Kentucky Law Journal

Volume 50 | Issue 2 Article 4

1961

Torts--Federal Tort Claims Act--Negligent Appraisal by Agent of Federal Housing Commissioner

H. Jefferson Herbert Jr.
University of Kentucky

Recent Cases

TORTS—FEDERAL TORT CLAIMS ACT—NEGLIGENT APPRAISAL BY AGENT OF FEDERAL HOUSING COMMISSIONER—Plaintiff, during negotiations for the purchase of a house, applied for a conditional mortgage insurance commitment, as provided by the National Housing Act.[1] The house was appraised by an employe of the Federal Housing Administration (hereinafter referred to as FHA), and plaintiff was informed of its estimated value. Plaintiff was furnished a written statement of the appraised value,[2] an FHA insured loan was obtained, and he purchased the house. After plaintiff took possession of the house serious structural defects appeared which a qualified appraiser, by exercising reasonable care, could have ascertained.[3] In an action against the Government, the District Court and the Court of Appeals[4] allowed plaintiff, under the Federal Tort Claims Act,[5] to recover the difference between purchase price and actual value. *Held:* Reversed. Recovery is barred by the provision of the FTCA which excludes claims arising out of misrepresentation.[6] *United States v. Neustadt,* 81 Sup. Ct. 1294 (1961).

The FTCA waives the Government's immunity from liability for the tortious conduct of its employes, with certain exceptions, including "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, *misrepresentation,* deceit, or interference with contract rights."[7] When the Government by representing that it has performed an act, leads a reasonable person to believe it was performed with care, and he is damaged because in fact it was negligently performed, or not performed at all, this question arises: can plaintiff recover for misfeasance or nonfeasance or is recovery barred because misrepresentation is involved?

The misrepresentation exclusion of the FTCA has been held to include claims arising from *negligent* misrepresentations.[8] In *Jones v.*

---

[1] Section 1 (a), 72 Stat. 73, 12 U.S.C. § 1709(a)(1958).

[2] The National Housing Act § 115, 71 Stat. 298, 12 U.S.C. § 1715 (q)(1957) requires the seller of a dwelling approved for mortgage insurance to furnish the purchaser, prior to sale, a written statement of the appraised value as determined by the Federal Housing Commissioner.

[3] United States v. Neustadt, 281 F.2d 596, 598 (4th Cir. 1960).

[4] United States v. Neustadt, 281 F.2d 596 (4th Cir. 1960).

[5] 60 Stat. 842 (1946) (Codified in scattered sections of 28 U.S.C.) [hereinafter referred to as FTCA].

[6] 28 U.S.C. § 2680(h) (1958).

[7] 28 U.S.C. § 2680(h) (1958). (Emphasis added.)

[8] See cases cited in United States v. Neustadt, 81 Sup. Ct. 1294, 1298 (1961).

United States[9] an agent of the Geological Survey negligently underestimated the value of oil reserves under land owned by a corporation of which plaintiff was a shareholder. Plaintiff sold his shares at a lower price than he could have if a correct estimate had been made. The court in denying recovery reasoned that Congress must have intended to exclude claims arising from negligent misrepresentation because: (1) the FTCA specifically excludes claims founded upon *deceit* which comprehends an intentional misstatement, (2) the FTCA separately excludes claims founded upon *misrepresentation,* (3) therefore, Congress must have intended the misrepresentation exclusion to comprehend negligent misstatements. Any other interpretation placed upon these exclusions would render them redundant.[10] This reasoning contrasts sharply with the language of Congressional reports on the FTCA:

> The other exemptions in section 4-2 [of the FTCA] relate to certain governmental activities which should be free from the threat of damage suits, or for which adequate remedies are already available. *These exemptions cover claims arising out of . . . deliberate torts such as assault and battery.* . . . (Emphasis added.)[11]

The excluded torts have been described as "deliberate torts, well established in the common law,"[12] or "torts partaking of an intentional wrong."[13] The court, however, did not inquire into the legislative history of the FTCA. Instead, it seemed pre-occupied with the question of whether section 226 of the National Housing Act authorized recovery on the facts of the instant case.[14] In the absence of a specific statute negating the Government's liability,[15] plaintiff's recovery logically should turn on the existence of a common law or statutory duty, a breach thereof, and a waiver of immunity by the Government.

Furthermore, the distinction between *deceit* and *misrepresentation* is by no means so easily drawn as it was by the court in the *Jones* case, and as echoed by the court in the instant case. To maintain an action for deceit some jurisdictions require that the misstatement be intentional. In other jurisdictions an unintentional misstatement will support an action for deceit:

---

[9] 207 F.2d 563 (2d Cir. 1953).

[10] *Id.* at 564.

[11] H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945). Substantially identical language appears in S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946).

[12] Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation,* 35 Geo. L.J. 1, 49 (1946).

[13] Address by Hon. Rubey M. Hulen, Judge of the United States Court of Appeals, before St. Louis section of the Missouri Bar Ass'n, Feb. 27, 1948, 7 F.R.D. 689, 694 (1948).

[14] United States v. Neustadt, 81 Sup. Ct. 1294, 1301 (1961).

[15] *E.g.,* Mid-Central Fish Co. v. United States, 112 F. Supp. 792 (W.D. Mo. 1953).

> The first and smaller group [of cases rejecting the requirement of an intentional misstatement] holds that an action of *deceit* is maintainable against a defendant who has honestly misstated a fact upon which he intends the plaintiff to act . . . *if he fails to exercise reasonable care in ascertaining the data upon which his statement is based, or if he fails to exercise the judgment of a reasonable man upon carefully collected data.* (Emphasis added.)[16]

Therefore, it is inevitable that the terms *deceit, misrepresentation,* and *negligent misrepresentation* would be used loosely. In one jurisdiction *deceit* might embrace an intentional misstatement, whereas in another it might connote an innocent misstatement based on negligently ascertained data.

Recovery under the FTCA is in accordance with the law of the place in which the tort occurs.[17] Congress has described the excluded torts as *deliberate.*[18] Regardless of the name used to describe the action in the jurisdiction involved, Congress apparently intended to exclude recovery for intentional misstatements. To allow recovery for a negligent misstatement would not render redundant the deceit and misrepresentation exclusions of section 2680(h) of the FTCA.

The misrepresentation exclusion of the FTCA was first raised as a defense in *Mid-Central Fish Co. v. United States,*[19] an action for damages caused by negligent flood forecasts. Recovery was denied on the grounds, *inter alia,* that Congress intended *misrepresentation,* as used in the FTCA, to include *negligent misrepresentation.* Recovery could have been denied without an interpretation of the FTCA, because the Flood Control Act of 1928 specifically excludes recovery against the Government for damage "from or by a flood."[20] The Court in the principal case ignored this alternate ground for decision in the *Mid-Central Fish Co.* case.

The reasoning of the court in *Jones v. United States*[21] has been discussed above. Here again, an interpretation of the FTCA was not necessary to deny recovery, because members of the Geological Survey are not permitted to execute surveys or examinations for private parties.[22] Recovery should be denied because the Government owed

---

[16] Bohlen, *Misrepresentation as Deceit, Negligence or Warranty,* 42 Harv. L. Rev. 733, 735 (1929). See also authorities cited *id.* at 735-36 n.3.

[17] 28 U.S.C. § 1346(b) (1958), as amended, 28 U.S.C. § 1346 (Supp. I, 1959).

[18] H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945); S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946).

[19] 112 F. Supp. 792 (W.D. Mo. 1953), *aff'd sub nom.* National Mfg. Co. v. United States, 210 F.2d 263 (8th Cir. 1954).

[20] National Mfg. Co. v. United States, 210 F.2d 263, 271 (8th Cir. 1954).

[21] 207 F.2d 563, 564 (2d Cir. 1953).

[22] 43 U.S.C. § 31 (1958). The Court of Appeals in United States v. Neustadt, 281 F.2d 596, 599 n.3 (4th Cir. 1960), took note of this aspect of *Jones v. United States.*

plaintiff no duty of care,[23] or because the particular Government employe was acting outside the scope of his authority.[24] However, the Supreme Court in the principal case again refused to recognize the weakness of an alternate ground for decision of a case upon which it relied for support.

The reasoning of the first cases holding *misrepresentation* to comprehend *negligent misrepresentation* are apparently unsound. Furthermore, as these cases could have been decided on other grounds, they are of questionable value as precedent for subsequent cases where recovery could have been denied only if the *misrepresentation* exclusion were held to include *negligent misrepresentation.*

The approach to cases involving misrepresentation should first be to determine what duty, if any, was owed plaintiff, and then to decide whether a claim for the breach of that duty is excluded by the FTCA. *United States v. Otness*[25] and both lower courts hearing the principal case held that the Government owed plaintiff a duty to perform an *act* with care. The negligent performance of the *act* was the gravamen of the complaint.[26] In each case the Government had assumed a duty to act and had negligently performed that duty. Neither the fact that the Government communicated the results of the act, nor the fact that plaintiff reasonably assumed that the act was performed with care, is reason for invoking the exclusion of *misrepresentation,* even if it were interpreted as including *negligent misrepresentation.*[27] The fundamental cause of plaintiff's loss was the breach of a duty to perform an act with care which was owed plaintiff by the Government. If a specific duty to act is owed plaintiff, recovery should not be denied because an element of misrepresentation exists, even if *misrepresentation* included *negligent misrepresentation.*[28] It might be reasoned that two duties are owed plaintiff: (1) the duty to perform an act with

---

[23] That a common law duty to exercise reasonable care, arising from the Government's undertaking to act, may be imposed upon the Government was recognized in Union Trust Co. v. United States, 113 F. Supp. 80, 84 (D.D.C. 1953) and Social Security Administration Baltimore Fed. Credit Union v. United States, 138 F. Supp. 639, 648 (D. Md. 1956).

[24] 28 U.S.C. § 1346(b) (1958).

[25] 178 F. Supp. 647 (D. Alaska 1959). Defendant negligently searched for and failed to find a missing channel marker, and then issued a bulletin stating that no part of the marker remained above the natural contour of the bottom. Plaintiff's ship subsequently struck the submerged marker and was damaged.

[26] United States v. Neustadt, 281 F.2d 596, 602 (4th Cir. 1960).

[27] *Id.* at 601: [T]he government owed a specific duty to the plaintiffs. . . . It does not necessarily follow . . . that the case falls within the exemption of the Tort Claims Act, since it involves not only misrepresentation but also negligent performance of a definite duty owed to the plaintiffs.

[28] Bohlen, *Misrepresentation as Deceit, Negligence or Warranty,* 42 Harv. L. Rev. 733, 746 (1929): "[I]n negligent misrepresentation the important thing is the negligence and not the fact that it is a misrepresentation. . . ."

care; and (2) the duty to correctly communicate the results of the act. If both duties are breached, and if the FTCA bars recovery for loss occasioned by *negligent* misrepresentation, recovery should still be allowed for the breach of the duty to *act* with care. If only the first duty is breached, recovery should be allowed for the same reason. If only the second duty is breached, recovery depends on the interpretation given to the misrepresentation exclusion of the FTCA.

If the foregoing reasoning, though inconsistent with the reasoning actually used, had been applied in the *Mid-Central Fish Co.* and *Jones* cases, the same result would have been reached: recovery was denied because the Government owed no duty to perform the act with care, or the Government employe was acting outside the scope of his employment. Applying the same reasoning process the court in the *Otness* case allowed recovery.[29]

A possible explanation of the court's disposition of the principal case, not implicitly stated in the opinion, is that the court was reluctant to hold that on the facts a duty of care to the prospective mortgagor was imposed upon the Government. A duty of reasonable care, arising from a voluntary undertaking, can be imposed upon the Government.[30] It is arguable that under the circumstances of this case a reasonable person would not rely solely upon the appraisal of an FHA agent, hence the court's inquiry into the history of the Federal Housing Act. This may be the reason the court summarily concluded that recovery for negligent misrepresentations is excluded from the FTCA, and also refused to impose liability for a negligent *act* of the defendant. This reasoning would be more acceptable in light of the manifest intention of the framers of the FTCA.[31]

An additional argument, based on policy, warrants an opposite disposition of the *Neustadt* case. The Government is becoming increasingly involved in many areas where private interests are performing similar functions. If Government activity is justified because

[29] Anglo-American & Overseas Corp. v. United States, 242 F.2d 236 (2d Cir. 1957), is an interesting example of a case where, it is believed, a sound result was not reached. Plaintiff was to buy certain imported merchandise for resale to the Government, providing such merchandise was not excluded by the Government pursuant to the Pure Food, Drug and Cosmetic Act. The goods were inspected by the Government and a release notice sent plaintiff. When the goods were subsequently delivered to the Government they were again tested by the Food and Drug Administration, found to be adulterated, and destroyed. Plaintiff's complaint was dismissed in an action based upon a negligent inspection when the goods first entered the country. Testimony should have been heard to allow plaintiff to attempt to establish a duty of care upon the Government arising from knowledge that importers customarily use conditional purchase agreements of this type, and rely upon the Government's inspection of the imported goods.

[30] See generally note 23, *supra.*

[31] H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945); S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946).

it can provide services such as mortgage insurance to the consumer at more economical rates than private interests, then if to provide these services at lower prices the Government requires exemption from liability to which the private interests would be subjected, the argument justifying the Government's activity is fallacious. In light of the strong argument which can be presented for interpreting the FTCA as allowing recovery for negligent misrepresentation, it is urged that Government liability be allowed *at least* where the Government activity causing plaintiff's loss has a private counterpart.

H. Jefferson Herbert, Jr.

WORKMEN'S COMPENSATION-SET-OFFS AND DEDUCTIONS FOR RE-EMPLOYMENT-ABANDONMENT OF THE "DITTY" RULE—Claimant was employed as a truck driver at an average weekly wage of $96.00. He sustained a compensable injury which disabled him from driving motor vehicles, but was thereafter employed by the same employer as a "gasser" at a wage of $119.00 per week. The Workmen's Compensation Board made an award for total permanent disability and denied the employer's claim of credit for the weeks after the injury in which he employed claimant at wages exceeding those paid prior to the injury. The circuit court affirmed. The employer appealed, alleging several errors[1] including the refusal to allow the credit claimed. *Held:* Affirmed. An employer is not entitled to credit against a workmen's compensation award for total permanent disability for weeks in which he employed claimant at wages exceeding those paid prior to the injury.[2] *E. & L. Transp. Co. v. Hayes,* 341 S.W.2d 240 (Ky. 1960).

The court's reasoning concerning the issue of credit is complex and merits some elaboration; this requires an examination of the history of the *Ditty* rule in order to show the factors that led to its development and the justification of its final abandonment in Kentucky.

The rule was first enunciated in *Consolidation Coal Co. v. Ditty,*[3] where the claimant was totally and permanently disabled from performing his former work. The court held that he was entitled to

[1] Error was alleged in the Board's (1) refusing to require further medical examination, and (2) finding of total permanent disability. E. & L. Transp. Co. v. Hayes, 341 S.W.2d 240, 241 (Ky. 1960).

[2] The court also held that the question of additional examinations under Ky. Rev. Stat. § 342.205 (1960) [hereinafter cited as KRS] was within the discretion of the Board, and that where an employee is totally disabled from performing the work of his former occupation and his capacity to perform other kinds of work is impaired, he is entitled to compensation for the total disability under KRS 342.095.

[3] 286 Ky. 395, 150 S.W.2d 672 (1941).