Discretionary Immunity in California in the Aftermath of Johnson v. State

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INTRODUCTION

The concept of sovereign immunity dates back to the ancient precept that "the king can do no wrong." Its introduction into American law was perhaps inevitable in view of the common law shared by both the British and American legal systems. But the notion of the king's inability to err as a basis for a principle of American jurisprudence is not without its ironic elements. One author has commented:

It seems an anomaly that the theory "the King can do no wrong" could become so entrenched in the laws of a country founded on the precept that the King had indeed done wrong.¹

The general term "sovereign immunity" has long embodied the principle that actions performed by public officials pursuant to a legislative grant of discretion should not be the subject of adjudication in the courts. On the other hand, the law traditionally has allowed suits against public entities and their employees for actions classified as "ministerial" rather than "discretionary" in nature. The distinction between ministerial and discretionary acts has been codified in both the federal and California tort claim acts² and has in the past been a fruitful subject for law review commentators.³ One writer has described the discretionary immunity problem in this manner:

Somewhere a line supposedly separates the performance of judicial, legislative, executive, and other "discretionary" functions from manual, clerical and other "ministerial" work. The officer who exercises what the courts call discretionary

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power is immune from tort liability, but the public employee whose tasks are regarded as ministerial is liable.\textsuperscript{4}

In the 1969 landmark decision of \textit{Johnson v. State of California},\textsuperscript{5} the California Supreme Court reviewed the concept of immunity for discretionary actions and recast the judicial test for applying such immunity in terms of the separation of powers doctrine. The \textit{Johnson} case, which Professor Kenneth Davis applauds as one which "deserves to become the foundation for further building of the law under the 'discretionary function' exception,"\textsuperscript{6} has thus attempted to simplify for the courts the difficult problem of separating discretionary from ministerial acts.

This comment will discuss the holding of \textit{Johnson v. State} and examine the subsequent treatment of discretionary immunity in the California courts in light of that decision. So that the reader may appreciate the significance of \textit{Johnson}, the previous development of the discretionary immunity doctrine in California will be briefly described. The discussion will center on the earlier landmark decision of \textit{Muskopf v. Corning Hospital District},\textsuperscript{7} which abrogated the common law doctrine of sovereign immunity in California and led to the passage of the California Tort Claims Act.\textsuperscript{8} Secondly, \textit{Johnson v. State} will be analyzed, with special attention paid to three significant facets of its holding. Finally, the development of the case law in the aftermath of \textit{Johnson} will be examined. For convenience, this analysis will focus on five areas: (1) previous case law reconsidered in light of \textit{Johnson}; (2) post-\textit{Johnson} liability; (3) the relationship between the discretionary immunity statute\textsuperscript{9} and the specific immunities in the California Tort Claims Act;\textsuperscript{10} (4) the requirement that, to be allowed the defense of discretionary immunity, the public entity or employee first show that discretion was actually exercised; and (5) the suggestion that a discretionary act performed in a negligent manner be subject to liability.

\textbf{DISCRETIONARY IMMUNITY BEFORE 1969}

\textit{Early Development}

A recent work on governmental immunity in California notes that "[W]rongful acts or omissions involving official discretion have long been held in California not a basis for personal liability

\textsuperscript{5} 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).
\textsuperscript{6} K. Davis, \textit{Administrative Law Treatise} § 25.08 at 846 (Supp. 1970).
\textsuperscript{7} 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).
\textsuperscript{8} Cal. Gov't Code §§ 810-996.6 (West 1966).
\textsuperscript{9} Id. § 820.2.
\textsuperscript{10} Id. §§ 810-996.6.
of the culpable officer."11 The earliest case on the subject is *Downer v. Lent*,12 in which the plaintiff sued the Board of Pilot Commissioners, which had forced him to surrender his pilot's license. The California Supreme Court held that the Board's demurrer to the complaint should have been sustained, noting:

> Whenever, from the necessity of the case, the law is obliged to trust to the sound judgment and discretion of an officer, public policy demands that he should be protected from any consequences of an erroneous judgment.13

The problem which has plagued courts dealing with the discretionary immunity question, from the *Downer* decision to the present, is how to determine which acts are discretionary and therefore immune, and which are ministerial and therefore actionable.14 A frequently cited case discussing this issue is *Ham v. County of Los Angeles*,15 in which the court stated:

> The main perplexity in the case of public officials . . . is to determine where the ministerial and imperative duties end and the discretionary powers begin. . . . [I]t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail.16

Four traditional approaches evolved by which the courts determined what acts were discretionary. Some courts used the "dampen the ardor" approach as set forth by Justice Learned Hand in the leading case of *Gregoire v. Biddle*.17 The theory behind this approach was that if immunity was not granted for certain actions of public employees, those employees would be deterred by fear of liability from making necessary governmental decisions. The applicability of the immunity doctrine was determined by balancing the liability of the employee and the public entity against "the effect that the liability would have upon the governmental function being provided."18

The second method used by the courts, called the "semantic approach," was an attempt to determine which acts were discre-
tionary and which were ministerial by mechanically applying a definition. For example, in Elder v. Anderson, the court of appeal quoted the following definition of “discretionary acts” from a Nevada case:

Discretionary acts are those wherein there is no hard and fast rule as to the course of conduct that one must or must not take, and, if there is a clearly defined rule, such would eliminate discretion.

Unfortunately this approach did nothing more than restate the problem.

Thirdly, some courts evolved what was called the “governmental action-proprietary action” distinction. Under this standard, the government could not be liable for actions taken that were peculiarly “governmental in nature, and thus could not be performed by private entities.”

A fourth approach, developed by the United States Supreme Court in Dalehite v. United States, attempted to make a distinction between the planning of governmental acts and the “operational” execution of the plans. In that case the court stated, “The alleged ‘negligence’ does not subject the Government to liability. The decisions held culpable were all responsibly made at a planning rather than operational level.”

The Muskopf and Lipman Decisions

In 1961, the California Supreme Court, following a trend evident from decisions in other state courts, abrogated the doctrine of sovereign immunity in Muskopf v. Corning Hospital District, a case which Professor Davis calls “[p]ossibly the most important state case . . . in the magnitude of its contribution to the movement away from sovereign immunity.” In the companion case of Lipman v. Brisbane Elementary School District, however, the supreme court made it clear that, although sovereign immunity was no longer a part of California common law, public entities still could not be held liable for discretionary actions of their employees.

20. Id. at 331, 23 Cal. Rptr. at 48, 51.
22. Id. at 761-62, 178 P.2d at 5.
24. Id. at 42.
29. Id. at 229, 359 P.2d at 467, 11 Cal. Rptr. at 99.
In the aftermath of *Muskopf* and *Lipman*, the Legislature immediately passed Civil Code section 22.3, which delayed the abrogation of sovereign immunity until the ninety-first day after the close of the 1963 legislative session. Then in 1963, after an extensive study of the sovereign immunity problem had been conducted by the California Law Revision Commission, the California Tort Claims Act was enacted.

**The California Tort Claims Act**

The tort claims act retained part of the *Muskopf* and *Lipman* rulings, while it rejected other facets of those holdings. Discretionary immunity for the acts of public entities and their employees gained express recognition:

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

This codification of discretionary immunity, according to the Law Revision Commission, was intended to be a restatement of pre-existing California law.

To further ensure that what the courts presently viewed as discretionary acts would not be construed differently by the judiciary in the future, the tort claims act went on to grant specific immunities to certain kinds of administrative actions:

These specific provisions grant immunity to a public employee for: non-negligent conduct in executing enactments; torts of other persons not proximately caused by the employee; failure to adopt or enforce an enactment; injuries caused by conduct related to issuance, suspension, or revocation of licenses under authority of an enactment; failure to make a health or safety inspection; instituting or prosecuting any judicial or administrative proceeding; and entry upon property expressly or impliedly authorized by law.

At the same time, the Legislature rejected that part of the *Lipman* holding which stated that the liability of the public entity and the employee may not be co-extensive. Government Code section

33. *Id.* § 820.2.
34. 4 *Cal. Law Revision Comm'n Reports, Recommendations and Studies* 843 (1963).
815.2\textsuperscript{37} immunizes the public entity from liability where its employee is immune.

The period between 1963 and 1969 witnessed several developments which became part of the foundation for the decision in Johnson v. State. The first was the formulation of the so-called "subsequent negligence" rule. In the leading case of Sava v. Fuller,\textsuperscript{38} the court held that a state botanist had exercised discretion in making the decision to analyze a plant substance that a child might have ingested, in order to determine whether or not it was toxic. The botanist incorrectly diagnosed the substance as toxic, and the child was thereafter treated for the ingestion of this plant, rather than for his actual malady—bronchopneumonia. The "subsequent negligence" of the botanist—occurring after he had exercised his discretion—in making a faulty diagnosis of poisoning was held to be actionable.\textsuperscript{39}

Other appellate courts disagreed with the subsequent negligence rule. In Ne Casek v. City of Los Angeles,\textsuperscript{40} police officers had custody of two handcuffed persons. The suspects escaped and, while fleeing, ran into and injured the plaintiff, who sued the officers for negligently failing to use sufficient force to restrain the prisoners. The court stated that the subsequent negligence doctrine had not been accepted by the Legislature, and held the policemen immune.\textsuperscript{41}

Another approach adopted by some courts during this period was the so-called "Good Samaritan" rule. Like the subsequent negligence rule of Sava v. Fuller,\textsuperscript{42} the "Good Samaritan" rule finds its origin in the federal courts.\textsuperscript{43} It holds that once a voluntary duty is assumed, negligent performance of that duty will be actionable. It is simply an application of the traditional rule of tort law that a party's nonfeasance may give rise to tort liability where a person, in reasonable reliance on the party's promise of aid, refrains from taking certain precautions or securing necessary assistance and suffers harm as a result.\textsuperscript{44} For example, in Morgan v. County of Yuba,\textsuperscript{45} a police officer gratuitously agreed to warn the plaintiff's decedent when a certain prisoner was to be released, and then failed to do so. The prisoner, upon release, sought out

\textsuperscript{37} CAL. GOV'T CODE § 815.2 (West 1966).
\textsuperscript{38} 249 Cal. App. 2d 281, 57 Cal. Rptr. 312 (1967).
\textsuperscript{39} Id. at 290, 57 Cal. Rptr. at 317.
\textsuperscript{40} 233 Cal. App. 2d 131, 43 Cal. Rptr. 294 (1965).
\textsuperscript{41} Id. at 138, 43 Cal. Rptr. at 299.
\textsuperscript{42} 249 Cal. App. 2d 281, 57 Cal. Rptr. 312 (1967).
\textsuperscript{43} See, e.g., United States v. DeVane, 306 F.2d 182 (5th Cir. 1962); United States v. Lawter, 219 F.2d 559 (5th Cir. 1955).
\textsuperscript{44} United States v. Lawter, 219 F.2d 559, 562 (5th Cir. 1955).
\textsuperscript{45} 230 Cal. App. 2d 938, 41 Cal. Rptr. 508 (1964).
and killed the unsuspecting promisee. The court held, in a wrongful death action, that the officer was not immune.\textsuperscript{46}

While these approaches indicate that California courts were developing increasing sophistication in dealing with the difficulties of the discretionary immunity doctrine, there was still no consensus as to how these cases should be treated. In \textit{Johnson v. State of California},\textsuperscript{47} the California Supreme Court approached the concept of immunity from another perspective, viewing it as an adjunct of the separation of powers doctrine.

**JOHNSON V. STATE: A NEW APPROACH TO DISCRETIONARY IMMUNITY**

Judicial opinions prior to \textit{Johnson} only perfunctorily and superficially discuss the purpose and rationale for granting immunity to governmental employees and entities for discretionary actions.\textsuperscript{48} The \textit{Johnson} court emphasized that in dealing with this question, the key word is "governmental": the purpose of the immunity is to protect "governmental" activities.\textsuperscript{49} It held that immunity should be granted only for those basic policy decisions which were distinctly delegated to the non-judicial branches of government.\textsuperscript{50}

Plaintiff Ida Mae Johnson and her husband were requested by the Youth Authority to provide a foster home for a young juvenile. Five days after he was placed in the Johnson home, the boy attacked the plaintiff with a butcher knife while she was asleep.\textsuperscript{51} Mrs. Johnson alleged that the Youth Authority had failed to warn her and her husband of the boy's known homicidal tendencies.

The issue, as framed by the court of appeal, was "whether or not the negligent failure . . . to inform plaintiff of the boy's tendencies comes within the immunity for discretionary acts or omissions granted by section 820.2 of the Government Code."\textsuperscript{52} The appellate court answered this question in the affirmative, holding that both the placement of the boy with the family and the decision whether or not to warn were discretionary.\textsuperscript{53}

\textsuperscript{46} Id. at 942-43, 41 Cal. Rptr. at 511-12.
\textsuperscript{47} 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).
\textsuperscript{48} Even Sava v. Fuller, 249 Cal. App. 2d 281, 57 Cal. Rptr. 312 (1967), from which the supreme court draws heavily in its \textit{Johnson} decision, does not discuss discretionary immunity in light of the purposes for the immunity.
\textsuperscript{49} 69 Cal. 2d at 793, 447 P.2d at 360, 73 Cal. Rptr. at 248.
\textsuperscript{50} Id.
\textsuperscript{52} Id. at 718-19.
\textsuperscript{53} Id. at 720.
DISCRETIONARY IMMUNITY

The supreme court, in reversing, rejected both the "semant-
ic" and "dampen the ardor" approaches to discretionary immu-
nity. Instead of applying these rationales, the court held that
certain policy factors are to be weighed in determining whether
immunity should be granted in a particular case. The supreme
court also examined the purpose of discretionary immunity and
concluded that its justification lay in the separation of powers
doctrine. Finally, the court mandated that the state must initially
demonstrate that discretion has in fact been exercised before im-
munity will attach.

Rejection of Earlier Approaches

The court first held that "[a] semantic inquiry into the mean-
ing of 'discretionary' will not suffice as a criterion for interpreting
section 820.2." Reviewing several of the definitions previously
applied in California cases, the court rejected "the state's invitation
to enmesh ourselves deeply in the semantic thicket." Lipman
v. Brisbane Elementary School District was cited for the proposi-
tion that such a purely mechanical approach to the discretionary
immunity doctrine would not suffice.

Similarly, the "dampen the ardor" argument, which had been
advanced in previous California cases and which held that immu-
nity is necessary to insure that an employee's zeal is not blunted
by fear of personal liability, was also rejected, but on different
grounds. The court recognized that this rationale at one time
might have been a valid basis for granting immunity, but that the
California system of indemnification, under which state employees
are reimbursed for monetary losses resulting from tort judgments
against them, substantially eliminated the concern that an employ-
ees zeal might be dampened. The court reached this conclu-
sion after detailing the Government Code provisions protecting the
employee from monetary liability for actions taken in his govern-
ment employ.

Thus the court rejected two lines of California decisions dat-
ing back to the nineteenth century. In their place, the court

54. 69 Cal. 2d at 787-93, 447 P.2d at 356-60, 73 Cal. Rptr. at 244-48.
55. Id. at 789, 447 P.2d at 357, 73 Cal. Rptr. at 245.
56. Id. at 793, 447 P.2d at 360, 73 Cal. Rptr. at 248.
57. Id. at 794-95, n.8, 447 P.2d at 361 n.8, 73 Cal. Rptr. at 249, n.8.
58. Id. at 787, 447 P.2d at 356, 73 Cal. Rptr. at 244.
59. Id. at 788, 447 P.2d at 357, 73 Cal. Rptr. at 245.
60. Id. at 788, 447 P.2d at 357, 73 Cal. Rptr. at 245.
61. 69 Cal. 2d at 789-90, 447 P.2d at 358-59, 73 Cal. Rptr. at 246-47.
62. See notes 17-18 and accompanying text supra.
63. 69 Cal. 2d at 790-91, 447 P.2d at 358-59, 73 Cal. Rptr. at 246-47.
64. CAL. GOV'T CODE §§ 825-25.6 (West 1970).
adopted an approach based on an even more venerated principle of American law: separation of powers.

**Approach Adopted**

After first recognizing the difficulty of drawing a line "between the immune 'discretionary' decision and the unprotected ministerial act" the court noted that many governmental activities "'must remain beyond the range of judicial inquiry' . . . ." The court then stated:

Courts and commentators have . . . centered their attention on an assurance of judicial abstention in areas in which responsibility for basic policy decisions has been committed to coordinate branches of government. Any 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. The court commented that this approach concentrates on the reasons for granting immunity to the governmental entity.

The court then analyzed the specific problem raised by Mrs. Johnson in the instant case. The decision to parole the juvenile was a resolution of policy considerations that was entrusted to the Youth Authority, an agency in a coordinate branch of government. The state was therefore immune from judicially decreed liability on the decision to place the boy on parole. The failure to warn, however, was a different matter. In dealing with this issue, the court adopted the "subsequent negligence" approach utilized in such California cases as *Sava v. Fuller,* and in a number of federal court decisions. Once the decision to parole had been reached, subsequent actions carrying out that decision were not immune:

Once an official reaches the decision to parole to a given family, however, the determination as to whether to warn the

65. 62 Cal. 2d at 793, 447 P.2d at 360, 73 Cal. Rptr. at 248.
66. Id.
67. Id.
68. Id. at 794, 447 P.2d at 360, 73 Cal. Rptr. at 248. While the court noted that its proposed distinction was sometimes described as that between the "planning" and "operational" levels of decision-making, the holding does not draw extensively from Dalehite v. United States, 346 U.S. 15 (1953), the principal case espousing this viewpoint. See notes 23-24 and accompanying text supra. Instead, the Johnson reasoning more closely follows that of the subsequent negligence doctrine as it has developed in California. It should be noted, however, that the "planning-operational level test" and the subsequent negligence approach have much in common.
69. 249 Cal. App. 2d 281, 57 Cal. Rptr. 312 (1967).
70. See, e.g., American Exchange Bank of Madison, Wisconsin v. United States, 257 F.2d 938 (7th Cir. 1958); Costley v. United States, 181 F.2d 723 (5th Cir. 1950).
foster parents of latent dangers facing them presents no such reasons for immunity; to the extent that a parole officer consciously considers pros and cons in deciding what information, if any, should be given, he makes such a determination at the lowest, ministerial rung of official action.\textsuperscript{71}

**Policy Considerations**

The Johnson court adverted to its earlier holding in Lipman\textsuperscript{72} to reiterate the policies which are to be considered in determining whether the discretionary immunity doctrine is to apply (that is, whether the action sought to be challenged in litigation is committed to a coordinate branch of government). First of all, the importance of the governmental function involved must be considered. Secondly, this function must be evaluated in light of the extent to which imposed liability might impair its free exercise. Finally, the court should consider the availability of remedies other than a tort suit for damages.\textsuperscript{78} These three policy considerations, an important part of the Johnson decision, have received little attention in lower California courts.\textsuperscript{74}

**Requirement That Discretion in Fact Be Exercised**

A potentially significant facet of the Johnson decision, which is found in a footnote to the case, requires the governmental entity or employee to demonstrate that a considered decision actually took place.\textsuperscript{75} If there was no such deliberation, the action is not immune. In determining that the decision to parole was a policy question entrusted to a coordinate branch of government, the court stated: "This conclusion disposes of the question . . . whether the governmental entity . . . must show that its employee actually reached a considered decision knowingly and deliberately encountering the risks."\textsuperscript{76} The court continued:

Accordingly, to be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place. The fact that an employee normally engages in "discretionary activity" is irrelevant if, in a given case, the employee did not render a considered decision.\textsuperscript{77}

Since the state must affirmatively prove that discretion was exercised in fact, few cases can be disposed of on demurrer by the governmental entity.

\textsuperscript{71} 69 Cal. 2d at 795-96, 447 P.2d at 362, 73 Cal. Rptr. at 250.
\textsuperscript{72} 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961).
\textsuperscript{73} Id. at 230, 359 P.2d at 467, 11 Cal. Rptr. at 99.
\textsuperscript{74} See notes 116-123 and accompanying text infra.
\textsuperscript{75} 69 Cal. 2d at 794 n.8, 447 P.2d at 361 n.8, 73 Cal. Rptr. at 249 n.8.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 794-95 n.8, 447 P.2d at 361 n.8, 73 Cal. Rptr. at 249 n.8.
This requirement can be traced to a statutory origin. Section 820.2 of the Tort Claims Act states that before there can be immunity, the governmental act or omission must be "the result of the exercise of the discretion." Thus the essential element of section 820.2 is "a causal connection between the exercise of discretion and the injury."

The Johnson court realistically noted that the approach it adopted "offers some basic guideposts, although it certainly presents no panacea" to the problem of discretionary immunity. Nevertheless, it is a praiseworthy attempt to clarify one of the most thoroughly confusing areas of California law. The Johnson decision, with its emphasis on immunity for activities of a governmental nature, can be viewed as an extension of the supreme court's earlier holding in Muskopf v. Corning Hospital District. In that case the court noted that "[i]n formulating 'rules' and 'exceptions' [as to immunity] . . . when there is negligence, the rule is liability, immunity is the exception." The Johnson rule, which more closely approximates the liability of the governmental entity for tortious conduct to that of the average person, is in keeping with the court's position in Muskopf.

The Current Post-Johnson Approach In California

This review of the development of California law since Johnson v. State will highlight several facets of its holding. First, the Johnson decision requires that case law before 1969 be reinterpreted in light of the separation of powers rationale. Although the statutory basis for discretionary immunity remains unchanged, pre-1969 holdings now must be analyzed carefully in light of Johnson to determine their continued validity as precedent. The application of the Johnson "subsequent negligence" rationale in the area of correctional programs and police activities is particularly difficult. Ne Casek v. City of Los Angeles, a pre-Johnson decision, will be analyzed to demonstrate this difficulty.

Secondly, the California Supreme Court has clarified its Johnson test for immunity in a number of subsequent decisions which will be examined. The practicability of the Johnson test for determining whether an act is discretionary will then be analyzed in light of the post-Johnson case history.

78. CAL. GOV'T CODE § 820.2 (West 1966).
80. 69 Cal. 2d at 794, 447 P.2d at 360, 73 Cal. Rptr. at 248.
82. Id. at 219, 359 P.2d at 462, 11 Cal. Rptr. at 94.
In *County of Sacramento v. Superior Court*,\(^8\) the supreme court apparently settled the question of the relation of the general discretionary immunity statute, section 820.2 of the Tort Claims Act, to the other "specific" immunities found in the act which purport to codify traditionally discretionary governmental actions. The *County of Sacramento* decision by a divided court, which held that the specific immunities cover both the discretionary decision and the ministerial implementation of that decision, will be examined in detail.

Fourthly, as noted earlier, the *Johnson* court requires the governmental employee or entity to demonstrate that a considered decision has actually been rendered before discretionary immunity will apply. The subsequent treatment of this requirement by the California courts will be discussed.

Finally, some commentators\(^8\) have suggested that the government should be held liable for its agents' decisions which, though discretionary, are the product of a negligent exercise of that discretion. While this suggestion has not been accepted by the California legislature, the requirement in *Johnson* that discretion must actually be exercised before immunity will apply is a step in this direction.

**Previous Case Law in Light of Johnson**

The *Johnson* approach, while fashioning a new lens through which discretionary immunity is to be viewed, repudiated the reasoning, though not necessarily the result, of many previous California decisions.\(^8\) Professor Van Alstyne has noted that while "the court did not expressly overrule any prior case. . . a number of earlier opinions of the appellate courts are no longer authoritative."\(^8\) The *Johnson* court rejected those opinions which applied the "dampen the ardor" and the "semantic" approaches to discretionary immunity.\(^8\) It is also clear that the supreme court's reliance on the subsequent negligence approach propounded in *Sava v. Fuller*\(^8\) renders doubtful the validity of decisions at odds with this rationale. An examination of the continued validity of the decision in *Ne Casek v. City of Los Angeles*\(^9\) in light of *Johnson* is illustrative of the difficulties encountered in determining whether pre- *Johnson* cases are still good law.

84. 8 Cal. 3d 479, 503 P.2d 1382, 105 Cal. Rptr. 374 (1972).
85. *See* notes 190-91 and accompanying text *infra*.
86. VAN ALSTYNE, * supra* note 11, § 5.54, at 18-19.
87. *Id.* § 5.51, at 14-15.
88. *See* notes 17-20 and accompanying text * supra*.
89. 249 Cal. App. 2d 281, 57 Cal. Rptr. 312 (1967). *See* note 38-39 and accompanying text * supra*.
*Ne Casek* held that policemen who had negligently allowed prisoners to escape and injure a bystander by colliding into her were immune in a tort action for negligence. The policemen's decision as to the amount of force to be used in detaining the suspects was found by the court to be discretionary.91

The supreme court in *Johnson* ratified the *Ne Casek* reasoning which rejected the "semantic" approach to discretionary immunity.92 However, *Johnson* did not follow that part of *Ne Casek* in which the court declined to draw the "subtle distinction," required by the subsequent negligence doctrine, between a deliberate decision on the part of the officers to use a particular means of physical restraint, and the negligent application of that decision.93 In addition, *Johnson* cited *Ne Casek* for the proposition that the "dampen the ardor" justification for immunity is no longer viable.94 The *Ne Casek* court reached exactly the opposite conclusion, however, stating:

It therefore appears to us that if . . . it is the possible dampening of a public official's zeal which is the basis for the discretionary immunity doctrine, its application seems particularly appropriate in the present context.95

Applying the "subsequent negligence" doctrine approved in *Johnson* to the *Ne Casek* fact situation would seem to require a different result in the latter case: the discretionary act in *Ne Casek* was the decision to use certain means of restraint; the "ministerial" implementation of the decision, including the officers' negligence in allowing the prisoners to escape, would be actionable. However, the subsequent negligence doctrine is not easily adapted to situations involving the arrest, incarceration, or release of prisoners. For example, as the court observed in *Ne Casek*, to have held the officers liable would have been tantamount to inviting increased use of force against arrestees in the future, and the formulation of "[a] rule of law which may encourage police brutality is not desirable."96

The court of appeal in *State v. Superior Court for the County of Orange*97 enunciated another policy factor militating against the use of the subsequent negligence doctrine in this situation.

For purposes of imposing tort liability, courts of this state have been quite hesitant to view as ministerial particular decisions or acts involving prisoner rehabilitation. [citations

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91. *Id.* at 142, 43 Cal. Rptr. at 302.
92. 69 Cal. 2d at 790, 447 P.2d at 358, 73 Cal. Rptr. at 246.
93. 233 Cal. App. 2d at 137-38, 43 Cal. Rptr. at 299.
94. 69 Cal. 2d at 790-91, 447 P.2d at 358, 73 Cal. Rptr. at 246.
95. 233 Cal. App. 2d at 137, 43 Cal. Rptr. at 298.
96. *Id.*, 43 Cal. Rptr. at 299.
omitted]. . . . This hesitancy to classify decisions or acts as ministerial—i.e., liability inducing—derives from a policy judgment that prison personnel might otherwise be inhibited from maintaining innovative rehabilitation-release programs.98

In a subsequent decision, County of Sacramento v. Superior Court,99 the California Supreme Court specifically approved the holding in Ne Casek,100 thus creating an exception to the subsequent negligence formulation approved in Johnson.

Ne Casek points up the difficulty in determining the validity of pre-1969 cases in light of Johnson. Pre-Johnson cases must be analyzed carefully; in some instances the holding of the case will remain the same, while the reasons for the decision will no longer be valid. In some areas, such as the administration of correctional programs, other policy factors may lead to the conclusion that the “subsequent negligence” approach, endorsed in Johnson, should not be applied. In addition, as might be expected in this difficult area, the test is more easily applied in some factual situations than in others. The supreme court itself has taken the opportunity to apply directly its Johnson test in two cases101 since Johnson was handed down, thus affording the lower courts some additional guidance in the area.

Post-Johnson Liability

Shortly after its decision in Johnson, the California Supreme Court decided the case of McCorkle v. City of Los Angeles.102 The court had granted a hearing in the case prior to rendering the Johnson decision; thus in McCorkle, it adopted substantially the decision of the court of appeal, noting that the appellate court opinion was correct in light of Johnson.103 The reasoning in McCorkle is fully in accord with the “subsequent negligence” rationale of Sava v. Fuller,104 which was endorsed in Johnson. Once the discretionary decision entrusted to a coordinate branch of government was made, the “subsequent negligence” of the governmental employee in carrying out that decision was no longer immune.

In McCorkle, the defendant policeman was in the process of

98. Id. at 1026, 112 Cal. Rptr. at 708-09.
100. Id. at 485, 503 P.2d at 1386-87, 105 Cal. Rptr. at 378-79.
103. Id. at 254-55, 449 P.2d at 455, 74 Cal. Rptr. at 391.
104. 249 Cal. App. 2d 281, 57 Cal. Rptr. 312 (1967).
investigating a traffic accident, when he directed the plaintiff, who had been involved in the accident, to go out into the street and demonstrate what had occurred. Complying with the officer's direction, the plaintiff was run down by another car and subsequently sued the police and the city for negligence. Because the officer had already exercised his discretion in deciding to investigate the accident, his discretionary immunity was held not to apply to the subsequent "ministerial" actions taken in carrying out that decision.08

The case emphasizes the essential requirement of Government Code section 820.2— that a causal connection must exist between the exercise of discretion and the injury before there can be immunity. In McCorkle, no causal connection was found. The court said:

[The officer] would have been immune if plaintiff's injury had been the result of [the officer's] exercise of discretion. . . . It was not: it resulted from his negligence after the discretion, if any, had been exercised.108

McCorkle also illustrates the limited notion of "discretion" applied in the Johnson case. Decisions which are of a purely governmental nature and which are clearly to be decided by a non-judicial branch of government will be immune. Actions by government employees carrying out those basic policy decisions, although they may involve the use of "discretion" in the ordinary sense of the word, will not be immune.109

The officer's actions at the scene of the accident certainly involved elements of "discretion" as the word is commonly used: he had to decide, for example, whether to call a towing truck, whether back-up police should be called in, and what would be the quickest and safest way to clear up the accident. But, although these decisions involved discretion to the extent that the officer had to choose among alternative courses of action, they were not considered "governmental" decisions and therefore immunity did not attach.110 Instead the officer was held to the normal standard of care in tort law—that of the reasonable man under similar circumstances.

Ramos v. County of Madera111 provides another example of

105. 70 Cal. 2d at 258-60, 449 P.2d at 458-59, 74 Cal. Rptr. at 394-95.
106. Id. at 261-62, 449 P.2d at 460, 74 Cal. Rptr. at 396.
107. CAL. GOV'T CODE § 820.2 (West 1966).
108. 70 Cal. 2d at 261-62, 449 P.2d at 460, 74 Cal. Rptr. at 396.
109. "The court said: "[T]he existence of some such alternatives facing the employee does not perforce lead to a holding that the governmental unit thereby attains the status of non-liability under section 820.2." 69 Cal. 2d at 790, 447 P.2d at 358, 73 Cal. Rptr. at 246.
110. 70 Cal. 2d at 261-62, 449 P.2d at 460, 74 Cal. Rptr. at 396.
111. 4 Cal. 3d 685, 484 P.2d 93, 94 Cal. Rptr. 421 (1971).
the supreme court’s application of its Johnson test. Plaintiffs, two
families receiving state aid, alleged in their complaint that the
county welfare department had ordered the adults and minor chil-
dren to work in the fields or have their payments cut off. The
Segovia family sued for intentional infliction of emotional distress
upon their fifteen-year old mentally-reartrd daughter, who had
been verbally assaulted by a county social worker for failing to
work. The Valero family alleged that, as a result of working in
the field, two of their children had become physically ill. Both
families sought damages from the county for tortiously coercing
the plaintiffs to work as a condition to receiving welfare payments,
contrary to state law.112

The defendants claimed discretionary immunity for the ac-
tions taken at the county level. After re-iterating its premise, pro-
pounded in the Muskopf and Johnson cases, that compensation
must be afforded to injured parties, unless immunity is clearly pro-
vided for by statute,113 the California Supreme Court rejected the
argument. The court held that the basic policy decision—
whether or not able-bodied minors must be unemployed but will-
ing to work as a condition to receiving state aid—was made by
the Legislature.114 Said the court: “The authority given to
counties to implement the basic policy decisions of the Legislature
. . . is purely ministerial.”115

One 1969 case provides an excellent example of the type of
governmental decision which the Johnson court determined was
“committed” to a coordinate branch of government and thus im-
une from liability. In Susman v. City of Los Angeles,116 plaint-
iffs sued the city and state, alleging in one count that the National
Guard should have been called in to combat a riot. The court
analyzed the nature of the governmental decision to be made and
concluded that it was peculiarly in the province of the executive
branch of government:

The reasoning of Johnson is . . . particularly applicable
to the allegations with respect to the acting Governor upon
which plaintiffs seek to base a cause of action in tort against
the State of California. When and under what circumstances
the National Guard should be called into action to preserve
the peace and to protect property is a matter within the dis-
cretion of the Governor . . . and, for the reasons expressed
in Johnson . . . is not open to judicial inquiry or review.117

112. Id. at 689-90, 484 P.2d at 95-96, 94 Cal. Rptr. at 423-24.
113. Id. at 692, 484 P.2d at 98, 94 Cal. Rptr. at 426.
114. Id. at 693-94, 484 P.2d at 99-100, 94 Cal. Rptr. at 427-28.
115. Id. at 695, 484 P.2d at 100, 94 Cal. Rptr. at 428.
117. Id. at 818-19, 75 Cal. Rptr. at 250.
Practicability of the Johnson "Policy Factors"

The Johnson case mandated that discretionary immunity apply only to those governmental decisions which are to be made by a coordinate branch of government. The case also laid out a test by which courts were to determine which governmental actions were discretionary under the terms of the statute:

Although it may not be possible to set forth a definitive rule which would determine in every instance whether a governmental agency is liable for discretionary acts of its officials, various factors furnish a means of deciding whether the agency in a particular case should have immunity, such as the importance to the public of the function involved, the extent to which governmental liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages.118

These three policy factors have not been widely used in the analysis, apparently called for in Johnson, to determine whether the action is committed to a coordinate branch of government.

For example, in Jones v. Oxnard School District,119 the court of appeal merely noted that "'discretionary' is ... to be given a flexible definition which balances the harm that may be caused by inhibition upon the governmental function against the desirability of providing redress for wrong. ..."120 In another decision, Burns v. City Council of Folsom,121 the court chose to emphasize the third factor: availability of other remedies. In reaching its decision that a building inspector, having no mandatory duty to issue a building permit, was immune from civil liability, the court held that the plaintiff had been wholly preoccupied with monetary relief and had failed to pursue his administrative remedies.122 The court found that, in light of the Johnson policy factor of encouraging the use of alternative remedies, the plaintiff's failure was fatal to his cause of action.123

The application of these three policies, which the Johnson court cited as "... furnish[ing] a means of deciding whether the agency in a particular case should have immunity ..."124

120. Id. at 593, 75 Cal. Rptr. at 840.
122. Id. at 1005, 107 Cal. Rptr. at 791.
123. Id. While the court was actually construing sections 818.4 and 821.2 of the Tort Claims Act, it felt that the policy factors enunciated in the Johnson court's interpretation of section 820.2 were applicable to these sections as well. Id. at 1004, 107 Cal. Rptr. at 790-91.
124. 69 Cal. 2d at 789, 447 P.2d at 357, 73 Cal. Rptr. at 245, quoting Lipman.
remains unclear. The California Supreme Court has not expanded upon them at any length. At this point in the development of the discretionary immunity doctrine in California, however, several comments can be made concerning their practicability.

Certainly, the more important the governmental decision is to the public, the more likely that it will be a basic policy decision "entrusted to a coordinate branch of government," and thereby immune. At the same time, the court's consideration of whether the imposition of liability might impair the exercise of the governmental function reflects the Johnson court's desire to avoid entangling the judicial branch in decisions which are to be made by the executive and legislative branches of government. This consideration was sharply outlined in the Lipman holding:

There is a vital public interest in securing free and independent judgment of school trustees in dealing with personnel problems, and trustees, being responsible for the fiscal well-being of their districts, would be especially sensitive to the financial consequences of suits for damages against the districts.

The difficulty with the policy factors put forth first in Lipman, and then in Johnson, is that they do not provide a workable basis for analysis. For example, the "importance to the public of the function involved" is a qualitative judgment. Decisions as to priorities of public importance are made by legislatures and government executives, not courts. There may be legislative history available to aid the court in determining the function's importance, but if there is not, the standards by which a court would make this determination are extremely vague.

The California Supreme Court recognized this difficulty in the Johnson case itself. Replying to the state's contention that the Youth Authority fulfills the "important" public service of rehabilitation of juveniles, the court noted:

In the absence of legislative declaration, we cannot say that the Youth Authority performs a function so much more important than that of other state agencies as to warrant total immunity. Indeed, if "importance" were the criterion, presumably most state services could meet it: immunity would then be the rule rather than the exception, and we would truly have turned Muskopf on its head.
Similarly, the third policy consideration which Lipman and Johnson posit as a means of deciding which actions are discretionary—the availability of remedies other than tort suits—is not much help. It is hard to conceive of what other "remedies" the court had in mind. For example, if the court was referring to the question whether the plaintiff had exhausted his administrative remedies, this would seem irrelevant to the issue of whether the governmental action was "committed to a coordinate branch of government." Furthermore, the Tort Claims Act requires that a claim for damages be filed and rejected by the governmental entity before suit can be brought. The Act thus has built into it a procedural exhaustion of remedies requirement that must be satisfied before the court will consider the substantive question of immunity. To sum up the "availability of other remedies" remains a procedural requirement rather than part of a practicable test for determining the question of immunity.

While the policy considerations listed in Johnson appear to be of dubious value in aiding courts to decide the immunity question, the California Supreme Court has alluded to several other considerations which may be more helpful. First, where there is a specific grant of legislative power to a governmental agency to make discretionary decisions, all actions of the agency exercising that specific power are immune. In Johnson the court stated:

The Youth Authority unquestionably makes some decisions falling within the "discretionary function" language of section 820.2. . . . As to the determination of whether to place a youth on parole, for example, the Legislature has specifically granted to the Youth Authority the power to weigh potential risks and benefits and to establish standards . . . . The decision to parole thus comprises the resolution of policy considerations, entrusted by statute to a coordinate branch of government, that compels immunity from judicial re-examination.

In contrast, if the Legislature has retained rather than delegated the power to make certain policy decisions, the actions of a governmental body in carrying out those legislative decisions will not be immune. This was the case in Ramos v. County of Madera, where the court stated:

[T]his basic policy decision—whether or not able-bodied minors must be unemployed and willing to work as a condition to receiving aid—has been made by the Legislature (and by Congress).

129. 69 Cal. 2d at 795, 447 P.2d at 361, 73 Cal. Rptr. at 249.
130. 4 Cal. 3d 685, 484 P.2d 93, 94 Cal. Rptr. 421 (1971).
131. Id. at 694, 484 P.2d at 100, 94 Cal. Rptr. at 428.
Thus a court should closely scrutinize the statutory basis of the governmental decision for clues as to which branch of government or agency is to make the decision.

A second guide to whether actions are immune from liability may be found in the characteristics of the governmental decision itself. If governmental conduct or actions are identical or similar to those which courts have examined in other contexts and with which they are familiar and comfortable, there is some indication that a basic policy decision is not involved. For example, in Johnson the court noted that

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 court's ability to re-examine it.\textsuperscript{132}

The court went on to comment:

[T]his is a classic case for the imposition of tort liability. Defendant failed to warn plaintiff of a foreseeable, latent danger, and this failure led to plaintiff's injury from precisely the expected source; courts encounter this type of allegation daily and are well suited to resolve its validity under traditional tort doctrine.\textsuperscript{133}

Finally, a third aid is available to the courts in determining which acts are discretionary within the meaning of section 820.2\textsuperscript{134} of the Tort Claims Act. While the court's decision on the immunity question is one of law, the governmental entity is in the best position to inform the court and convince it that a decision should be immune from liability. Only the state can fully detail the decision-making process that takes place in resolving policy decisions and which is peculiarly governmental in nature. Thus it may be said that the state has a "burden" to prove that a decision rises to the required level, where the nature of the decision is not self-evident. The court in Johnson alluded to this burden, commenting:

Since the state fails to demonstrate a pressing interest in judicial refusal to review a parole officer's decision as to warnings, the instant case falls far short of the strong showing required by section 820.2 to justify "discretionary function" immunity.\textsuperscript{135}

These three suggested aids to the determination of the discretionary immunity issue, while certainly not presenting a comprehensive test, at least admit of a more practical application than

\textsuperscript{132} 69 Cal. 2d at 794, 447 P.2d at 360, 73 Cal. Rptr. at 248 (emphasis added).
\textsuperscript{133} \textit{Id.} at 797, 447 P.2d at 363, 73 Cal. Rptr. at 251.
\textsuperscript{134} \textit{CAL. GOV'T CODE} § 820.2 (West 1966).
\textsuperscript{135} 69 Cal. 2d at 798, 447 P.2d at 363, 73 Cal. Rptr. at 251.
those guides put forth in Lipman and Johnson. If the discretionary immunity rationale set forth in the Johnson case is fully to be utilized in the lower courts, a more comprehensive treatment by the supreme court of the “policy factors” which are to determine immunity is needed.

To conclude this discussion of the practical application of the Johnson test for determining which actions are discretionary, and thus immune, the court of appeal’s decision in Connelly v. State of California136 should be examined. The case is of interest not so much for its correct holding that the State Department of Water Resources could be found negligent in imparting information as to the projected crest level of a flooding river, but rather for Justice David’s dissent.137 The dissent espouses the traditional view of the bases for discretionary immunity and can be used to highlight the changes in the approach to discretionary immunity made by the Johnson decision. Justice David narrowly construes the Johnson holding and criticizes the “separation of powers” rationale found in that decision. In Connelly, plaintiff alleged that the State Board of Water Resources was negligent in forecasting the river height in a flood, resulting in the plaintiff’s failure to set his marine docks high enough to avoid flood damage. The court held that the state’s demurrer to the complaint should have been overruled, stating:

[T]he determination to issue flood forecasts is a policy-making function, a discretionary activity within the scope of governmental immunity, while gathering, evaluating and disseminating flood forecast information are administrative or ministerial activities outside the scope of governmental immunity.138

The dissent first examined the separation of powers theory on which the Johnson rationale is based, maintaining that courts cannot determine the existence of discretion by considering the legislative purposes for granting immunity.139 Since the Legislature had given the immunity, its bases in establishing such a policy were irrelevant. The dissent continued:

The further dicta in Johnson . . . indicating that the discretionary-immunity doctrine depends upon judicial self-restraint and abstention, based upon the separation of powers, is novel in California law. It is not a workable tool since the enactment of section 820.2.140

137. Id. at 753, 84 Cal. Rptr. at 263.
138. Id. at 751, 84 Cal. Rptr. at 262.
139. Id. at 764, 84 Cal. Rptr. at 271 (dissenting opinion of David, J.).
140. Id. at 767, 84 Cal. Rptr. at 273.
Justice David then offered a serious challenge to the propriety of the judicial role in redefining "discretionary actions" in terms of separation of powers. He noted that pre-1963 decisions, which decided whether the employee and the government were immune on a case-by-case factual basis, were expressly approved by the report before the Senate when the California Tort Claims Act was adopted. Since section 820.2 was said to restate existing California law, the dissent reasoned:

If by such redefinition the [Johnson] court has eliminated the the type of fact-finding discretion [found in pre-1963 cases] it has created new liabilities contrary to Government Code section 815, which declares any new liability must be declared by statute.¹⁴¹

Justice David concluded that, since the Legislature already has declared the statutory immunity of employees, and the consequent immunity of the state where the employer's immunity exists . . . all the conclusions whether or not such immunity should exist as judicial policy [in Johnson] were purely dicta, not involved in any ultimate question presented to the court.¹⁴²

The statement of Justice David that the California Supreme Court in the Johnson case has created new liabilities contrary to Government Code section 815¹⁴³ is belied by two considerations. First, the Supreme Court in Lipman v. Brisbane Elementary School District,¹⁴⁴ which was handed down prior to the enactment of the discretionary immunity statute, had rejected a mechanical application of discretionary immunity in favor of relying on "various factors [which] furnish a means of deciding whether the agency in a particular case should have immunity."¹⁴⁵ The court noted this clearly in Johnson:

The Legislature in fact specifically approved the Lipman approach in defining "discretionary" acts. The Senate Committee on the Judiciary Comment to section 820.2, part of the 1963 codification of sovereign immunity law, states, "This section restates the pre-existing California law," citing Lipman, inter alia.¹⁴⁶

Secondly, the California Tort Claims Act¹⁴⁷ provides direct support for the result of the Johnson rationale that limits discretionary immunity to ensure compensation for tortious conduct. Section 820 of the Act states:

¹⁴¹. Id. at 773, 84 Cal. Rptr. at 278.
¹⁴². Id. at 769-70, 84 Cal. Rptr. at 275.
¹⁴³. CAL. GOV'T CODE § 815 (West 1966).
¹⁴⁵. Id. at 230, 359 P.2d at 467, 11 Cal. Rptr. at 99.
¹⁴⁶. 69 Cal. 2d at 789 n.4, 447 P.2d at 357 n.4, 73 Cal. Rptr. at 245 n.4.
¹⁴⁷. CAL. GOV'T CODE §§ 810-996.6 (West 1966).
(a) Except as otherwise provided by statute (including Section 820.2), a public employee is liable for injury caused by his act or omission to the same extent as a private person.\textsuperscript{148}

This section is consistent with the Johnson court's statement that "courts should not casually decree governmental immunity."\textsuperscript{149}

The Relationship Between the Discretionary Immunity Statute and the Specific Immunities Granted in the California Tort Claims Act

Government Code section 820.2\textsuperscript{150} purports to codify the traditional immunity of governmental entities and employees for discretionary actions. The Legislature also included several sections in the Tort Claims Act intended to ensure that certain acts currently viewed by the courts as deserving of immunity would remain so and not be found actionable in future judicial decisions.\textsuperscript{151}

What remained unclear, however, was the application of discretionary immunity to these specific immunity statutes. Were both those acts specifically found by the Legislature to be discretionary and their "ministerial" implementation cloaked with immunity, or were these latter actions subject to liability under the Johnson approach?

In dicta the supreme court discussed the issue in the 1972 decision of Baldwyn v. State,\textsuperscript{152} which concerned immunity under Government Code section 830.6\textsuperscript{153} for an ill-conceived plan or design of a public improvement. The court first noted that the specific immunity covered those governmental deliberations involved in deciding on a plan or design to be utilized.\textsuperscript{154} The court then held that the "ministerial" implementation of this discretionary decision would not be covered by the immunity of section 830.6:

The purpose of that immunity is to keep the judicial branch from reexamining the basic planning decisions made by executive officials or approved by legislative bodies. However, supervision of the design after it has been executed is essentially operational or ministerial. Consequently, it is consistent to find liability for negligence at that level when, as in the instant case, the actual operation of the planning decision is examined in the light of changed physical conditions.\textsuperscript{155}

However, when a divided court addressed the issue directly in County of Sacramento v. Superior Court,\textsuperscript{156} it held that the spe-

\textsuperscript{148} Id. § 820.
\textsuperscript{149} 69 Cal. 2d at 798, 447 P.2d at 363, 73 Cal. Rptr. at 251.
\textsuperscript{150} CAL. GOV'T CODE § 820.2 (West 1966).
\textsuperscript{151} Id. §§ 820.4, 820.8, 821-21.8.
\textsuperscript{153} Id. at 436 n.9, 491 P.2d at 1129 n.9, 99 Cal. Rptr. at 153 n.9.
\textsuperscript{154} 8 Cal. 3d 479, 503 P.2d 1382, 105 Cal. Rptr. 374 (1972).
specific discretionary immunities codified in the Tort Claims Act did cover the ministerial implementation of those decisions. An escaped prisoner killed the plaintiff's husband during a burglary attempt, and the plaintiff sued the county for negligence in allowing the prisoner to escape. The plaintiff acknowledged that there was immunity for discretionary acts, but contended that,

there is no immunity with respect to ministerial acts and the alleged acts of petitioners' employees in leaving the jail doors unlocked were ministerial in nature.107

The defendants argued that, although the escape may have been caused by their negligence, the specific immunity granted by section 845.8(b)158 must apply. The issue was framed thus: Does section 845.8, subdivision (b),

... extend immunity to a governmental entity and its employees with respect to both ministerial and discretionary acts of the employees for injury caused by an escaped prisoner?159

The California Supreme Court answered the question in the affirmative. The court noted that certain of the specific immunity statutes in the California Tort Claims Act160 had been amended to exclude immunity with respect to ministerial acts or omissions. For example, section 844.6161 grants public entities immunity, with a number of exceptions, for injuries caused by a prisoner or for injuries to a prisoner. But this section also expressly provides that the public employees are not immune from liability for injuries caused by the employees' ministerial acts or omissions, which are negligent or wrongful. In contrast, section 845.8,162 at issue in the County of Sacramento case, had not been amended in this manner:

Numerous other related sections amended at the same time likewise provide for certain exclusions of immunity with respect to ministerial acts or omissions, and it must be assumed that if the Legislature had intended that there be any such exclusion of immunity with respect to section 845.8, subdivision (b), it would have so provided.163

The court also commented on the difficulty of isolating "ministerial" actions from "discretionary" ones in the particular area of correctional programs, stating that:

Ministerial implementation of correctional programs, however, can hardly, in any consideration of the imposition of tort

157. Id. at 485, 503 P.2d at 1386, 105 Cal. Rptr. at 378.
159. 8 Cal. 3d at 481, 503 P.2d at 1383, 105 Cal. Rptr. at 375.
161. Id. § 844.6 (West Supp. 1974).
162. Id. § 845.8.
163. 8 Cal. 3d at 482-83, 503 P.2d at 1384-85, 105 Cal. Rptr. at 376-77.
liability, be isolated from discretionary judgments made in adopting such programs.\textsuperscript{164}

A strong dissent objected on two grounds to the majority's position that the specific immunity statutes covered both discretionary acts and those acts implementing discretionary decisions which are termed "ministerial."\textsuperscript{165} First, the dissent noted that when the California Law Revision Commission drafted Government Code section 845.8, it accompanied its proposal with a comment which states that "this section is a specific application of the discretionary immunity recognized in California cases and in Section 820.2."\textsuperscript{166} The dissent maintained that since the Legislature enacted the statutes as proposed by the Commission without change, the Commission's comment on the statute must be given substantial weight by the court.\textsuperscript{167} Thus, under this reasoning, since section 845.8 purports to cover only a discretionary decision, any ministerial acts implementing that decision would not be immune.

Secondly, the dissent argued that its interpretation of the statute in question was further supported by the Legislative Committee's comment to section 820.2, the general discretionary immunity statute. The committee stated:

In the sections that follow [including section 845.8] several immunities . . . are set forth even though they have been regarded as within the discretionary immunity.\textsuperscript{168}

Once again, section 845.8 would cover only discretionary decisions and not their ministerial implementation.

Finally, the dissent proceeded to analyze the factual situation in the \textit{County of Sacramento} case, in light of the reasoning employed in \textit{Johnson}. Addressing itself to the \textit{Johnson} directive that the courts look to the reasons for granting immunity,\textsuperscript{169} the dissent stated:

The reason for recognizing an immunity referable to escaping or escaped prisoners is to leave the administrators of jails and prisons free and unfettered from legal criticism of . . . the organization, program, and general direction of jails, prisons and custodial institutions . . . . Defendant county, having decided the location of the jail in question, having fixed the degree of security for the facility, having determined the program for the inmates and having established a general policy

\textsuperscript{164} \textit{Id.} at 485, 503 P.2d at 1386-87, 105 Cal. Rptr. at 378-79.
\textsuperscript{165} \textit{Id.} at 486, 503 P.2d at 1387, 105 Cal. Rptr. at 379.
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} \textit{Id.} at 489, 503 P.2d at 1389, 105 Cal. Rptr. at 391 (emphasis added).
\textsuperscript{169} 69 Cal. 2d at 789, 447 P.2d at 357-58, 73 Cal. Rptr. at 245-46.
for the operation of the jail in question, should not be subject
to judicial scrutiny of its considered judgments.\textsuperscript{170}

But once such judgments are reached, actions of the govern-
mental agency to "accomplish and meet the purpose of the plan" will not be immune, and liability can be imposed if they are negli-
gently performed. The dissent argued:

The charges relate to the internal administration of the jail,
and they pertain to alleged failures to contain and control.
They smack of faulty implementation of a plan.\textsuperscript{171}

The effect of the California Supreme Court's decision in
\textit{County of Sacramento v. Superior Court} is to limit its earlier hold-
ing in \textit{Johnson}. The "specific immunities" of the Tort Claims Act
will be deemed to cover both discretionary policy decisions and
also those actions taken to implement the decisions—actions which
under the \textit{Johnson} analysis would be termed "ministerial" and not
immune.

While the positions of both the majority and the dissent find
logical support in the legislative history of the California Tort
Claims Act,\textsuperscript{172} the holding of the case at least has the distinction
of not contravening the plain meaning of the statute in question—
that there shall be no liability for injuries caused by an escaping
or escaped prisoner.\textsuperscript{173} The decision vividly demonstrates that
\textit{Johnson v. State of California} has not completely laid to rest the
difficulties of the discretionary immunity question.

\textit{Requirement That Discretion in Fact Be Exercised}

It will be recalled that the \textit{Johnson} court, in re-examining
the reasons for granting discretionary immunity, held that the dis-
cretion vested in governmental employees or entities must be
shown actually to have been exercised before immunity will at-
tach.\textsuperscript{174} Immunity is not granted simply because the state or its
employees could have exercised, or in the normal course of em-
ployment did exercise discretion in making decisions. This facet
of the \textit{Johnson} holding settled an issue which had been in doubt.
The court of appeal's decision in the \textit{Johnson} case itself had
stated:

\begin{itemize}
  \item \textsuperscript{170} 8 Cal. 3d at 490, 503 P.2d at 1390, 105 Cal. Rptr. at 382 (dissenting
  opinion).
  \item \textsuperscript{171}  Id. at 491, 503 P.2d at 1391, 105 Cal. Rptr. at 383.
  \item \textsuperscript{172} \textit{See} the majority opinion's discussion at 8 Cal. 3d 482-84, 503 P.2d at
  1384-85, 105 Cal. Rptr. at 376-77. The dissent discusses the application of the
  legislative history at 8 Cal. 3d at 488-89, 503 P.2d at 1388-89, 105 Cal. Rptr.
  at 380-81.
  \item \textsuperscript{173} \textit{CAL. GOV'T CODE} § 845.8 (West Supp. 1974).
  \item \textsuperscript{174} 69 Cal. 2d at 794-95 n.8, 447 P.2d at 361 n.8, 73 Cal. Rptr. at 249 n.8.
\end{itemize}
It is . . . possible . . . that the failure to inform [the plaintiff of the boy's homicidal tendencies] was not so much the result of a decision on the part of state officials, that is to say the product of reasoned judgment, but that it stemmed from a negligent failure to exercise any judgment. The result would be the same. The discretionary immunity doctrine is designed for the benefit of officials who exercise judgment . . . (citations omitted) [Surely mere thoughtlessness does not destroy the immunity.\textsuperscript{175}]

The supreme court in \textit{Ramos v. County of Madera}\textsuperscript{176} reiterated the \textit{Johnson} requirement that the employee or entity must show that a conscious weighing of alternatives took place. The court stated that "'[t]he actor must not only have discretion but also must act in the exercise of that discretion.'\textsuperscript{177}

The only post-\textit{Johnson} cases to focus on the "exercise of discretion" requirement are \textit{Elton v. County of Orange}\textsuperscript{178} and \textit{Biggers v. Sacramento Unified School District}.\textsuperscript{179} In \textit{Elton} the plaintiff, a dependent child, filed an action seeking damages for beatings, scaldings, and other atrocities committed upon him by foster parents after he was placed in their home. The county argued that the placement of the child in a foster home was a discretionary act. The court first held that the county was not immune under section 820.2, stating:

While the Orange County Probation Department performs functions with respect to dependent children which could be classified as involving basic policy decisions (such as recommending a child be, or not be, declared a dependent child), and hence warrant immunity, it does not follow [that] its subsequent ministerial acts in implementing such decisions rise to the same level.\textsuperscript{180}

The court ruled that the decision to place a child in a particular home "may entail the exercise of discretion in a literal sense, but . . . [does] not achieve the level of basic policy decisions. . . ."\textsuperscript{181}

The court then focused on the \textit{Johnson} requirement that the exercise of discretion must be proved:

In \textit{Johnson} . . . the Supreme Court also held the public agency must demonstrate its employee in fact consciously exercised discretion in connection with the negligent acts or omissions charged in order to invoke the 'discretionary acts' immunity provisions . . . . Such a showing was not and

\textsuperscript{175}. 65 Cal. Rptr. 717, 719 n.4 (1968) (vacated).
\textsuperscript{176}. 4 Cal. 3d 685, 484 P.2d 93, 94 Cal. Rptr. 421 (1971).
\textsuperscript{177}. \textit{id.} at 692 n.7, 484 P.2d at 98 n.7, 94 Cal. Rptr. at 426 n.7.
\textsuperscript{178}. 3 Cal. App. 3d 1053, 84 Cal. Rptr. 27 (1970).
\textsuperscript{180}. 3 Cal. App. 3d at 1058, 84 Cal. Rptr. at 30.
\textsuperscript{181}. \textit{id.}
could not have been made by the county at the demurrer stage and the trial court's ruling sustaining the demurrer by reason of the immunity provisions [in 820.2] was also erroneous for this reason.182

The plaintiff in Biggers alleged that, as a result of the school district's negligence in not taking adequate precautions for the safety of the school grounds, he suffered injuries from a beating at the hands of a gang of hoodlums. The trial court entered judgment after sustaining the defendant's demurrer without leave to amend.

The court of appeal reversed, on the grounds that "[a]t the pleading stage, determination of that issue (immunity) cannot be made." The court went on to state:

It may very well be that the case will fall within one of those situations where section 820.2 does not apply . . . . Suppose it should develop that respondents have refused to exercise any discretion in the matter of supervision of safety of adolescents attending Sacramento High School—even an abused discretion knowing that gangs of marauding hoodlums are endangering lives; that they have just turned their backs on the whole problem. Would section 820.2 apply? We would not so rule.183

If this rule were consistently followed, most immunity cases could not be decided at the demurrer stage. The lower courts have had little opportunity to apply the requirement, but it has been ignored on at least one occasion. In Susman v. County of Los Angeles,184 the court sustained general demurrers to the plaintiff's complaint that the National Guard should have been called in by the acting Governor to put down a riot. If the requirement that the exercise of discretion must actually be proved had been followed, the case could not have been disposed of on demurrer.

The requirement that discretion must be proved actually to have been exercised by the governmental employee or entity is one of the most significant facets of the Johnson holding. As noted above, it is based on the language of Government Code section 820.2,185 which requires that the act result from an exercise of discretion. It is also tied, however, to the separation of powers rationale. Only those peculiarly governmental "basic policy decisions" entrusted to a "coordinate branch of government" are immune. This type of decision is not likely to be one made casually

182. Id. at 1058, 84 Cal. Rptr. at 31.
183. 25 Cal. App. 3d at 275-76, 101 Cal. Rptr. at 710.
by a governmental employee or entity; rather it will normally be made only after various factors are weighed.

If applied to the fullest extent, this requirement could significantly broaden the range of liability imposed on the government. To date, however, despite the California Supreme Court's explicit reiteration of the requirement in *Ramos v. County of Madera*, the lower California courts appear not to have recognized its importance.

*The Problem Of The Discretionary Decision Performed in a Negligent Manner*

A basic policy question is involved in the decision whether to impose liability upon public employees and entities for decisions that are clearly discretionary in origin but which are negligently made. For example, the court in *Elton v. County of Orange* indicated that a county welfare department's decision to recommend that a child be declared a dependent is "discretionary" as the term is used in Government Code section 820.2. This decision could have been made in a negligent manner, such as, for example, by not compiling complete information on the background of the child.

Current California law precludes such liability, because under Government Code section 820.2, as construed in the *Johnson* case, if the governmental employer or entity proves that discretion has actually been exercised—whether negligently or not—there will be immunity. Two noted commentators have suggested that imposing legislative liability for this type of conduct should be considered. Professor Davis has stated,

> "Keeping the door open to liability for some kind of fault in connection with the performance or nonperformance of discretionary functions is preferable to the tendency of the federal cases to immunize all discretionary power."

Professor Van Alstyne has also suggested a distinction along these lines:

> "It may be possible to distinguish between injury caused by a deliberately conceived but nevertheless incorrect exercise of personal judgment and discretion, and injury caused by a careless or negligent exercise thereof."

186. 4 Cal. 3d at 692 n.7, 484 P.2d at 98 n.7, 94 Cal. Rptr. at 426 n.7.
187. 3 Cal. App. 3d 1053, 84 Cal. Rptr. 27 (1970).
188. Id. at 1058, 84 Cal. Rptr. at 30-31.
189. CAL. GOV'T CODE § 820.2 (West 1966).
The requirement in *Johnson* that the exercise of discretion actually be proved is a step in this direction. One form of negligence can be total inaction—as opposed to a considered decision not to act. Under *Johnson*, such non-feasance, if the result of a total failure to even consider whether to act, is subject to liability.\(^\text{192}\) It should be noted, however, that if governmental liability is extended so as to encompass negligent discretionary acts, the liability of governmental entities and employees would be, for practical purposes, co-equal to the range of liability faced by the ordinary person.

**Conclusion**

California law has been in the forefront of the development of a viable approach to the problem of immunity for discretionary acts of public entities, their employees, and public officeholders. Both the 1961 decision of *Muskopf v. Corning Hospital District*\(^\text{193}\) and the 1969 case of *Johnson v. State of California* are landmarks in the field of sovereign immunity. The *Johnson* case, with its emphasis on separation of powers as a rationale for sovereign immunity, is the most successful attempt thus far to clarify the long-standing problem of which acts are discretionary and which are ministerial.

Certain features of the *Johnson* decision, however, have not received widespread attention in the lower courts. *Johnson* mandates that three policy considerations—importance of the function involved, extent to which liability would impair the exercise of that function, and availability of other remedies—be balanced to determine whether the governmental decision is committed to a coordinate branch of government and thus immune.\(^\text{194}\) To date, the lower courts have not extensively engaged in the required analysis. As has been pointed out above, the *Johnson* policy factors do not provide a workable tool.\(^\text{195}\) While other guidelines are available for use by the courts, further elaboration by the supreme court is needed in this area.

*Johnson* also requires that discretion in fact be exercised before there can be immunity.\(^\text{196}\) This requirement, which is mandated by the wording of section 820.2 of the Tort Claims Act,\(^\text{197}\) is a sharp break with pre-*Johnson* cases. It is one of the most significant requirements of the case and, if widely applied, would result in an increase in governmental liability.

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192. 69 Cal. 2d at 794-95 n.8, 447 P.2d at 361 n.8, 73 Cal. Rptr. at 249 n.8.
194. 69 Cal. 2d at 789, 447 P.2d at 357, 73 Cal. Rptr. at 245.
195. See notes 124-28 and accompanying text supra.
196. 69 Cal. 2d at 794-95 n.8, 447 P.2d at 361 n.8, 73 Cal. Rptr. at 249 n.8.
197. CAL. GOV'T CODE § 820.2 (West 1966).
Finally, the supreme court in *County of Sacramento v. Superior Court*\(^1\text{98}\) limited the application of *Johnson* by deciding that the immunities granted by the Tort Claims Act for specific discretionary actions extended to both the discretionary decision and its ministerial implementation. Thus, ministerial actions in carrying out a discretionary decision will be immune when that decision is covered by a specific immunity of the Tort Claims Act.

Certainly there is a viable place in the American system of law, with its emphasis on separation of powers, for a doctrine of discretionary immunity which allows administrative bodies with quasi-legislative powers, governmental departments, and public officeholders to make decisions unhampered by fears of civil liability. At the same time there is a need within this system to protect those injured by governmental actions performed in execution of those decisions on a ministerial level from the blind application of an archaic rule of immunity. Professor Davis has praised the *Johnson* approach as worthy of becoming the basis for future building of the discretionary immunity doctrine.\(^1\text{99}\) It remains to be seen whether *Johnson* will receive widespread acceptance by federal and other state courts.

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198. 8 Cal. 3d 479, 503 P.2d 1382, 105 Cal. Rptr. 374 (1972).