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Torts -- Federal Tort Claims Act Discretionary Function Exception

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value theory"¹² has been applied. Under this rule the fair market value is based on what use the lessee makes of his leasehold, excluding recovery for expectant profits. While testimony is taken by appraisers the court still has wide discretion in determining the actual amount of the award.

The "investment securities rule"¹³ which was applied in the instant case entails giving the full award to the lessor, in contrast to other methods where the court apportions the award between the parties at the time of the judgment.¹⁴ The lessor must invest the award in highest grade securities and the lessee gets the interest therefrom during the unexpired term of the lease. However, investment of the award was not decreed in the principal case because the lessee's interest was substantially protected since the rental payments far exceeded the return from the investment. The advantage of the "investment securities rule" is that the court does not get involved in a maze of technicalities and formulas.¹⁵ The only scale that is applicable is the economic change in the security market, and this is guarded against by the court retaining jurisdiction as was done in the instant case, where the chancellor set the amount temporarily at three and one-half per cent. This method removes a high percentage of the "crystal gazing."¹⁶ A disadvantage of this, or any fixed rule, is that it is arbitrary and does not take into account other equitable factors such as the premium value placed on commercial property as distinguished from residential property.¹⁷

It is difficult to see how any one rule can fill the need or supply the answer in apportionment disputes. Each case should be taken on its own merits. It is suggested that those contracting in real estate should provide for apportionment of award in the event of condemnation in order to avoid the effect of a court decision in this involved and nebulous area.

F. Stewart Elliott.

TORTS — FEDERAL TORT CLAIMS ACT DISCRETIONARY FUNCTION EXCEPTION

Ammonium nitrate fertilizer stored in vessels in Texas City harbor exploded, causing 560 deaths and extensive property damage. An action against the United States¹ alleged Government liability for the negligence of its employees in manufacturing, packing and shipping the fertilizer.

12. *Pasadena v. Porter*, 201 Cal. 381, 257 Pac. 526 (1927); *Bales v. Wichita Midland Ry.*, 92 Kan. 771, 141 Pac. 1009 (1914).

13. *In re Pfleges*, L.R. 6 Eq. 426 (1868); cf. *Matter of Central Park Comm'rs*, 54 How. Prac. 313 (N.Y. 1873); see Note, 40 HARV. L. REV. 1135 (1927).

14. See note 5 *supra*.

15. See note 11 *supra*.

16. See Note, 48 HARV. L. REV. 682 (1935).

17. See Comment, 33 MICH. L. REV. 1087 (1935).

1. 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2412, 2671-80 (Supp. 1952) (Federal Torts Claims Act).

2. *In re Texas City Disaster Litigation*, 197 F.2d 771 (5th Cir. 1952).

The Court of Appeals reversed³ the District Court's decision for plaintiffs⁴ on the ground that the acts or omissions charged fell within the exception from the waiver of sovereign immunity in the Federal Tort Claims Act.⁴ The Supreme Court granted certiorari⁵ and *held*, that acts of government in formulating and *carrying out* a plan for the manufacture of such fertilizer were acts of *discretion* not resulting in liability. *Dalehite v. United States*, 73 Sup. Ct. 956 (1953).⁶

Query: What is the extent of the discretionary function exception of the Federal Tort Claims Act? The accepted principle is that no action lies against the United States unless Congress has authorized it,⁷ and in recognizing that if granted, such a right is taken subject to such qualifications as may have been imposed,⁸ we approach an analysis of the discretionary function exception of the Act. Congress' purpose in enacting this legislation was to afford a more adequate remedy for injured persons by the creation of a judicially enforceable right, supplanting the onerous private bill method.⁹ However, it was considered undesirable that a tort action, in addition to not being permitted to interfere with a recognized governmental activity, should be used as a medium for testing the "propriety of a discretionary administrative act."¹⁰ The final House Report states that the discretionary function exception¹¹ was designed to preclude claims against a "regulatory" agency;¹² the ultimate application of this exception, however, has been left with the courts.

Nothing approaching a definite standard has appeared in the decisions construing and applying the exception, although some courts have attempted to construe it traditionally to exclude judicial interference with lawful legislative and executive action.¹³ In general, there seems to be a tendency to construe this exception liberally in favor of the government.¹⁴ Indeed, this exception has been interpreted as an express reservation of immunity, which was not to be restricted by definement of construction.¹⁵ Where there is a "proprietary" function involved, the courts have tended to

3. *Dalehite v. United States*, Civil No. 787 (S.D. Texas April 13, 1950).

4. 28 U.S.C. § 2680(a) (Supp. 1952) ("any claim 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.") (italics supplied).

5. *Dalehite v. United States*, 344 U.S. 873 (1952).

6. The decision of the Supreme Court was 4-3, with Mr. Justice Clark and Mr. Justice Douglas not sitting. Mr. Justice Reed wrote the opinion for the court; Mr. Justice Jackson, joined by Mr. Justice Black and Mr. Justice Frankfurter, dissented.

7. *Feres v. United States*, 340 U.S. 135, 139 (1950).

8. *Federal Housing Administration v. Burr*, 309 U.S. 242, 251 (1939).

9. Sen. Rep. No. 1011, 79th Cong., 2d Sess. 25 (1946).

10. *Hearings before Committee on the Judiciary on H. R. 5373 and H. R. 6463*, 77th Cong., 2d Sess. 5, 6, 44 (1942).

11. See note 4 *supra*.

12. H. R. Rep. No. 1287, 79th Cong., 1st Sess. 5-6 (1942).

13. *Coates v. United States*, 181 F.2d 816 (8th Cir. 1950).

14. *Kendrick v. United States*, 82 F. Supp. 430, 431 (D.C. Ala. 1949).

15. *Toledo v. United States*, 95 F. Supp. 838 (D.C.P.R. 1951).

exclude cases from the exceptions;¹⁶ and in cases approaching a "governmental" function, the courts seem to have applied it.¹⁷ The exception has received wide usage in denying recovery whenever there have appeared official or administrative decisions or acts, which would of necessity involve a use of discretion on the part of the official or administrator in charge. In one such instance, the court held that the decision of range officials not to grant the plaintiff permission to cross public lands with his sheep was such a decision.¹⁸ Other acts or omissions within the exception include the determination that migratory birds could not be hunted in a certain year,¹⁹ the failure of an army hospital to dispatch an ambulance promptly where regulations provided that they need do so only "whenever practicable,"²⁰ spraying government property with a dangerous herbicide, although cognizant of the possibility of private property damage,²¹ and seizing a privately-owned coal mine.²² In cases where there is no discretion, but the duty to act is mandatory upon the government, such as marking a wrecked ship,²³ the exception has not been applied. On the other hand, in situations involving large projects inherently clothed with the public interest, similar in some respects to the instant decision, the exception has been applied. Such cases include an abuse of discretion in releasing too much water from behind a dam,²⁴ and one in which there occurred alleged negligence in carrying out the exact operational plans approved by the authority having the discretionary power.²⁵

The instant case involves a Cabinet level decision to embark upon a fertilizer export program as part of foreign aid. The majority of the

16. *Ure v. United States*, 93 F. Supp. 779 (D.C. Or. 1950), *aff'd*, 193 F.2d 505 (9th Cir. 1951) (the government failed to keep an irrigation canal in repair over which it had assumed a "proprietary" control; plaintiff recovered for land damage).

17. *Toledo v. United States*, 95 F. Supp. 838 (D.C.P.R. 1951) (tree fell on plaintiff's car after it had been weakened by disease in experimental station; denying recovery, the court stressed the "governmental function" of agricultural experimentation).

18. *Chourmos v. United States*, 193 F.2d 321 (10th Cir. 1951), *cert. denied*, 343 U.S. 977 (1952).

19. *Sickman v. United States*, 184 F.2d 616 (7th Cir. 1950) (plaintiff denied recovery where protected migratory birds caused crop damage).

20. *Denny v. United States*, 171 F.2d 365 (5th Cir. 1948) (army officer and his wife denied recovery for death of stillborn child as a result of failure of army hospital to send ambulance).

21. *Harris v. United States*, 106 F. Supp. 298 (E.D. Okla. 1952) (plaintiff denied recovery for damage to private property caused by spraying dangerous herbicide on adjoining government property).

22. *Old King Coal Co. v. United States*, 88 F. Supp. 124 (D.C. Iowa 1949) (recovery denied where damages sought for refusal of Secretary of Interior to return plaintiff's coal mine seized by government).

23. *Somerset Seafood Co. v. United States*, 193 F.2d 631 (4th Cir. 1951) (represents minority view).

24. *Olson v. United States*, 93 F. Supp. 150 (D.C.N.D. 1950) (agents of United States having discretion to release water from behind a dam released an excessive amount, causing damage to plaintiff's land); *accord*, *Pacific Nat. Fire Ins. Co. v. Tennessee Valley Authority*, 89 F. Supp. 98 (D.C. Va. 1950); *Thomas v. United States*, 81 F. Supp. 881 (D.C. Mo. 1949).

25. *Boyce v. United States*, 93 F. Supp. 866 (S.D. Iowa 1950) (discretion was not extended to minor details in over-all channel deepening project which involved blasting which injured plaintiff's land, because details were decided by person having the discretion).

Supreme Court, in applying the discretionary function exception, reasons from the major premise that once a high level policy determination has been made which involves the discretion requisite for immunity under the Act, this immunity persists throughout the implementation of the decision: "once discretionary, always discretionary." The conclusion reached thereby is that acts of subordinates in carrying out the operations of government in accord with official directives are not actionable.²⁶ This ruling does not define precisely where discretion ends, or set limitations as to whom shall exercise the discretion. Accepting the major premise that discretion must end somewhere short of the bottom of the ladder of authority; that is, discretion, as Congress intended it to be applied, reaches only the higher level balancings of values, the dissent concludes that immunity does not extend into the greater part of the operational phases of policy decisions.²⁷ Thusly, they would impose liability upon the government in the instant case, where allegedly the negligence arose in the packing and shipping of the ammonium nitrate.

It is submitted that the majority holding in this case too liberally construes the application of the exception to lower-level acts. There is an uncertainty pervading the meaning of a "discretionary function" which, as it has been argued, must lead to hardship and arbitrariness.²⁸ Mr. Justice Cardozo, speaking on limitations of the waiver of immunity by the sovereign, has said: "The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by reinforcement of construction where consent has been announced."²⁹ Eloquently indicating the effect of the court's decision, the dissent observes that the discredited doctrine of "The King can do no wrong" had not been uprooted; it has merely been amended to read, "The King can do only little wrong."³⁰

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26. *Dalehite v. United States*, 73 Sup. Ct. 956, 968 (1953).

27. *Id.* at 979.

28. Parker, *The King Does No Wrong, Liability for Misadministration*, 5 VAND. L. REV. 167, 171-72 (1952); see Comment, 36 MARQ. L. REV. 88 (1952); Notes, 66 HARV. L. REV. 488 (1953), 101 U. PA. L. REV. 420 (1952).

29. *Anderson v. Hayes Construction Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926).

30. *Dalehite v. United States*, 73 Sup. Ct. 956, 980 (1953).