Discretionary Function Exception of Federal Tort Claims Act

Ronald E. Kay
must be to prevail over a prior controlling decision does not lend itself to easy solution."

It still remains the duty of federal courts, exercising due care and foresight, to meet the challenge. To stay decisions in the absence of state law is to deny the litigants their due while burdening them with extra expense of prolonged litigation. Should a party suffer in a diversity case because a federal court is bound to prior court rulings and has to disregard more recent dicta of a clear, unequivocal and contrary nature? . . . [A]ll rules of the law are for courts to apply—yes; but all rules of law are also for the courts to change. . . . These changes and these applications should indeed not depend upon the accident of diversity. . . . The poor litigating parties should not be forgotten."

The *Mason* decision is equitable, it is correct. "Conflict with the past is to be preferred over conflict with the future."

**Richard E. Berkowitz**

**DISCRETIONARY FUNCTION EXCEPTION OF FEDERAL TORT CLAIMS ACT**

A landowner brought action against the Government for damages caused by the construction and maintenance of flood dikes. The Federal Tort Claims Act imposes liability upon the Government, "... where the United States, if a private person, would be liable to the claimant . . .", but excepts "Any claim based upon . . ., the exercise or performance or the failure to exercise or perform a discretionary function . . ., on the part of a federal agency or employee of the Government." Held, that the construction and maintenance of the dikes involved the exercise of a discretionary function, and therefore was not actionable. *McGillic v. United States*, 153 F. Supp. 565 (D.N.D. 1957).

The Federal Tort Claims Act, enacted in 1946, waived the sovereign immunity of the United States, with certain exceptions, in tort actions.

22. Note, 59 YALE L.J. 978 (1950)
23 Corbin, supra note 4, at 772
24. Id. at 776
2. 28 U.S.C. § 1346(b) (Supp. IV 1956).
4. Minnesota v. United States, 305 U.S. 382 (1938) (it is an established principle of jurisprudence in all civilized nations, resting on reasons of public policy, because of the inconvenience and danger which will follow from any different rule, that the sovereign cannot be sued without its consent and permission); see also 53 AM. JUR., *United States* § 127 (1945).
The purpose of the act was to relieve Congress of the burden of compensating citizens through the passage of private bills for tortious governmental activities, and to create adequate remedies through judicially enforceable rights.

The general exception to governmental liability is predicated on the discretionary function provision of the act. This has probably received the greatest consideration of the courts due to the paucity of legislative observation of the exception's purpose. Early views of the act agreed that the intent of the discretionary function exception was to exclude the substitution of judicial opinion as to the correctness of an exercise of discretion for that of the officially legally empowered to make that decision.

The principle that the Government should not be liable for its discretionary acts when engaged in authorized activities, even if there has been negligence or an abuse of such discretion, was the fundamental purpose for including the discretionary function exception in the act. The decision in the instant case was based on that principle, and is consistent with prece-
dent. Thus, the unnecessary release of water through a dam or the failure to reinforce irrigation canals were held to be discretionary decisions. This principle has not been confined to flood control or irrigation projects and includes other official or administrative decisions and acts authorized by statute. Therefore, the Government was not liable for decisions made in issuing permits or weather forecasts, or for the admitting and discharging of patients from its hospitals.

When a governmental agency has been under a common law or statutory duty to act in a specific way and intentionally has not, the courts have refused to extend the protection of the discretionary function exception. Thus, when the Coast Guard failed in a mandatory duty imposed by statute to mark or remove wrecked ships and when an interne negligently treated a patient, the Government was not liable for damages caused by blasting during the construction of a dam.


15. Ure v. United States, 225 F. 2d 709 (9th Cir. 1955).


18. Chournos v. United States, 343 U. S. 977 (1952) (failure to grant grazing permits); Weinstein v. United States, 244 F. 2d 68 (3d Cir. 1957) (negligence of government inspector); Powell v. United States, 233 F. 2d 851 (10th Cir. 1956); Dupree v. United States, 146 F. Supp. (E. D. Pa. 1956) (Coast Guard's denial of license).

19. National Mfg. Co v. United States, 210 F. 2d 263 (8th Cir. 1954); Mid-Cent. Fish Co v. United States, 112 F. Supp. 792 (W. D. Mo. 1953); Western Mercantile Co v. United States, 111 F. Supp. 799 (W. D. Mo. 1953). The rationale of the courts is that since the operation of weather information service creates no duty, there can be no negligence, and thus no recovery under the Federal Tort Claims Act.

20. Smart v. United States, 207 F. 2d 841 (10th Cir. 1953); Denny v. United States, 171 F. 2d 365 (5th Cir. 1948); Dugan v. United States, 147 F. Supp. 674 (D. D. C. 1956); Contra, Fair v. United States, 234 F. 2d 288 (5th Cir. 1956).

21. Somerset Seafood Co v. United States, 193 F. 2d 631 (4th Cir. 1951); accord, Cornell Steamboat Co v. United States, 138 F. Supp. 16 (S. D. N. Y. 1956). For similar results, see Oman v. United States, 179 F. 2d 738 (10th Cir. 1950) (an official refused to cancel a grazing permit as required by regulations); Ellison v. United States, 98 F. Supp. 18 (D. Nev. 1951) (government liable for diverting a water supply, contrary to a court decree, in conjunction with a proprietary project).
a patient after admittance to its hospital, the Government was held liable.

When an individual can only act legally in one way, there is no discretion involved but merely a failure in a duty. The courts have beclouded the issue in these cases by referring to "negligence after the exercise of discretion, etc." in an attempt to justify their avoidance of the discretionary function exception.

The United States, until recently, claimed immunity for all conduct in furtherance of the "end-objectives" of "uniquely governmental functions" which had no counterpart in private business. In addition, it claimed that when the project or activity was discretionary in its entirety, then all conduct performed in furtherance of that activity was discretionary and non-actionable. In Dalahite v. United States, the entire Texas City port was leveled by an explosion which occurred during the loading of fertilizer for shipment abroad as part of our Foreign Aid program. The catastrophe was allegedly caused by the negligent packing and shipping of the fertilizer and the failure of the Coast Guard to supervise the loading or to combat the fire. The Court concluded that there can be no liability for purely governmental functions and that once a high-level policy determination has been made which invokes the immunity of the discretionary function exception of the act, the immunity extends throughout the implementation of the

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22. United States v. Gray, 199 F. 2d 239 (10th Cir. 1952); accord, Grigalaukas v. United States, 181 F. 2d 723 (5th Cir. 1950); Griggs v. United States, 178 F. 2d 1 (10th Cir. 1949); Ruffino v. United States, 126 F. Supp. 132 (S. D. N. Y. 1954); Dishman v. United States, 93 F. Supp. 567 (D. Md. 1950). For other cases holding Government liable for failing in a common law duty, see United States v. Trubow, 214 F. 2d 192 (9th Cir. 1954) (failure to keep its premises safe); United States v. White, 211 F. 2d 79 (9th Cir. 1954) (failure to warn business invitees of dangers); Maryland v. Manor Real Estate and Trust Co., 176 F. 2d 414 (4th Cir. 1949) (failure to keep its premises safe).

23. See supra note 9.


25. Dalahite v. United States, 346 U.S. 15 (1955); Williams v. United States, 218 F. 2d 473 (5th Cir. 1955) (Florida District Court refused to inquire into cause of government experimental plane which exploded in mid-air. This rationale was criticized by the Court of Appeals, but the decision was affirmed under the doctrine of res ipsa loquitur); Coste v. United States, 181 F. 2d 816 (8th Cir. 1950); Toledo v. United States, 95 F. Supp. 838, 841 (D. Puerto Rico 1950); Olson v. United States, 93 F. Supp. 866 (S. D. Iowa 1950). For a few early sagacious decisions (pre Dalahite) which held contra by distinguishing between high-level policy decisions and those necessarily made by subordinates in performing their tasks and holding the latter liable for negligent decisions, see Worley v. United States, 119 F. Supp. 719 (D. Ore. 1952) (negligent setting of poisoned animal traps); Bovino v. United States, 93 F. Supp. 866 (S. D. Iowa 1950) (by way of dictum the court indicated the exception would not apply to low level employees); Robertson v. United States, 87 F. Supp. 994 (W. D. Wash. 1949) (negligent cross examination of witness by Army sergeant).

26. 346 U.S. 15 (1953) (consolidated suits represented some 8,485 plaintiffs for damages amounting to $200,000,000).
The minority reasoned that Congress intended such discretionary immunity to apply only to high-level decisions and that the immunity does not extend to the operational phase of policy decisions. This theory has been greatly modified by the decisions in Indian Towing Co. v. United States and United States v. Union Trust Co. The former concluded that the Government may be liable for negligence in carrying out a "uniquely governmental function," its liability being predicated on the local law applicable to private citizens and not that applicable to municipal corporations. The latter held that the discretionary function immunity refers to decisions at the planning level which are necessary to the success of the overall project, and not to decisions made by employees in handling the operational details of the program. There are decisions since Dalahite which hold that once an employee or agent of the Government has exercised his discretion, reasonable care must be used in pursuing the course he has decided to follow. The judiciary has apparently realized the inequitable implications of Dalahite, and although not expressly overruling it, there

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27. Reed, J., Id. at 35, "the 'discretionary function or duty' . . . includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment there is discretion."

28. Jackson, J., dissenting, Id. at 58, "if decisions are being made at cabinet levels as to the temperature of bagging explosive fertilizers, . . . and how the bags should be labeled, perhaps an increased sense of caution even at that height would be wholesome. The common sense of this matter is that a policy adopted in the exercise of an immune discretion was carried out carelessly by those in charge of detail. We cannot agree that all the way down the line there is immunity. . . ."


33. 346 U.S. at 60, Jackson, J., dissenting, "Surely a state so long debated was meant to embrace more than traffic accidents. If not, the ancient and discredited doctrine that "The King can do no wrong" has not been uprooted; it has merely been amended to read, "The King can do only little wrong."
has been an obvious change of attitude on the part of the Supreme Court. Thus, a recent district court case, which originally cited Dalahite, held that discretionary immunity extended to the pilot of a low-flying plane performing survey work in conformance with government plans. This was reversed by the court of appeals which held that the Government exercised its discretion in deciding to use its pilots in making the survey, and even though the pilot was following orders, the injury resulted simply because the pilot did not look where he was going. The reversal completely ignored Dalahite and cited only the the decision in Indian Towing Co. which had been handed down earlier in the same week as the reversal.

It seems without question that the Supreme Court will now hold the Government liable for the negligent conduct of its employees engaged in the operational details of any governmental activity. This desirable result of a liberalization of the general applicability of the Federal Tort Claims Act has been brought about by judicial realization of its duty to interpret strictly the discretionary function exception. In the instant case, the plaintiff's allegation of damage caused by the Government's decision to build a dike was at most an allegation that the Government had abused its discretion in carrying out an authorized program. It appears in the light of recent decisions, that if the plaintiff had alleged negligence in the actual construction of the dike, or negligence in some operational aspect of the project, the Government would not have been entitled to a dismissal. In view of the

34. Pennsylvania R.R., supra note 32, wherein it was held that negligence of Coast Guard charged with supervision of loading would not be discretion. But see Dalahite, supra note 32, in which the majority would not hold Coast Guard liable for negligence in regulating loading or fighting the fire. For an excellent review of the modern trend see Fair v. United States, 394 F. 2d 188 (5th Cir. 1968). It is further worth noting that the minority in Dalahite, whose dissent was indicative of the desire to give broad extension to the Tort Claim Act, had become the majority in Indian Towing Co. A reading of the opinions and the dissents in the two cases leads to the conclusion that Indian Towing Co. represents a definite change of attitude on the part of the Supreme Court.


36. Rayonier Inc. v. United States, U.S. 77 S. Ct. 374 (1957) (government liable in fighting fire on own land if negligent) reaffirmed, Indian Towing Co., 350 U.S. 61 (1955), and Union Trust Co., 350 U.S. 907 (1955); Friday v. United States, 239 F. 2d 701 (9th Cir. 1957) (no discretion in supervisor not allowing truck driver to sleep; cuts discretionary immunity off at high level) Pierce v. United States, 235 F. 2d 366 (6th Cir. 1956) (government owes due care, even if entire project is an authorized program); State of California v. United States, 151 F. Supp. 570 (N. D. Cal. 1957) (the exception only applies to planning level and not operational level); Bartholomae Corp. v. United States, 135 F. Supp. 651 (S. D. Cal. 1955) (the government is not liable for expert's decisions in atomic blasting); Sullivan v. United States, 129 F. Supp. 713 (N. D. Ill. 1955) (when an F. B. I. agent in making an arrest drives negligently, there is no discretion); Desert Beach Corp. v. United States, 128 F. Supp. 581 (S. D. Cal. 1955) (irrigation canal is discretionary, but if specific negligence is alleged in acts of employee, government cannot get a directed verdict); Guy F. Atkinson Co. v. Merritt, Chapman, and Scott Corp., 126 F. Supp. 406 (N. D. Cal. 1954) (the government is not entitled to summary judgment on basis of discretionary function in authorizing entire dam project; specific act complained of might have been a job incidental to a discretionary decision; more evidence was needed as to who made the specific decision).
facts and presentation of the plaintiff's case, the decision of the court, based on the immunity of governmental discretion, cannot be questioned.

RONALD E. KAY

CONSTITUTIONAL LAW—CONTEMPT OF COURT—NEWSPAPER PHOTOGRAPHERS

Plaintiff newspaper sought to enjoin enforcement of a state court order prohibiting representatives of the press from taking pictures in and in the vicinity of the court room during the progress of a trial. Held, injunction refused. The state court has the right to prohibit the taking of pictures during a trial. This restriction to uphold the dignity of the court is not a violation of freedom of the press. *Tribune Review Publishing Company v. Thomas*, 153 F. Supp. 484 (W.D. Pa. 1957).¹

It has never been questioned that the courts have a right to punish persons disturbing the administration of justice when these disturbances are committed in the presence of the court.² An inherent function of the judicial system is the duty of the courts to conduct proceedings with fitting dignity and decorum.³ Where photographers disturbed the proceedings of a trial by exploding flash powder, they were held in contempt for detracting from the decorum of the court.⁴ Court orders have been promulgated which bar photographers from taking pictures during court proceedings on the theory that the presence of cameramen would potentially detract from the dignity and decorum of the court.⁵

¹ The Westmoreland County Court during the trial of John Wesley Wabel, "The Phantom Killer of the Turnpike," Commonwealth v. Wabel, 382 Pa. 80, 114 A.2d 334 (1955), promulgated a court rule prohibiting the taking of pictures in the court house or within 40 feet of the entrance of any court room. Rule 6084 of the courts of Westmoreland County, Pennsylvania. Press photographers took pictures of Wabel on his way into court for sentencing in direct violation of this order. They used infra-red camera and did not attract attention or distract the court. The photographers were cited for contempt of court when the pictures appeared in print. On appeal to the Supreme Court of Pennsylvania, the convictions were upheld although the jail sentences were vacated. *In re Mack*, 386 Pa. 251, 126 A.2d 679 (1956). The Supreme Court of the United States denied certiorari, *Mack v. Pennsylvania*, 352 U.S. 1002 (1956), and the plaintiffs brought this test case into the Federal Court.

² Ex parte Terry, 128 U.S. 289 (1888).

³ Judicial canon 35 provides; "Proceedings in court should be conducted with fitting dignity and decorum. The taking of Photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court, and create misconceptions with respect thereto in the mind of the public and should not be permitted."

⁴ In re Seed, 140 Misc. 681, 251 N.Y.S. 615 (Sup. Ct. 1931).

⁵ State v. Clifford, 162 Ohio St. 370, 123 N.E. 2d 8 (1954).