SECTION 3

DEFENSES FOR DISCRETIONARY ACTIVITIES

A. IMMUNITY FROM LIABILITY BASED ON DISCRETIONARY FUNCTION OR ACTIVITY

A.1. Introduction

The primary defense to the state's tort liability for negligent design and maintenance is based on the theory that certain action taken by government is "discretionary" in nature, and, therefore, immune from suit. This chapter focuses on important United States Supreme Court cases that have construed the discretionary function exception in the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq.*, and state supreme court cases that have construed a provision for discretionary immunity in state tort claims acts. The state court opinions frequently rely on one or more of the important U.S. Supreme Court decisions.

A.2. Federal Cases Interpreting the Discretionary Function Exemption in the FTCA

The discretionary function exemption in the FTCA provides that the United States Government may not be held liable for:

> (a) *Any claim* 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 an employee of the Government, whether or not the discretion be abused.* (Emphasis added.)[1]

The federal courts have had considerable difficulty in construing the italicized language—the discretionary function exemption—as it appears in the federal act or in comparable state statutes.

In 1991, in *United States v. Gaubert*,[2] the Supreme Court held that if a regulation allows an employee to exercise discretion, then "the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations."[3] Moreover, the Court held that "it must be presumed that the agent's acts are grounded in policy when exercising that discretion."[4] Under *Gaubert*, there is no distinction between planning and operational actions:[5] it is not the status or level of the governmental actor that determines whether the discretionary exemption applies; rather it is the nature of the conduct or decision-making. The *Gaubert* Court expanded discretionary immunity beyond that exercised at the so-called planning level.

It is useful first to review briefly the reasons for the discretionary function exemption in the FTCA. In the numerous drafts of the FTCA before its final passage in 1946, Congress considered exempting from the Act's coverage certain activities that were deemed to be purely "governmental" in nature, as distinguished from the type of activities normally undertaken and carried out by private persons. Activities that are governmental in nature are probably not susceptible of precise definition. An important reason for excluding governmental functions from review by the judiciary was to preserve the separation of powers.[6] Under our tripartite form of government, the powers of the legislative, executive, and judicial branches of government are to be kept separate and distinct. However, perhaps because of the difficulty in defining governmental activities, the FTCA did not exempt governmental activities as such. Instead, Congress included an exception to preclude governmental activities that are discretionary in nature from judicial review. The pertinent language is found in 28 U.S.C. § 2680, *supra.*

Although Congress may have believed that the courts would be able to differentiate between discretionary and nondiscretionary or ministerial actions, their inability over the intervening years to distinguish them led to a maze of confusion in the cases.[7] Because judgment, choice, or discretion is present in virtually all human activity, the issue is how to draw a line between activities that are discretionary and those that are nondiscretionary. Although the courts have attempted to provide guidelines, drawing the line is the problem the courts confront when trying to define what is discretionary.[8]

The inquiry into the breadth and meaning of discretionary functions must begin with a discussion of two federal cases that are the foundation of the remaining

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[1] 28 U.S.C. § 2680.

[2] 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), *on remand*, 932 F.2d 376 (5th Cir. 1991).

[3] Gaubert, 111 S. Ct. at 1274.

[4] *Id.*

[5] *Id.*

[6] "The retention of sovereign and municipal immunity for discretionary functions stems from the separation of powers doctrine." Mahan v. N.H. Dep't of Admin. Servs., 141 N.H. 747, 693 A.2d 79, 82 (1997).

[7] At the core of this confusion is the fact that virtually all human activity involves some element of choice, judgment, or discretion. As the court stated in *Smith v. United States,* 375 F.2d 243 at 246 (5th Cir. 1967), *cert. denied*, 389 U.S. 841, 19 L. Ed. 2d 106, 88 S. Ct. 76 (1967) "[m]ost conscious acts of any person whether he works for the government or not, involve choice. Unless government officials…make their choices by flipping coins, their acts involve discretion in making decisions." As explained in *Sava v. Fuller*, 249 Cal. App. 2d 281, 57 Cal. Rptr. 312 (1967), all human activity involves some element of discretion: "He who says that discretion is not involved in driving a nail has either never driven one or has a sore thumb, a split board, or a bent nail as the price of attempting to do so."

[8] Federal cases are collected in *Claims Based on Construction and Maintenance of Public Property as Within Provision of 28 U.S.C. 2680(a) Excepting from Federal Tort Claims Act Claims Involving "Discretionary Function or Duty,"* 37 A.L.R. FED. 537.

case law: *Dalehite v. United States*[9] and *Indian Towing Co. v. United States*.[10] In *Dalehite,* damages were sought for the death of Henry G. Dalehite caused by the explosion of fertilizer at Texas City, Texas, in 1947. There were 300 separate personal injury and death and property claims aggregating $200 million. The suit alleged negligence on the part of the entire body of federal officials and employees involved in a program of production of the material FGAN, which had a basic ingredient, ammonium nitrate, long used as a component in explosives. Certain deactivated ordnance plants were designated for the production of the fertilizer. Numerous federal agencies were involved in the planning and operation of the program for which there was a completely detailed set of specifications. The FGAN involved in the disaster had been consigned to the French Supply Council and, after warehousing at Texas City for 3 weeks, was loaded on two ships destined for France. Due to an uncontrollable fire in one of the ships, both ships exploded, leveling much of Texas City and killing many inhabitants.

Because no individual acts of negligence could be shown, the suit was predicated on three areas of alleged negligence of the United States Government: (1) carelessness in drafting and in adopting the fertilizer export plan as a whole, (2) negligence in various phases of the manufacturing process, and (3) official dereliction of duty in failing to police the shipboard loading. The Government contended that the acts in question were protected by the discretionary function exemption of the FTCA.

The U.S. Supreme Court held that the decisions pertinent to the fertilizer program were discretionary, and that the discretion did not end with the initial decision to implement the fertilizer program:

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act 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 and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be held actionable.[11]

The *Dalehite* Court reviewed the numerous decisions involved in the production of FGAN and found each one to be discretionary and exempt. Specifically, the following decisions were discretionary: (a) the cabinet-level decision to institute the fertilizer export program;[12] (b) the need for any further investigation into FGAN's combustibility;[13] (c) the drafting of the basic plan of manufacture, including the bagging temperature of the mixture, type of bagging, and special coating of the mixture;[14] and (d) the failure of the U.S. Coast Guard to regulate and police the storage of the FGAN in some different fashion.[15]

The alleged negligent acts were held to have been performed under the direction of a "plan developed at a high level under a direct delegation of plan-making authority from the apex of the Executive Department."[16] The Court found that the decisions were made with knowledge of the factors and risks involved and were based on previous experience with the materials and on judgment requiring consideration of a vast spectrum of factors. There were no acts of negligence in carrying out the plan insofar as the production and shipment of the material. Rather, the basis of the suit rested on charges that the plan itself had been defective. The Court held, in language that later evolved as a widely used test in federal and state courts, that these decisions "were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicality of the Government's fertilizer program."[17]

A dissenting opinion, written by Justice Jackson, in taking issue with the majority's construction of the term discretionary, argued that the discretionary function exemption is not based on who did the thinking or at what level,[18] but on the nature of the discretionary activity. Moreover, Justice Jackson stated that the governmental decisions involved were not "policy decisions," but were more akin to those considerations given to bagging or labeling by an ordinary manufacturer, which would not be immune. Indeed, the minority opinion's position, that "a policy adopted in the exercise of an immune discretion was carried out carelessly by those in charge of detail,"[19] would later become the basis of liability in many tort suits at both the federal and state levels. Courts would later hold

[9] 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953), *reh'g denied*, 346 U.S. 841, 880, 74 S. Ct. 13, 117, 98 L. Ed. 362, 386, 347 U.S. 924, 74 S. Ct. 511, 98 L. Ed. 1078 (1954), *explained in* United States v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 81 L. Ed. 2d 660, 104 S. Ct. 2755 (1984) ("It follows that the acts of FAA employees in executing the 'spot check' program in accordance with agency directives are protected by the discretionary function exception as well." 104 S. Ct. at 2768.).

[10] 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955) (*not followed by* K.W. Thompson Tool Co. v. United States, 836 F.2d 721,726 (1st Cir. 1988); ("It is fair to conclude that Indian Towing should no longer play a role in determining the application of section 2680(a); Dalehite and Varig are now the beacon cases.").

[11] Dalehite, 346 U.S. at 35–36.

[12] *Id.* at 37.

[13] *Id*. at 36–37.

[14] *Id*. at 38–42.

[15] *Id*. at 42–43.

[16] *Id.* at 40.

[17] *Id*. at 42.

[18] The minority stated that it would not predicate liability on whether a decision is taken at "Cabinet level" or at any other "high altitude." 346 U.S. at 57.

[19] Dalehite, 346 U.S. at 58.

that, after a decision protected by the exemption has been made, negligence in implementing that decision is not protected by the discretionary function exemption.[20]

In *Dalehite,* the operational-planning test began to emerge: decisions made at the "planning level" were discretionary and those made at the "operational level" were not.

Indian Towing, supra, involved a different section of the FTCA and did not purport to modify the *Dalehite* doctrine, which came to be labeled in federal and state cases as the "operational-planning level" test. In *Indian Towing* the petitioners sought damages under the FTCA arising out of the alleged negligent operation by the U.S. Coast Guard of a lighthouse light. The specific acts of negligence relied upon were the failure of the responsible Coast Guard personnel to check the system that operated the light and to repair or give warning of the light's failure to operate.[21]

The Government and the Court assumed that the acts involved were committed at the operational level and that the discretionary exemption was not at issue; however, the language of the *Indian Towing* decision contributed significantly to the narrowing of the *Dalehite* holding:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning.[22]

In explaining the operational-planning level dichotomy, one federal court wrote:[23]

> In a strict sense, every action of a government employee, except perhaps a conditioned reflex action, involves the use of some degree of discretion. The planning level notion refers to decisions involving questions of policy; that is, the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy. For example, courts have found that a decision to reactivate an Air Force Base[24]…or to change the course of the Missouri River[25]…or to decide whether or where a post office building should be built[26]…are on the planning level because of the necessity to evaluate policy factors when making those decisions. The operational level decision, on the other hand, involves decisions relating to the normal day-by-day operations of the government. Decisions made at this level may involve the exercise of discretion but not the evaluation of policy factors. For instance, the decision to make low-level plane flights to make a survey[27]…or the operation of an air traffic control tower[28]…, or whether a handrail should be installed as a safety measure at the United States Post Office in Madison, Wisconsin,[29] involve the exercise of discretion but not the evaluation of policy factors.
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> The discretionary function exemption applies when the plaintiff claims that conduct at the planning level is the cause of his injuries. Conversely, the exception does not apply when the plaintiff complains of conduct at the operational level, even though such conduct is required for the execution of a planning level decision.

The operational-planning level test, which looked to the echelon of the official, rather than to the discretionary nature of his or her conduct, was useful as a general guide but seemed unsound as a conclusive test for application of the exception.[30] Consequently, some circuits questioned the use of the operational-planning level test, suggesting that this aid tended to obscure the meaning of the exception.

In *United States v. Varig Air Lines,*[31] the question was whether the certification by the Federal Aviation Administration of the airworthiness of private aircraft

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[20] More recent cases citing the *Indian Towing* holding include: Good v. Ohio Edison Co., 149 F.3d 413, 420 (6th Cir. 1998); Dorking Genetics v. United States, 76 F.3d 1261, 1266 (2d Cir. 1996); and Hetzel v. United States, 43 F.3d 1500, 1504 (D.C. Cir. 1995). The Supreme Court's decision in *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955) rejected the *Dalehite* minority's position that decisions involving uniquely or purely governmental functions, which private persons or corporations do not or are unable to perform, such as the providing and maintaining of armed forces, were discretionary and that any negligence committed in the execution of these purely governmental functions would be protected by the discretionary function exemption. Thus, it does not matter whether the alleged negligence, for purposes of the exemption, occurred during the performance of governmental or proprietary activity.

[21] Indian Towing Co. v. United States, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955).

[22] Indian Towing Co., 350 U.S. at 69.

[23] Swanson v. United States, 229 F. Supp. 217, 219–220 (N.D. Calif. 1964).

[24] United States v. Hunsucker, 314 F.2d 98 (9th Cir. 1962).

[25] Coates v. United States, 181 F.2d 816 (8th Cir. 1950).

[26] American Exchange Bank of Madison, Wisconsin v. United States, 257 F.2d 938 (7th Cir. 1958).

[27] Dahlstrom v. United States 228 F.2d 819 (8th Cir. 1956).

[28] Eastern Air Lines v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955), *rev'd*, 350 U.S. 907, 100 L. Ed. 796, 76 S. Ct. 192 (1955), *modified, remanded*, 350 U.S. 962, 100 L. Ed. 835, 76 S. Ct. 429 (1956), *appeal after remand*, 99 U.S. App. D.C. 205, 239 F.2d 25 (1956), *cert. denied,* 353 U.S. 942, 1 L. Ed. 2d 760, 77 S. Ct. 816 (1957).

[29] American Exchange Bank of Madison, Wisconsin v. United States, 257 F.2d 938 (7th Cir. 1958).

[30] 2 LESTER S. JAYSON, HANDLING FEDERAL TORT CLAIMS § 12.05.

[31] United States v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 81 L. Ed. 2d 660, 104 S. Ct. 2755 (1984), *reh'g denied*, United States v. United Scottish Ins. Co., 468 U.S. 1226, 82 L. Ed. 2d 919, 105 S. Ct. 26 (1984) *and on remand*, S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) v. United States, 744 F.2d 1387 (9th Cir. 1984).

constituted an activity immunized by the discretionary exemption of the FTCA. In holding that the certification process fell within the umbrage of 28 U.S.C. § 2680, the Court took note of the existing lack of certainty by various lower courts concerning the proper interpretation of the discretionary exemption and took pains to reaffirm its holding in *Dalehite:*

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form the basis for suit under the Tort Claims Act 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 and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.[32]

The Court stated that "[a]s in *Dalehite,* it is unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception."[33] It was possible, however, to isolate certain factors "useful in determining when the acts of a Government employee are protected from liability by § 2680(a)."[34] The Court identified two such factors:

> First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case.… Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the government acting in its role as a regulator of the conduct of private individuals.[35]

The Court stated that the underlying basis for the discretionary function exception was that

> Congress wished to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. By fashioning an exception for discretionary governmental functions…Congress took "steps to protect the Government from liability that would seriously handicap efficient government operations."[36] (Citations omitted.)

The Court had an opportunity in *Varig* either to disavow or to limit the operation of the planning-operational dichotomy. The fact that the Court did not suggests that the decision in *Varig* did not strike a serious blow to the use of this somewhat mechanistic device to separate discretionary from nondiscretionary activities. The lower federal court cases decided after *Varig* generally interpreted the decision as reaffirming the validity of the planning-operational test.[37]

However, importantly, the Court in *Varig* rejected the argument that planning-level activities can only take place at the highest levels of government; the Court wrote that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case."[38] The Court added: "Thus, the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability."[39]

Thus, the decision in *Varig* did much to clarify the confusion caused by *Indian Towing* concerning the status of the planning-operational test; it also served to dispel the misapprehension caused by *Dalehite* that the level of decision-making is a controlling factor in determining the applicability of the discretionary function exception. The *Varig* Court, however, also held that for decision-making to be discretionary in nature, the activity must be grounded on considerations of "social, economic, and political policy."[40]

Another significant case in the l980s is *Berkovitz v. United States.*[41] *Berkovitz* was an action against the United States to recover damages for the licensing and approval for the release of a polio vaccine that in fact caused the disease to be contracted. In holding that § 2680(a) of the FTCA was inapplicable to the facts of the case, the Court reviewed its prior opinions relating to the discretionary function exception, which it deemed to be of special significance and relevance. Because of the "summing-up" nature of the opinion in *Berkovitz,* it is worth quoting some of it:

> The determination of whether the discretionary function exception bars a suit against the Government is guided by several established principles. This Court stated in *Varig* that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case".… In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary

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[32] 104 S. Ct. at 2763, *quoting* Dalehite v. United States, 346 U.S. at 35-36.

[33] United States v. Varig Airlines, 104 S. Ct. at 2764.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 2765 *quoting* United States v. Muniz, 374 U.S. 150, 163, 83 S. Ct. 1850, 1858, 10 L. Ed. 2d 805 (1963).

[37] In *Ala. Elec. Coop., Inc. v. United States,* 769 F.2d 1523, 11th Cir. 1985), the court stated: "In our opinion *Varig Airlines* supports the planning/operational distinction developed by the lower courts in cases subsequent to *Dalehite,*" *adding* that planning level decisions are those that involve "the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy," whereas operational level decisions are those involving "normal day-by-day operations of the government." 769 F.2d at 1527–28.

[38] Ala. Elec. Coop., Inc., 769 F.2d at 1527, quoting from Varig Airlines, 104 S. Ct. at 2765.

[39] *Id.*

[40] *Id.* at 1531, *quoting* Varig Airlines, 104 S. Ct. at 2765.

[41] 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988).

> unless it involves an element of judgment or choice. See *Dalehite* v. *United States*…(stating that the exception protects "the discretion of the executive or the administrator to act according to one's judgment of the best course"). Thus, the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect. *Cf. Westfall v. Erwin*…(recognizing that conduct that is not the product of independent judgment will be unaffected by threat of liability).
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> Moreover, assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield. The basis for the discretionary function exception was Congress' desire to "prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. Varig Airlines*.... The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy. See *Dalehite v. United States*…("Where there is room for policy judgment and decision there is discretion"). In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment.[42]

In *United States v. Gaubert*,[43] the Court made it clear that the exercise of immune discretion is not confined to the so-called policy or planning level. In *Gaubert,* a federal tort claims action arose as the result of the supervision by federal regulators of a federally insured savings and loan. Gaubert was the thrift's chairman and largest shareholder. Gaubert's action sought damages for the alleged negligence of federal officials in selecting the new officers and directors for and in participating in the day-to-day management of the thrift. The question was whether the regulators' actions fell within the discretionary function exception and were protected. The district court found that all of the regulators' actions fell within the discretionary function exception and dismissed.

The Court of Appeals for the Fifth Circuit held that, although the federal regulators "did not have regulations telling them, at every turn, how to accomplish their goals for the [thrift], …the officials were only protected by the discretionary function exception until their actions became operational in nature and thus crossed the line in *Indian Towing*."[44]

The appellate court affirmed the district court's dismissal of the claims that concerned the merger that the federal agents instituted, the agreement they arranged removing Gaubert from the thrift's management, the personal guarantee that Gaubert gave at their behest, and the replacement of the thrift's management that the agents arranged. However, the court reversed the dismissal of the claims that concerned the regulators' activities after they assumed a supervisory role in the thrift's day-to-day affairs.

The U.S. Supreme Court reviewed the prior precedents, such as *Dalehite*, *Varig Airlines,* and *Berkovitz*, and summarized the effect of the discretionary function exception where there are regulations that guide the federal employee's actions:

> [1] Under the applicable precedents…if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation.…
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> [2] If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy.
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> [3] On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.[45]

The Court observed that the employee's conduct may not always be guided by specific regulations, but stated that "it will most often be true that the general aims and policies of the controlling statute will be evident from its text."[46]

In significant language, the Court laid down a broad definition of immune discretion under the FTCA:

> When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.[47]

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[42] Berkowitz, 108 S. Ct. at 1958–59.

[43] 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), *on remand*, 932 F.2d 376 (5th Cir. 1991), *among conflicting authorities noted in* Wright v. United States, 868 F. Supp. 930 (E.D. Tenn. 1994) (holding that Forest Service's decision not to cut tree fell within discretionary function exception of the FTCA), *aff'd* 1996 U.S. App. LEXIS 12438 (6th Cir. Apr. 11, 1996), *and criticized in* Tseu ex rel. Hobbs v. Jeyte, 88 Haw. 85, 962 P.2d 344, 348 (1998).

[44] Gaubert, 111 S. Ct. at 1273.

[45] *Id.* at 1274.

[46] *Id.*

[47] *Id.* at 1274–75.

In reversing the Fifth Circuit, the Supreme Court held that the discretionary function exception extends to "decisions made at the operational or management level…." Discretion involves choice or judgment, which are not limited "exclusively to policymaking or planning functions."[48] The Court stated that there was "no suggestion [in *Dalehite*] that decisions made at an operational level could not also be based on policy."[49] The Court distinguished *Indian Towing* on the basis that "making sure the [lighthouse] light was operational 'did not involve any permissible exercise of policy judgment.'"[50]

In reviewing the specific, alleged day-to-day actions of the regulators of which Gaubert complained, the Court noted that there were no "formal regulations governing the conduct in question"; thus, "[t]he relevant statutory provisions were not mandatory, but left to the judgment of the agency the decision of when to institute proceedings against a financial institution and which mechanism to use."[51] The regulations did not prohibit the use of supervisory mechanisms, in lieu of formal proceedings, such as the ones employed by the federal regulators.[52] Moreover, not only did the Federal Home Loan Bank Board policy appear to sanction such measures on a case by case basis, but also "the challenged actions involved the exercise of choice and judgment."[53]

Again, in important language, the Court, dismissing Gaubert's complaint as alleging "nothing more than negligence on the part of the regulators,"[54] wrote:

> If the routine or frequent nature of a decision were sufficient to remove an otherwise discretionary act from the scope of the exception, then countless policy-based decisions by regulators exercising day-to-day supervisory authority would be actionable. This is not the rule of our cases.... [F]rom the face of the amended complaint, it is apparent that all of the challenged actions of the federal regulators involved the exercise of discretion in furtherance of public policy goals....[55]

In sum, since the *Gaubert* decision, the federal test for determining whether a decision is protected by the discretionary function exemption is not the level of the decision-maker but rather the discretionary nature of the decision itself.

A.3. State Cases Construing a Provision in State Tort Claims Acts Exempting Discretionary Activity

One of the earliest state court cases (subsequent to the enactment of the FTCA) to examine the nature of discretionary immunity was *Weiss v. Fote,*[56] decided by the New York Court of Appeals. The *Weiss* court, however, did not have a specific provision in a tort claims act providing for discretionary immunity; nevertheless, the *Weiss* court held that the government's alleged negligence was discretionary and protected from liability. In holding that the determination of the Board of Safety of the City of Buffalo regarding the length of the clearance interval in a traffic light was an immune, discretionary decision, the Court of Appeals was first faced with the fact that the New York statute waiving sovereign immunity to suit contained no provision excluding from liability discretionary decision-making by a governmental body. In reading immunity for such decision-making into the statute, the court said:

> Lawfully authorized planning by governmental bodies has a unique character deserving of special treatment as regards the extent to which it may give rise to tort liability. It is proper and necessary to hold municipalities and the State liable for injuries arising out of the day-by-day operations of government—for instance, the garden variety injury resulting from the negligent maintenance of a highway—but to submit to a jury the reasonableness of the lawfully authorized deliberations of executive bodies presents a different question.... To accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexpert hands what the Legislature has seen fit to entrust to experts. Acceptance of this conclusion, far from effecting revival of the ancient shibboleth that "the king can do no wrong," serves only to give expression to the important and continuing need to preserve the pattern of distribution of governmental functions prescribed by constitution and statute.[57]

The court's decision, which read discretionary immunity into the statute, was based on (1) constitutional requirements concerning the separation of powers, and (2) the common law rule of immunity for the discretionary acts of governmental entities. The decision of the New York Court of Appeals in this respect has had wide influence on the decisions of other courts of last resort faced with the issue of the nature of discretionary immunity.[58]

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[48] *Id.* at 1275.

[49] *Id.*

[50] *Id.*, *citing* Berkovitz, 486 U.S. at 538, n.3.

[51] *Id.* at 1277.

[52] *Id.*

[53] *Id.* at 1278.

[54] *Id.* at 1279.

[55] *Id.*

[56] 7 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.E.2d 63 (1960), *reh'g denied,* 8 N.Y.2d 934, 204 N.Y.S.2d 1025 (1960).

[57] Weiss, 200 N.Y.S.2d at 413. (Citations omitted).

[58] In the following cases, however, the New York courts denied immunity, because the evidence established that the planning for the installation of the particular guardrails in question was grounded on inadequate study and lacked a reasonable basis: Van Son v. State, 116 A.D.2d 1013, 498 N.Y.S.2d 938 (1986) (passenger drowned when car broke through a guardrail and fell into the river) and Zalewski v. State, 53 A.D.2d 781, 384 N.Y.S.2d 545 (1976) (posts were made of highly brittle cast aluminum alloy and discontinuous rails used could not absorb and distribute vehicle impact).

Another important case is *Johnson v. State,*[59] decided by the Supreme Court of California. Unlike the *Weiss* case, *Johnson* involved the construction of a statutory provision exempting discretionary activity on the part of the government from liability. The California statute[60] provided in relevant part that "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." The statute also immunized governmental entities "where the employee is immune from liability" and hence insulated the State (with certain exceptions) against liability to the same extent as a public employee.

In *Johnson*, the plaintiff sought damages from the State for its failure to give adequate warning of the homicidal tendencies of a 16-year-old youth the State placed in a foster home. In holding that the State was not immunized by the above provision of the statute, the court first rejected a semantic approach to the applicability of the discretionary function exception. The court pointed out that a distinction between the words "discretionary" and "ministerial" based on linguistics or lexicography will not work, because virtually all ministerial activity involves the exercise of discretion. The court stated that the purpose of the statutory provision for discretionary immunity was to assure "judicial abstention in areas in which the responsibility for *basic policy decisions* has been committed to coordinate branches of government."[61] (Emphasis supplied by the court.) The court added that "[a]ny wider judicial review, we believe, would place the court in the unseemly position of determining the propriety of decisions expressly entrusted to a coordinate branch of government."[62] Thus, the exception was said to be based on the constitutional separation of powers, which compels the courts to abstain from review of determinations made by a coordinate branch of government that involve "basic policy decisions."[63]

The court recognized that "this interpretation of the term 'discretionary' presents some difficulties."[64] It stated that

> our interpretation will necessitate delicate decisions; the very process of ascertaining whether an official determination rises to the level of insulation from judicial review requires sensitivity to the considerations that enter into it and an appreciation of the limitations on the court's ability to reexamine it. Despite these potential drawbacks, however, our approach possesses the dispositive virtue of concentrating on the reasons for granting immunity to the governmental entity. It requires us to find and isolate those areas of quasi-legislative policy-making which are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision.[65]

The California Supreme Court held that the statutory provision for discretionary immunity related exclusively to determinations made by a coordinate branch of government that involve basic policy decisions.[66]

Another decision that had wide influence is one by the Supreme Court of Washington in *Evangelical United Brethren Church of Adna v. State.*[67] This decision, as the one in *Weiss,* involved the interpretation of a statute waiving immunity but not containing an express exception for discretionary activities. A 14-year-old boy escaped from the custody of a state-maintained correctional institution and thereafter caused the destruction of the Evangelical United Brethren Church by setting it afire. The action charged that the State was negligent in applying only minimum security measures in the detention of the youth when it knew or should have known that the youth was a pyromaniac.

The court held that the State was protected by the rule of discretionary immunity. The court noted that states waiving immunity to suit in tort litigation had provided either a judicial or statutory exception for governmental activities discretionary in nature. It stated: "The reason most frequently assigned is that in any organized society there must be room for *basic governmental policy decision* and the implementation thereof, unhampered by the threat or fear of sovereign tort liability...."[68] (Emphasis added.)

The court laid down a four-pronged test to determine the applicability of discretionary immunity:

> Whatever the suitable characterization or label might be, it would appear that any determination of a line of demarcation between truly discretionary and other executive and administrative processes, so far as susceptibility to potential sovereign tort liability be concerned, would necessitate a posing of at least the following four preliminary questions: (1) Does the challenged act, omission, or decision necessarily involve a *basic governmental policy,* program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of *basic policy evaluation,* judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged

[59] 69 Cal. 2d 782, 73 Cal. Rptr. 240, 447 P.2d 352 (1968).

[60] CAL. GOV'T CODE § 820.2.

[61] Johnson, 447 P.2d at 360.

[62] *Id*.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Cf.* The decisions of the U.S. Supreme Court in Varig and Berkovitz reaching exactly the same conclusion regarding the comparable provisions of the FTCA.

[67] 67 Wash. 2d 246, 407 P.2d 440 (1965). *Reh'g denied* 1966.

[68] Evangelical United Brethren, 407 P.2d at 444.

> act, omission, or decision? If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a discretionary governmental process and non-tortious, regardless of its unwisdom.[69] (Emphasis added.)

Thus, in *Evangelical United Brethren*, the court reached a conclusion similar to the decisions in *Varig, Berkovitz,* and *Johnson:* discretionary immunity relates solely to decision-making by a governmental entity that involves the evaluation of broad policy factors and considerations.

The Supreme Court of Florida adopted the foregoing line of reasoning in *Commercial Carrier Corporation v. Indian River County*.[70] Florida, as New York and Washington, passed legislation waiving immunity to suit in tort without including an exemption for discretionary activity. The case involved a collision at an unmarked intersection where there previously had been a Stop sign and the word "Stop" painted on the pavement prior to the intersection. The defendant allegedly was negligent in failing to replace the downed or missing sign and to repaint the worn pavement surface signing. The State defended on the ground, *inter alia,* that the omissions were an exercise of discretion by government officials and employees, which were exempt from the statute waiving immunity.

The court held that the State was liable to suit on the facts before it but read an exception for discretionary immunity into the act. The court, relying heavily on the decisions in *Weiss* and *Evangelical United Brethren,* adopted the four-pronged test in *Evangelical United Brethren*. The court stated that "we are persuaded by these authorities that even absent an express exception…for discretionary functions, certain *policy-making*...governmental functions cannot be the subject of traditional tort liability."[71] (Emphasis added.)

The decision in *Commercial Carrier* is also significant because it is more recent than most other state supreme court decisions in which the nature of discretionary immunity was presented *de novo*. The Florida court was able to review considerable precedent in reaching a decision. It chose to adopt the reasoning that the discretionary function exception relates solely to "policy-making" decisions of a coordinate branch of government.

The above cases, of course, were decided prior to *United States v. Gaubert*, *supra*; thus, it is important to note that since *Gaubert* some state courts, as well as the D.C. Court of Appeals, have cited and followed *Gaubert*.[72] For example, in *Aguehounde v. District of Columbia,*[73] involving a claim by a pedestrian struck at an intersection controlled by a traffic signal, the court held that the setting of signal lights was an exercise of discretion. The plaintiff argued that the light interval decision "involved purely engineering calculations," thus making it a ministerial act, and that "to establish immunity, the government must produce evidence that 'social, political or economic considerations entered into the timing of the clearance interval'" at the intersection.[74]

The Court of Appeals disagreed:

> Our case law suggests, however, that the proper inquiry is not: what concerns were actually balanced in each individual's act? Instead, we should ascertain whether the type of function at question is grounded in policy analysis. See, e.g., *United States v. Gaubert*…. Just as the length of yellow intervals is part of the overall traffic design, it is part of the overall policy of determining traffic flow in the District.[75]

The Court of Appeals, citing prior precedent in the District of Columbia, observed that where "an employee fails to follow an established policy, because the existence of a set policy means that all discretion has been removed from the employee, …the employee's actions would…be ministerial."[76] After "[f]inding that the setting of yellow intervals is a discretionary function,"[77] the court next turned to the question of whether there was a specific or mandatory directive for employees to follow in setting the timing interval.[78] The court, finding none, concluded that any mismeasurement was therefore irrelevant.[79] "The question of negligence has no relevance until it is established that an act was ministerial."[80] Thus, the Court of Appeals concluded that because the District had no mandatory policy in place for determining signal intervals, the District's employees, using a timing guide for intervals, were exercising immune discretion.

Another case makes it clear also that decisions can be based on policy and protected from liability no matter the level at which they are made. The case of *Rick v. State Department of Transp. & Dev.*,[81] a wrongful death action arising out of the collision between a car and a train at a railroad crossing, illustrates that the language of "operational" negligence, however, still

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[69] *Id.* at 445.

[70] 371 So. 2d 1010 (Fla. 1979), *on remand*, 372 So. 2d 1022 (Fla. Dist. Ct. App. 3d Dist., *appeal after remand*, 398 So. 2d 488 (Fla. Dist. Ct. App. 3d Dist. 1981), *and on remand*, Cheney v. Dade County, 372 So. 2d 1182 (Fla. Dist. Ct. App. 3d Dist. 1979).

[71] Commercial Carrier Corp., 371 So. 2d at 1020.

[72] Trujillo v. Utah Dep't of Transp., 1999 Ut. App. 227, 986 P.2d 752, 1999 Utah App. LEXIS 104 (1999); Tseu ex rel. Hobbs v. Jeyte, 88 Haw. 85, 962 P.2d 344 (1998); and Rick v. State Dep't of Transp. & Dev., 630 So. 2d 1271 (La. 1994).

[73] 666 A.2d 443 (D.C. App. 1995).

[74] Aguehounde, 666 A.2d at 449.

[75] *Id.* at 449–50.

[76] *Id.* at 450.

[77] *Id.* at 451.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 453 (Citations omitted).

[81] 630 So. 2d 1271 (La. 1994).

persists, even though the court cited the *Gaubert* case. The Supreme Court of Louisiana noted that the discretionary function exception involves a two-step analysis:

> First, a court must determine whether the action is a matter of choice. If no options are involved, the exception does not apply. If the action involves selection among alternatives, the court must determine whether the choice was policy based. Decisions at an operational level can be discretionary if based on policy. *U.S. v. Gaubert*....[82]

However, the court concluded that the crossing in question "was not selected for earlier upgrade, because the DOTD negligently assigned it a low hazard index.... Using 1974 data to formulate a 1986 hazard index was not a policy decision. It was operational negligence on the part of the DOTD."[83]

Some state courts continue to apply the planning-operational test of discretion, sometimes without even mentioning the *Gaubert* case,[84] and the Supreme Court of Utah expressly declined to embrace the *Gaubert* decision in *Trujillo v. Utah Dept. of Transp.*[85] In *Trujillo,* the court ruled that the transportation department's formulation of a traffic control plan to use barrels rather than barriers at an accident location was not a policy-level decision.[86] Moreover, the court held that the failures to reduce speed in a construction zone as called for in the construction plan, to investigate accidents, or to consider corrective action in response to notice of a dangerous condition were all operational-level activities.[87] Another court has stated that if the "work involved no marshaling of state resources, no prioritizing of competing needs, no planning, and no exercise of policy-level discretion," then the activity is likely to be held to be ministerial in nature.[88] In *Tseu ex rel. Hobbs v. Jeyte*,[89] the court stated that it had never adopted the reasoning in *Gaubert*, and it would be "directly contrary to its previous holdings on the discretionary function exception under Hawaii law to do so."[90]

In sum, the transportation department's counsel should be aware that some state courts have not embraced *Gaubert* or have rejected its holding. Possibly other state courts have not been made aware of the reasoning in *Gaubert*. In any event, counsel will want to cite *Gaubert* and argue that immune discretion may be exercised at the so-called operational level and that a planning-operational level test of discretion does not apply or should no longer be applied in construing a provision in a state tort claims act for discretionary immunity. If the state court adopts the *Gaubert* decision, it may be possible to immunize more actions that are discretionary in nature but that occur at the so-called operational level.

B. APPLICATION TO HIGHWAY DESIGN OF AN EXEMPTION FOR DISCRETIONARY ACTIVITY

B.1. Introduction

This section considers whether transportation departments may claim immunity for all decisions involving the planning and designing of projects, even if the approved plan or design contains a defective feature or omits a feature that should have been included. Although some courts recognize that design generally involves the consideration of broad policy factors protected by the discretionary function exemption, there are exceptions to immunity where, for example, the plan or design was approved without due deliberation or study, or where it was unreasonable or arbitrary.

If the plan proves to be dangerous later, such as when there are changed physical conditions that render an approved plan or design defective, then the state may have a duty to remedy the unsafe condition or to give adequate notice to the traveling public. In some states, the legislatures have enacted design immunity statutes, but the statutes may not afford the state absolute protection for its design of public property.

Consistent with the language in *Dalehite* that "it is not a tort for government to govern";[91] it has been held that generally (a) the decision to build a highway and (b) the approval of a plan or design of a highway are not actionable.[92] Since the U.S. Supreme Court's deci-

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[82] Rick, 630 So. 2d at 1276.

[83] *Id.* The trial court's verdict that the DOTD was liable was affirmed.

[84] Taylor-Rice v. State, 979 P.2d 1086, 1104, 1999 Haw. LEXIS 258 (1999) (failure to replace a guardrail was operational-level act with no mention of Gaubert); State v. San Miguel, 981 S.W.2d 342, 348-49, 1998 Tex. App. LEXIS 4668 (Tex. App., Houston, 1998) (decision to warn of a missing railing held to be discretionary; decision to use a particular type of barricade held to be not discretionary); State v. Livengood, 688 N.E.2d 189, 196, 1997 Ind. App. LEXIS 1569 (1997) (design and installation of replacement of a portion of a guardrail to comply with a safety standard was operational level task and not immune); and Schroeder v. Minnesota, 1998 Minn. App. LEXIS 1436 (1998) (decision to patch pavement where it met a bridge was operational level activity).

[85] 1999 Utah App. 227, 986 P.2d 752, 1999 Utah App. LEXIS 104 (Utah 1999).

[86] Trujillo, 986 P.2d at 762.

[87] *Id.*

[88] Defoor v. Evesque, 694 So. 2d 1302, 1306 (Ala. 1997).

[89] 88 Haw. 85, 962 P.2d 344, 348 (1998).

[90] *Id. See also* Trujillo v. Utah Dep't of Transp., 1999 Utah App. 227, 986 P.2d 752, 760, n.2, 1999 Utah App. LEXIS 104 (Utah 1999) (The appellate court rejected the Gaubert analysis, holding that the U.S. Supreme Court's interpretation of the discretionary function exemption in the FTCA was not binding on Utah's interpretation of its tort claims act and ruling that the court would continue to follow the planning/operational dichotomy.).

[91] *Supra* note 9.

[92] *Liability of Governmental Entity or Public Officer for Personal Injury or Damages Arising Out of Vehicular Accident Due to Negligent or Defective Design of a Highway*, 45 A.L.R. 3d 875

sion in *United States v. Gaubert*, it is possible that some state courts will be even more receptive to the view that "[w]hen established governmental policy…allows a government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion,"[93] meaning that the agent's alleged negligence in exercising his or her discretion is immune from liability.

B.2. Immunity for Negligent Design Based on a Statutory Exemption for Discretionary Activity

If there is one area of highway activity that may be considered to be generally immune as a protected exercise of discretion, it is the one of highway design. Whether pre- or post-*Gaubert*, there are numerous examples of governmental actions held to be discretionary, including the approval of highway designs and specifications,[94] the decision to adhere to a former design during highway reconstruction,[95] or decisions regarding the inclusion of barriers.[96] The discretionary function exemption of the FTCA[97] was held to preclude liability of the United States for a bridge design in *Wright v. United States*.[98] In *Summer v. Carpenter*,[99] the Supreme Court of South Carolina held that "[a]s for negligent design, the [Tort Claims] Act provides absolute governmental immunity from liability for loss resulting from the design of highways and other public ways."[100] In that case, the court held the department would be immune even if it had been on notice that the design of the intersection was dangerous.[101] Other cases have found that the transportation department had design immunity for various reasons.[102]

If the court extends immunity only to decisions that involve "broad policy considerations," then it is possible that a design feature may not be protected. For example, in *Breed v. Shaner,*[103] the State was alleged to have been negligent in the design of the highway. The Supreme Court of Hawaii ruled that not all aspects of the design function fall within the exempt planning stage. After noting that the purpose of the discretionary exemption is "to protect the decision-making processes of state officials and employees which require the evaluation of broad public policies,"[104] the court went on to state:

> The effect of the circuit court's order is to hold the designing of a highway always involves the evaluation of broad policy factors. This places total emphasis on protecting the State to the exclusion of those who sustain injuries proximately caused by the negligent design of a highway. Although broad policy considerations may be a factor in certain aspects of highway design we do not think the circuit court's generalization is correct.… [F]urther facts must be adduced on the record to show that the decision to include the curve or other design feature involved the evaluation of broad policy factors before the court can decide that the discretionary function exception applies.[105]

(§ 13 superseded by *Governmental Tort Liability as to Highway Median Barriers*, 58 A.L.R. 4th 559).

[93] United States v. Gaubert, 499 U.S. 315, 111 S. Ct. 1267, 1774, 113 L. Ed. 2d 335 (1991).

[94] Delgadillo v. Elledge, 337 F. Supp. 827 (E.D. Ark. 1972) (approval of designs and specifications was discretionary and, therefore, immune); Hughes v. County of Burlington, 99 N.J. Super. 405, 240 A.2d 177 (1968) (decision to omit emergency shoulders) *cert. denied*, 51 N.J. 575, 242 A.2d 379 (1968); Fitzgerald v. Palmer, 47 N.J. 106, 219 A.2d 512 (1966) (decision by the State not to design its overpasses with wire fences).

[95] Richardson v. State, Dep't of Roads, 200 Neb. 225, 263 N.W.2d 442 (1978), *supp. op*., 200 Neb. 781, 265 N.W.2d 457 (1978).

[96] Alvarez v. State, 79 Cal. App. 4th 720, 95 Cal. Rptr. 2d 719 720, 1999 Cal. App. LEXIS 1148 (1999) (design immunity not lost because of an absent barrier, although approved for eventual installation because of higher traffic volume) and Higgins v. State, 54 Cal. App. 4th 177, 62 Cal. Rptr. 2d 459, 1997 Cal. App. LEXIS 283 (1997) (upheld immunity for barrier because it was a design decision).

[97] 28 U.S.C. § 2680(a).

[98] 568 F.2d 153, 158 (10th Cir. 1977), *cert. denied,* 439 U.S. 824 (1978) ("[T]he [government] was engaged in a 'discretionary function' when it determined to aid and assist the State of Utah in the construction of the bridge and approach roads…") *and criticized by*: Alabama Elec. Coop., Inc. v. United States, 769 F.2d 1523 (11th Cir. 1985); Allen v. United States, 816 F.2d 1417 (10th Cir. 1987), *cert. denied,* 484 U.S. 1004, 98 L. Ed. 2d 647, 108 S. Ct. 694 (1988); and Ochran v. United States, 117 F.3d 495 (11th Cir. 1997), *reh'g, en banc, denied*, 136 F.3d 1333 (11th Cir. 1998).

[99] 328 S.C. 36, 492 S.E.2d 55, at 58 (1997), *reh'g denied,* (Oct. 21, 1997).

[100] S.C. CODE ANN. § 15-78-60 (15).

[101] Summer, 492 S.E.2d at 58. Certain wedging work at the intersection was relied upon to remove the claim from the protection of the statute, but the court held that the "circumstances indicate[d] the intersection was still under design and not subject to maintenance by the Highway Department." *Id.* at 60. There was, however, error in the trial judge's ruling that the department would have had discretionary immunity, because the evidence did not establish that the State considered various design options for the intersection and then selected one "after carefully weighing competing considerations." *Id.*

[102] Higgins v. State, 54 Cal. App. 4th 177, 62 Cal. Rptr. 2d 459, 465–66 (1997) (evidence established that absence of a median barrier was a design choice made by the State; no "changed circumstances" to defeat the State's immunity); Grenier v. City of Irwindale, 57 Cal. App. 4th 931, 67 Cal. Rptr. 2d 454 (2d Dist. 1997); Shand Mining, Inc. v. Clay County Board of Comm'rs, 671 N.E.2d 477 (Ind. Ct. App. 1996) (county entitled to immunity under a statutory provision dealing with a loss caused by the design of a highway if the loss occurs at least 20 years after the highway was designed where there was no evidence that the county had altered or redesigned the highway since then), *reh'g denied*, (Feb. 13, 1997), *transfer denied*, 683 N.E.2d 595 (Ind. 1997); and Cygler v. Presjack, 667 So. 2d 458 (Fla. App. 4th Dist. 1996) (summary judgment for the department affirmed; government not liable for failing to provide a traffic regulating or separating device or barrier).

[103] 57 Haw. 656, 562 P.2d 436 (1977).

[104] Breed, 562 P.2d at 442.

[105] *Id.* at 443.

Thus, the court held that only those aspects of design activity that involve broad policy considerations come within the ambit of the discretionary function exemption.[106] Similarly, although the court in *Japan Air Lines Co., Ltd. v. State*[107] drew a distinction between "decisions that are merely operational in nature" and those that involve planning or policy formulation, the court stated that "[a] design decision which does not require evaluation of broad policy factors does not come within the discretionary function exception."[108]

In *Stewart v. State*,[109] involving alleged defective lighting and improper design of a bridge, the Supreme Court of Washington stated that discretionary immunity is "an extremely limited exception"[110] to the general withdrawal of state tort immunity by the legislature.[111] The court identified decisions that involve broad policy considerations and that qualify for discretionary immunity, for example, the "decisions to build the freeway, to place it in this particular location so as to necessitate crossing the river, [and] the number of lanes…."[112] However, for the transportation department to be immune, it must show "that it considered the risks and advantages of these particular designs, that they were consciously balanced against alternatives, taking into account safety, economics, adopted standards, recognized engineering practices and whatever else was appropriate."[113]

Because of the absence of a clear showing that basic policy decisions were involved in the design of the bridge, the court decided that the design was indeed a proper subject of judicial review and that the issues regarding negligent design should have been submitted to the jury.[114]

Thus, courts in some cases have rejected the argument made under a state tort claims act's provision for discretionary immunity that all design activities are discretionary in nature.

[106] *Id.*

[107] 628 P.2d 934, 936 (Alaska 1981).

[108] Japan Airlines Co., 628 P.2d at 937.

[109] 92 Wash. 2d 285, 597 P.2d 101 (1979), *overruled in part on other grounds by* Crossen v. Skagit County, 100 Wash. 2d 355, 669 P.2d 1244 (1983) (decisions regarding the design and lighting of the bridge did not meet all requirements for immunity), *overruled in part on other grounds by* Crossen v. Skagit County, 100 Wash. 2d 355, 669 P.2d 1244 (1983) (jury instruction on county's duty need not refer specifically to MUTCD).

[110] Stewart, 597 P.2d at 106.

[111] WASH. REV. CODE ANN. § 4.92.090.

[112] Stewart, 597 P.2d at 106.

[113] *Id.* at 106–07.

[114] Andrus v. State, 541 P.2d 1117 (Utah 1975) (discretionary exemption of the Utah Tort Claims Act did not extend to negligence in the design of the highway), *criticized by* Colman v. Utah State Land Bd., 795 P.2d 622 (Utah 1990) (inverse condemnation under the Utah Constitution not subject to sovereign immunity limitations in Governmental Immunity Act).

B.3. Arbitrary or Unreasonable Decisions or Decisions Made Without Adequate Study or Deliberation

There are decisions in which the courts have held that transportation departments could not claim immunity, because there was inadequate study of the plan or design, or the approval of the plan or design was arbitrary or unreasonable.[115] In *Weiss v. Fote*,[116] although the court held that it would be improper to permit a jury to review the local Board of Safety's judgment as to the proper clearance interval for a traffic light, the court emphasized that its decision might have been different if the evidence had revealed that the government's decision was either arbitrary or unreasonable.[117] Nevertheless, the level of proof required to challenge the state's basis for approving a design with an alleged defective feature may be quite difficult to attain. As the court stated in *Hall v. State*:[118]

> the Claimant must show that the design was evolved and approved without adequate study, or that the design lacked a reasonable basis.… *The proof must establish that the plan could not have been adopted if due consideration had been given it*.... [T]o place liability on the State for a decision by a planning body, the Court of Appeals in *Weiss* required proof, not only that a reasonable man would have acted otherwise, but that the State used no reason at all.[119] (Emphasis supplied).

In *Hall,* the court allowed the plaintiff to go forward with proof of the cause of action for negligence under the stringent *Weiss* test.[120] The extent of the State's compliance with applicable design standards may be a factor in determining the reasonableness of the design for highways[121] or bridges.[122] The *Weiss v. Fote* opinion

[115] Romeo v. New York, 1997 N.Y. Misc. LEXIS 576 (1997) (State failed to conduct an adequate study of an intersection); *but see* Redcross v. State, 241 A.D.2d 787, 660 N.Y.S.2d 211, 1997 N.Y. App. Div. LEXIS 8080 (3d Dep't 1997) (placement of pedestrian control button was not plainly inadequate or lacking a reasonable basis).

[116] 7 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.E.2d 63 (1960) *reh'g denied,* 8 N.Y.2d 934 (1960), 168 N.E.2d, 857 *mot. granted*, 10 N.Y.2d 886 (1961).

[117] 167 N.E.2d at 66.

[118] 106 Misc. 2d 860, 435 N.Y.S.2d 663 (Ct. Cl. 1981).

[119] 435 N.Y.S.2d at 665.

[120] *Id.* at 666. The court concluded that the proper standard by which to judge the rendition of engineering services by the State was the same as the standard to which engineers in the private sector were held, "a malpractice standard of reasonable care and competence owed generally by practitioners in the particular profession."

[121] Patti v. State, 217 A.D.2d 882, 630 N.Y.S.2d 137, 138 (1995) ("The State demonstrated that, despite the fact that the barricades were not part of the original highway plan for this exit area, ...their use and arrangement did not constitute a hazardous condition...[and the] array of barricades was in compliance with the only clear standards in the manual....")

[122] Harland v. State, 142 Cal. Rptr. 201 75 Cal. App. 3d 475 (1977) (court affirmed $3 million judgment against California as

intimated that government decisions made without adequate prior study would not enjoy discretionary immunity.[123]

B.4. Effect of Known Dangerous Conditions on Immunity

Several courts have recognized an exception to design immunity if the state had notice[124] of a dangerous condition of the highway because of its design.[125] In such a case, the court may hold that the state had a duty to correct the dangerous condition or to give adequate notice to the traveling public.[126] As the court stated in *City of St. Petersburg v. Collom*,[127]

> [w]e find that a governmental entity may not create a known hazard or trap and then claim immunity from suit for injuries resulting from that hazard on the grounds that it arose from a judgmental, planning-level decision. When such a condition is knowingly created by a governmental entity, then it reasonably follows that the governmental entity has the responsibility to protect the public from that condition.…

Similar views with respect to the exclusion of discretionary immunity in the case of known dangerous conditions have been adopted and expressed by courts in other jurisdictions.[128] In cases involving bridges, although one case stated that there is no duty "to warn of [an] open and obvious hazard,"[129] the courts generally have recognized that, notwithstanding the discretion exercised in the designing of bridges, there may be liability where the state fails to respond to a dangerous condition.[130]

B.5. Design Immunity Statutes

A few states, in addition to having a provision in the tort claims act exempting discretionary activities from liability, have sought to give further impetus to the rule that an approved highway plan or design is not actionable for injuries resulting therefrom. "The rationale behind statutory design immunity is to avoid a jury reweighing the same factors which were already considered by the governmental entity that approved the design."[131] For instance, California's governmental tort claims act embraces plan or design immunity.[132] A public entity is immune from liability for an injury

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a result of a fatal automobile accident on a bridge where expert witness testified that the bridge was dangerous because of a number of design factors); Zalewski v. State, 53 A.D.2d 781, 384 N.Y.S.2d 545 (1976) (State held liable for creating an unsafe bridge guardrail without adequate prior study).

[123] Weiss, 167 N.E.2d at 66.

[124] If a dangerous condition was not of the State's own making, it must have had actual or constructive notice and a reasonable opportunity to take remedial action with respect thereto; however, it has been held that where the dangerous condition was of the State's own making, notice was not required. Johnson v. State, 636 P.2d 47 (Alaska 1981).

[125] Thompson v. Coates, 694 So. 2d 599 (La. Ct. App. 2d Cir. 1997), *cert. denied,* 701 So. 2d 987 (La. 1997) (design of a highway causing hydroplaning may result in a dangerous condition); Bane v. California, 208 Cal. App. 3d 860, 256 Cal. Rptr. 468 (5th Dist. 1989), *review denied,* (May 23, 1989) (failure to take remedial steps within a reasonable period of time after notice that design changes resulted in an unreasonably dangerous intersection), *(criticized in* Grenier v. City of Irwindale*,* 57 Cal. App. 4th 931, 67 Cal. Rptr. 2d 454 (2nd Dist. 1997)*,* and *criticized in* Sutton v. Golden Gate Bridge, Highway & Transp. Dist., 68 Cal. App. 4th 1149, 81 Cal. Rptr. 2d 155 (22nd Dist. 1997). *Compare* Compton v. City of Santee, 12 Cal. App. 4th 591, 15 Cal. Rptr. 2d 660, 665 (4th Dist. 1993) (city entitled to design immunity for a bridge also could not be held liable for failing to warn that the design was dangerous) and Alvarez v. State, 79 Cal. App. 4th 720, 95 Cal. Rptr. 2d 719, 1999 Cal. App. LEXIS 1148 (1999) (The court backed away from its earlier decision in Bane.).

[126] *Id.*

[127] 419 So. 2d 1082, 1086 (Fla. 1982); *see also* Clarke v. Florida Dep't of Transp., 506 So. 2d 24 (Fla. Dist. Ct. App. 1987); Greene v. State, Dep't of Transp., 465 So. 2d 560 (Fla. 1st Dist. Ct. App. 1985); and State Dep't of Transp. v. Brown, 497 So. 2d 678 (Fla. Dist. Ct. App. 1986), *review denied*, 504 So. 2d 766 (Fla. 1987).

[128] Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983) (failure to post signing warning that a bridge was 2 ft more narrow than its roadway approaches), *appeal after remand*, 111 Idaho 897, 728 P.2d 1306 (1986), *not followed on other grounds by* Packard v. Joint Sch. Dist., 104 Idaho 604, 661 P.2d 770 (Ct. App. 1983); Gavica v. Hanson, 101 Idaho 58, 608 P.2d 861 (1980) (failure to erect warning signs that "motorists...were approaching a haze area...."), *overruled in part by* Chandler Supply Co. v. Boise, 104 Idaho 480, 660 P.2d 1323, 1328 (1983) ("In our view, the purpose behind the discretionary function exception is to preserve governmental immunity from tort liability for the consequences which arise from the planning and operational decision-making necessary to allow governmental units to freely perform their traditional governmental functions"); (*overruled in part* by Sterling v. Bloom, 111 Idaho 211, 723 P.2d 755, 766 (1986) ("[W]e hold that the planning/operational test...applies to the discretionary function exception...."); *see also* McClure v. Nampa Highway Dist., 102 Idaho 197, 628 P.2d 228 (1981) (negligence of the State in failing to post a sign warning of the known dangerous condition created by an abrupt curve in the roadway), *overruled in part by* Chandler Supply Co. v. Boise, *supra, and in part by* Sterling v. Bloom, *supra;* and Carlson v. State, 598 P.2d 969 (Alaska 1979) and Shuttleworth v. Conti Constr. Co., 193 N.J. Super. 469, 475 A.2d 48 (1984).

[129] Masters v. Wright, 508 So. 2d 1299 (Fla. Dist. Ct. App. 1987) (individual killed while walking on a bridge designed to accommodate motor vehicle traffic only).

[130] Cay v. Department of Transp. & Dev., 631 So. 2d 393 (La. 1994), *reh'g denied,* Feb. 24, 1994) (duty to construct bridge railings of sufficient height); Campbell v. Louisiana Dep't of Transp. & Dev., 648 So. 2d 898 (La. 1995) (duty to install guardrails on a bridge); and Millman v. County of Butler, 244 Neb. 125, 504 N.W.2d 820 (1993) (liability where public authority knows from inspection reports that a bridge does not comply with applicable construction standards and fails to post warning signs).

[131] Wooten v. S.C. Dep't of Transp., 326 S.C. 516, 485 S.E.2d 119, 123, 1997 S.C. App. LEXIS 53 (1997).

[132] CAL. GOV'T CODE § 830.6.

caused by the plan or design of a public project that was approved in advance by a public body or employee exercising discretionary authority to give approval, if there was any substantial evidence upon which a reasonable employee or public body could have approved the plan or design.[133]

For the state to have design immunity, it must establish a causal relationship between the plan or design and the accident, discretionary approval of the plan or design prior to construction, and the existence of substantial evidence supporting the reasonableness of the adoption of the plan or design.[134] As for approval, it has been held that a detailed plan drawn up by a competent engineering firm and approved by the city engineer in the exercise of his discretionary authority was "persuasive evidence" of the element of prior approval.[135]

The New Jersey plan or design immunity statute provides that:

> Neither the public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of public property, either in its original construction or any improvement thereto, where such plan or design has been approved in advance of the construction or improvement by the Legislature or the governing body of a public entity or some other body or a public employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved.[136]

Although the California statute invites the court to consider whether approval of the plan or design by the public body was reasonable, the New Jersey statute simply requires approval by one exercising discretionary authority to give such approval.

Even in states having a design immunity statute, the statute may not necessarily provide for immunity in every situation involving an allegedly defectively designed transportation project. There may be an exception to design immunity where the highway in actual use has a design feature that was not approved in the overall plan or design of the highway.[137]

B.6. Duty to Improve the Design Due to Changed Circumstances

The initiation of design studies, recommendations for highway improvements, and the commencement of improvements are themselves discretionary and do not burden the state with any further duty to complete the preliminary work.[138] A question may arise, however, as to whether the state had a duty to improve or change an existing highway where actual use or changed circumstances some time later indicated that the highway design was no longer satisfactory.

For the State to lose its design immunity in California, as held in *Alvarez v. State*,[139] there must be "changed physical conditions" that have produced a dangerous condition of the highway or other public improvement. In *Alvarez*, the plaintiff failed to produce substantial evidence of such a change in physical conditions, in part because the highway's traffic volume was less than the design capacity for the highway, and the accident rate was less than expected.[140] In another case, the mere fact that a street flooded during storms was insufficient to show a change in physical conditions.[141] It has been held also that there was no duty to upgrade a previously constructed guardrail because of changes in technology relating to the design of guardrails.[142]

If there is immunity for the planning and designing of highway projects, is such immunity perpetual? *Baldwin v. State*[143] held that the omission of a left-turn lane, which the state later knew was dangerous in actual practice, was not immunized by the state's design immunity statute.[144] The state argued that the plan or design was based on traffic conditions at the time of the preparation of the blueprint and that the installation of a special lane was not then required. However, the court held that, although initial immunity could have attached because the plan was reasonable and duly approved, the immunity continues only so long as conditions have not changed.

> Having approved the plan or design, the governmental entity may not, ostrich-like, hide its head in the blue-

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[133] *See* CAL. GOV'T CODE § 830.6.

[134] Higgins v. State, 54 Cal. App. 4th 177, 62 Cal. Rptr. 2d 459, 1997 Cal. App. LEXIS 283 (1997).

[135] Grenier v. City of Irwindale, 57 Cal. App. 4th 931, 67 Cal. Rptr. 2d 454, 459, 1997 Cal. App. LEXIS 737 (1997).

[136] N.J. STAT. ANN. tit. 59, § 4-6.

[137] In *Cameron v. State*, 7 Cal. 3d 318, 102 Cal. Rptr. 305, 497 P.2d 777, 782 (1972), the design plans contained no specification of the uneven superelevation as the highway was actually constructed. "Therefore such superelevation as was constructed did not result from the design or plan introduced into evidence and there was no basis for concluding that any liability for injuries caused by this uneven superelevation was immunized by [Calif. Govt. Code] section 830.6." 497 P.2d at 782.

[138] Kaufman v. State, 27 A.D.2d 587, 275 N.Y.S.2d 757 (1966) (A decision not to erect barriers, after recommendations and restudy of an original design by the authorized body in the light of expert opinion then available, is not actionable negligence.)

[139] 79 Cal. App. 4th 720, 95 Cal. Rptr. 2d 719, 1999 Cal. App. LEXIS 1148 (1999).

[140] *Id*.

[141] Grenier v. City of Irwindale, 57 Cal. App. 4th 931, 67 Cal. Rptr. 2d 454, 462, 1997 Cal. App. LEXIS 737 (1997).

[142] Kniskern v. Township of Somerford, 112 Ohio App. 3d 189, 678 N.E.2d 273 (1996), *dismissed, discretionary appeal not allowed,* 77 Ohio St. 1485, 673 N.E.2d 145 (1996), *cert. denied,* 521 U.S. 1120, 138 L. Ed. 2d 1015, 117 S. Ct. 2513 (1997).

[143] 6 Cal. 3d 424, 99 Cal. Rptr. 145, 491 P.2d 1121, (1972) (*overruling* Cabell v. State, 67 Cal. 2d 150, 430 P.2d 34, 60 Cal. Rptr. 476 (1967)) and Becker v. Johnston, 67 Cal. 2d 163, 60 Cal. Rptr. 485, 430 P.2d 43 (1967)).

[144] CAL. GOV'T CODE § 830.6.

> prints, blithely ignoring the actual operation of the plan. Once the entity has notice that the plan or design, under changed physical conditions, has produced a dangerous condition of public property, it must act reasonably to correct or alleviate the hazard.[145]

The court concluded that permitting a jury to consider the question of perpetuity of the design did not interfere with governmental discretionary decision-making, because the jury would not be reweighing the same technical data and policy criteria as would be true if the jury were allowed to pass upon the reasonableness of the original plan or design.[146] It may be noted that the mere passage of time alone will not constitute a change in conditions.[147] In 1979, after the *Baldwin* decision, Section 830.6 was amended to give the public authority a reasonable time to improve the design after having notice of a dangerous condition.[148]

In *Sutton v. Golden Gate Bridge, Highway and Trans. Dist.*,[149] the plaintiff alleged that the lack of a median barrier on the Golden Gate Bridge constituted a dangerous condition of public property for which the district did not have design immunity. The court held that California Government Code Section 830.6 provided the public entity with an affirmative defense of design immunity in actions arising out of an alleged dangerous condition of public property. The fact "'[t]hat a paid expert witness for plaintiff, in hindsight, found…the design was defective, does not mean, *ipso facto*, that the design was unreasonably approved.'"[150]

The court rejected the plaintiff's argument that the evidence failed to show that the transportation department did not make a design decision by actually considering whether to include a median barrier. The court found that there was ample evidence of studies of the bridge and whether a median was needed before and after a bridge deck replacement project in 1979. The plaintiff also contended that "technological advances in the development of a movable median barrier constitute[d] evidence of changed physical conditions defeating design immunity."[151] The court further rejected the plaintiff's argument that changed physical conditions are unnecessary to the loss of design immunity and that immunity ends when it is apparent that the design has created a dangerous condition. The court concluded: "We agree with the *Grenier and Compton* courts that changed physical conditions are necessary to the loss of design immunity.… As appellant has not shown a change in physical conditions, there is no triable issue of fact on design immunity."[152]

If the state has a duty to respond to a plan or design's changed conditions, then there may be an issue concerning the length of time within which it is reasonable for the state to respond appropriately. The issue of the length of time the state had to respond to recommended changes was before the New York Court of Appeals in *State v. Friedman*,[153] involving consolidated appeals from several court decisions. For convenience, the three cases involved will be referred to by the names *Cataldo, Muller,* and *Friedman.*

The *Cataldo* case involved a bridge that was completed in 1955. The original plan called for no median barriers. The first review of this decision, completed in 1962, concluded that median barriers were undesirable. In July 1962, the decision was reviewed again, leading to the erection of barriers at the westerly end of the bridge because of the high incidence of crossover accidents. In 1972, another report recommended against the use of barriers on the easterly and tangent sections of the bridge for the same reasons expressed in the two 1962 reports.

In 1973, following an accident, the plaintiff claimed that the state was negligent for failing to install a median barrier on another section of the bridge. The Court of Appeals held that the 1962 and 1972 reports were grounded on an adequate study and demonstrated that their recommendations had a reasonable basis. The court stated: "The authority fulfilled its duty under *Weiss* by studying the dangerous condition, determining that design changes were not advisable, and later reaching the same conclusions upon reevaluation of its decision."[154]

However, in the *Muller* case, the authorities decided that median barriers should be installed on the entire length of a bridge. Approximately 3 years later, in December 1977, the plaintiff was injured in a crossover accident. In reinstating a verdict for the plaintiff, the Court of Appeals held that the change in the original plan or design must be implemented within a *reasonable* time or the State may be held liable for the delay. The 3-year delay in carrying out the State's decision to erect a median barrier was unreasonable and, hence, the State was liable.

In the *Friedman* case*,* 5 years earlier in February 1973, the transportation department had recognized, based on the proliferation of crossover accidents, the need for a median barrier on a viaduct. Although inclusion of a barrier on the viaduct was proposed in August 1974, the State had not commenced work by

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[145] Baldwin, 491 P.2d at 1127. (Footnote omitted).

[146] *Id*. at 1128.

[147] Cameron v. State, 102 Cal. Rptr. 305, 497 P.2d 777, n.10 (1972). *See also* Anderson v. City of Thousand Oaks, 65 Cal. App. 3d 82, 135 Cal. Rptr. 127 (1977) (Absence of approved features from the design was itself part of the approved design; however, there was a triable issue on whether the City had notice of a dangerous condition and failed to take action).

[148] Sutton v. Golden Gate Bridge, Highway and Trans. Dist., 68 Cal. App. 4th 1149, 1163, 81 Cal. Rptr. 2d 155, at 164 (Calif. App. 1st Dist. 1998).

[149] 68 Cal. App. 4th 1149, 81 Cal. Rptr. 2d 155 (Calif App. 1st Dist. 1998).

[150] Sutton, 81 Cal. Rptr. 2d at 160, *quoting* Ramirez v. City of Redondo Beach, 192 Cal. App. 3d 515, 525, 237 Cal. Rptr. 505 (1987).

[151] *Id*. at 163.

[152] *Id*. at 164

[153] 67 N.Y.2d 271, 502 N.Y.S.2d 669, 493 N.E.2d 893 (1986).

[154] State v. Friedman, 502 N.Y.S.2d at 676.

the time of the Friedman accident in March 1978. The State attributed its delay to necessary work on other projects and to the need for the setting of funding priorities.

The Court of Appeals held that the 5-year delay in carrying out the decision to install a median barrier was unreasonable. The State "failed to demonstrate at trial either that the 5-year delay between DOT's recognition of the hazardous condition on the viaduct and its project proposal and the Friedman accident was necessary…or that the delay stemmed from a legitimate ordering of priorities with other projects based on the availability of funding."[155]

Thus, decisions from New York establish that a decision made because of a *Weiss*-type review of a plan or design of the highway in operation must be executed within a *reasonable* time after the review; otherwise, the state may be held liable for the delay. What constitutes an acceptable period of delay in implementing the decision depends on circumstances of each case.

In sum, there may be limited immunity for negligent design under the exemption for discretionary activity. However, such immunity may not be available if it can be demonstrated to the court that the design decisions were made arbitrarily or without an adequate or reasoned basis. Although design immunity statutes may be important to the transportation department in protecting design decisions from liability, once again immunity may not be available in those cases where it is established that a design has become dangerous in actual use or that there is a hazardous condition because of changed physical circumstances.

C. APPLICATION OF DISCRETIONARY EXEMPTION TO MAINTENANCE OF HIGHWAYS

C.1. Introduction

It is not possible simply to categorize decisions involving construction or maintenance activities as purely operational in character and, therefore, not worthy of protection under the discretionary function exemption. Similarly, the mere labeling of an activity as being either a "design" or a "maintenance" function has been rejected as an unsatisfactory test to determine whether a particular activity should be immune under the discretionary function exception.[156]

As seen under the *Gaubert* decision, where state courts follow the U.S. Supreme Court's interpretation of the FTCA's discretionary function exception, the transportation department's employees may make decisions on a day-to-day basis at the so-called "operational" level, which still may come within the protection of the discretionary function exception. But where state courts have not accepted *Gaubert,* the courts may be following the planning-operational distinction under which only discretion exercised at the planning level is likely to be immune from liability.[157]

C.2. The Element of Choice as the First Step in the Analysis

Under the *Gaubert* decision, there is a presumption that an employee is exercising discretion if the statute, regulation, agency policy, or other guideline allows the employee to exercise some discretion in his or her decision-making. The first inquiry is whether the government's employee's action involves an element of judgment or choice.[158] If the course of conduct is prescribed in some fashion by the government, then there is no discretion to violate the mandate and, thus, no immunity. However, even if the public employee is allowed by the agency's regulation, policy, or manual to exercise some discretion, then there may be immunity for the employee's alleged negligence in performing highway construction or maintenance activities.[159]

The two-step analysis was described in *Rick v. Department of Transp. & Dev.*,[160] a railroad crossing accident case, in which the discretionary function exception was at issue:

> First, a court must determine whether the action is a matter of choice. If no options are involved, the [discretionary function] exception does not apply. If the action involves selection among alternatives, the court must determine whether the choice was policy based. Decisions at an operational level can be discretionary if based on policy.[161]

The phrase "based on policy" is important as the transportation employee who exercises discretion in implementing a policy directive may be entitled to immunity for his or her actions even though he or she was not required to consider broad policy objectives in making the decision at issue. Prior to the *Gaubert* case, there was authority holding that immune discretion involved in formulating a policy could flow downward and immunize subordinates who had to exercise

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[155] *Id.*

[156] Stevenson v. State Dep't of Transp., 290 Or. 3, 619 P.2d 247 (1980) (A verdict for the plaintiff was reinstated without regard to whether the dangerous condition was the result of faulty design or negligent maintenance, because there was nothing "in the record to suggest that the responsible employees of the highway division made any policy decision of the kind we have described as the exercise of governmental discretion.") 619 P. 2d at 254.

[157] *See, e.g.,* Trujillo v. Utah Dep't of Transp., 1999 Utah App. 227, 986 P.2d 752, 1999 Utah App. LEXIS 104 (1999); Tseu ex rel. Hobbs v. Jeyte, 88 Haw. 85, 962 P.2d 344 (1998); and Rick v. State Dep't of Transp. & Dev., 630 So. 2d 1271 (La. 1994).

[158] United States v. Gaubert, 499 U.S. 315, 322, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), *on remand*, 932 F.2d 376 (5th Cir. 1991).

[159] Robinson v. Washington Metro. Area Transit Auth., 676 A.2d 471 at 474 (D.C. App. 1996) (There was discretionary action involved, because the applicable manual allowed station manager "to weigh on the spot the same considerations as to an appropriate response to observed crime that underline[d] the directives.").

[160] 630 So. 2d 1271 (La. 1994).

[161] Rick, 630 So. 2d at 1276, *citing* United States v. Gaubert.

discretion to implement the policy.[162] Immunity was exhausted only if the policy was sufficiently detailed that the employee has no discretion in implementing it.

Prior to the *Gaubert* decision, the courts had a tendency to decide construction and maintenance cases under one of two basic approaches. One approach was to follow the *Dalehite* case. Thus, a state court in a case involving maintenance of a highway could decide that even though the details of the project were not spelled out fully, the alleged negligence occurred at the "operational level." Decisions made at the operational level did not involve policy-making and did not come within the exception.[163]

The second approach, based on the *Indian Towing* decision, was that if the negligent construction or maintenance was performed in such a way that it deviated from the specifications of the approved plan or design, then the alleged negligence would not be protected under the exception. The reason was that once the policy-level decision was made to undertake a project, there was no discretion to perform it negligently.[164]

In *State v. Abbott,*[165] the court stated that day-to-day "housekeeping" functions (ministerial duties) are generally not discretionary.[166] However, since the *Gaubert* case, so-called housekeeping functions, presumably meaning those performed at the operational level, may nevertheless may be protected by the discretionary function exception. As seen, the first question is whether the applicable statute, regulation, policy, or guideline permitted the transportation employee to exercise discretion in performing his or her duties relating, for example, to highway maintenance. If the employee is not required to comply with any specific guidelines, the argument may be even stronger that the employee is exercising discretion in the performance of his or her duties. As one court has stated, the state's argument that the "absence of formal standards renders all maintenance discretionary has some appeal…."[167] The court agreed that the decision *whether* to enact regulations requiring particular maintenance or inspection procedures regarding hoists was an act characterized by official discretion; however, "[t]he absence of formal standards…is not dispositive of the issue of immunity."[168]

Thus, it may be important whether there is *any* standard or policy concerning how a lower ranking employee is to perform his or her tasks. On the other hand, if a statute requires the transportation agency to promulgate rules or regulations, then it may be important that the agency has done so. In one case, there was immunity, because the agency "did promulgate at least some rules pursuant to its statutory mandate…."[169] Another example is the case of *Aguehounde v. District of Columbia,*[170] in which the court held that the setting of traffic light signal intervals was discretionary. The court specifically noted that the government had not adopted a directive that mandated the setting of traffic intervals that "would transfer the setting of the interval timing from a discretionary to a ministerial task."[171] "Moreover, the testimony at trial established that there were several different charts which the engineers used to determine the length of signal intervals."[172] The court held that there was no claim even for simple mismeasurement by the engineers, because "the evidence considered as a whole did

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[162] Spillway Marina, Inc. v. United States, 445 F.2d 876, 878 (10th Cir. 1971). A marina was damaged by the draw-down of the water level of a reservoir in Kansas, an Army Corps of Engineers project. The government contended that the decision to draw down the reservoir was discretionary, and the court agreed:

> The discretionary function did not stop in the decision to construct Turtle Creek Reservoir. It continued because the storage and release of water was directly related to the attainment of objectives sought by the reservoir construction. Decisions of when to release and when to store required the use of discretion.

Id. at 878. The draw down decision depended on a great number of variable factors, such as navigation conditions and needs, irrigation requirements, and rainfall.

[163] United States v. Hunsucker, 314 F.2d 98 (9th Cir. 1962) (A directive authorizing construction on an air base did not specifically authorize the acts and omissions that caused the damage to the plaintiffs' land; thus, the negligence in implementing the overall general plan was committed at the operational level and, therefore, was not immunized by the discretionary function exemption.).

[164] State v. Abbott, 498 P.2d 712, 722 (Alaska 1972) (Once the State made the decision to provide winter maintenance,

> the individual district engineer's decisions as to *how* that decision should be carried out in terms of men and machinery is made at the operational level; it merely implements the basic policy decision. Once the basic decision to maintain the highway in a safe condition throughout the winter is reached, the state should not be given discretion to do so negligently. The decisions at issue in this case simply do not rise to the level of government policy decisions calling for judicial restraint. Under these circumstances the discretionary function exemption has no proper application.) (Footnote omitted).

[165] 498 P.2d 712 (Alaska 1972).

[166] *Id*. at 720.

[167] Mahan v. New Hampshire Dep't of Admin. Servs., 141 N.H. 747, 693 A.2d 79, 83 (1997). Factual issues precluded summary judgment on the issue of the applicability of the discretionary function exception.

[168] *Id.*

[169] Evenstad v. State, 178 Ariz. 578, 875 P.2d 811, 819 (Ct. App. 1993) (In a case involving whether the motor vehicle division had promulgated rules that might prevent it from issuing a license to an habitually intoxicated person, the agency was held to have immunity.).

[170] 666 A.2d 443 (D.C. 1995).

[171] Aguehounde, 666 A.2d at 451.

[172] *Id.* at 452.

not establish the existence of a mandatory policy for setting traffic intervals which would transfer the function into a ministerial one. We also conclude that any mismeasurement, if there was one, was therefore irrelevant in this analysis."[173]

C.3. The Element of Policy Consideration as the Second Step in the Analysis

Even though the policy or manual may permit the transportation employee engaged in maintenance activity some discretion, it is still necessary to consider and evaluate the *nature* of the particular maintenance activity to determine whether the decisions involved policy-type considerations.

As seen, cases prior to *Gaubert*[174] seemed to assume that maintenance decisions of whatever kind were low-level, operational decisions. Thus, the courts may have failed to consider the nature of the decision-making that was actually involved. A pre-*Gaubert* case and a post-*Gaubert* decision involving pavement resistance illustrate how some activity at the maintenance level that heretofore was ruled nondiscretionary now could be considered discretionary in nature, because the employee was performing activity that involved both choices and policy considerations.

In *Costa v. Josey,*[175] a pre-*Gaubert* case, the question was whether alleged negligence regarding the resurfacing of a highway was protected from liability because of the State's discretionary function exception. The Supreme Court of New Jersey, after noting that virtually "all official conduct, no matter how ministerial, involves the exercise of some judgmental decision-making," held that such maintenance activity was not protected by the exception:

> We recognize that the resurfacing plans in this case were approved by high-level officials, the State Highway Engineer and the Commissioner of Transportation. Although the identity of the decision-maker may indicate that the decision involves basic policy making, that conclusion does not follow. A high-level official may make operational decisions as well. Here, the record is devoid of any evidence that the Engineer's and Commissioner's approval was other than an operational determination.... Moreover, subsumed within the principle that the public entity is immune when it exercises its discretion with respect to basic policy is the necessity for demonstrating that there has in fact been an exercise of that discretion. Here, for example, assuming that a basic policy matter was involved, there is nothing to indicate that any competing policy choices were actually considered when the resurfacing plan was made and approval given.[176]

Although the court conceded that almost all activities involve some element of discretion, it rested its decision on the finding that the particulars of the resurfacing operation in question were *operational* rather than *planning* in nature.[177]

In a case decided after *Gaubert*, the D.C. Circuit ruled in *Cope v. Scott*[178] that the Federal Government's decisions regarding road maintenance, including matters regarding the road's skid resistance and whether to resurface the highway, were decisions that were discretionary in nature and protected by the exception. Since the *Gaubert* decision, the following decisions have been held to be discretionary:

- The choice of materials used in the construction of guardrails;[179]
- Decisions regarding skid resistance and surface types where the applicable manual stated that the standards should be followed "to the extent practicable";[180]
- A city's operation of its water main system;[181] and
- The setting of priorities for road repair work and the deployment of maintenance crews.[182]

Similarly, in a mass transit case involving a garage accident, the court ruled that the agency could not be held liable "for determinations made in establishing 'plans, specifications or schedules of operations for the Metrorail.'"[183]

C.4. Applicability of the Discretionary Activity Exemption in Maintenance Cases Involving Known Dangerous Conditions

It appears that when the transportation department has knowledge of a dangerous or hazardous condition, under both pre-*Gaubert* and post-*Gaubert* decisions, the department has a duty to correct the defective condition or to give adequate warning. The discretionary function exception has been held not to apply to protect the department from liability for negligence where there was a failure to respond to dangerous or hazardous conditions.[184]

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[173] *Id.* at 451.

[174] 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), *on remand*, 932 F.2d 376 (5th Cir. 1991).

[175] 83 N.J. 49, 415 A.2d 337 (1980).

[176] 415 A.2d at 342–43.

[177] The court remanded the case for trial for determinations of whether the initial design contemplated that the divider would be lowered by subsequent resurfacing and whether the decision to resurface was a policy-level decision that came within the meaning of the discretionary function exemption.

[178] 310 U.S. App. D.C. 144, 45 F.3d 445 (D.C. Cir. 1995) (*criticized in* Aguehounde v. D.C., 666 A.2d 443 (D.C. 1995)).

[179] Baum v. United States, 986 F. 2d 716 (4th Cir. 1993).

[180] Cope v. Scott, 310 U.S. App. D.C. 144, 45 F.3d 445 (1995).

[181] Olson v. City of Garrison, 539 N.W.2d 663 (N.D. 1995). In Olson, there were no statutes, regulations, or policies prescribing a course of action for maintenance.

[182] Woods v. Ladehoff, 1993 Minn. App. LEXIS 113 (Minn. Ct. App. Feb. 2, 1993).

[183] Maxwell v. Washington Metro. Area Transit Auth., 98 Md. App. 502, 633 A.2d 924 at 929 (1993), *quoting* Beatty v. Washington Metro. Area Transit Auth., 860 F.2d 1117, 1127 (D.C. Cir. 1988).

[184] *See* Symmonds v. Chicago, M., S.P. & P.R. Co., 242 N.W.2d 262 (Iowa 1976) (existence of hazardous highway condition alone sufficient to give rise to the public agency's duty to

In some instances, where it can be demonstrated that a policy decision was made not to provide warning signs, there may be immunity for the decision not to provide them.[185] However, where the department decides to install a sign at an intersection, it has a duty to maintain it until it exercises its discretion to remove it or replace it with a more appropriate sign.[186] The discretionary function exception may not protect the state from alleged negligence for failing to provide an adequate warning sign when the highway presents a hazardous condition.

D. APPLICATION OF THE DISCRETIONARY ACTIVITY EXEMPTION TO HIGHWAY GUARDRAILS AND BARRIERS

D.1. Decisions to Provide or Not Provide Guardrails and Barriers as Protected by the Discretionary Exemption

The discretionary function exemption has been on occasion successfully asserted as a defense when the state has been sued because of a decision not to install guardrails or barriers.[187] As stated in *State, Dept. of Transportation v. Vega,*[188] the decision whether to erect a guardrail or a barrier is a planning level decision. On the other hand, a public entity may be held liable for injury caused by a dangerous condition of its property, and the state's failure to erect median barriers to prevent cross-median accidents may result in liability.[189]

If a plaintiff alleges that the state was negligent in *constructing* a guardrail on the road, the transportation department's evidence may be that, when the guardrail was installed, there were no prevailing engineering standards in existence for the designing and installing of guardrails along the highway. If so, the plaintiff must present evidence controverting the department's contention.[190] However, there may be a jury question concerning the state's liability if there is evidence "presented…that [the department of transportation] failed to utilize accepted professional engineering standards…."[191] On the other hand, it has been held also that when a defectively designed guardrail is a substantial factor in the cause of an accident, even negligent drivers and passengers can recover damages

provide adequate warning). Two cases holding that the State's failure to provide warning signs at a given location did not involve the exercise of discretion are *Stanley v. State*, 197 N.W.2d 599 (Iowa 1972) and *Ehlinger v. State*, 237 N.W.2d 784 (Iowa 1976); *but see* Seiber v. State, 211 N.W.2d 698 (Iowa 1973) (held that a policy determination not to erect signs along the state highways warning of deer involved the exercise of protected discretion).

[185] Jennings v. State, 566 P.2d 1304 (Alaska 1977) (The State's decisions not to provide an overpass, to lower the speed limit, to post warning signs, or to provide additional controlled crossings on a highway near a school all came within the "ambit" of the discretionary function exemption of the Alaska statute.).

[186] Board of Comm'rs v. Briggs, 167 Ind. App. 96, 337 N.E.2d 852 (1975), *reh'g denied,* 167 Ind. App. 137, 340 N.E.2d 373 (1976); *see also* Kiel v. DeSmet Township, 90 S.D. 492, 242 N.W.2d 153 (S.D. 1976).

[187] Dean v. Commonwealth, Dep't of Transp., 561 Pa. 503, 751 A.2d 1130, 2000 Pa. LEXIS 1241 (Pa. 2000) (failure to erect a guardrail did not constitute a "dangerous condition" of commonwealth realty); Lockwood v. Pittsburgh, 561 Pa. 515, 751 A.2d 1136, 2000 Pa. LEXIS 1213 (Pa. 2000) (failure to erect a guardrail is not a "dangerous condition of the streets" for purposes of the "streets exception" to governmental immunity under tort claims act); Sutton v. Golden Gate Bridge, 68 Cal. App. 4th 1149, 81 Cal. Rptr. 155 (1998), *review denied,* 1999 LEXIS 1346 (Cal., Mar. 9, 1999) (no liability for failing to provide a median barrier, particularly where there was no showing of "changed conditions" between the time of the reconstruction and the accident).

[188] 414 So. 2d 559 (Fla. Dist. Ct. App. 3d Dist. 1982), *petition denied*, 424 So. 2d 763 (Fla. 1983); State v. San Miguel, 2 S.W.3d 249, 251, 1999 Tex. LEXIS 101 (1999); Helton v. Knox County, 922 S.W.2d 877 (Tenn. 1996) ("[T]he decision not to install guardrails despite the recommendations of state inspectors falls within the discretionary function exception."); Cygler v. Presjack, 667 So. 2d 458 (Fla. App. 4th Dist. 1996); Newsome v. Thompson, 202 Ill. App. 3d 1074, 148 Ill. Dec. 377, 560 N.E.2d 974 (1st Dep't 1990).

[189] Ducy v. Argo Sales Co., 25 Cal. 3d 707, 159 Cal. Rptr. 835, 602 P.2d 755, 760, 1979 Cal. LEXIS 332 (1979) (The Supreme Court of California held that the language of § 835, CAL. GOV'T CODE, "refute[d] the state's argument that it [was] under no 'duty' to protect the public against dangers that are not created by physical defects in public property" and that under the circumstances in that case the State was liable for failure to provide an adequate median barrier. *Compare* Carney v. McAfee, 577 N.E.2d 1374, 1986 Ohio App. LEXIS 9509 (Ct. App., 6th Dist., 1986), where the court appears to have required that there be a defect in the highway before there could be a duty on the city's part to provide a guardrail: "there was no actionable defect such as a hole, obstruction or excavation present in the street so as to render it not reasonably safe," and there was insufficient evidence for the jury to find that the absence of a median guardrail was a nuisance under the applicable statute or common law.

[190] Bird v. Kan. Dep't of Transp., 23 Kan. App. 2d 164, 928 P.2d 915 (1996). However, the reviewing court concluded that excerpts of expert deposition testimony were sufficient to controvert the Secretary's contention that no standards existed in 1972.

[191] Pike v. S.C. Dep't of Transp., 332 S.C. 605, 506 S.E.2d 516, 519–20 (S.C. App. 1998), *reh'g denied*, (Nov. 19, 1998). On the other hand, the trial court did not err in admitting evidence of 19 prior accidents at and near the intersection, when only one of the accidents was similar to the decedent's. *See* McIntosh v. Dep't of Transp., 234 Mich. App. 379, 594 N.W.2d 103, 1999 Mich. App. LEXIS 50 (1999) (genuine issue of material fact requiring trial on whether site where automobile crossed highway median was a "point of hazard"); and Temple v. Chenango County, 228 A.D.2d 938, 644 N.Y.S.2d 587, 589, 1996 N.Y. App. Div. LEXIS 7276 (3d Dep't 1996) (factual issue requiring trial on whether road and guardrails were built in accordance with good engineering practices).

from the state under the principles of comparative negligence.[192]

Of course, if there are applicable standards at the time of design and construction, it is important that the roadway and any guardrails or barriers meet them.[193] However, it has been held also that the transportation department need not show that there were applicable standards and that it complied with them to be able to claim immunity: "The discretionary function exception may come into play when there are no standards applicable to the governmental action."[194]

It should be noted that decisions regarding the removal of such devices are also important. A decision, for example, to remove a guardrail should be supported by an adequate study.[195] Moreover, if there are no guardrails, it may be important that the state's comprehensive reconstruction plan for the highway in question show that there was a decision not to provide a guardrail or barrier.[196]

Some jurisdictions will require evidence of the state's deliberation when the discretionary defense is raised. Thus, the discretionary defense may be unavailable if the transportation department made the decision not to spend funds on guardrails without engaging in active or affirmative decision-making; that is, rather than mere inaction or indecision, there must be an affirmative decision not to act.[197] "To establish discretionary immunity, the governmental entity must prove that, when faced with alternatives, it actually weighed competing considerations and made a conscious choice."[198]

In claims arising out of the failure to provide guardrails or barriers, it has been held that the fact that the same improvements are provided elsewhere is not evidence of negligence or a basis for the state's liability.[199] Furthermore, a delay in installing or erecting a guardrail or barrier may not be unreasonable in view of the scope of the particular reconstruction project at issue.[200] There may be changes in the standards applicable to guardrails or barriers between the time of the original design and the construction of the highway. The transportation department has no duty as technology develops to upgrade a previously constructed guardrail. Moreover, the department's "decision not to redraft its plans to incorporate a new guardrail design [is] the type of discretionary decision which is entitled to the protection of sovereign immunity…"[t]he fact that ODOT chose to incorporate some changes set forth in the new standards, but not others, proves that ODOT engineers were exercising their independent judgment in modifying the project plans in the months prior to construction."[201]

In the foregoing cases, the agency's decision-making concerning whether to provide or upgrade guardrails and barriers was held to be within the discretionary exemption and, therefore, immune to review by the courts. Out of the triumvirate of social, economic, and political policy considerations—the generally agreed basis of discretionary immunity—the courts relied primarily on economic considerations in holding the agency's decision to be nonreviewable.

D.2. Decisions to Provide or Not Provide Guardrails and Barriers That Are Not Discretionary

As seen in a previous section, there is some question as to whether the operational-planning level test is or should remain viable at the state level since the Supreme Court's decision in *United States v. Gaubert*.[202] There appear to be only a few decisions that hold that the state's decision-making regarding the installation or upgrading of guardrails and barriers is not an exercise of discretion. At the state court level, there are cases before and after the U.S. Supreme Court's *Gaubert* decision in which the courts declined to rule that administrative decisions concerning the installation of

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[192] Taylor-Rice v. State, 91 Haw. 60, 979 P.2d 1086, 1999 Haw. LEXIS 258 (1999) (affirmed judgment below that the State was 20 percent negligent).

[193] Utley v. State, 570 So. 2d 501, *cert. denied*, 573 So. 2d 1121 and 573 So. 2d 1122 (La. 1991) (no showing that the lack of a barrier on a median presented an unreasonable risk of injury).

[194] Bird v. Kan. Dep't of Transp., 928 P.2d at 920 (1996).

[195] Maricondo v. State, 151 A.D.2d 651, 542 N.Y.S.2d 712 (2d Dep't 1989), *appeal denied*, 75 N.Y.2d 702, 551 N.Y.S.2d 905, 551 N.E.2d 106 (1989).

[196] Light v. State, 672 N.Y.S.2d 543 (App. Div. 3d Dep't 1998), *leave to appeal denied*, 92 N.Y.2d 807, 678 N.Y.S.2d 593, 700 N.E.2d 1229 (1998).

[197] Goss v. City of Globe, 180 Ariz. 229, 883 P.2d 466 (Ariz. App. Div. 2 1994).

[198] Pike v. S.C. Dep't of Transp., 332 S.C. 605, 506 S.E.2d 516 at 518 (S.C. App. 1998), *reh'g denied*, (Nov. 19, 1998).

[199] Ross v. Chicago, 168 Ill. App. 3d 83, 118 Ill. Dec. 760, 522 N.E.2d 215 (1st Dist. 1988), *appeal denied*, 122 Ill. Dec. 446, 526 N.E.2d 839 (1988).

[200] Edouard v. Bonner, 224 A.D.2d 575, 638 N.Y.S.2d 688, *appeal denied*, 88 N.Y.2d 811, 649 N.Y.S.2d 378, 672 N.E.2d 604 (2d Dep't 1996).

[201] Kniskeen v. Somerford Twp., 112 Ohio App. 3d 189, 678 N.E.2d 273, 278–79 (Ohio App. 10th Dist. 1996), *dismissed, appeal not allowed*, 77 Ohio St. 3d 1485, 673 N.E.2d 145 (1966), *recons. denied*, 77 Ohio St. 3d 1549, 674 N.E.2d 1187 (1997), *cert. denied*, 117 S. Ct. 2513.

[202] 111 S. Ct. 1267, 499 U.S. 315, 113 L. Ed. 2d 335 (1991), *on remand*, 932 F.2d 376 (5th Cir. 1991). *See* Bruce Peterson and Mark Van Der Weide, *Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447 (1997); Jim Fraiser, *A Review of the Substantive Provisions of the Mississippi Governmental Immunity Act: Employees' Individual Liability, Exemptions to Waiver of Immunity, Non-Jury Trial, and Limitation of Liability*, 68 MISS. L.J. 703 (1999); Amy M. Hackman, *Note and Comment*: *The Discretionary Function Exception to the Federal Tort Claims Act: How Much is Enough?*, 19 CAMPBELL L. REV. 411 (1997).

tion of guardrails and barriers were protected by the state's discretionary function exception to liability.[203]

Nevertheless, it has been held that the state may be liable for a determination whether to install a raised median in the following instances: because such a decision is not a discretionary function;[204] for not providing one where the state had recognized that it was necessary;[205] or for failing to provide a temporary one.[206] The *alteration* of a median barrier has been held to be maintenance activity that did not come within the discretionary exception.[207]

In a guardrail case, it was held that the state had a duty to the motorists and passengers in an accident where the car struck the buried end of a guardrail. The court held that it was reasonably foreseeable that a motorist would leave the road at excessive speeds and vault over the guardrail.[208] In affirming a judgment against the state, the court noted that the state had reasonable notice of a prior accident in the same vicinity in which the design of the guardrail was at issue.[209]

Although decisions based on budgetary or other economic constraints, as seen, generally are discretionary in nature,[210] in *Gregorio v. City of New York*, the City contended that its failure to replace a barrier was due to funding priorities. However, the City presented no evidence on planning, ordering of priorities, or limitations on available funding. The court held that the City was not immune from liability for injuries caused by a defective barrier.[211]

The state may be liable for the failure to correct a defect in a guardrail or to upgrade it during resurfacing of the highway. Indeed, one court held that the state was negligent in spite of the discretionary function exception and even though the driver was intoxicated and speeding.[212] The discretionary exception did not apply to the transportation department's decision to reconstruct a bridge below standards that were applicable at the time of reconstruction.[213] In a case involving the reduced height of a bridge railing, the court held that the decision was an operational one to which the discretionary exception did not apply.[214]

In *State v. Livengood,*[215] an Indiana court held that "the State [was] not immune from suit under [a] twenty year design immunity" statute where the State "substantially redesigned the guardrail in 1980 when it removed over 100 feet of the existing guardrail and installed the BCT end-treatment."[216] However, the State was immune to the extent that the plaintiffs' case rested on the State's allegedly negligent construction of the original guardrail. Although the State was immune for any alleged negligence that arose from the adoption of the applicable standard, it was "not immune from liability for negligence that relate[d] to the specific application of that standard.…"[217]

In a more recent case, also not citing the Supreme Court's *Gaubert* decision, the highest court in Nevada held that the State may be held liable for failing to install safety barriers near support posts for a freeway overpass, because the State's decision was an opera-

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[203] Gregorio v. City of New York, 246 A.D.2d 275, 677 N.Y.S.2d 119, 122, 1998 N.Y. App. Div. LEXIS 8975 (1998) (City not immune where it had notice that a barrier was defective). In Helton v. Knox County, 922 S.W.2d 877, 885 (Tenn. 1996), the court cited United States v. Gaubert, 499 U.S. 315, 323, 111 S. Ct. 1267, 1273, 113 L. Ed. 2d 335 (1991) for the proposition that "[w]hen deciding whether a particular decision is 'planning' or 'operational,' the courts should keep in mind the purpose of the discretionary function exception; that is, 'to prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy....'" [sic], but the court did not suggest that the law in Tennessee had changed because of the Gaubert decision.

[204] Lawton v. City of Pocatello, 886 P.2d 330 (Idaho 1994).

[205] Ames v. New York, 177 A.D.2d 528, 575 N.Y.S.2d 917 (2d Dep't 1991).

[206] Pino v. Gauthier, 633 So. 2d 638 (La. App. 1st Cir. 1993), *cert. denied*, 634 So. 2d 858 (La. 1994) and 634 So. 2d 859 (La. 1994).

[207] Daniel v. State, 239 N.J. Super. 563, 571 A.2d 1329 (1990).

[208] Taylor-Rice v. State, 91 Haw. 60, 979 P.2d 1086, 1096–97, 1999 Haw. LEXIS 258 (1999).

[209] Taylor-Rice, 979 P.2d at 1105–06.

[210] Emmons v. Olmsted County, 1997 Minn. App. LEXIS 579 (1997) (cost and other factors led county not to install guardrail on existing bridges).

[211] Gregorio v. City of New York, 246 A.D.2d 275, 677 N.Y.S.2d 119, 122–23, 1998 N.Y. App. Div. LEXIS 8975 (1st Dep't 1998).

[212] Taylor-Rice v. State, 91 Haw. 60, 979 P.2d 1086 (1999), *overruling* Ikene v. Mauro, 54 Haw. 548, 511 P.2d 1087.

[213] Williams v. City of Monroe, 658 So. 2d 820 (La. App. 2d Cir. 1995), *cert. denied,* 664 So. 2d 451–52 (La. 1995) (bridge railing not part of the "improved portion" of a highway designed for vehicular traffic); and Chaney v. Mich. Dep't of Transp., 447 Mich. 145, 523 N.W.2d 762 (1994), *reh'g denied*, 526 N.W.2d 881 (Mich. 1994) (guardrail adjacent to but beyond the shoulder of a state highway).

[214] *Id.* The Chaney case involved interpretation of a statutory "highway exception" to governmental immunity.

[215] 688 N.E.2d 189, 194 (Ind. App. 1997).

[216] Adopted in 1979, GR 10A governs the installation of BCT end-treatments and allows Indiana DOT to use a parabolic curve ranging from 1 to 4 ft with a 4-ft curve preferable.

[217] State v. Livengood, 688 N.E.2d at 197. *See also:* Johnson v. County of Nicollet, 387 N.W.2d 209 (Minn. App. 1986) (court limited discretionary activity to the "policy decision to permit public use of the road;" decisions beyond that point, including even the decision not to erect a guardrail at a particular location, not discretionary); Butler v. State, 336 N.W.2d 416 (Iowa 1983) (court, applying the planning/operational dichotomy, held that design and placement of guardrail not immune); State v. Magnuson, 635 S.W.2d 581 (Tex. App. 1982) *writ ref'd n.r.e.*, (Oct. 6, 1982), *reh'g of writ of error overruled*, (Nov. 10, 1982) (decision not to erect a guardrail was operational); and State v. Webster, 88 Nev. 690, 504 P.2d 1316, 1319 (1972) (failure to provide cattle guard at entrance to controlled access highway was "the type of operational function of government not exempt from liability…state's position would effectively restore sovereign immunity.").

tional one.[218] Furthermore, the state may be held liable where it unacceptably fails to comply with safety standards, has actual knowledge of other accidents at the same site, and fails to maintain an adequate clear space between the edge of the pavement and a highway hazard, such as a culvert headwall.[219]

D.3. Railroad Crossings

The rules stated in the foregoing section apply also in cases involving traffic control at railroad crossings. Cases have involved the issues of whether there is a duty to take certain action because of the recommendations of a report or study; whether the failure to act is protected by the discretionary function exemption; whether there is a duty to upgrade existing devices at crossings; and whether certain evidence, such as accident data and "near misses," is admissible into evidence to establish that the state had a duty to respond to a dangerous situation.

First, highway department engineers may have immunity in determining whether to remove railway rails surrounding a crossing signal.[220] Second, it has been held that a particular regulation did not impose a mandatory duty on the state to install active warning devices at a railroad crossing.[221] Third, it has been held that there was immunity for crossing signals installed in 1957 when a state statute provided that approved crossing safety devices or improvements were "adequate and appropriate protection."[222]

Although the effect of standards and guidelines is considered elsewhere, in *McEwen, supra,* a corridor study had stated that gates should be installed at all crossings where trains exceeded 40 mph; however, the court agreed that the state's decision not to upgrade the crossing in question was in accordance with a priority rating system that balanced financial constraints, limited funding, and safety considerations. The state's actions were protected by the exemption for discretionary action.[223] Nevertheless, in *Archon v. Union Pac. R.R.*,[224] the court rejected the discretionary function defense in a situation where the transportation department failed to install active warning devices at a railroad crossing, forcing the plaintiff-driver to "creep" up to the tracks to see beyond boxcars on the rails. The passive warning devices did not warn of an approaching train.

Although 23 U.S.C. § 409 is discussed elsewhere, *Sawyer v. Illinois C.G.R. Co.*[225] held that § 409 is binding in an action against the State; thus, data developed by the State pursuant to that section on railroad crossing accidents was inadmissible in a State court action. The court precluded testimony regarding a letter from the highway department that recommended that flashing lights be installed at a railroad crossing. The court also precluded evidence of the presence of the accident location on an inventory of hazardous sites, testimony concerning notice to the railroad of an unusually dangerous situation 2 years before the accident, and testimony that the site "was in the top 1 percent most dangerous in Mississippi."[226]

Although the court affirmed a jury verdict in favor of the railroad, it noted that "[t]here can be no serious suggestion that these passive warning devices [an 'X' cross buck sign and reflectorized railroad markings on the pavement] fell below minimum standards mandated by law."[227] The court precluded evidence of "near misses," but the court did observe that it "had no doubt there are cases where evidence of near accidents may be admissible for the purpose of showing the dangerous character of a place and to show notice there to the person in control."[228]

In sum, the decision not to install a barrier or guardrail may be considered a discretionary function and held to be immune from liability.[229] However, as seen, before and after the U.S. Supreme Court's decision in *Gaubert*, there are some cases in which the transportation department was held liable for failure to install a barrier or guardrail or for failure to correct a dangerous condition.

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[218] Arnesano v. State, Dep't of Transp., 113 Nev. 815, 942 P.2d 139 (1997).

[219] Woollen v. State, 256 Neb. 865, 593 N.W.2d 729, 741 (1999). There are pre-*Gaubert* cases holding that discretion is exhausted when either the decision is made to build a new highway or to open a new highway for public use and that all decisions thereafter, including decisions regarding the installation of guardrails and barriers, are operational-level decisions that are not immunized by the discretionary exemption. There are post-*Gaubert* decisions where the courts continue to refer to the operational nature of the decision in holding that the state was negligent with respect to the guardrail or barrier in question. As seen in *State v. Livengood*, 688 N.E.2d 189, 196, 1997 Ind. App. LEXIS 1569 (1997), the court relied on the planning/operational level dichotomy but held that the installation of a portion of a guardrail to comply with a safety standard was an operational task and not immune.

[220] Taylor v. Shoemaker, 605 So. 2d 828 (Ala. 1992).

[221] Ball v. Burns & McDonnell, 256 Kan. 152, 883 P.2d 756 (1994).

[222] McEwen v. Burlington N. R.R. Co., 494 N.W.2d 313, 316 (Minn. Ct. App. 1993), *review denied,* 1993 Minn. LEXIS 135 (Minn. Feb. 25, 1993).

[223] McEwen, 494 N.W.2d at 317.

[224] 657 So. 2d 987 (La. 1995)*, on reh'g,* 675 So .2d 1055 (La. 1996).

[225] 606 So. 2d 1069 (Miss. 1992)*, reh'g denied,* 1992 Miss. LEXIS 615 (Miss. Aug. 26, 1992).

[226] Sawyer, 606 So. 2d at 1073–74.

[227] *Id.* at 1071, n.2.

[228] *Id*. at 1075.

[229] 39 AM. JUR. 2D *Highways, Streets, and Bridges* § 443, at 928.

E. THE DISCRETIONARY ACTIVITY EXEMPTION AS APPLIED TO TRAFFIC CONTROL DEVICES

E.1. Immunity for Decisions Regarding Whether to Provide Them

Section II.A discusses whether transportation departments have a duty[230] to provide traffic control devices, such as traffic lights, and, if so, when that duty arises.[231] This section discusses when the department's decision to provide or not to provide them is immune from liability because of the exemption for discretionary activities. Usually, transportation departments have immunity for the initial decision as to whether to install traffic control devices.[232] However, after the department decides to provide them, it has a duty to maintain them in good working order.[233]

According to one authority, liability for failure to provide or maintain traffic lights or signals at intersections depends on the circumstances. "The strongest cases for recovery have been those in which the highway authority failed within a reasonable time to replace a traffic sign which had been removed by unauthorized persons, to re-erect or repair a sign which had fallen down or had been knocked down or bent over, or to replace a burned out bulb in an electric traffic signal."[234] However, a transportation department has escaped liability where the motorist fails to establish that a traffic control device would have been "an appropriate remedial measure" at an intersection between a local road and a state highway lacking a traffic control device.[235] Finally, it should be noted that in some municipalities there may be no liability solely for failure to maintain traffic lights.[236]

E.2. Immunity for Selection, Placement or Sequencing

E.2.a. Traffic Lights and Signals

Cases involving transportation departments' duty for traffic control devices frequently involve issues of their design, placement, or sequencing. There may be statutory immunity for decisions concerning traffic sign selection, their placement, or adequacy.[237] Cases have held that decisions concerning traffic control devices and whether extra ones are needed at a given intersection rest within the sound discretion of the transportation department.[238] Thus, the general rule is that the state's decision-making concerning the providing or placing of signs, signals, or warning devices is protected by the discretionary function exception.[239] As

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[230] *See* Hart v. Salt Lake County Comm'n, 324 Utah Adv. Rep. 30, 945 P.2d 125 (1997), *cert. denied*, 953 P.2d 449 (Utah 1997) (In a case involving allegedly inadequate warning devices, the County failed to preserve the legal issue that it did not owe a duty to the plaintiff.) *See also* Harkness v. Hall, 684 N.E.2d 1156, 1159 (Ind. Ct. App. 1997) (appellate court reversed lower court's decision granting defendant's motion for summary judgment; county's immunity from "any design defect claim" did not immunize county from claim alleging defective maintenance and signage).

[231] Traffic control devices encompass a variety of traffic signs, lights, signals, and markings. *See, e.g.*, 21 DEL. CODE ANN. §§ 4107-4112.

[232] A public agency may be entitled to immunity with respect to a claim that it failed initially to place signs "warning of the unpaved condition of [a] bridge and that the road was closed to vehicular traffic." Boub v. Township of Wayne, 291 Ill. App. 3d 713, 684 N.E.2d 1040, 1048 (1997), *appeal granted*, 176 Ill. 2d 570, 690 N.E.2d 1379 (1998). (However, the case may be distinguishable in that the bicyclist injured on the bridge was not a permitted user to whom the township owed any duty.) *See also* Weiss v. N.J. Transit, 128 N.J. 376, 608 A.2d 254, 257 (1992) ("[T]he explicit grant of immunity for failure to provide traffic signals under N.J.S.A. 59:4-5 'will prevail over the liability provisions'" of the tort claims act in a case in which the plaintiff alleged that the public activities were independently negligent in delaying the implementation of a plan to install a traffic signal at a railroad crossing.) In *Wainscott v. State*, 642 P.2d 1355 (Alaska 1982), the decision to provide flashing red and yellow lights instead of a sequentially changing traffic signal at the intersection in question was immune; however, in *Department of Transp. v. Brown*, 267 Ga. 6, 471 S.E.2d 849 (1996), *recons. denied*, (July 12, 1996), the decision to open a highway prior to completion with two-way stop signs rather than four-way traffic light signals was not a "public policy" decision that entitled the State to immunity. *See also* Rapp v. State, 648 P.2d 110 (Alaska 1982); Pierrotti v. La. Dep't of Highways, 146 So. 2d 455 (La. App. 3d Cir. 1962) and Griffin v. State, 24 Misc. 2d 815, 205 N.Y.S.2d 470 (1960), *aff'd* 14 A.D.2d 825, 218 N.Y.S.2d 534 (4th Dep't 1961).

[233] *See* Iovino v. Mich., 228 Mich. App. 125, 577 N.W.2d 193 (1998), *review pending,* 1999 Mich. LEXIS 241 (1999) (where positioning of roads created a hazard, duty arose to erect adequate signs or traffic signals); and Forest v. State, 493 So. 2d 563 (La. 1986), *reh'g denied,* (Oct. 9, 1986) (absence of amber flashing lights contributed to a finding of liability).

[234] *See* Annot., *Liability of Highway Authorities Arising Out of Motor Vehicle Accident Allegedly Caused by Failure to Erect or Properly Maintain Traffic Control Device at Intersection*, 34 A.L.R. 3d 1008, 1015.

[235] Starr v. Veneziano, 747 A.2d 867, 873–74, 2000 Pa. LEXIS 714 (Pa. 2000).

[236] Capshaw v. Tex. Dep't of Transp., 988 S.W.2d 943, 946, 1999 Tex. App. LEXIS 2050 (Ct. App., El Paso, 1999) (Unless there is a dangerous condition that the government failed to remedy, generally the transportation department is not liable for claims arising from defective traffic signals.) *See also* Radosevich v. County Comm'rs of Whatcom Co., 3 Wash. App. 602, 476 P.2d 705 (1970).

[237] McLain v. State, 563 N.W.2d 600, 603, 1997 Iowa Sup. LEXIS 167 (1997), *citing* I.C.A. § 668.10, subd. 1.

[238] State Farm Auto Ins. Co. v. Ohio Dep't of Transp., 1999 Ohio App. LEXIS 2601 (1999).

[239] McDuffie v. Roscoe, 679 So. 2d 641, 645 (Ala. 1996) (court stated "we cannot agree that posting warning signs was a ministerial function"); French v. Johnson County, 929 S.W.2d 614 (Tex. App. 1996) (decision not to post warning signs held to be a discretionary function); Jacobs v. Board of Comm'rs, 652 N.E.2d 94 (Ind. Ct. App. 1995), *transfer denied*, (Nov. 20, 1995) (county

seen elsewhere, however, the state may not be immune from liability if it has failed to respond to a dangerous condition.[240]

In *Department of Transportation v. Neilson,*[241] the complaint alleged that the State and others were negligent in that an intersection was defectively designed as a roadway and was not adequately controlled with traffic control signs and devices. The court stated that:

> the issue to be decided in this case is whether decisions concerning the installation of traffic control devices, the initial plan and alignment of roads, or the improvement or upgrading of roads or intersections may constitute omissions or negligent acts which subject governmental entities to liability. We answer the question in the negative, holding such activities are basic capital improvements and are judgmental planning-level functions.[242]

In *Davis v. Cleveland,*[243] the defendants allegedly set the sequential change of traffic lights at an intersection in a manner such that the interval of the yellow caution light was too brief to allow for clearance of traffic before the signal changed. The tort liability act waived governmental immunity "for injury proximately caused by a negligent act or omission of any employee within the scope of his employment," except and unless the act or omission arose out of "the exercise or the failure to exercise or perform a discretionary function, whether or not the discretion is abused."[244]

Based on the statutory language, the court ruled that the setting of the timing sequence of the traffic light by defendants' employees was a "judgment call" falling within the ambit of the discretionary exemption.

> In this case, it is the acts or omissions of the employees in setting the yellow caution interval that are really claimed to be the proximate cause of plaintiff's injuries. The traffic signal itself operates properly according to the timing sequence previously set, and is itself not defective. Thus, this case must be considered under T.C.A., Section 29-20-205. Since the acts or omissions for which the plaintiffs claim the City of Cleveland and Bradley County are liable are acts or omissions for which immunity has not been removed under T.C.A., Sec. 29-20-205, this action is barred.[245]

In *Bjorkquist v. City of Robbinsdale,*[246] a bicyclist claimed that the timing of the clearance interval between the change of traffic lights from red to green was unduly brief and that the improper timing of the light change was the proximate cause of an accident in which he was struck by an automobile at the intersection.[247] The plaintiff asserted that the timing of the change of lights was based on a decision made at the operational level, and, therefore, was not immune from judicial review. The court ruled, however, that the decision on the length of the clearance interval was a part of the planning process; thus, it was a discretionary decision that was protected by the Act.

Other cases have ruled that decision-making regarding the installation and placement of warning signs and signals is not discretionary; for instance, the decision to open a highway prior to completion with two-way stop signs rather than four-way traffic light signals was not a "public policy" decision that would entitle the state to immunity under the discretionary function exception.[248] Moreover, where the positioning of roads creates a hazard, there is a duty to erect adequate signs or traffic signals. In *King v. State,*[249] the placement of the devices was in technical compliance with the MUTCD. However, the State was held liable for the design of a traffic light at an intersection, because the traffic control devices at that location were improperly aimed, equipped, and located, with the result that they confused and misled motorists.

E.2.b. Warning Signs or Markings

It should be noted that there may be a distinction between "regulating" signs and "warning" signs. There are cases decided under California Government Code Section 830.4 holding that the failure to install a "regulating" or "regulatory" sign is immune.[250] For example, in *Frazer v. County of Sonoma*,[251] the court held that painted lines on a highway consisting of double yellow lines with white striping inside, which an expert maintained would have prevented an accident, were "regulatory" type markings, rather than "warning" type markings, and thus their absence was not a

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failed to establish that it had engaged in systematic process to determine when and where to place warning signs).

[240] Helmus v. Transp. Dep't, 238 Mich. App. 250, 604 N.W.2d 793, 1999 Mich. App. LEXIS 321 (1999) (government agencies have duty to provide adequate warning signs or traffic control devices at the location of a known "point of hazard"); Harkness v. Hall, 684 N.E.2d 1156 (Ind. Ct. App. 1997) (duty to maintain signs or signals in good working order); and Bendas v. Township of White Deer, 531 Pa. 180, 611 A.2d 1184, 1187, 1992 Pa. LEXIS 395 (1992) (commonwealth's duty to make highways reasonably safe included erecting traffic control devices or otherwise correcting dangerous conditions).

[241] 419 So. 2d 1071 (Fla. 1982).

[242] *Id.* at 1077

[243] 709 S.W.2d 613 (Tenn. Ct. App. 1986).

[244] Tennessee Governmental Tort Liability Act, TENN. CODE ANN. § 29-20-201, 205.

[245] 709 S.W.2d at 616.

[246] 352 N.W.2d 817 (Minn. Ct. App. 1984); *see also* Zank v. Larson, 552 N.W.2d 719 (Minn. 1996).

[247] The plaintiff conceded that the decision whether to install a traffic control device at the intersection was discretionary in nature and exempt from liability under the discretionary function exception of the Minnesota Tort Claims Act.

[248] Department of Transp. v. Brown, 267 Ga. 6, 471 S.E.2d 849 (1996), *recons. denied,* (July 12, 1996).

[249] 83 Misc. 2d 748, 370 N.Y.S.2d 1000 (Ct. Cl. 1975).

[250] Section 830.4 refers to "regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs, as described by the Vehicle Code, or distinctive roadway markings as described in section 21460 of the Vehicle Code."

[251] 267 Cal. Rptr. 39, 218 Cal. App. 3d 454 (1st Dist. 1990).

dangerous condition for which the county could be held liable. The section does not always shield the public entity, however, from liability.[252] Rather, the provision provides for immunity for a dangerous condition caused by the "mere" failure to provide certain signs. Where there are additional factors that give rise to a dangerous condition, the absence of a regulatory sign or signal may be considered.[253] As for warning signs, there may be immunity for failing to provide one under California Government Code Section 830.8, as long as the signal, sign, marking, or device was not necessary to warn of a dangerous condition that would not have been reasonably apparent to and would not have been anticipated by a person exercising due care.

The courts have considered whether the posting of a curve warning sign is a discretionary activity protected by the discretionary exemption of state tort claims acts or is instead an unprotected operational or ministerial level activity. In *Peavler v. Board of Comm'rs of Monroe County*,[254] the appellate court specifically declined to rule on whether the county's decision not to erect signing warning of a dangerous curve was discretionary, stating that whether the decision was discretionary (and hence protected) or ministerial (and hence unprotected) was an issue for the jury to decide. The court remanded the case for a jury determination on the issue.

The *Peavler* case was consolidated with *Board of Comm'rs of County of Steuben v. Hout,*[255] and the state supreme court reversed and remanded:

> The defendants here seek to establish the defense of immunity. Each bears the burden to show that a policy decision, consciously balancing risks and benefits, took place. Neither defendant county presented evidence to show that its decision regarding the warning signs was the result of such a process.... Failure to engage in this decision-making process does not automatically result in liability. The county simply is not shielded by immunity if the failure to erect a warning sign did not result from a policy decision consciously balancing risks and advantages.... On remand, the counties bear the burden to demonstrate the discretionary nature of the decision in order to prevail on a claim of immunity.[256]

In *Lee v. State*,[257] the court held that the transportation department's improvement of the highway curves at issue was in the planning phase at the time of the accident such that the State and the department were entitled to immunity. In *Ring v. State*,[258] the court held that the State did not breach its maintenance duties by failing to erect signs warning of curves prior to an accident only 8 days after the State officially took control of the road.

As noted in *Carpenter v. Johnson,*[259] there is a distinction between the exercise of governmental discretion and the exercise of professional judgment by highway engineers in deciding the need for signing. The question is whether the State's employees are exercising discretion within the meaning of the tort claims act or merely exercising professional judgment within established guidelines. The court remanded the case for the jury to resolve whether the decision not to post warning signs was protected "governmental discretion" or the unprotected exercise of "professional judgment."

There may be immunity even when there was no sign or signal, but there was an acknowledged risk to the motorist. In *Lee v. State ex rel. Depart. of Transp. & Dev.,*[260] it was disputed whether a "Stop Ahead" sign was in place on the date of the accident. The trial judge determined that the sign was necessary to properly warn motorists of the need to stop at the intersection. In reversing the trial judge's decision against the State, the appellate court held that "[i]t is well-settled that a governmental authority that undertakes to control traffic at an intersection must exercise a high degree of care for the safety of the motoring public," but it is not "responsible for all injuries resulting from any risk posed by the roadway or its appurtenances, only those caused by an unreasonable risk of harm to others."[261] Although the absence of a sign may have created an unreasonable risk of harm to motorists,[262] the intersection was guarded by two flashing red beacons, was free of obstructions, and was visible at a distance of more than 800 ft.[263] The court also stated that "[i]n all situations, the decision to erect a warning sign is discretionary on the part of DOTD."[264]

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[252] Bunker v. City of Glendale, 168 Cal. Rptr. 565, 111 Cal. App. 3d 325 (2d Dist. 1980) (liability arising out of misleading speed limit sign).

[253] City of South Lake Tahoe v. Superior Court, 73 Cal. Rptr. 2d 146, 62 Cal. App. 4th 971 (3d Dist. 1998).

[254] 492 N.E.2d 1086 (Ind. Ct. App., 1st Dist., 1986); *see also* Farrell v. State, 612 N.E.2d 124 (Ind. Ct. App. 1993), *vacated,* 622 N.E.2d 488 (Ind. 1993).

[255] 497 N.E.2d 597 (Ind. App. 3d Dist. 1986).

[256] 528 N.E.2d at 47–48.

[257] 682 N.E.2d 576, 1997 Ind. App. LEXIS 895 (1997).

[258] 705 N.Y.S.2d 427, 428, 2000 N.Y. App. Div. LEXIS 3345 (3d Dep't 2000).

[259] 231 Kan. 783, 649 P.2d 400 (1982).

[260] 701 So. 2d 676 (La. 1997). The issue in the case was not immunity based on the exercise of discretion but liability for a dangerous condition.

[261] Lee, 701 So. 2d at 678. "It is well-settled that a governmental authority that undertakes to control traffic at an intersection must exercise a high degree of care for the safety of the motoring public." *Id.*

[262] *Id.* at 679.

[263] The court disregarded the claim that there was glare from the sun: "Temporary sun blindness, like visual impairment caused by fog or heavy rain, is a physical condition with which drivers must learn to contend in a safe and responsible manner." *Id.*

[264] *Id.*

E.2.c. Stop Signs and Speed Limit Signs

As in the case of traffic lights, it has been held that the decision whether or not to erect a Stop sign at an intersection is a protected discretionary decision and immune from judicial review under the discretionary exemption in state tort claims acts.[265]

In *Gonzales v. Hollins,*[266] the question was whether the city's action in changing the traffic control device to a static Stop sign was a discretionary activity and immune under the Minnesota Tort Claims Act. In holding that the city's decision to replace the traffic control devices was discretionary, the court relied upon the planning-operational dichotomy, stating that the decision concerning the change in the traffic control devices was "planning" in nature.

However, the New York Court of Appeals reached a different result in *Alexander v. Eldred.*[267] The court applied its previously announced rule that the exemption for discretionary activity does not apply to decision-making that was grounded on an inadequate study or that lacked a reasonable basis. In a case involving the absence of a Stop or other sign at the junction of the highway with a private road, the city's traffic engineer testified that he did not consider installing a sign on the private road. Although he believed that he lacked authority to do so, the state's vehicle and traffic law authorized the installation of signs on private roads open to public motor vehicle traffic. The court ruled that the engineer's ignorance of the law reflected both inadequate study and the lack of a reasonable basis for the decision not to install signing warning of the intersection.[268]

Although there are a few cases, as noted, holding differently, once the state makes a decision and erects a sign, the transportation authority has the duty to maintain it in good working order, and its failure to do so is not protected by the discretionary function exemption.[269]

The decision to post a speed limit sign is a protected planning level activity rather than an unprotected operational activity.[270] As stated in *Kolitch v. Lindedahl*,[271] based on the planning and operational dichotomy, the posting of a speed limit is a planning level decision protected by the discretionary exemption. However, it has been held that the state's posting of advisory rather than mandatory speed limit signs at a dangerous intersection constituted negligence.[272]

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[265] Tell City v. Noble, 489 N.E.2d 958 (Ind. App. 1st Dist. 1986) (held that the decision of the city not to install a Stop sign or other form of traffic control at an intersection was discretionary and immune from judicial review under the Indiana Tort Claims Act).

[266] 386 N.W.2d 842 (Minn. App. 1986). *See* Nguyen v. Nguyen, 565 N.W.2d 721, 723 (Minn. Ct. App. 1997) ("Discretionary immunity applies in this case because the challenged conduct, the County's decision to delay the intersection improvements, occurred at the planning level.").

[267] 63 N.Y.2d 460, 483 N.Y.S.2d 168, 472 N.E.2d 996 (1984).

[268] In the leading case of *Weiss v. Fote, supra* note 116, the court denoted inadequate study and lack of reasonable basis as grounds for avoiding the application and protection of the discretionary exemption.

[269] Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979), *on remand*, 372 So. 2d 1022 (Fla. Dist. Ct. App. 3d Dist. 1979), *appeal after remand*, 398 So. 2d 488 (Fla. Dist. Ct. App. 3d Dist. 1981), and *on remand*, Cheney v. Dade County, 372 So. 2d 1182 (Fla. Dist. Ct. App. 3d Dist. 1979); *See* Bussard v. Ohio Dep't of Transp., 31 Ohio Misc. 2d 1, 507 N.E.2d 1179 (Ct. Cl. 1986); Shuttleworth v. Conti Constr. Co., 193 N.J. Super. 469, 475 A.2d 48 (1984) (jury question presented whether the county was guilty of "palpably unreasonable" conduct in allowing a sign to become obscured by vegetation after installation); Bryant v. Jefferson City, 701 S.W.2d 626 (Tenn. App. 1985); Dep't of Transp. v. Neilson, 419 So. 2d 1071 (Fla. 1982) (failure to maintain traffic control devices in proper working order once installed constituted negligence at the unprotected, operational level); and Crucil v. Carson City, 95 Nev. 583, 600 P.2d 216 (1979) (discretionary exemption provision of the tort claims act was inapplicable).

[270] Ireland v. Crow's Nest Yachts, Inc., 552 N.W.2d 269, 273–74, 1996 Minn. App. LEXIS 882 (1996) (engineer's decision not to install a "distance plaque" on the approach to a curve was discretionary).

[271] 100 N.J. 485, 497 A.2d 183 (1985).

[272] Scheemaker v. State, 125 A.D.2d 964, 510 N.Y.S.2d 359 (1986), *appeal granted*, 69 N.Y.2d 610, 516 N.Y.S.2d 1025 (1987), *and aff'd,* 70 N.Y.2d 985, 526 N.Y.S.2d 420, 521 N.E.2d 427 (1988).