Failure to Meet Their Appointed Rounds - Tort Liability of Postal Service Supervisory Personnel for Lost or Mishandled Mail

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FAILURE TO MEET THEIR APPOINTED ROUNDS —
TORT LIABILITY OF POSTAL SERVICE
SUPERVISORY PERSONNEL FOR LOST
OR MISHANDLED MAIL

INTRODUCTION

The problem of poor mail delivery service is a recurring one, felt in all segments of society. For the small businessman, who relies on the Postal Service as a lifeline to his customers, suppliers, and creditors, late or misplaced mail delivery can result in financial loss and damage to business reputation. Furthermore, the severity of this problem is heightened by the fact that there is no commercial recourse available—the Postal Service exerts monopolistic control over letter deliveries. If the distraught businessman attempts to right this wrong in court, he becomes sorely aware of the federal laws immunizing the Postal Service from tort liability for lost or negligently handled mail.

Despite the pervasive immunity of the Service itself, a postal employee who personally mishandles the mail is liable for his negligence. However, this remains an illusory avenue to relief. As a practical matter, finding the person who actually mishandled the mail often provides an impervious barrier to recovery. A more efficacious avenue to relief would fasten liability on the personnel who supervise the allegedly negligent employees. Nevertheless, the law is silent as to the liability in tort of postal employees at the supervisory level.

This comment attempts to expose this noticeable gap in the tort law and supply a foundation for imposing liability on supervisory employees. In the course of providing this foundation, it details three legal hurdles which must be surmounted in order to impose such liability—the Federal Tort Claims Act, the Postal Reorganization Act, and the doctrine of discretionary immunity.

After a brief look at early case law, the legislative and case history of both the Federal Tort Claims Act and the Postal

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1. Businessmen customarily rely on the mails to advertise upcoming sales. Delay of sale advertisements to a number of customers results in depleted stock for the involuntarily tardy shopper. The consequential loss of goodwill is substantial. In addition, a misplaced order for goods with a supplier results in the shopper not being able to buy out of stock items. Again, the loss of goodwill is noticeable. A businessman's credit rating is endangered by nondelivery of a creditor's bill. All of the preceding situations raise havoc with a small businessman's operations.

Reorganization Act is examined to determine if it contemplates supervisorial liability. Assuming these Acts can be interpreted to establish liability, this comment then analyzes the impact of the doctrine of discretionary immunity, as enunciated in Barr v. Matteo, on situations when liability might conceivably attach. Finally, this comment explores development of the case law concerning supervisorial liability in analogous federal agencies and projects its application to Postal Service supervisors.

**EARLY CASE LAW**

There is a substantial body of older case law specifically imposing liability upon postmasters for the nondelivery of mail. In his *Treatise on Torts*, Cooley described the liability as follows:

But in respect to mail matter received at his [postmaster's] office for delivery, a duty is fixed upon him in behalf of the several persons to whom each letter, paper or parcel is directed. When the proper person calls for what is there for delivery, the postmaster must deliver it, and his refusal to do so is a tort. The postmaster is also liable to the person entitled to it for the loss, through his own carelessness or that of any of his clerks or servants, of any letter or other mail matter which shall have come into his official custody.

In *Dunlop v. Monroe*, the United States Supreme Court affirmed the liability of a postmaster for negligent supervision of his assistants. The Court was careful to limit those situations in which the postmaster would be charged with the negligence of his assistants. Liability was found to exist only when the negligent acts resulted from the postmaster's failure to properly supervise his assistants in the discharge of their duties. Subsequent cases reaffirmed this rule.

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6. 8 U.S. (7 Cranch) 242 (1812).
7. *Id.* at 269.
8. *See, e.g.*, Raisler v. Oliver, 97 Ala. 710, 12 So. 238 (1893). In *Raisler* the court held:
This early case law seemed to establish a clear avenue of relief for the disgruntled businessman injured by defective mail delivery. However, this clear avenue was clouded somewhat by the passage of the Federal Tort Claims Acts, specifically the provisions which limited the Act's general waiver of sovereign immunity.

THE FEDERAL TORT CLAIMS ACT

Legislative Background

Prior to the Federal Tort Claims Act, there was no general waiver of sovereign immunity in tort actions on the part of the United States Government. Since the federal government had not consented to be sued for the tortious acts of its agents, the individual claimant's only recourse was to seek relief through private legislation. Under this scheme, Congress considered individually the claims of unhappy postal customers.

As the number of claims multiplied, Congress found itself hard pressed to discharge its legislative functions. Witnesses who appeared before a special committee of Congress, investigating the ability of the legislative branch to cope with its increasingly complex problems, testified with near unanimity that congressional consideration of private claim bills was simply too time consuming. The implication of this testimony was clear—the private claim bills were impediments to a more efficient lawmaking body. The special committee subsequently proposed a bill to streamline the workload of Congress. The bill confronted the problems created by the escalating number of

[A] postmaster is not responsible for the defaults or misfeasance of his clerks or assistants, although appointed by him and under his control, unless it be shown that the postmaster was negligent in not exercising proper care and prudence in the selection of suitable and competent persons to perform the duties of clerks or deputy assistants, or unless it be shown that the postmaster himself was negligent in the duty resting upon him, to properly superintend such clerks or assistants in the performance of the particular acts or duty, the doing of which, or the omission to do which, caused the loss and injury.

Id. at 713, 12 So. at 240 (emphasis added).


11. 1 L. Jayson, supra note 9, § 52, at 2-6.

private claim bills. When enacted, it contained a prohibition of such claim bills and a broad waiver of sovereign immunity known as the Federal Tort Claims Act.\textsuperscript{13}

\textit{Federal Tort Claims Act}

The Act embodies the consent of the United States to be sued for the tortious acts of its agents. Although expansive, the Act provides certain exceptions to this general consent.\textsuperscript{14} The exception applicable to the Postal Service reads as follows: "The provisions of this title [Federal Tort Claims Act] shall not apply to . . . (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter."\textsuperscript{15} The legislative history accompanying the committee's bill gave few clues to the congressional intent underlying this exception. It simply noted that Senate Bill 2177 was designed "to provide for increased efficiency in the legislative branch of the Government."\textsuperscript{16} Its pervasive language, standing alone, arguably could extend to postal employees who were previously held liable for their negligent acts. If this interpretation were adopted, the Federal Tort Claims Act would erect a substantial barrier to recovery for those victimized by defective mail service.

However, several factors militate against the adoption of

\begin{itemize}
\item \textsuperscript{13} 28 U.S.C. §§ 2671-2680 (1970).
\item \textsuperscript{14} \textit{Id.} § 2680(a)-(c) (1970). This section provides in pertinent part:
  The provisions of this chapter and section 1346 (b) of this title shall not apply to—
  (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 involved be abused.
  (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.
  (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.
\item \textsuperscript{15} \textit{Id.} § 2680(b).
\item \textsuperscript{16} 92 CONG. REC. index, at 579 (1946). In the index to the Hearings before the Special Committee on the Organization of Congress, there was only one listing relevant to the matter at hand—"Private Claim Bills." The testimony made no mention of the "postal matter" exception. The gist of the testimony was that congressional consideration of private claim bills exhausted too much time and was not the optimal means of disposition of claims in the interest of justice. Additionally, Senate Report 1400 of the Special Committee on the Organization of Congress cast no light on the exception under consideration other than the points elucidated in notes 9-13 and accompanying text \textit{supra}.
\end{itemize}
this interpretation. First, it is readily inferable from the discussions of the Senate and House centering around earlier legislation, that the exception was intended to apply to actions against the federal government only, not individual postal officials.\footnote{A number of bills waiving the sovereign immunity of the United States were introduced in Congress prior to the enactment of the Federal Tort Claims Act. Although none of these bills became law, they are useful in determining congressional intent in regard to the "postal matter" exception which all of them contained. For example, the hearings on S. 2690 contain part of the memorandum for the Attorney General in which it is stated that the Federal Tort Claims Act excepts from its scope, "a series of torts as to which, for the time being at least, it may be dangerous for the Government to subject itself to suit, until in any event considerable experience has been had under the proposed legislation." \textit{Hearings on S. 2690 Before the Subcomm. of the Senate Comm. on the Judiciary, 76th Cong., 3d Sess.} 13 (1940). The Chairman of the Federal Bar Association criticized the exemptions from suit. \textit{Id.} at 14. Additionally, Alexander Holtzoff, Special Assistant to the Attorney General, stated that the bill "merely waives the immunity of the United States against being sued." \textit{Id.} at 34 (emphasis added). At the hearings on H.R. 7236, Holtzoff, who played a significant role in drafting the proposed legislation, further explained: \textit{Now, section 303 exempts from the scope of the measure certain types of torts (such as those involving loss of letters or postal matter). The theory of these exemptions is that, since this bill is a radical innovation, perhaps we had better take it step by step and exempt certain torts and certain actions which might give rise to tort claims that would be difficult to defend or in respect to which it would be unjust to make the Government liable.} \textit{Hearings on H.R. 7236 Before the Subcomm. No. 1 of the House Comm. on the Judiciary, 76th Cong., 3d Sess.} 22 (1940) (emphasis added). The thrust of the debates on H.R. 7236 was that the Federal Tort Claims Act and its exceptions concern the government, not the individual postal officials. \textit{See} \textit{86 Cong. Rec.} 12015-32 (1940).}

Second, though there are no reported decisions attempting to apply the Postal Service's exception to shield individual employees from liability, cases interpreting the other exceptions in the Act present a rational argument that they apply only to suits against the United States and do not afford immunity to its employees engaged in the function described.\footnote{28 U.S.C. § 2680(a)-(c) (1970).} Thus, in \textit{Henderson v. Bluemink}, the court reasoned:

Generally, suits involving damages caused by an employee of the United States are brought under the Federal Tort Claims Act which provides a basis for recovery against the United States. However, with the exception of a provision in the Act and others found elsewhere, there is no statutory protection for federal employees from personal liability arising out of their own negligent conduct while acting within the scope of their employment. The Act itself provides that

\begin{footnotesize}
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\item[17.] A number of bills waiving the sovereign immunity of the United States were introduced in Congress prior to the enactment of the Federal Tort Claims Act. Although none of these bills became law, they are useful in determining congressional intent in regard to the "postal matter" exception which all of them contained. For example, the hearings on S. 2690 contain part of the memorandum for the Attorney General in which it is stated that the Federal Tort Claims Act excepts from its scope, "a series of torts as to which, for the time being at least, it may be dangerous for the Government to subject itself to suit, until in any event considerable experience has been had under the proposed legislation." \textit{Hearings on S. 2690 Before the Subcomm. of the Senate Comm. on the Judiciary, 76th Cong., 3d Sess.} 13 (1940). The Chairman of the Federal Bar Association criticized the exemptions from suit. \textit{Id.} at 14. Additionally, Alexander Holtzoff, Special Assistant to the Attorney General, stated that the bill "merely waives the immunity of the United States against being sued." \textit{Id.} at 34 (emphasis added). At the hearings on H.R. 7236, Holtzoff, who played a significant role in drafting the proposed legislation, further explained: \textit{Now, section 303 exempts from the scope of the measure certain types of torts (such as those involving loss of letters or postal matter). The theory of these exemptions is that, since this bill is a radical innovation, perhaps we had better take it step by step and exempt certain torts and certain actions which might give rise to tort claims that would be difficult to defend or in respect to which it would be unjust to make the Government liable.} \textit{Hearings on H.R. 7236 Before the Subcomm. No. 1 of the House Comm. on the Judiciary, 76th Cong., 3d Sess.} 22 (1940) (emphasis added). The thrust of the debates on H.R. 7236 was that the Federal Tort Claims Act and its exceptions concern the government, not the individual postal officials. \textit{See} \textit{86 Cong. Rec.} 12015-32 (1940).\end{enumerate}
\end{footnotesize}
a judgment against the United States shall operate as a bar to any action against the individual employee, but that section proscribes a double recovery, not a suit against the individual employee in the first instance. 29

As the preceding discussion illustrates, the Federal Tort Claims Act should not bar an unhappy postal customer from suing individual postal employees for negligent delivery of services. Both the case law interpreting the Act and the legislative history accompanying it, seem to contemplate this type of suit. However, after overcoming this initial barrier to recovery, a second potential obstacle must be considered—the effect of the Postal Reorganization Act of 1971.

THE POSTAL REORGANIZATION ACT

Legislative Background

In 1971, Congress completely revamped the Post Office Department by passing the Postal Reorganization Act. 21 The Department was given a new name, the Postal Service, 22 and was abolished as a cabinet level department. 23 The new Postal Service is directed by an eleven member board of governors, nine of which are chosen by the President. 24 Under chapter four of Title 39, the Service is given broad powers, such as acquiring property, 25 settling claims, 26 constructing facilities, 27 entering contracts, 28 and accepting gifts in its own name. 29 Of special significance is the provision allowing the Postal Service “to sue and be sued in its official name.” 30

The House report accompanying the Postal Reorganiza-

20. Id. at 403-04. Similarly, in Turner v. Ralston, 409 F. Supp. 1260 (W.D. Wis. 1976), the court reasoned: “An injured person in a non-automobile case may at his option sue the federal official responsible for the injury instead of or in addition to the government. In fact, a judgment against the individual officers does not preclude a later action against the United States . . . .” Id. at 1261 (citations omitted).
22. Id. § 201.
23. Section 201 provides: “There is established, as an independent establishment of the executive branch of the Government of the United States, the United States Postal Service.” Id.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id. § 401(3).
29. Id. § 401(7).
30. Id. § 401(1).
tion Act labels the Postal Service as a "public service." Though ostensibly cast in the public mold, it would be more accurate to term the Postal Service a public-private hybrid. For example, the Service is accorded the power to incur obligations up to a ten billion dollar ceiling in its own name. Similarly, the discussion which attended the passage of the reorganization bill emphasized the need to infuse elements of private enterprise into the Service. Additionally, the bill reflects an attempt by Congress to minimize political control over the postal system, by turning it loose from the political patronage system.

Given this public-private hybrid, the question then becomes what effect does its creation have on the individual's ability to sue the Postal Service or its employees? Alternatively, assuming the ability to sue survives, does the exception provided in the Federal Tort Claims Act have any continued validity with respect to the new Service? A partial answer to these inquiries is supplied by cases interpreting the "sue or be sued" language of the Reorganization Act.

Postal Cases Defining the "Sue and Be Sued" Language

Granted the ability to "sue and be sued in its official name," the Postal Service has been subjected to liability in cases occurring subsequent to the reorganization of 1971. For example, Association of American Publishers v. Governors of the United States Postal Service involved a postal rate dispute growing out of a decision of the Governors of the Postal Service which effectively increased postal rates. The court noted that the Postal Service, as a suable entity, was accountable for its legal errors. The court went on to define a basis for a private action against a postal governor: "Of course, this does not mean that if personally, or in some official capacity other than as a signatory to an order of the Postal Service, a Governor

33. H.R. REP. No. 1104, 91st Cong., 2nd Sess. (1970), reprinted in [1970] U.S. Code Cong. & Ad. News 3652. Congress was concerned over the political cronyism prevailing in the Post Office. By giving the Postal Service the ability to incur obligations and enter into contracts without political approval, Congress hoped that the Service would become a more business-like operation, untainted by political patronage.
34. 485 F.2d (2d Cir. 1973).
35. Id. at 772.
erroneously, negligently, or willfully injured some person, the Governor might not properly be named in some proceeding a defendant.”\textsuperscript{36} American Publishers is important in two respects. First, it made clear that the Reorganization Act did not dampen the individual’s right to sue the Postal Service for its negligence. Second, it indicated that Postal Service employees would remain liable individually for their negligence in a proper factual setting. However, American Publishers did not establish whether “a proper factual setting” encompassed the negligent handling of the mail.

In addition, later cases have suggested that the “sue and be sued” language of the Reorganization Act may actually expand those situations in which the Postal Service could be liable. Thus, in \textit{White v. Bloomberg}, a postal employee claimed back pay and post-judgment interest in a labor dispute.\textsuperscript{37} The Postal Service contended that as a governmental agency it was immune from an award of post-judgment interest. In rejecting this claim, the court acknowledged that under the doctrine of sovereign immunity the government could not, without its consent, be obligated to pay interest on its debts. However, the court noted that it was equally well established that sovereign immunity was waived when Congress authorized an agency to sue or be sued in its own name.\textsuperscript{38} Similarly, in \textit{Kennedy Electric Co. v. United States Postal Service}, a subcontractor claimed that the Postal Service negligently failed to obtain payment and performance bonds from a contractor.\textsuperscript{39} In granting relief, the court broadly construed the “sue and be sued language” relying on \textit{F.H.A. v. Burr:}\textsuperscript{40}

\[\text{Absent implied exceptions and restrictions, not here present, or other showing that Congress used the phrase in a narrow sense, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with the authority to "sue or be sued," that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.}\textsuperscript{41}

The application of the \textit{F.H.A.} logic to the Postal Service

\textsuperscript{36.} Id.
\textsuperscript{37.} 501 F.2d 1379 (2d Cir. 1974).
\textsuperscript{38.} Id. at 1385.
\textsuperscript{39.} 508 F.2d 954 (10th Cir. 1974).
\textsuperscript{40.} 309 U.S. 242, 245 (1940).
\textsuperscript{41.} 508 F.2d at 957.
by the *Kennedy* court represented an important breakthrough. The *Kennedy* court, in drawing an analogy between the “sue and be sued” wording of the Banking Act of 1935 and the language in the Postal Reorganization Act, impliedly left the Service open to a broad spectrum of tort claims. This would indeed be the case if the Service is considered subject to all those suits available against private business. In addition, *Kennedy* can be read to imply that for purposes of the “sue or be sued” language the Postal Service is to be treated similar to other federal alphabet agencies. A substantial body of well-developed case law has grown up around the “sued or be sued” language as applied to these other agencies. A careful analysis of the judicial treatment of these analogous agencies will serve to define those types of situations which will fasten liability on the agency or its employees.

*Analogous Cases Defining the “Sue and Be Sued” Language*

As noted previously, the court in *F.H.A.* stated that the “sue and be sued” language opened the federal agency to lawsuits on the same level as private enterprise. This status has led to these agencies being liable in tort. For example, in *Keifer & Keifer v. Reconstruction Finance Corp. & Regional Agricultural Credit Corp.*, the plaintiff sued the Reconstruction Finance Corporation and its chartered subsidiary for negligence in failing to provide proper care for cattle delivered under a cattle feeding contract. In finding liability, the Supreme Court negated the concept of sovereign immunity as applied to government corporations:

> In spawning these corporations during the past two decades, Congress has uniformly included amenability to law. Congress has provided for not less than forty of such corporations discharging governmental functions, and without exception the authority to sue-and-be-sued was included. Such a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope.

In addition, the Court maintained that the liability of a gov-

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42. 309 U.S. at 245.
43. 306 U.S. 381 (1939).
44. *Id.* at 390-91.
ernment corporation empowered generally "to sue and be sued" was not confined to suits sounding only in contract. The Court found no sound policy reasons for making a government corporation's liability contingent upon the substantive nature of the claim presented.15

As Keifer & Keifer reveals, courts have been willing to pierce government agencies which are ostensibly semi-private corporations functioning under government auspices. This willingness apparently stems from courts' inability to find policy reasons which serve to limit the individual's right to recover against agencies existing free from substantial government control.16 The Postal Reorganization Act, by its terms, endeavors to set the Postal Service apart from governmental control.17 Therefore, it seems arguable that the Postal Service should be liable for the torts of its employees. Nevertheless, the courts have not yet arrived at this conclusion.18

The conclusion reached in the preceding analysis must be reconciled with the express immunity which was afforded the Post Office under the Federal Tort Claims Act. A possible rec-

46. Courts have recognized that governmental agencies might potentially be liable even when created by executive order and not by congressional mandate (such as the Postal Service). See Herren v. Farm Security Administration, 153 F.2d 76 (8th Cir. 1946) (contract damages available against agency created by executive order); Thomason v. Work Projects Administration, 138 F.2d 342 (9th Cir. 1943) (congressional agencies established with "sue and be sued language" are liable even in tort).
47. See notes 21-34 and accompanying text supra.
48. See, e.g., Myers & Myers, Inc. v. United States Postal Serv., 527 F.2d 1252 (2d Cir. 1975). In Myers a former "star route" carrier sued two individual postal employees, the Postal Service and the United States for negligence in terminating contracts on false information. The court dismissed the action as to all defendants except the United States, stating:

We should first note that suit under the Federal Tort Claims Act lies here, if at all, only against the United States. Neither the Postal Service nor the Postal Inspection Service, named as defendants, may be sued directly on claims brought under 28 U.S.C. § 1346(b).

The district court also lacks jurisdiction in respect to the two individual Postal Service employees named as defendants in this action. Only claims against the United States are included within the Federal Tort Claims Act jurisdiction. No justification for ancillary or diversity jurisdiction has been claimed or argued for by appellants in this case. Id. at 1256.

Nevertheless, it must be noted that the court characterized the decision not to renew the star route contracts as discretionary in nature. Id. at 1258.
conciliation is to ignore the grant of immunity, since the "sue and be sued" language in the Reorganization Act can be read to have impliedly repealed it. The force of this reconciliation, however, is considerably weakened by the holding of the Supreme Court in Posadas v. National City Bank. In this case the Court announced a "cardinal rule" that repeals by implication are not favored. The Court confined repeals by implication to two well-settled categories. The first arises when the provisions of the two competing acts are in irreconcilable conflict. In this situation, the later act impliedly repeals the earlier one to the extent of the conflict. The second arises if the later act covered the entire subject of the earlier one and was "clearly intended as a substitute." In this situation, the later act repeals the original one in its entirety.

The former approach probably will not sustain the contention that the grant of immunity can be ignored. Since the Postal Reorganization Act did not repeal the Federal Tort Claims Act, but simply authorized the Post Office to incur new responsibilities, it could be maintained that no "irreconcilable conflict" exists between the two acts. The latter approach probably would not support ignoring the grant of immunity either, since it cannot be adequately established that the Postal Reorganization Act was intended to supplant the Federal Tort Claims Act.

As a result of the courts' reluctance to favor repeal by implication, the Postal Reorganization Act may not have affected the Postal Service's grant of immunity under the Federal Tort Claims Act. Under this view, the Service itself continues to remain immune from attacks based on negligent handling of transmission of the mail. In spite of the Service's continued immunity, the Reorganization Act probably did not af-

49. 296 U.S. 497 (1936).
50. Id. at 503.
51. Id.
52. Id.
53. Id. See United States v. Tynen, 78 U.S. (11 Wall.) 88 (1871). In Tynen, Justice Field maintained that if two acts are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.

Id. at 92.
54. See 296 U.S. at 503.
fect the availability of an action against a supervisor who negligently discharges his duties. However, it still must be shown that this negligent discharge of duty was the cause of the actual injury in question. Even if this can be shown, the claimant may still face a barrier to recovery—the doctrine of discretionary immunity.

**DISCRETIONARY IMMUNITY**

*Liability-Producing Decisions*

In discharging the duties of his office, a postal official makes many types of decisions and performs many different functions. The making of any particular decision or the performance or nonperformance of any identifiable function could conceivably produce a chain of causation that eventually injures a postal customer. Though liability could flow from all such acts or omissions, Congress, in passing the Tort Claims Act, expressly provided that certain types of decisions would not be liability producing. Specifically, Congress mandated that liability would not flow from a government official’s "exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused."55 This exemption from liability also extended to the federal agency that employed the decision-maker.56 Thus, the Act makes a distinction between decisions which can produce liability and those cloaked with immunity from suit.

This distinction was first enunciated in *Barr v. Matteo.*57 In *Barr,* the petitioner was sued for libel over material contained in his press release. As a defense, he argued that the material was absolutely privileged. The Supreme Court, per Justice Harlan, sustained the defense on the grounds that the publication of a press release was a discretionary function and hence, not actionable.58 *Barr* established a basic rule that, in order to foster fearless leadership and courageous decisionmaking unencumbered by second thoughts of possible liability, the discretionary acts of executive officials of the government do not give rise to liability.

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56. *Id.*
58. *Id.* at 574.
After Barr, the question remains whether or not a postal official’s supervision of the day to day handling of the mail is to be accorded discretionary status. If not, his failure to properly discharge this duty would open the door to liability. Though, this question has yet to be resolved, a line of cases exists imposing liability on supervisory personnel in other areas of government. It seems reasonable to assume that if negligent supervision is actionable with regard to one government agency, it should be equally actionable with regard to another agency similarly situated. An examination of this line of cases will aid in the determination of their applicability in the context of postal supervision.

Supervisorial Liability in Government Agencies

There is no black letter formula for determining whether or not a particular supervisorial activity will be accorded discretionary status. In Estrada v. Hills, the court attempted to outline the distinction between discretionary and nondiscretionary decisions. Estrada involved a suit by the owner of a building which burned down when a neighboring building, owned by the Department of Housing and Urban Development (HUD), caught fire. The complaint charged that the fire was caused by the negligence of the Secretary of HUD and various other officials of the Department. In determining the potential liability of the various officials, the Estrada court enunciated the following test: “Generally speaking, a duty is discretionary if it involves judgment, planning or policy decisions. It is not discretionary if it involves enforcement or administration of a mandatory duty at the operational level, even if some degree of expert evaluation is required.” The Estrada opinion is noteworthy for the manner in which this test was applied to the two individuals directly charged with supervising the maintenance of the building. The court maintained that the mere supervision of employees was not a discretionary activity.

In Seaboard Coastline Railroad v. United States, another court attempted to flesh out the discretionary-nondiscretionary

60. Id. at 436.
61. Id. at 437. The court noted: “The affidavits submitted by defendants Miller and Ice suggest that their duties are not discretionary. They are charged with supervising the disposition of HUD property, but they do not claim that they set policy or engage in planning. Apparently their duties are operational and they execute policies determined by others.” Id.
In this case, the railroad sued the federal government and a government official for injury to its railroad cars and an employee when its tracks were washed away by water diverted from a federal aircraft maintenance facility. In finding the government liable, the court provided additional clarification on discretionary and nondiscretionary activity:

The discretionary function envisioned by 28 U.S.C. § 2680(a) . . . was the government's policy decision to construct an aircraft maintenance facility at Fort Rucker and to build a drainage system in furtherance of that goal. Once the government decided to build a drainage ditch, it was no longer exercising a discretionary policy-making function and it was required to perform the operational function of building the drainage ditch in a non-negligent manner.

The line of demarcation between discretionary and nondiscretionary decisionmaking is further sharpened by a look at two additional cases. In the first, Stanley v. United States, the plaintiff's estate sued for damages in conjunction with the death of a workman killed while painting a radio tower owned by the government. The complaint charged that the government negligently caused the death by failing to construct a safety rail around the tower which would have prevented the accident. The government again argued that the executive decision to build such a railing was discretionary and thus, cloaked in the mantle of immunity. In allowing recovery, the court noted that once the decision had been made to construct the tower, there were no competing policy considerations in-

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62. 473 F.2d 714 (5th Cir. 1973).
63. Id. at 716.
64. See also Indian Towing Co. v. United States, 350 U.S. 61 (1955). Though decided before Barr v. Matteo, this case applied a discretionary/ministerial analysis. Plaintiff sued the United States for negligent failure to keep a lighthouse beacon lit, resulting in damage to a ship. The court parried the government's assertion that maintenance of the lighthouse involved discretion:

The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chadeleur 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 to give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.

Id. at 69.
volved in how to do it. Consequently, the failure to provide a
safety rail was not the result of a discretionary decision but a
mere operational decision from which liability could arise.\textsuperscript{68}

The second, \textit{Henderson v. Bluemink}, involved an army
doctor who was sued for malpractice.\textsuperscript{67} In his defense, the doc-
tor contended that his job entailed a panoply of discretionary
functions which should immunize his decisions from liability.
The court disagreed, stating that the civil standards for mal-
practice liability should apply. The court saw no reason to
insulate the army doctor from liability in the interest of pre-
serving fearless, vigorous and effective administration of the
policies of the government.\textsuperscript{68}

The preceding cases provide a strong conceptual founda-
tion for the premise that a postal official who fails to properly
perform his duty of supervision is liable for the damage prox-
mately caused to a customer by his negligence. Taken together
they establish the principle that although it may have been a
nurse who gave the fatal
injection,\textsuperscript{69} a janitor who allowed rub-
bish to accumulate and a fire hazard to develop,\textsuperscript{70} or a construc-
tion worker who improperly dug a drainage ditch,\textsuperscript{71} this does
not automatically relieve the employee's supervisor of liabil-
ity.\textsuperscript{72} Thus, a postal worker's mishandling of the mail should

\textsuperscript{66} Id. at 1095-96.
\textsuperscript{67} 511 F.2d 399 (D.C. Cir. 1974).
\textsuperscript{68} For a malpractice action against employees of an army hospital, see Costley v.
United States, 181 F.2d 723 (5th Cir. 1950). Plaintiff, a military dependent treated in
an army hospital, sued for malpractice in the care given her during delivery of her
child. The United States responded with the argument that surely the daily activi-
ties of a doctor in caring for patients and saving lives was discretionary. Rejecting this
argument, the court said:
In order to determine whether or not the government comes within the
exemption set out above, we must decide whether or not it was exercising
a discretionary function or duty when its employees negligently injected
a harmful substance into Mrs. Costley's body. We think they were not
exercising a discretionary function, because they had already exercised
their discretion by admitting her into the hospital, and once having ad-
mited her and undertaken the delivery of her child, they were under a
duty to attend and treat her.
\textit{Id.} at 724.

\textsuperscript{69} See Henderson v. Bluemink, 511 F.2d 399 (D.C. Cir. 1974).
\textsuperscript{71} See Seaboard Coastline R.R. v. United States, 473 F.2d 714 (5th Cir. 1973).
\textsuperscript{72} See Dunlop v. Munroe, 11 U.S. (7 Cranch) 242 (1812); Wright v. McCann,
460 F.2d 126 (2d Cir. 1972); Moon v. Winfield, 368 F. Supp. 843 (N.D. Ill. 1973); Raisler
v. Oliver, 97 Ala. 710, 12 So. 238 (1893); Perkins v. Blauth, 163 Cal. 782, 122 P. 50
not provide a threshold barrier that insulates his negligent su-
pervisor from liability.

Additionally, these cases make clear that an examination of the competing policy factors, which go into the making of the particular decision or the performance of any particular activity, is the crux of the discretionary-nondiscretionary distinction. When this examination is directed at the unique aspects of post office supervision, it can readily be seen that there are nondiscretionary activities involved in managing the handling of the mail.

A postmaster is entrusted with the duty of supervising the daily receipt, processing and delivery of the mail. If a problem arises in the processing of the mail at his facility, the postmaster is charged with implementing procedures to remedy it. A postmaster does not personally handle the mail, yet he must see that his subordinates handle it properly.

Following the logic of the earlier cases, it would appear that the selection of the proper procedure to handle the mail involves competing policy considerations and thus, is discretionary. However, once the selected procedure has been implemented it would similarly appear that the supervision of handling based on that procedure could be construed as operational and thus, nondiscretionary. A failure to properly perform this latter function could generate liability.

To date, the courts have not yet ruled on what facets of a postmaster's job call for discretionary, policy-making decisions. In formulating the discretionary-nondiscretionary distinction with respect to the tasks of postal supervision, the courts might be influenced by several factors. One potential factor is the scope of the postmaster's job. Considering the immense amount of mail which passes through a postal facility daily, courts might view the supervisor's job as a series of on the spot procedural decisions that should be accorded discretionary status. This volume of mail also gives rise to another potential factor. In view of the many handling problems the amount of mail creates, courts might take the position that a supervisor is not physically able to supervise every facet of mail service. Thus, it would not be realistic to impose liability on


73. See notes 59-68 and accompanying text supra.
him for failure to properly supervise all the procedures designed to run the modern postal facility.

A final factor which may influence the court’s formulation is the recent legislative proposal to hold the Postal Service accountable for various negligent acts of its agents. This attempt may cause the courts to view supervisorial liability more favorably—as simply in line with emerging congressional policy. As a result, this trend merits attention.

Postal Service Accountability

Congress has recently attempted to deal with the problem of Postal Service accountability for the negligence of its agents. A bill has been introduced in the United States House of Representatives by Norman Mineta (D-Cal.) which would afford injured customers of the Postal Service a measure of relief.\footnote{H.R. 14465, 94th Cong., 2d Sess. (1976). The bill was introduced on June 18, 1976.}

Mr. Mineta’s remarks to Congress upon his introduction of H.R. 14465 are a succinct statement of the problem faced by the mail customer:

Today I have introduced legislation which, if enacted, will for the first time set forth specific Congressional standards to govern the carriage of mail by the Postal Service, and will provide individuals and businesses with a legal remedy for damages incurred through the negligence of the Postal Service. In my brief experience as a Member of the Postal Service Subcommittee, I have come to realize that the Postal Service is a lot like a stubborn donkey—you can try to entice it into acceptable and desired behavior by dangling financial carrots in front of it, but you should always have a pretty good stick to coax it along from behind occasionally. My bill provides that stick, in a manner most in keeping with practicality. While this body has been debating various policy aspects of the postal system, we have been ignoring what perhaps is the fundamental complaint against the U.S. Postal Service—its abysmal performance in the carriage of the mails. While we try and halt the closings of small post offices in rural areas, the extension of clusterbox and curbside delivery in suburban areas and the curtailment of necessary business service in urban areas, we ignore the fact that there are many Americans who find themselves losing money in their dealings with the Postal Service—money which is lost due to the failure of the Postal Service to adequately perform its basic function of moving the mail with due speed, care and accuracy.

Millions of individuals and businesses rely on the mails for economic livelihood. When the Postal Service loses, delays or damages their mail, it often results in monetary losses which cannot be recovered, but must be paid out of their own pockets. These losses mean more to those affected than any debate on who should make postal policy, or on who should pay how much in postage.

What recourse has an individual or business whose parcels are damaged or lost due to the negligence of the Postal Service? None. What recourse has an individual or business when an important check, contract or bid is lost or delivered weeks late? None. Despite the fact that the
The bill seeks to amend Title 39 of the United States Code to provide that the Postal Service shall be liable for negligent handling or delivery of mail. Additionally, the bill proposes a one hundred dollar limit on Service liability for lost mail if two alternative rates of postage are established, and the customer elects to pay the lower rate. To clear up any potential conflict with the Federal Tort Claims Act, the legislation specifically strikes the section granting the Service immunity. Finally, the bill provides substantial assistance to the customer seeking relief. If the mail is damaged, lost, or delayed, it is presumed that this is due to the negligence of the Service and the presumption can be rebutted only by a clear preponderance of the evidence.

Unfortunately, the bill represents only a small step toward providing for a truly accountable Postal Service in the business sphere. The average business customer simply cannot afford to pay the higher postage rates, set out by the bill, for his bulk mailings. Yet if he does not, he may collect only one hundred

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Post. Service has caused financial losses and/or damage to business reputations and credit ratings, under the present law it is immune from suit arising in this manner.

We in the Congress have acted, in the passage of HR 8603, to strip the postal management of its shield against Congressional and Administrative controls, by abolishing the Board of Governors, returning the Postmaster General to the Cabinet, and taking back budgetary controls over the USPS's finances. It is time we acted to strip the Postal Service of its shield of 'sovereign immunity,' which is used to protect it from the results of its negligence.

By prescribing specific standards governing the manner in which the U.S. mails are to be treated, and by making a violation of those standards evidence of negligence on the part of the Postal Service, we can give the American people a good, sound stick to prod the Postal Service into upgrading the service they provide. By allowing these suits to be pursued, we make ourselves clear on the fact that we will no longer tolerate sloppy service and arrogant, "consumer-be-damned" attitudes from those who are to serve the American public.

Letter from Congressman Norman Mineta's Office to Robert Froelich (September, 1976) [on file at SANTA CLARA L. REV.].

76. Id. § 3686(a)(2)(B). A different system of recovery is proposed for delayed mail: "(ii) the amount of postage paid multiplied by 10, in the case of delayed mail."
Id. § 3686(a)(2)(A).
77. Id. § 3686 § 2.
78. Id. § 3686(b) provides:

In any action against the Postal Service for the recovery of damages under this section, the damaged mail, delayed mail, or lost mail involved shall be presumed to have been damaged, delayed, or lost as a result of the negligence of the Postal Service, or the officers, employees, or agents of the Postal Service. Such presumption may be rebutted only by a clear preponderance of the evidence.
dollars for lost mail or ten times his postage for delayed mail.\textsuperscript{79} Though it is a positive step, the bill does not allow for recovery of many types of damages, such as loss of business reputation, which are likely to be suffered if the mail is negligently handled.

In light of the proposed legislative limits on Postal Service liability and its current legislative immunity, the injured customer’s best avenue to complete relief appears to be a suit against the postmaster-supervisor. Supervisorial liability arguably survives both the immunity provisions of the Federal Tort Claims Act and the legislative restructuring of the Postal Reorganization Act. Similarly, it can be contended that there are aspects of postal supervision which require nondiscretionary decisionmaking and activity. Thus, the suit against the postmaster-supervisor should survive the doctrine of discretionary immunity. In spite of the plausability of this analysis, it has not yet been adopted by the courts.

CONCLUSION

The ability of postal officials to hide behind the cloak of sovereign immunity is repugnant to the democratic principle of individual accountability for one’s acts and to the legal concept that “for every wrong there is a remedy.” Chief Justice Traynor of the California Supreme Court noted this in his landmark opinion in \textit{Muskopf v. Corning Hospital District}:

\begin{quote}
The rule of governmental immunity for tort is an anachronism, without rational basis and has existed only by force of inertia. It has been judicially abolished in other jurisdictions. None of the reasons for its continuance can withstand analysis. No one defends total governmental immunity. In fact it does not exist. It has become riddled with exceptions, both legislative and judicial, and the exceptions operate so illogically as to cause serious inequality.\textsuperscript{80}
\end{quote}

\textsuperscript{79} See notes 99-100 and accompanying text \textit{supra}.
\textsuperscript{80} 55 Cal. 2d 211, 216, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961).

The doctrine of sovereign immunity appears to have originated by accident in \textit{Russell v. The Men of Devon}, 2 T.R. 667, 100 Eng. Rep. 359 (1788), where plaintiff, who could name no entity responsible for his injury, sued “The Men of Devon” not as a municipal corporation, but as a group of unnamed defendants. Rather than dismiss the case for failure to name a defendant, the English Court stated a principle which was subsequently adopted in the United States. This flawed legal concept was later rejected by English courts but paradoxically flourished in this country during the nineteenth century. See \textit{Jackson v. City of Florence}, 294 Ala. 592, 320 So. 2d 68 (1975).
Furthermore, a supervisory postal official should not be absolved of liability for his own negligence merely because he has attained a supervisory position. On the other hand, postal officials cannot be made insurers of the safe and timely arrival of every piece of mail which passes through their post office. Therefore, a balance must be struck between these two extremes. One solution would be to accord a postal official one mistake per customer. This “free ride” approach would engender the type of personal accountability necessary. Subsequent errors could be punished by personal liability in tort. A supervisory postal official would be more apt to actually “supervise” his employees if he knew that failure to remedy errors by his subordinates would result in personal accountability.

Under this solution, a ceiling on personal liability would have to be set, in order to avoid multimillion dollar judgments being rendered against an individual employee. To facilitate an adequate recovery to injured plaintiff, a subordination provision could be enacted providing that the United States would

The United States Supreme Court as early as 1939 recognized the disfavored status of sovereign immunity in Kiefer & Kiefer v. Reconstruction Fin. Corp. (RFC), 306 U.S. 381 (1939). In discussing the RFC’s argument that the Court of Claims had no jurisdiction because the case sounded in tort rather than in contract, Mr. Justice Frankfurter refused to “make application of a steadily growing policy of governmental liability contingent upon irrelevant procedural factors. These, in our law, are still deeply rooted in historical accidents to which the expanding conception of public morality regarding governmental responsibility should not be subordinated.” Id. at 396 (emphasis added). This same language is cited with approval in Petty v. Tennessee-Missouri Bridge Comm’n, 359 U.S. 275, 280 (1959).

81. A traditional function of civil liability for negligence is to supply a sanction which encourages care appropriate to the needs of society and the circumstances of the case. Therefore, where governmental immunity has had the effect of encouraging laxness and a disregard of potential harm, exposure of the government to liability for its torts will have the effect of increasing governmental care and concern for the welfare of those who might be injured by its actions. This increased concern would cause government officials to evaluate proposed activities in light of their total costs, both those paid directly and those paid indirectly in the form of compensation for injuries to the individual members of society. Otherwise stated, government liability forces the official to balance the total social utility of the action undertaken against the total risks and cost to society. The government will thus be encouraged to take the course which is ultimately the most economical to society.


For an enlightening article as to abolition of tort immunity of state entities, see Lambert, Tort Law, 36 AM. TRIAL LAW. J. 20 (1976). Lambert maintains: “Official maladministration is tyranny and legalized pillage unless redressed by an adequate set of remedies against the blameworthy governmental unit, its officials and its agencies.” Id. at 34.
pay all judgment sums in excess of the mandated personal liability ceiling. Though the taxpayer would consequently be burdened to some extent, on balance, it appears more just to distribute the effects of Postal Service negligence over a broad segment of the populace rather than severely damaging an individual customer or small businessman. Such a rule would be in keeping with both the spirit and the letter of the law.

Robert A. Froehlich

82. A correlative solution would be to retain individual immunity of postal officials from tort, with the proviso that after one negligence judgment against an individual postal employee (which the United States would pay in its entirety), the official would automatically be discharged upon committing a second error.