police officers,[36] prosecutors,[37] school trustees,[38] superintendents of schools,[39] and tax assessors.[40]

Activities which have been found to be *discretionary* include building inspection and regulation,[41] issuance of franchises,[42] health protection (including quarantines),[43] law enforcement,[44] legislative decisions,[45] license issuance and revocation,[46] personnel administration of public employees,[47] public works and public improvements functions,[48] and taxation and public finance matters.[49]

On the other hand, activities which have been classified as *ministerial* and outside the discretionary immunity doctrine include arrest of suspected law violators without warrant or justification,[50]

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[36] *E.g.*, Allen v. Superior Court, 171 Cal. App. 2d 444, 340 P.2d 1030 (1959); Hancock v. Burns, 158 Cal. App. 2d 785, 323 P.2d 456 (1958).

[37] *E.g.*, Tomlinson v. Pierce, 178 Cal. App. 2d 112, 2 Cal. Rptr. 700 (1960); Rubinow v. County of San Bernardino, 169 Cal. App. 2d 67, 336 P.2d 968 (1959).

[38] *E.g.*, White v. Towers, 37 Cal. 2d 727, 235 P.2d 209 (1951); Prentice v. Bertken, 50 Cal. App. 2d 344, 123 P.2d 96 (1942); Norton v. Hoffman, 34 Cal. App. 2d 189, 93 P.2d 250 (1939); Pearson v. Reed, 6 Cal. App. 2d 277, 44 P.2d 592 (1935).

[39] *E.g.*, Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961).

[40] *E.g.*, Gridley School Dist. v. Stout, 134 Cal. 592, 66 P. 785 (1901).

[41] *E.g.*, Ballerino v. Mason, 83 Cal. 447, 23 P. 530 (1890).

[42] *E.g.*, Knapp v. City of Newport Beach, 186 Cal. App. 2d 669, 9 Cal. Rptr. 90 (1960) (commencement of civil proceedings to abate a public nuisance); Dawson v. Rash, 160 Cal. App. 2d 154, 324 P.2d 959 (1958) (prosecution of criminal enforcement proceedings against alleged violator).

[43] *E.g.*, Martelli v. Pollock, 162 Cal. App. 2d 655, 328 P.2d 795 (1958).

[44] *E.g.*, Jones v. Czapkay, 182 Cal. App. 2d 192, 6 Cal. Rptr. 182 (1960).

[45] *E.g.*, White v. Towers, 37 Cal. 2d 727, 235 P.2d 209 (1951); Tomlinson v. Pierce, 178 Cal. App. 2d 112, 2 Cal. Rptr. 700 (1960); Rubinow v. County of San Bernardino, 169 Cal. App. 2d 67, 336 P.2d 968 (1959); Dawson v. Martin, 150 Cal. App. 2d 379, 309 P.2d 915 (1957).

[46] *E.g.*, Allen v. Superior Court, 171 Cal. App. 2d 444, 340 P.2d 1030 (1959) (questioning a witness at legislative hearing); Hancock v. Burns, 158 Cal. App. 2d 785, 323 P.2d 456 (1958) (public disclosure of an investigating committee's findings and recommendations).

[47] *E.g.*, Downer v. Lent, 6 Cal. 94 (1856) (termination of an occupational license).

[48] *E.g.*, Ellis v. City Council, 222 Cal. App. 2d 490, 35 Cal. Rptr. 317 (1963) (officer's decision to compel subordinate to perform his duties); Cross v. City of Tustin, 165 Cal. App. 2d 146, 331 P.2d 785 (1958) (official investigations on qualifications and fitness of prospective public employees); Hardy v. Vial, 48 Cal. 2d 577, 311 P.2d 494 (1957) (prosecution of administrative proceedings to discipline public employees); Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961) (official discussions of the competence and efficient performance of duties by subordinates).

[49] *E.g.*, Miller v. San Francisco, 187 Cal. App. 2d 480, 9 Cal. Rptr. 767 (1960) (assurance that specified public improvements would be undertaken at public expense); Lavine v. Jessup, 161 Cal. App. 2d 59, 326 P.2d 238 (1958) (decisions on the location of planned public buildings).

[50] *E.g.*, Ballerino v. Mason, 83 Cal. 447, 23 P. 530 (1890) (assessments for tax purposes); Gridley School Dist. v. Stout, 134 Cal. 592, 66 P. 785 (1901) (wrongful reapportionment of school funds).

[50] *See* Dragna v. White, 45 Cal. 2d 469, 289 P.2d 428 (1955) (arrest of

assignment of inexperienced youth in juvenile forestry camps to dangerous firefighting duties,[51] diagnosis and treatment of diseases by physicians in public hospitals,[52] disclosure by school officials of confidential information about a pupil when the state statute specifically prohibits disclosure,[53] failure of a superior officer to discharge, suspend or discipline a subordinate known to be incompetent–and thus dangerous to others,[54] and refusal to issue a building permit when all legal requirements have been satisfied.[55]

Breadth of Section 820.2

The prefatory language of section 820.2, "*except as otherwise provided by statute*,"[56] indicates legislative intent that immunity will attach to all discretionary acts except those specifically set forth by the legislature.[57] A further limitation imposed by the courts on the scope of the doctrine (apart from finding that the act complained of was "ministerial") is that the injury-causing act must be "within the scope of [the employee's] authority."[58] "Scope of authority" has been broadly interpreted to include not only activities established as primary functions of the office, but also activities which are incidental and collateral to the purposes of the office.[59] The "scope of authority" requirement has been used by courts to preclude the application of discretionary immunity to conduct intentionally exceeding explicit statutory grants of authority.[60]

The legislature specifically rejected the suggestion made in the *Lipman* decision that the immunity of the public entity was not necessarily coextensive with the immunity of the public employee. Section 815.2(b) specifies that the liability of the entity is vicarious—arising from the liability of the employee,[61] "except as otherwise pro-

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suspected law violator by police officer without warrant or justification); Coverstone v. Davies, 38 Cal. 2d 315, 239 P.2d 876 (1952) (holding officers not liable for false arrest on facts).

[51] *See* Collenburg v. County of Los Angeles, 150 Cal. App. 2d 795, 310 P.2d 989 (1957).

[52] *See* Davie v. Regents of Univ. of Cal., 66 Cal. App. 689, 227 P. 247 (1924).

[53] Elder v. Anderson, 205 Cal. App. 2d 326, 23 Cal. Rptr. 48 (1962).

[54] *See* Fernelius v. Pierce, 22 Cal. 2d 226, 138 P.2d 12 (1943).

[55] Ellis v. City Council, 222 Cal. App. 2d 490, 35 Cal. Rptr. 317 (1963). *See* Armstrong v. City of Belmont, 158 Cal. App. 2d 641, 322 P.2d 999 (1958).

[56] CAL. GOV'T CODE § 820.2 (emphasis added).

[57] *See* note 19 *supra*.

[58] *Id.*

[59] White v. Towers, 37 Cal. 2d 727, 733, 235 P.2d 209, 213 (1951), *quoting with approval from* Nesbitt Fruit Prods. v. Wallace, 17 F. Supp. 141 (S.D. Iowa 1936). *See also* Frazier v. Moffatt, 103 Cal. App. 2d 379, 229 P.2d 123 (1951); Norton v. Hoffman, 34 Cal. App. 2d 189, 93 P.2d 250 (1939).

[60] 5 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 252 (1963).

[61] "Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." CAL. GOV'T CODE § 815.2(b). "This section imposes upon public entities vicarious liability for the tortious acts and omissions of their employees. It makes clear that in the absence of statute, a public entity cannot be held liable for an employee's act

vided."[62]

Judicial Interpretation

A statute which has its soul in a single, ambiguous word like "discretion," can predictably cause problems in judicial application. Several California courts of appeal which have been called upon to interpret section 820.2 have indeed had problems. Three different approaches to the distinction between acts which are "discretionary" and those which are "ministerial" have been formulated to aid the courts in applying the discretionary immunity doctrine to specific sets of facts.

"Dampen the Ardor" Approach

Several California cases have adopted the "dampen the ardor" approach suggested by Judge Learned Hand in *Gregoire v. Biddle*.[63] *Gregoire* supplied both a rationale for the doctrine and a test for its application, reasoning that liability of the public employee and the entity must be balanced against the effect that the liability would have upon the governmental function being provided. Judge Hand expressed fear that the burden of requiring public officials to litigate claims against themselves, while facing possible personal pecuniary loss, would "dampen the ardor" of such officials and that it would "in the end be better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."[64]

Judge Hand's argument is quoted in the *Muskopf*[65] opinion and has been cited in earlier California cases.[66] In *Lipman* the court substantially paraphrased the "dampen the ardor" approach when it said:

> The subjugation of officials, the innocent as well as the guilty, to the burden of a trial and to the danger of its outcome would impair their zeal in the performance of their functions, and it is better to leave the injury unredressed than to subject honest officials to the constant dread of retaliation.[67]

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or omission where the employee himself would be immune . . . . Thus, this section nullifies the suggestion appearing in a dictum in Lipman v. Brisbane Elementary School District [citation omitted] that public entities may be liable for the acts of their employees even when the employees are immune." CAL. GOV'T CODE § 815.2(b) comment.

[62] Statutes which provide for entity liability even though the employee is immune include: CAL. GOV'T CODE §§ 830-35.4, 840.2 (dangerous condition on public property); CAL. VEHICLE CODE §§ 17001, 17004 (injuries resulting from operation of emergency vehicles); CAL. PEN. CODE §§ 4900-06 (erroneous conviction of a felony); CAL. GOV'T CODE § 815.6 (failure to exercise reasonable diligence to discharge a mandatory duty imposed by enactment).

[63] 177 F.2d 579 (2d Cir. 1949).

[64] *Id.* at 581.

[65] Muskopf v. Corning Hospital Dist., 55 Cal. 2d 211, 221, 359 P.2d 457, 462-63, 11 Cal. Rptr. 89, 94-95 (1961).

[66] Hardy v. Vial, 48 Cal. 2d 577, 582-83, 311 P.2d 494, 496-97 (1957); Elder v. Anderson, 205 Cal. App. 2d 326, 333, 23 Cal. Rptr. 48, 53 (1962); Legg v. Ford, 185 Cal. App. 2d 534, 543-44, 8 Cal. Rptr. 392, 397 (1960).

[67] 55 Cal. 2d at 220, 359 P.2d at 467, 11 Cal. Rptr. at 99.

In *Ne Casek v. City of Los Angeles*[68] the court of appeal for the second district approved of Hand's reasoning. *Ne Casek* involved the negligence of a policeman in failing to use sufficient force to restrain an arrestee, who in the course of his flight injured the plaintiff. In finding the officer and the city immune under section 820.2, Justice Kaus expressed fear that to hold subject to judicial scrutiny at a later date a decision as to the amount of force necessary to make an arrest would affect the zeal of officers. Such zeal, he thought, is necessary to accomplish the goals of law enforcement.[69] Further, if officers should be liable for decisions to use minimal force to effect an arrest, the tendency of the officer on the beat would be to use excessive force. "A rule of law which may encourage police brutality is not desirable."[70]

The "dampen the ardor" or "impairment of zeal" approach to the application of discretionary immunity has been criticized by Professor Van Alstyne,[71] consultant to the Law Revision Commission, which drafted section 820.2. The rationale behind Judge Hand's argument is that public employees would be made to fear personal pecuniary loss, and that officials could be harrassed by groundless litigation. This rationale, Van Alstyne points out, is negated by the availability to the official of indemnification by the public entity for all nonmalicious torts committed within the scope of the officer's authority.[72] Further, the present system of administration of justice discourages groundless actions, while it allows those with merit to proceed to trial.[73]

Professor Van Alstyne further contends that Judge Hand's arguments for immunizing the individual do not justify extending that immunity to the public entity.[74] This criticism seems irrelevant, since the passage of section 815.2 makes the public entity's liability vicarious.[75]

To limit the intent behind the "dampen the ardor" approach to consideration of employees' personal pecuniary loss and harrassment in the courts deprives the approach of its real meaning. The subjugation of public officers and agencies to fear of liability cannot help but impinge upon the freedom of governmental action to some extent. The chief attribute of the "dampen the ardor" approach is that its application requires a balancing of the needs of the public as opposed to the loss suffered by the injured plaintiff.

The Semantic Approach

The case law prior to the passage of section 820.2 provides numerous examples of activities which have been classified as either "dis-

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[68] 233 Cal. App. 2d 131, 43 Cal. Rptr. 294 (1965).
[69] *Id.* at 135-38, 43 Cal. Rptr. at 299.
[70] *Id.* at 137, 43 Cal. Rptr. at 299.
[71] Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. Rev. 463, 478-85 (1963).
[72] *Id.* at 478-79.
[73] *Id.*
[74] *Id.* at 484-86.
[75] *See* note 61 *supra*.

cretionary" or "ministerial."[76] Cases arising under section 820.2 can draw by analogy from distinctions made in past cases when the facts are sufficiently similar. The courts have naturally synthesized the prior holdings into a concise statement of the law, which as an aid for future interpretation is unfortunately rather useless due to its generality. For example, the rule formulated in *Elder v. Anderson*[77] was phrased:

> [W]here the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial, but where the act to be done involves the exercise of discretion and judgment it is not deemed merely ministerial.[78]

Such a distinction adequately covers the few instances of governmental activity where the activity is either an absolute statutory duty, or where the discretion of the public officer to act within a certain sphere is absolute. The twilight zone between "discretionary" and "ministerial" becomes no clearer by the use of such a semantic yardstick. One court has observed that "it would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail."[79]

Only one California case decided solely on the basis of section 820.2 has resorted to the semantic approach. In *Glickman v. Glasner*,[80] the court of appeal for the second district, applied the "rule" offered by *Elder*, and concluded that alleged libelous statements by the State Kosher Food Law representative that certain kosher slaughterers had been disqualified under law as "schochtim" (slaughterers of poultry according to Orthodox Hebrew ritual) were exercises of "discretion."[81] All other cases decided under section 820.2, which have dealt with the defense of discretionary immunity by the semantic approach, have done so because section 820.2 was urged collaterally to a defense under one of the specific immunities within the Tort Claims Act.[82]

The Subsequent Negligence Approach

An act of discretion along with the immunity which it confers can continue to a point in time. But after this point has been reached, subsequent harm-producing acts will not be shielded by immunity. This distinction, which has the effect of severely limiting the doctrine

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[76] *See* text accompanying notes 22-55 *supra*.

[77] 205 Cal. App. 2d 326, 23 Cal. Rptr. 48 (1962).

[78] *Id.* at 331, 23 Cal. Rptr. at 51 *quoting* State *ex rel.* Hammond v. Wimberly, 184 Tenn. 132, 134, 196 S.W.2d 561, 563 (1946).

[79] Ham v. County of Los Angeles, 46 Cal. App. 148, 162, 189 P. 462, 468 (1920). *See also* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 29.10, at 1644 (1956).

[80] 230 Cal. App. 2d 120, 40 Cal. Rptr. 719 (1964).

[81] 230 Cal. App. 2d at 126, 40 Cal. Rptr. at 723.

[82] *See, e.g.*, Goff v. County of Los Angeles, 254 A.C.A. 53, 61 Cal. Rptr. 840 (1967); Miller v. Hoagland, 247 A.C.A. 16, 55 Cal. Rptr. 311 (1966); Burgdorff v. Funder, 246 A.C.A. 535, 54 Cal. Rptr. 305 (1966); Fish v. Regents of Univ. of Cal., 246 A.C.A. 375, 54 Cal. Rptr. 656 (1966).

of discretionary immunity can be found in *Costley v. United States*.[83] In *Costley*, with facts almost identical to those in *Muskopf*,[84] the federal government claimed immunity under section 2680 of the Federal Tort Claims Act,[85] the wording of which closely parallels the wording of section 820.2 of the California Government Code. In holding the government liable for the negligence of the hospital staff, the court found that after discretion had been exercised by admitting the plaintiff into the hospital, immunity would protect neither the government nor the employees.[86] The rationale of the *Costley* rule appears to be that it is within the sole discretion of the government to extend or withhold services to its citizens, but once the determination has been made to provide a specific service, the government will be held to the same standard of care the law requires of private citizens.

The *Costley* rule has been expressly adopted in one very recent California case, *Sava v. Fuller*.[87] The court of appeal for the third district held that the negligence of a state botanist in analyzing a plant substance believed ingested by a child was "subsequent" to the discretionary act of offering plant analysis services to the public; therefore the immunity under section 820.2 did not apply.[88] Judge Pierce justified the imposition of the subsequent negligence test by a

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[83] 181 F.2d 723 (5th Cir. 1950).

[84] Muskopf v. Corning Hospital Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

[85] The government is immune from liability arising from "any claims based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a) (1964).

[86] 181 F.2d at 724.

[87] 249 A.C.A. 313, 57 Cal. Rptr. 312 (1967). There is dictum in the *Sava* decision indicating that Ne Casek v. City of Los Angeles, 233 Cal. App. 2d 131, 43 Cal. Rptr. 294 (1965), was decided on the basis of specific immunities. 249 A.C.A. at 319, 57 Cal. Rptr. at 316. A close reading of *Ne Casek* shows this is not the case.

Other California decisions contain language which indicates that the subsequent negligence test may have had some bearing on the courts' conclusions. *See, e.g.*, Collenburg v. County of Los Angeles, 150 Cal. App. 2d 795, 310 P.2d 989 (1957), holding the superintendent of a forestry camp for juveniles personally liable for negligently ordering inexperienced youth to assist in fighting fire on the "hot line," on the theory that "[i]f discretion is exercised and a course of conduct begun, a failure to exercise ordinary care will give rise to liability." *Id.* at 803, 310 P.2d at 995; *see* Dillwood v. Riecks, 42 Cal. App. 602, 184 P. 35 (1919). Morgan v. County of Yuba, 230 Cal. App. 2d 938, 41 Cal. Rptr. 508 (1964), apparently initiated a trend in the court of appeal for the third district, to adopt the rule of the *Costley* case (Judge Pierce wrote both the *Morgan* and *Sava* decisions). In *Morgan* the county sheriff promised to warn the plaintiffs' decedent prior to releasing a prisoner who had threatened the decedent's life. No warning was given and the threat was carried out. The court held the defendant to a standard of ordinary care in carrying out the promise. 230 Cal. App. 2d at 945, 41 Cal. Rptr. at 513.

Is it more than coincidental that the *Sava*, *Costley* and *Collenburg* cases involve children or juveniles in some manner? Are the courts merely saying that the "interests of justice" compel a finding of liability?

[88] 249 A.C.A. at 322-23, 57 Cal. Rptr. at 317-18.

close examination of the wording of section 820.2. Emphasis was placed upon the wording that the act or omission must be "the *result* of the exercise of . . . discretion (emphasis added)." The court interpreted this language in the familiar terms of tort law, saying "[a] result is the consequence of a cause and a cause means proximate cause. It does not include everything that follows later. In short the legislature has not granted immunity from liability for every act or omission following after the exercise of discretion."[89]

The court of appeal in *Ne Casek* apparently considered and rejected the subsequent negligence test, viewing as too subtle the distinction between a negligent execution of a course of conduct previously decided upon, and the primary decision to engage in such conduct.[90] Manifestly, where a substantial lapse of time occurs between discretion (decision to arrest) and subsequent negligence (allowing escape), the distinction is easily drawn. But where the discretion is exercised almost simultaneously with the execution of the act to implement that discretion (as in *Ne Casek*), the *Costley* rule becomes unworkable. However, if the subsequent negligence approach were applied to the facts in *Ne Casek*, there is a high probability that a court preoccupied with that test would distinguish between the discretionary decision to make the arrest, and the negligent execution of the course of conduct decided upon. Once this was accomplished, it would be a routine matter for the court to find the police officer liable, despite the suggestion that such liability might encourage use of excessive force.[91]

The *Costley* approach to discretionary immunity has been utilized in California solely in cases alleging negligence of the public employee. However, where the employee's tort is intentional, the same limitation on immunity has been achieved by holding that the discretionary immunity doctrine does not apply when the conduct was outside the "scope of authority" of the public employee.[92]

Federal Discretionary Immunity Rule

A distinction has been urged in federal cases under section 2680 of the Federal Tort Claims Act[93] between those governmental activities at the "planning level" and those at the "operational level," immunity attaching only to the former. In the leading case, *Dalehite v. United States*,[94] the plaintiff alleged negligent determination of safety standards for the handling of ammonium nitrate fertilizer being shipped overseas as foreign aid. The fertilizer exploded, devastating Texas City, Texas. In finding that the government was immune under section 2680, the United States Supreme Court held that the formulation of safety standards had been made at the planning level on the basis of policy judgment and decision.[95] Shortly

[89] *Id.* at 316-17, 57 Cal. Rptr. at 314 (emphasis in original).
[90] 233 Cal. App. 2d at 137-38, 43 Cal. Rptr. at 299.
[91] *See* text accompanying note 70 *supra*.
[92] Authorities cited notes 53-60 *supra*.
[93] 28 U.S.C. § 2680 (1954).
[94] 346 U.S. 15 (1953). *See also* Eastern Air Lines v. Union Trust Co., 221 F.2d 62 (D.C. Cir.), *rev'd*, 350 U.S. 907 (1955), *modified*, 350 U.S. 961 (1956).
[95] 346 U.S. at 35-36.

after the *Dalehite* decision, the Supreme Court in *Indian Towing Co. v. United States*[96] held that negligence at the operational level of government was not within the immunity rule of section 2680. In *Indian Towing*, the plaintiff's tugboat and barge were damaged when the Coast Guard negligently maintained a navigational aid, and failed to warn the plaintiff that the aid was not operating. Because there was no immunity, the plaintiff recovered.[97]

It should be noted that the "planning level/operational level" distinction stated in *Dalehite* and *Indian Towing* has not been cited as controlling in any post-*Muskopf* California case. It has been criticized as offering no solution to the dilemma of classifying activities within the discretionary immunity rule.[98] It merely substitutes the equally ambiguous words "planning" and "operational" for "discretionary" and "ministerial."

The subsequent negligence approach of the *Costley* decision appears upon close examination to be an extension of the planning/operational level distinction. The discretion about which *Costley* speaks is the ability of the government to extend or withhold services to its citizens with total immunity. Such "discretion" corresponds quite closely with the "planning level" activities which are immune under the holding of *Dalehite*.

Appraisals of the Various Approaches

> While undoubtedly there are many cases where either judicial precedent or reason compel a holding in particular situations that a duty is discretionary or ministerial, there are others . . . where precedent at least is lacking. Thus we must look to the reasons advanced in justification of the discretionary immunity doctrine and determine whether in the situation before us, they are applicable.[99]

The very nature of selective sovereign immunity is that it attempts to balance the loss suffered by the plaintiff against the effect which liability would have on the governmental entity. Such balancing makes infinitesimally remote the possibility of devising a mechanical rule, such as the semantic test discussed above,[100] to cover all diverse fact situations to which discretionary immunity might apply.

The "dampen the ardor" and "subsequent negligence" approaches are irreconcilable. Judging by its effect, the subsequent negligence doctrine appears to have as its foundation the philosophy that governmental liability should conform closely to the liability of the private person. The subsequent negligence approach could have the effect of "dampening the ardor" of public officials to the extent that they will be reluctant to exercise the discretion vested in them. The imposition of blanket liability upon courses of conduct deliberately undertaken would tend to foster caution while engaged in that course

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[96] 350 U.S. 61 (1955).

[97] *Id.* at 69.

[98] Peck, *The Federal Tort Claims Act, A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207, 219 (1956).

[99] Ne Casek v. City of Los Angeles, 233 Cal. App. 2d 131, 136, 43 Cal. Rptr. 294, 298 (1965).

[100] *See* text accompanying notes 77-82 *supra*.

of conduct; however, it would discourage embarking upon *any* course of conduct.

It is possible that a court applying the "dampen the ardor" approach to the facts of the *Sava* case could have found the state botanist immune. Such immunity could be predicated upon a finding that liability for negligent analysis would tend to discourage the botanist from agreeing to make an analysis in the future. Yet the subsequent negligence test compels a holding of liability despite the fact that such liability may have the effect of denying the public a vital function of government. It must be conceded that the subsequent negligence test seems to offer greater predictability in its application due to its mechanical nature, and if generally recognized by all California courts, it would have the corollary effect of discouraging groundless litigation. However, predictability of result is only one of many factors discussed above which should be considered by the courts when interpreting section 820.2.

Conclusion

It would be unfortunate if the California Supreme Court rejected its own recognition of the "dampen the ardor" approach[101] in favor of the subsequent negligence rule proposed by the court of appeal for the third district.[102] Sovereign immunity is an area of the law in which inflexible rules are impractical. The inherent inflexibility of the subsequent negligence test detracts from any possible benefits which its adoption might bestow. On the other hand, the "dampen the ardor" approach requires balancing the merits of the plaintiff's case against the effect liability would have upon the governmental function involved. Such balancing seems more in tune with the legislative intent behind the Tort Claims Act of 1963.

*Justin A. Roberts**

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[101] *See* text accompanying note 67 *supra*.
[102] *See* text accompanying note 88 *supra*.
* Member, Second Year Class.

Memorandum 68-20

EXHIBIT II

California Tort Claims Act: Discretionary Immunity

Government operates for the benefit of all; hence, it is reasonable to expect that all should bear some of the burden of the injuries that are wrongfully inflicted by the government. The basic problem is to determine how far it is desirable to permit the loss distributing function of the tort law to apply to public entities without unduly frustrating or interfering with the desirable purposes for which such entities exist.[1]

The California Tort Claims Act of 1963 generally immunizes public entities from liability where individual employees are themselves immune.[2] The most significant individual immunity is found in the legislative provision that a public employee is not liable for his discretionary acts within the scope of his employment.[3] Discretionary immunity is conferred upon employees by the act to the same extent that it existed under California law prior to the court decisions abrogating the doctrine of sovereign immunity[4] which gave rise to the 1963 legislation.[5] In addition, specific statutory immunities are granted which, although regarded as within the ambit of discretionary immunity under pre-existing law, are included for purposes of preventing increased liability of public agencies by judicially redefining "discretionary immunity" to exclude certain acts that had previously been considered as discretionary.[6] These specific provisions grant immunity to a public employee for: non-negligent conduct in executing enactments;[7] torts of other persons not proximately caused by the employee;[8] failure to adopt or enforce an enactment;[9] injuries caused by conduct related to issuance, suspension, or revocation of licenses under authority of an enactment;[10] failure to make a health or safety inspection;[11] instituting or prosecuting any judicial or administrative proceeding;[12] and entry upon property expressly or impliedly authorized by law.[13] Taken as a whole, the discretionary immunity provisions of the act immunize public employees for administrative and quasi-judicial decisions, failure to perform cer-

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[1] 4 California Law Revision Commission, Reports, Recommendations and Studies 810 (1963).

[2] Van Alstyne, California Government Tort Liability § 5.33 (Cont. Ed. Bar 1964).

[3] See Cal. Gov't Code § 820.2.

[4] Muskopf v. Corning Hospital District, 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961); Lipman v. Brisbane Elementary School District, 55 Cal. 2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961).

[5] *Infra* note 23.

[6] *Supra* note 1, at 843.

[7] Cal. Gov't Code § 820.4.

[8] Cal. Gov't Code § 820.8.

[9] Cal. Gov't Code § 821.

[10] Cal. Gov't Code § 821.2.

[11] Cal. Gov't Code § 821.4.

[12] Cal. Gov't Code § 821.6.

[13] Cal. Gov't Code § 821.8.

tain public duties, acts under authority of enactment, and where immunity has been granted by previous case law.

It is doubtful that the provisions "eliminate the need to determine the scope of discretionary immunity by piecemeal judicial decisions"[14] as was hoped by the Law Revision Commission, for the previous case law which is continued by the act furnishes an expanded and inconsistent concept of discretionary action,[15] and the specific grants of immunity are unaccompanied by any guiding principles regarding the purposes of classifying conduct as discretionary. When faced with unique fact situations it is unclear whether a court should reason from the specific statutory grants of immunity which primarily protect administrative decisions and failure to perform under enactments, or reason from previous case law. Having decided to apply either or both of these sources of judicial guidance, there still remains a conspicuous absence of legislative expression of the interests served by defining certain conduct as discretionary. This is unfortunate because there are various interests which the discretionary immunity doctrine is designed to protect[16] and they should be measured carefully against the social interest of compensating victims injured as a result of negligent official action undertaken for the public good.[17]

A little noted but fundamental interest served by the doctrine is protection of the specialized functions of the different branches of government, *i.e.*, preservation of a proper separation of powers. Courts are reluctant to substitute law suits for the electorate by introducing the "reasonable man" test to ascertain the presence of negligence in high level executive and legislative decisions.[18] (Akin to this interest is that of preventing taxpayers' harassment suits from diminishing the efficiency of administrative and legislative bodies.) Further, there is the interest of protection of government against enormous and unpredictable liability which could result from judicial re-examination of major executive and legislative decisions.[19] To a large extent, these interests need protection

[14] *Supra* note 1, at 812.

[15] Gray, *Private Wrongs of Public Servants*, 47 CALIF. L. REV. 303, 346 (1959), concluding that "California stands alone among the states as having a substantial body of case law which adopts the federal courts' approach of extended immunity to administrative officers." See, generally, Davis, *Administrative Officers' Tort Liability*, 55 MICH. L. REV. 201 (1956); Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1963).

[16] For discussion see 2 HARPER & JAMES, THE LAW OF TORTS 1661-63 (1956). See also, Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963).

[17] Failing to provide for compensation in such cases requires one person to bear a disproportionate amount of the cost involved in the activity, seems, in effect, to be a form of unequal taxation without reasonable classification. It also seems inconsistent with the trend of legislation providing for compensation to the victims of crimes. See CAL. WELFARE & INST'NS CODE § 11211 providing for compensation to victims of crimes; and Senate Bill 2155, 89th Cong., 1st session, also providing for aid to the victims of crime.

[18] Glickman v. Glasner, 230 Cal. App. 2d 120, 40 Cal. Rptr. 719 (1964); Wright v. Arcade School District, 230 Cal. App. 2d 272, 40 Cal. Rptr. 812 (1964).

[19] Dalehite v. United States, 346 U.S. 15 (1953).

whether or not individual public officials are given personal immunity for good faith performance of acts within the scope of their authority.[20] However, where personal immunity does not exist, an additional interest becomes significant — namely, preservation of the freedom of public officials to act without fear of personal liability.

In a recent case, *NeCasek v. City of Los Angeles*,[21] suit was brought for damages allegedly caused by the negligence of two policemen in allowing two suspects to escape from custody.[22] The Court of Appeals of the Second District of California held the City of Los Angeles and the two police officers immune from liability under the California Tort Claims Act.[23] The court reasoned that Government Code section 820.2,[24] restated the common law discretionary immunity of public employees;[25] that other provisions of the statutory scheme do not detract from this general grant of immunity insofar as the factual situation in *NeCasek* is concerned;[26] that the decision as to how much force to use to restrain suspects in custody is discretionary within the meaning of the statute;[27] and that, although the escape from custody may have resulted not from a decision to use insufficient force, but from the negligent execution of a course of conduct previously determined, such a distinction would be so subtle that it would frustrate the policy of allowing the officer to freely choose the method of keeping the arrest effective.[28]

The decision is important because it establishes a precedent that an escape of a suspect from the custody of police will be attributed to dis-

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[20] 5 CALIFORNIA LAW REVISION COMMISSION, REPORTS, RECOMMENDATIONS AND STUDIES 256 (1963).

[21] 233 Cal. App. 2d 131, 43 Cal. Rptr. 294 (1965).

[22] Two suspects had been handcuffed together by the officers near the intersection of Seventh and Main Streets, in downtown Los Angeles. The suspects ran away and, in their flight, knocked down the plaintiff, severely injuring her.

[23] CAL. GOV'T CODE §§ 814-825.6.

[24] ". . . a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him. . . ." CAL. GOV'T CODE § 820.2.

[25] The rule was restated in statutory form to ensure that public employees would continue to remain immune for their discretionary acts as they had been prior to the adoption of the 1963 Tort Claims Act. California Senate Daily Journal, April 24, 1963, p. 1889.

[26] Immunity is specifically provided for a failure to arrest [§ 846], for injuries resulting from deliberate decisions to release persons from custody [§§ 845.8, 846], and for injuries caused by a prisoner, *i.e.*, "an inmate of a prison, jail, or correctional facility" [§§ 844, 844.6, 845.8]. However, in *NeCasek*, since the conduct involved was not for a failure to arrest, but for a careless arrest, and since the injuries were not caused by a "prisoner," the court relied on the general ground of "discretion" to immunize the city and officers from liability.

[27] According to the court, the purpose of the discretionary immunity doctrine is to prevent inhibition of public employees in the performance of their functions.

[28] Zeal in making arrests, a goal worthy of encouragement, would be "frustrated" if a "subtle distinction" were drawn between the decision to arrest and the decision of how much force to use in effecting the arrest. *Supra* note 21, at 137, 138, 43 Cal. Rptr. at 299. The court noted that both the Law Revision Commission and the legislature had declined to draw a distinction between the choice of a plan to rehabilitate a prisoner and the execution of that plan. The court in *NeCasek* analogized the process involved in correction and rehabilitation efforts to the process involved in the decision to arrest and the execution of that plan by police.

cretionary decisions of the police without inquiry into the particular facts of the case to determine what kind of police conduct permitted the escape. As one of the first applications of the discretionary immunity provisions of the 1963 act,[29] the decision is particularly appropriate for careful analysis, since it is desirable to assess at an early date whether the court's interpretation of the 1963 legislation's grant of discretionary immunity correctly conceived the express or underlying purposes of the legislation or accurately reflected these purposes in applying the legislation to the facts in *NeCasek*.

In *NeCasek*, the court apparently considered only one interest in favor of immunity — that of not inhibiting police officers from making free choices in the amount of force to be used to restrain persons under arrest from escaping. Specifically, the court did not want to make a decision which would promote use of excessive force by police officers in making arrests. Certainly this is an important social consideration. But the inhibiting aspects of liability cannot be considered without reference to the source of compensation. Under Government Code section 825[30] it is clear that, in the absence of fraud or malice on the part of the public employee, the public entity will pay the compensation. Thus, the inhibiting effect of personal liability is not present.[31] Inhibition, if produced at all today, would result from more subtle and speculative factors such as fear of incurring the disfavor of one's supervisors. These factors would seem largely operative whenever there is negligence in job performance quite apart from the compensation of the injured party.[32] In fact, it would seem that the purpose of authorizing indemnification of police officers for any judgment of liability, arising from good faith acts performed in their official capacity, was to remove fear of personal liability

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[29]See also, Glickman v. Glasner, *supra* note 18 (State Kosher Food Law Representative's sending of allegedly malicious letter to retail merchants); Wright v. Arcade School District, *supra* note 18 (decision regarding the furnishing of school crossing guards); Shakespeare v. City of Pasadena, 230 Cal. App. 2d 387, 40 Cal. Rptr. 871 (1964) (decision to detain suspicious person for short time pending inquiry with superiors); Morgan v. County of Yuba, 230 Cal. App. 2d 938, 41 Cal. Rptr. 508 (1964) (failure to warn of prisoner's release as expressly promised).

[30]CAL. GOV'T CODE § 825. "If an employee or former employee of a public entity requests the public entity to defend him against any claim or action against him for an injury arising out of an act or omission occurring within the scope of his employment as an employee of the public entity . . . [or] if the public entity conducts the defense of an employee or former employee against any claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed."

[31]Even prior to the 1963 Tort Claims Act it was the prevalent legislative policy, pursuant to numerous overlapping and sometimes inconsistent statutes, to require the entity to satisfy the judgment against the employee for "negligent torts" without a right to reimbursement from the employee. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 2.9. However where the tort was intentional, *e.g.*, assault by a police officer due to excessive force in effecting an arrest, the employee was not entitled to indemnification. *Supra* note 1, at 814.

[32]2 HARPER & JAMES, THE LAW OF TORTS 1663 (1956).

cretionary decisions of the police without inquiry into the particular facts of the case to determine what kind of police conduct permitted the escape. As one of the first applications of the discretionary immunity provisions of the 1963 act,[29] the decision is particularly appropriate for careful analysis, since it is desirable to assess at an early date whether the court's interpretation of the 1963 legislation's grant of discretionary immunity correctly conceived the express or underlying purposes of the legislation or accurately reflected these purposes in applying the legislation to the facts in *NeCasek*.

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[32]2 HARPER & JAMES, THE LAW OF TORTS 1663 (1956).

and thereby avoid hindering the snap judgments which are necessary to law enforcement work.

The court in *NeCasek* did not discuss the inhibition reduction factor of the indemnity provisions in its decision. Presumably the court determined that since the 1963 act purported to reinstate prior case law with respect to discretionary immunity, much of which developed at a time when there were no indemnification provisions, the legislature must have intended that the provisions not be considered in the determination of immunity. However that intention is not at all clear, and it would seem a better compromise of social interests to hold that the effect of the indemnification provisions is to make discretionary immunity applicable only to quasi-judicial, quasi-legislative, or administrative actions where interests other than inhibition prevention come into play.[33] This approach to the definition of discretionary immunity should at least be applicable to a case such as *NeCasek,* where there is no binding precedent to be found in prior case law.

Even if one accepts the court's conclusion that the decision to use a particular amount of force in keeping an arrest effective is discretionary, it is difficult to agree that no inquiry should be made into whether the plaintiff's injuries resulted from such a decision or from negligent execution of that decision (or perhaps an altogether different kind of decision). Such distinctions would not appear so fine as to be unnecessary when the social interest of giving an injured plaintiff a remedy is considered.[34]

It is true that the Law Revision Commission rejected Professor Van Alstyne's recommended distinction between the discretionary decision to incarcerate a particular prisoner in a minimum security facility and negligence in the administration of the minimum security correctional program.[35] However the reason given by the commission was:

> The nature of the precautions necessary to prevent the escape of prisoners and the extent of the freedom that must be accorded prisoners for rehabilitative purposes are matters that should be determined by the proper public officials unfettered by any fear that their decisions may result in liability.[36]

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[33] *Supra* note 16.

[34] "While any such line would have to be imprecise, yet this one has the merit of confining the discretionary exception to questions of a political nature where the policy in favor of the exception is reasonably clear and widely accepted." HARPER & JAMES, *op. cit. supra* note 32, at 1659. See also, 5 CALIFORNIA LAW REVISION COMMISSION, REPORTS, RECOMMENDATIONS AND STUDIES 432 (1963): "All that would be required by a holding of liability in such cases would be the burden of reasonable care in the execution of whatever program . . . is decided upon at the policy and planning level."

[35] *Supra* note 20, at 430-32.

[36] *Supra* note 1, at 827.

The obligation to rehabilitate persons may require creating an environment of relative freedom, and this obligation is not one which is imposed upon police officers in preventing escapes of suspects immediately after arrest. Particularly where suspects are believed to be extremely dangerous, any analogy to the obligations of a minimum security institution is awkward. In the arrest setting, the well-being of the suspect himself would almost always best be served by keeping the arrest effective once made, and avoiding the hazards of re-capture attempts.

Perhaps a compelling but unspoken reason for the court's granting of blanket immunity where arrestees escape was the fear of practically unlimited damage which might be caused by suspects once again at large. If, for example, a murderer escapes from the custody of the police, and remains uncaptured for several years, is not every murder he may commit a foreseeable risk of the negligence of the officers arresting him? And would not the public entity be liable for all injuries suffered by third parties during re-capture attempts? It is suggested that an appropriate limiting principle for compensating injuries caused by escapees would be to confine liability to those injuries occurring during the immediate flight from negligent custody, for it is this flight which is the particular hazard which the negligence of the officers created.[37] Section 846 of the 1963 act provides, "Neither a public entity nor a public employee is liable for injury caused by the failure to make an arrest," and this section furnishes a logical basis for immunizing the public entity from liability for injuries inflicted by escaped arrestees who are at large.

NeCasek demonstrates that the concept of discretionary immunity deserves the continued study of the Law Revision Commission, since the present statutory reference to previous case law coupled with certain specified immunities does not furnish the courts with articulated purposes and standards by which to avoid the judicial confusion which the Commission deprecated. Certainly any legal doctrine which conflicts so directly with the social interest of distributive justice warrants more careful consideration by the legislature and courts than discretionary immunity has received in California thus far. When the resultant injury to the plaintiff is clear, a separation of powers problem is not involved, and logical liability-limiting principles can be defined, a public entity should not be immune from liability for the negligent activities of its officers.

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[37]Note, 7 HASTINGS L. J. 330, 331 (1956). ". . . in effecting the escape, or upon being recaptured, assaultive actions are readily foreseeable. With possible freedom from confinement in the offing, the escapee is quite likely to use force and endanger the lives and property of those who stand in his way. The escape itself, aside from the purpose of confinement or the escapee's history, creates a foreseeable risk of harm to members of the public . . . and is independent of the purpose of confinement or the individual's known propensities.

Memorandum 68-20

EXHIBIT III

[Civ. No. 30391. Second Dist., Div. Five. Jan. 25, 1968.]

INA MAE JOHNSON, Plaintiff and Appellant, v. THE STATE OF CALIFORNIA, Defendant and Respondent.

[1] **Public Officers—Liabilities—Discretionary Powers: State of California—Liability.**—A decision of a parole agent of the Department of Youth Authority not to inform a prospective foster parent of the homicidal tendencies of a teen-age boy was protected as being but incidental and collateral to a larger discretionary immunity of the state and its officials and employees from liability for acts and omissions which are the result of the exercise of discretion vested in the state officials and employees (Gov. Code, § 820.2), where the failure to inform was but an integral part of the larger activity of rehabilitation process of placement of the paroled youth in a foster home, involving the basic discretionary decisions to parole the youth and to select the foster home.

APPEAL from a judgment of the Superior Court of Los Angeles County. Parks Stilwell, Judge. Affirmed.

Action for damages for negligence in failing to inform foster mother of homicidal tendencies of child placed in home. Summary judgment for defendant affirmed.

Fizzolio & Fizzolio and Albert Vieri for Plaintiff and Appellant.

Thomas C. Lynch, Attorney General, and Robert H. O'Brien, Deputy Attorney General, for Defendant and Respondent.

KAUS, P. J.—Plaintiff appeals from a summary judgment in favor of defendant.

In her complaint plaintiff alleges that the Youth Authority requested her and her husband to provide a foster home for a certain boy. She does not allege that she agreed to the placement, but apparently she did because on September 13, 1963, the boy was so placed. The Youth Authority is alleged to have

[1] See Cal.Jur.2d, Public Officers, § 146; Am.Jur., Public Officers (1st ed § 272 et seq).

McK. Dig. References: [1] Public Officers, § 43; State of California, § 57.

been negligent in that it knew that the boy had homicidal tendencies and a background of violence and cruelty towards both animals and humans, but failed to inform her of those facts. Five days later the boy assaulted plaintiff with a butcher knife while she was asleep.

After issue was joined the state filed a motion for summary judgment supported by the declaration of one William Baer. It is set forth in full in the footnote.[1]

Plaintiff filed a declaration in opposition to the motion, but none of the allegations therein are material to the only issue on this appeal.

[1] That issue is whether or not the negligent failure of Mr. Baer to inform plaintiff of the boy's tendencies comes within the immunity for discretionary acts or omissions granted by section 820.2[2] of the Government Code. If that question can be answered in the affirmative we need not concern ourselves with the further question whether the defendant is also protected by the more specific immunity described in section 845.8.[3]

It should be noted that the State of California is the only defendant herein. The immunity discussed runs in favor of public employees, rather than the state. Nevertheless, public

[1] "I, WILLIAM BAER, declare and state: That I am a duly authorized Parole Agent of the Department of Youth Authority, State of California, with offices at 14538 Friar Street, Van Nuys, California.

"On June 22, 1963, [Gary] was paroled by the California Youth Authority for placement. (See Exhibit 1 attached hereto which is incorporated by reference into this declaration as if fully set forth.)

"One of my functions as a parole agent involves finding suitable foster homes for children. The names, of Ina Mae Johnson and Floyd N. Johnson were made available to me by a friend of theirs who knew a parolee, not [Gary], who needed a foster home.

"I contacted the Johnsons and interviewed them about taking a teenage foster child. They were referred to the Los Angeles County Bureau of Licensing and were subsequently approved to board a teen-age boy. The above mentioned parolee was not placed with the Johnsons because relatives were found who took him. Mrs. Johnson was contacted by me on September 12, 1963, and the "placing of [Gary] was discussed with her. She agreed to have Gary placed with her and he was so placed on September 13, 1963. . . ."

[2] Section 820.2. "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

[3] Section 845.8. "Neither a public entity nor a public employee is liable for:

(a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release.

(b) Any injury caused by an escaping or escaped prisoner."

entities are indirectly protected by section 815.2, subdivision (b) which provides that the entity is not liable if the employee is immune.

To get one matter out of the way: although the state argues that even if it were a private entity it would not be liable, we assume at least for the purpose of this decision that cases such as *Poncher* v. *Brackett*, 246 Cal.App.2d 769 [55 Cal.Rptr. 59] and *Ellis* v. *D'Angelo*, 116 Cal.App.2d 310, 317 [253 P.2d 675] make that position untenable.

The question then becomes very simply whether the failure to reveal the boy's tendencies is clothed with immunity. Plaintiff argues that the giving of a warning was a ministerial act. The problem, however, is not whether the act which was wrongfully omitted is ministerial. What we must look to is the decision whether or not to perform the act.[4] If that decision can be said to be discretionary, the immunity applies. (*Sava* v. *Fuller*, [a]249 Cal.App.2d 281, 290 [57 Cal.Rptr. 312].) Thus, for example, in *Ne Casek* v. *City of Los Angeles*, 233 Cal.App.2d 131 [43 Cal.Rptr. 294] the court held that immunity applied to the decision of two police officers not to use certain restraints on two persons whom they had arrested and who escaped while handcuffed to each other. There too it would have been a ministerial act to use another pair of handcuffs, but the question that the court asked itself was whether or not the policy underlying the doctrine of discretionary immunity would be served by making the decision whether or not to use additional restraints, subject to judicial review.[5]

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[4]It is, of course, entirely possible—and within the broad sweep of the charging language of plaintiff's complaint—that the failure to inform her of the boy's tendencies was not so much the result of a decision on the part of state officials, that is to say the product of reasoned judgment, but that it stemmed from a negligent failure to exercise any judgment. The result would be the same. The discretionary immunity doctrine is designed for the benefit of officials who exercise judgment. (*Glickman* v. *Glamer*, 230 Cal.App.2d 120, 126 [40 Cal.Rptr. 719].) If, to protect such decisions, it is thought worth while to sacrifice plaintiffs who are damaged by other officials who act with malice (*Hardy* v. *Vial*, 48 Cal.2d 577, 581 [311 P.2d 494]), surely mere thoughtlessness does not destroy the immunity.

[5]The court in *Ne Casek*, believed that the purpose of the discretionary immunity doctrine was as stated by the Supreme Court in *Lipman* v. *Brisbane Elementary School Dist.*, 55 Cal.2d 224, 229 [11 Cal.Rptr. 97, 359 P.2d 465]: "The subjection of officials, the innocent as well as the guilty, to the burden of a trial and to the danger of its outcome would impair their zeal in the performance of their functions, and it is better to leave the injury unredressed than to subject honest officials to the constant dread of retaliation." This rationale has been criticized in a scholarly note (39 S.Cal.L.Rev. 470) and by at least one appellate deci-

[a]Advance Report Citation: 249 A.C.A. 313, 322.

The introductory section of the chapter of the Welfare and Institutions Code which establishes the Youth Authority reads as follows: "The purpose of this chapter is to protect society more effectively by substituting for retributive punishment methods of training and treatment directed toward the correction and rehabilitation of young persons found guilty of public offenses. To this end it is the intent of the Legislature that the chapter be liberally interpreted in conformity with its declared purpose." (Welf. & Inst. Code, § 1700.)

Section 1766 of the same code specifically permits the Youth Authority to parole persons committed to it. (See also Welf. & Inst. Code, §§ 1002, 1176.) Obviously the placement of parolees in foster homes is part and parcel of the rehabilitation process envisioned by the Legislature and, in turn, the giving of information concerning the parolee to prospective foster parents is an integral part of the placement. Even if it is only incidental and collateral to the main purpose of rehabilitation, the decision whether or not to make certain disclosures to the foster parent is protected by discretionary immunity if the larger activity in the course of which such a decision is made, is protected. (*Lipman* v. *Brisbane Elementary School Dist.*, 55 Cal.2d 224, 233 [11 Cal.Rptr. 97, 359 P.2d 465]; *White* v. *Towers*, 37 Cal.2d 727, 733 [235 P.2d 209, 28 A.L.R.2d 636].)

We do not believe that it can be questioned that the decision to parole a particular youth and the selection of the foster home are immune decisions. It follows that a decision not to inform a prospective foster parent of certain tendencies of the ward, must also be sheltered by the immunity.

We may assume that the Youth Authority could live with a rule which requires it to disclose such known facts about the parolee's past life as would indicate that he might murder the prospective foster parents. Yet it is apparent that if a court, today, announces such a rule, the decision would merely be a

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sion. (*Sava* v. *Fuller*, [b]249 Cal.App.2d 281, 290 [57 Cal.Rptr. 312].) We feel that we are bound by the pronouncements of the Supreme Court and the fact that the Legislature, in adopting section 820.2, purported to restate preexisting California law as exemplified by *Lipman* v. *Brisbane Elementary School Dist.*, *supra*; *Hardy* v. *Vial*, 48 Cal.2d 577 [311 P.2d 494] and *White* v. *Towers*, 37 Cal.2d 727 [235 P.2d 209, 28 A.L.R.2d 636]. (See Legislative Committee Comment to section 820.2; cf. *Scruggs* v. *Haynes*, [c]252 Cal.App.2d ——, —— [60 Cal.Rptr. 355].) All three cases cited in the Legislative Committee Comment referred to rely on the rationale criticized in *Sava* v. *Fuller*, *supra*.

[b]Advance Report Citation: 249 A.C.A. 313, 322.

[c]Advance Report Citation: 252 A.C.A. 271, 279.

foot in the door for a far more sweeping rule of compulsory disclosure.[6] If homicidal tendencies must be disclosed, it would be impossible to draw the line between that particular trait and others which might be of interest to the prospective foster parent. Every decision to parole and place in a home would become a possible lawsuit.[7]

Plaintiff relies on *Morgan* v. *County of Yuba*, 230 Cal.App. 2d 938, 942 [41 Cal.Rptr. 508]. In *Morgan* a deputy sheriff had expressly promised to warn plaintiffs immediately if one Ashby was released on bail. Ashby was released, no warning was given and he killed plaintiff's decedent, just as he had threatened to do. The Court of Appeal held that a cause of action was stated.

Morgan rests entirely on the failure to carry out an express promise and has been so construed by the Supreme Court in *Heieck & Moran* v. *City of Modesto*, 64 Cal.2d 229, 234 [49 Cal.Rptr. 377, 411 P.2d 105]. There was no comparable promise in this case.

The judgment is affirmed.

Hufstedler, J., and Stephens, J., concurred.

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[6]Actual attempts to kill are not the only means by which homicidal tendencies can be established. In the case at bar plaintiff submitted searching interrogatories to the defendant. Unless the state deliberately withheld something in its answers, there is no incident in the boy's past, known to the state which would make one suspect that the boy had the traits of character manifested in his attack on plaintiff. Nevertheless, in a proper case, such traits could be strongly suspected on the basis of the results of psychiatric or psychological testing. Should it be actionable if the state withholds the results of a parolee's Rohrschach?

[7]It is noted that litigation rather than personal liability is the only threat which an official faces in most cases. Under sections 825 to 825.6 of the Government Code the employing public entity must pay any judgment against the official unless it is based on an act or omission involving "actual fraud, corruption or actual malice." The author of the note in 39 Southern California Law Review, page 470 believes that this personal immunity from the financial burden of judgments enjoyed by employees should provoke a judicial reevaluation of the doctrine of discretionary immunity. The suggestion overlooks the fact that the intended beneficiary of the doctrine is not the guilty official who, but for the doctrine, would have to pay a judgment, but the innocent one who has had to go through the litigation process before being vindicated.