Vanderbilt Law Review

Volume 33
Issue 3 *Issue 3 - Symposium: In Honor of Dean John W. Wade: Current Developments in the Law of Torts*

Article 9

4-1980

Defining the Government's Duty Under the Federal Tort Claims Act

Thomas A. Varlan

Defining the Government's Duty Under the Federal Tort Claims Act

I. INTRODUCTION

When Congress enacted the Federal Tort Claims Act,[1] it established a mechanism for judicial resolution of claims arising from the negligence of employees of the United States government.[2] Prior to passage of the Act, the defense of sovereign immunity allowed the United States "exceptional freedom from legal responsibility."[3] The only relief available against the government for personal injury or property damage was through passage of a private relief bill in Congress.[4] With the advent of the Act, however, the United States consented to a partial waiver[5] of this broad immu-

1. Ch. 753, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.).

2. *See generally* 1 L. JAYSON, PERSONAL INJURY: HANDLING FEDERAL TORT CLAIMS (1979); Pitard, *Procedural Aspects of the Federal Tort Claims Act,* 21 LOY. L. REV. 899 (1975).

3. Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 388 (1939).

4. The injured plaintiff could also institute a civil suit against the negligent employee, but recovery often would be hindered by jurisdictional problems or by the employee's lack of financial resources. *See* L. JAYSON, *supra* note 2, at § 178.03.

5. 28 U.S.C. § 2680 (1976) excludes the following types of claims from the coverage of the Act:

(1) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(2) Any claim arising out of the loss, miscarriage or negligent transmission of letters or postal matter.

(3) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(4) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(5) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(6) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(7) 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.

(8) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(9) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(10) Any claim arising in a foreign country.

nity in circumstances that would have rendered a private person liable.[6]

The Act gives district courts jurisdiction to award damages against the United States only when a private individual could be held liable in like circumstances under state law.[7] Although it has received little critical commentary, application of this "analogous private liability" test has not been completely uniform. Inconsistency has resulted in the provision's application to situations in which the government undertakes so-called "good samaritan" activities such as inspection and certification pursuant to federal statutes and regulations. Decisions in this area often hinge on whether a court finds an actionable duty owed to injured plaintiffs by the United States as a result of these governmental undertakings.[8]

---

(11) Any claim arising from the activities of the Tennessee Valley Authority.

(12) Any claim arising from the activities of the Panama Canal Company.

(13) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

6. In Feres v. United States, 340 U.S. 135 (1950), the Court stated that the reason for the enactment of the Act was that "[t]he volume of private bills, the inadequacy of congressional machinery for determination of facts, the importunities to which claimants subjected members of Congress, and the capricious results, led to a strong demand that claims for tort wrongs be submitted to adjudiciation." *Id.* at 140.

7. 28 U.S.C. § 1346(b) (1976) gives district courts jurisdiction to entertain actions for damages arising out of

> injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would he liable to the claimant in accordance with the law of the place where the act or omission occurred.

See also 28 U.S.C. § 2674 (1976), which states in part: "The United States shall be liable, [with respect to the Act] in the same manner and to the same extent as a private individual under like circumstances."

8. Although this Recent Development focuses solely on defining the duty owed to plaintiffs injured by the negligence of government employees during inspections and certification procedures, a plaintiff must ordinarily satisfy four elements to recover under a negligence theory: first, there must be a duty owed to the plaintiff; second, there must have been a breach of that duty; third, the breach must be the proximate cause of the plaintiff's injury; and last, the governmental defendant must not be exempt from suit under the discretionary function exception of the Tort Claims Act.

The last element, the discretionary function exception of 28 U.S.C. § 2680(a) (1976), has been the subject of much commentary. *See, e.g.*, Matthews, *Federal Tort Claims Act—The Proper Scope of the Discretionary Function Exception*, 6 AM. U.L. REV. 22 (1957); Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81 (1968); Zillman, *The Changing Meanings of Discretion: Evolution in the Federal Tort Claims Act*, 76 MIL. L. REV. 1 (1976). In Dalehite v. United States, 346 U.S. 15 (1953), the Supreme Court's only extended discussion of the exception, the Court attempted to set broad guidelines for distinguishing discretionary from nondiscretionary acts by stating that

> [t]he 'discretionary function or duty' . . . includes more than the initiation of program

Although plaintiffs traditionally have had great difficulty recovering under the Act for the negligent actions of government employees who undertake inspections and certifications,[9] recent cases reveal a greater judicial willingness to subject the United States to liability under such circumstances.[10] Indeed, several cases have held that the existence of such regulatory activities gives rise to an *automatic* federal statutory duty, breach of which results in negligence per se under applicable state law.[11]

This Recent Development traces the Supreme Court's development of the analogous private liability test and examines the recent cases applying this test. The Recent Development then analyzes the divergent approaches taken in these cases and attempts to determine when an actionable duty arises under the Act.

II. Supreme Court Development of the Analogous Private Liability Test

In the first case to construe the analogous private liability test under the Tort Claims Act, the Supreme Court, in *Feres v. United States,*[12] narrowly limited the cases in which the United States would be subject to liability. The Court held that the government was not liable for injuries to servicemen arising out of activities incident to military service. The Court stated that since no American law had ever permitted a soldier to recover for negligence, there could exist no analogous private liability that would justify recovery under the Act.[13] The Court noted that rather than create new causes of action, the Act simply recognized the liability of the United States in circumstances that would result in private liabil-

---

and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.

Id. at 35-36. Although such broad language would seem to make the exception applicable to a wide variety of governmental undertakings, courts generally have not been willing to utilize it when the government undertakes activities such as inspection and certification. For example, in Blessing v. United States, 447 F. Supp. 1160 (E.D. Pa. 1978), the court rejected the government's argument tbat all regulatory actions are discretionary functions. Instead, it remarked that while the negligent formulation of enforcement policy is protected by the discretionary function exception, the negligent execution of such policy is not. *Id.* at 1179 n.28.

9. *See* notes 42-56 *infra* and accompanying text.
10. *See* notes 58-77 *infra* and accompanying text.
11. *See* notes 78-90 *infra* and accompanying text.
12. 340 U.S. 135 (1950).
13. *Id.* at 141.

ity.[14] According to the Court, the Act, while waiving immunity from recognized causes of action, was not intended to subject the government to "novel and unprecedented liabilities."[15]

In *Dalehite v. United States*[16] the Court continued to employ a narrow approach in its interpretation of the Act's liability test. In denying recovery, the Court first restated the proposition that the Act does not create new causes of action. Then, noting that the alleged carelessness of public firemen does not create private actionable rights,[17] the Court held that the government was not liable for negligent firefighting.[18] The Court partially based its decision on the fact that under state law such actions are protected by municipal immunity, concluding that no action could lie against the United States for negligence in the performance of an activity that has no analogy in general tort law.[19]

Dalehite's holding was sharply limited in *Indian Towing Co. v. United States.*[20] *Indian Towing* was an action for damages sustained when a vessel went aground and cargo on a barge towed by the vessel was damaged allegedly because of negligent operation of a Coast Guard lighthouse.[21] The Court held the government liable based on the "good samaritan" doctrine,[22] stating that "one who

---

14. *Id.*

15. *Id.* at 142.

16. 346 U.S. 15 (1953). *Dalehite* is referred to as the Texas City Disaster case in which 560 persons were killed and much of a Texas city was destroyed because of an explosion and fire occurring on a ship carrying sulphur and fertilizer at the order of the Office of War Mobilization and Reconstruction.

17. *Id.* at 43.

18. *Id.*

19. *Id.* at 44. The Court also refused to apply a doctrine of absolute liability because the Tort Claims Act requires either a "negligent" or a "wrongful act," while the doctrine of absolute liability arises irrespective of how the tortfeasor conducts himself. *Id. See also* Laird v. Nelms, 406 U.S. 797 (1972).

20. 350 U.S. 61 (1955).

21. *Id.* Coast Guard maintenance of lighthouses is authorized by 14 U.S.C. § 81 (1976).

22. 350 U.S. at 64. States that have adopted the "good samaritan" doctrine generally rely on RESTATEMENT (SECOND) OF TORTS §§ 323, 324A (1965), which contains the following language:

§ 323. Negligent Performance of Undertaking to Render Services

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

§ 324A. Liability to Third Persons for Negligent Performance of Undertaking

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to

undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner."[23] The Court also noted that the statutory language of section 2674[24] subjected the government to liability to the same extent as a private individual under *like* circumstances, not under the *same* circumstances.[25] Correspondingly, it rejected the government's argument that there could be no liability for "uniquely governmental functions."[26]

The *Indian Towing* Court further noted that the government's liability must be determined by standards applicable to private persons, not by those applied to municipalities or other public bodies.[27] To do otherwise, it declared, would force the courts to consider "the 'non-governmental'—'governmental' quagmire that has long plagued the law of municipal corporations."[28] Thus, the Court rejected the suggestion of *Dalehite* that actions protected by municipal immunity could have no private analogy in general tort law.[29]

In a case often read in conjunction with *Indian Towing,* the Supreme Court in *Rayonier, Inc. v. United States*[30] reemphasized that the test to measure the government's liability under the Tort Claims Act is that of a private person under like circumstances, not that of a municipal corporation or other public body.[31]

---

exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

23. 350 U.S. at 64-65.

24. *See* note 7 *supra.*

25. 350 U.S. at 64.

26. *Id.*

27. *Id.* at 65.

28. *Id.*

29. *See* note 24 *supra* and accompanying text. *Indian Towing* represents the most significant Supreme Court decision concerning governmental undertaking of good samaritan activities, but it was decided by only a 5-4 vote. The dissent argued that the majority was wrong in not applying the principles of *Feres* and *Dalehite* to the factual setting of the case. It noted that

> [t]he catastrophe that gave rise to the *Dalehite* case was subsequently presented to Congress for legislative relief by way of compensation for the losses which resulted . . . from the negligence of the Coast Guard. Throughout the reports, discussion and enactment of the relief act, there was no effort to modify the Tort Claims Act so as to change the law, in any respect, as interpreted by this Court in *Feres* and *Dalehite.*

350 U.S. at 74 (Reed, J., dissenting).

30. 352 U.S. 315 (1957).

31. *Id.* at 319. "To the extent that there was anything to the contrary in the *Dalehite* case it was necessarily rejected by *Indian Towing." Id.*

Rayonier involved the alleged negligence of the United States Forest Service in fighting a forest fire.[32] The Court held that the United States would be liable for losses sustained if state law would impose liability on a private person under similar circumstances.[33] Although noting that it might be "novel and unprecedented" to hold the United States liable for negligence in this situation, the Court, with language that stands in stark contrast to its earlier language in *Feres* and *Dalehite,* declared that "the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability."[34]

A 1963 Supreme Court case, *United States v. Muniz,*[35] although not specifically concerned with governmental undertakings, contains language that possesses potential for confusion in interpreting the analogous private liability test. In *Muniz,* the Court held that federal prisoners could maintain suit under the Tort Claims Act for injuries sustained through the negligence of government employees. In so holding, the Court noted that several states allowed prisoners to recover in like circumstances against both the jailer and the state.[36] The Court recoguized, however, that in several states jailers are not liable to prisoners because of such defenses as quasi-judicial immunity[37] and lack of duty owed.[38] The Court nevertheless stated that "the duty of care owed by the Bureau of Prisons to federal prisoners is fixed by 18 U.S.C. § 4042, independent of an inconsistent state rule."[39]

The effect of *Muniz* on the analogous private liability test of the Tort Claims Act is unclear. On the one hand, *Muniz* could be

---

32. The Forest Service had entered into an agreement with the state of Washington to protect against and to suppress any fires in certain areas of land. *See* 16 U.S.C. § 553 (1976).

33. 352 U.S. at 318.

34. *Id.*

35. 374 U.S. 150 (1963).

36. *Id.* at 159-60.

37. Bush v. Babb, 23 Ill. App. 2d 285, 162 N.E.2d 594 (1959); Carder v. Steiner, 225 Md. 271, 170 A.2d 220 (1961).

38. O'Hare v. Jones, 161 Mass. 391, 37 N.E. 371 (1894).

39. 374 U.S. at 164-65. 18 U.S.C. § 4042 (1976) provides:

> The Bureau of Prisons, under the direction of the Attorney General, shall—
>
> (1) have charge of the management and regulation of all Federal penal and correctional institutions;
>
> (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
>
> (3) provide for the protection, instrnction, and discipline of all persons charged with or convicted of offenses against the United States.

interpreted as holding that a duty to use due care may arise automatically from a federal statute regardless of how a state would treat a private person in similar circumstances. On the other hand, *Muniz* may be viewed as requiring courts to look first at general negligence or malpractice principles to establish a duty and then to modify such principles to find liability despite contrary state rules such as municipal immunity.[40] Of course, any interpretation of *Muniz* must be tempered by the fact that its holding may be limited to its specific factual setting. On numerous occasions, however, lower federal courts have relied on *Muniz* for support under many different factual situations.[41]

Thus, whatever the full import of *Muniz*, the Supreme Court has rendered a fairly expansive reading to the analogous private liability test of the Tort Claims Act. Specifically, *Indian Towing* and *Rayonier* indicate that such a broad approach is particularly applicable when the government undertakes activities authorized by a statutory or regulatory framework. Despite the Court's decisions, however, lower federal courts have been inconsistent in both the results reached and the analyses employed when considering the liability of the United States under the Act.

III. Divergent Approaches of Lower Federal Courts

A. *The Narrow Approach*

Numerous lower court decisions have adopted the view that no claim or cause of action exists against the government for negligent performance of activities conducted in conjunction with federally authorized inspections and certifications. These opinions stress that when the government is not contractually obligated to perform such undertakings, it cannot be said to owe a duty to private plaintiffs to assure that these activities are not negligently performed. For example, in *Davis v. United States*[42] the court denied recovery for the alleged negligence of an OSHA[43] inspection officer. The court held that the duties of the United States are rooted in federal law and that nothing resembling those duties devolves on private

40. *See* L. Jayson, *supra* note 2, at § 160; *The Supreme Court: 1962 Term*, 77 Harv. L. Rev. 62, 134-36 (1963).

41. *See, e.g.*, Black v. Sheraton Corp., 564 F.2d 531, 539 (D.C. Cir. 1977); Smith v. United States, 546 F.2d 872, 877 (10th Cir. 1976); Quinionez v. United States, 526 F.2d 799, 800 (9th Cir. 1975) (per curiam); McClain v. United States, 445 F. Supp. 770 (D. Or. 1978); Lahren v. United States, 438 F. Supp. 919 (D.N.D. 1977).

42. 395 F. Supp. 793 (D. Neb. 1975), *aff'd*, 536 F.2d 758 (8th Cir. 1976) (per curiam).

43. 29 U.S.C. §§ 651-678 (1976).

persons under OSHA.[44] Application of the Tort Claims Act to the enforcement activity of OSHA officers, the court declared, would equate duty under state law with duty under federal law contrary to the intention of the Act.[45]

The *Davis* court noted that applicable state law placed a duty only on persons who own or are in control of property to take suitable precautions to avoid injuries to others.[46] For this reason, the court concluded that *Indian Towing*[47] and *Rayonier*[48] were inapposite to cases involving OSHA inspections.[49] Thus, it concluded that the government could not be held liable for negligent inspection when the undertaking was required by federal law.[50]

The analysis employed in *Davis* has not been restricted to claims stemming from negligent OSHA inspections. In *Mosley v. United States*[51] the court held that injuries suffered by an employee on the premises of a mining operation periodically inspected by government employees were not recoverable under the Tort Claims Act.[52] According to the court, the inspection provisions of the federal Mine Safety Act[53] did not impose any duty under state law on a private person acting under similar circumstances.[54] The court also noted that the purpose behind the Mine Safety Act was to ensure an extension of federal mine supervision, not to create a private cause of action for negligent violation of the statute.[55] Therefore, it concluded that suit could not be maintained against the United States because such conduct did not create an actionable duty.[56]

B. The Intermediate Approach

Although *Davis* and *Mosley* are indicative of a judicial unwill-

---

44. 395 F. Supp. at 795.

45. *Id.* at 797.

46. *Id.* at 796 (citing McDonnell v. Wasenmiller, 74 F.2d 320 (8th Cir. 1934); Colvin v. Powell & Co., 163 Neb. 112, 77 N.W.2d 900 (1956); Hickman v. Parks Const. Co., 162 Neb. 461, 76 N.W.2d 403 (1956)).

47. *See* notes 20-29 *supra* and accompanying text.

48. *See* notes 30-34 *supra* and accompanying text.

49. 395 F. Supp. at 796-97.

50. *Id.* at 797.

51. 456 F. Supp. 671 (E.D. Tenn. 1978).

52. In this action, plaintiff sued for wrongful death after her husband, a crusher operator, had been killed on the work premises due to improperly guarded and inadequately equipped machinery.

53. Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. §§ 721-740 (1976).

54. 456 F. Supp. at 674.

55. *Id.* at 673.

56. *Id.* at 674.

ingness to subject the United States to liability for negligent performance of federally authorized inspections,[57] several cases have cast doubt on the continued vitality of such reasoning. These decisions, although not always differing in result from the narrow approach, utilize an analysis that focuses not on the reason for undertaking inspections, but on the question of whether a duty arose under a state's good samaritan rule because of the relationship created. These courts have held that individuals injured because of negligent government inspection and certification procedures are not precluded from recovery under the Tort Claims Act.

A series of recent cases typifies this emerging approach. In *Blessing v. United States*[58] the court stated that although the Tort Claims Act was not designed to redress breaches of federal statutory duty, negligent performance of such undertakings may give rise to a claim under the Act in circumstances in which negligent breach of a duty is predicated on state, not federal law.[59] In *Blessing,* injured employees brought suit under the Act alleging negligent inspection of an employer's premises by OSHA. The court found that plaintiffs failed to allege the necessary elements of increased risk of harm or reasonable reliance under the state's good samaritan law to allow the case to proceed to trial.[60] Nevertheless, the court decided that it had tentative jurisdiction under the Act and allowed plaintiffs sixty days to develop evidence that might enable them to state a cause of action.[61] Thus, the full import of the court's decision is that the government may be held liable for negligent inspections when such elements are satisfied. Correspondingly, *Blessing* does not search for a private right of action under OSHA,[62] but instead asks whether a duty arose under state law because of the relationship created by the undertaking.[63]

United Scottish Insurance Co. v. United States,[64] the most recent circuit court decision in this area, applied the *Blessing* analysis in the context of negligent inspections of aircraft by the Federal Aviation Administration.[65] The court noted that under the Tort

57. *See also* Mercer v. United States, 460 F. Supp. 329 (S.D. Ohio 1978); Mudlo v. United States, 423 F. Supp. 1373 (W.D. Pa. 1976).

58. 447 F. Supp. 1160 (E.D. Pa. 1978).

59. *Id.* at 1186 n.37.

60. *Id.* at 1196-99.

61. *Id.* at 1200.

62. *See* text accompanying notes 42-45 *supra.*

63. 447 F. Supp. at 1166, 1186-87.

64. 614 F.2d 188 (9th Cir. 1979).

65. *United Scottish Ins. Co.* dealt with improper installation of gasoline-fueled heaters in an aircraft that subsequently crashed. FAA regulations required the installing company to

Claims Act courts must determine governmental liability by analogy to liability of a private person in "like circumstances" under state law.[66] According to the court, inspections made pursuant to a federal statutory duty are not automatically included or excluded from the ambit of the Act.[67] Instead, the Ninth Circuit focused on the relationship of the parties created by the undertaking to determine whether a duty arose under the state's good samaritan doctrine to perform the inspection and certification in a careful manner.[68]

The *Scottish Insurance* court found the Supreme Court's good samaritan analysis in *Indian Towing*[69] to be directly applicable to situations in which the government negligently inspects and certifies others' property.[70] Unlike the court in *Davis v. United States,*[71] the Ninth Circuit did not find ownership or control of property relevant. Further, it did not consider the purpose of the inspection important.[72] Instead, the court focused solely on the elements of the good samaritan doctrine to determine the existence of an actionable duty in all types of governmental undertakings.[73]

Thus, *Blessing* and *Scottish Insurance* first ask whether an actionable duty can be found under state law and only then allow any federal regulation to be introduced as relevant evidence of whether that duty has been negligently breached.[74] Similarly, *Clemente v. United States*[75] also recognizes such a prerequisite inquiry when determining claims under the Act.[76] *Clemente,* however, seems to suggest that a court might more readily infer an actionable duty when an underlying statutory duty also exists.[77] To the

---

acquire a Supplemental Type Certificate (STC) for this type of installation. The FAA was required to inspect the installation prior to approval of issuance of the STC. *See* 14 C.F.R. § 21.111 (1979). The FAA issued the STC, and the airplane later crashed as a proximate result of an in-flight fire caused by improper installation. United Scottish Ins. Co. v. United States, 614 F.2d at 190.

66. 614 F.2d at 192.

67. *Id.* at 193-94.

68. *Id.* at 194.

69. *See* notes 20-26 *supra* and accompanying text.

70. United Scottish Ins. Co. v. United States, 614 F.2d at 194.

71. *See* notes 42-50 *supra* and accompanying text.

72. United Scottish Ins. Co. v. United States, 614 F.2d at 193.

73. *Id.* at 193-95. *See also* Thompson v. United States, 592 F.2d 1104 (9th Cir. 1979); George Byers Sons, Inc. v. East Europe Import Export, Inc., 463 F. Supp. 135 (D. Md. 1979).

74. *See* United Scottish Ins. Co. v. United States, 614 F.2d at 197 n.9.

75. 567 F.2d 1140 (1st Cir. 1977), *cert. denied,* 435 U.S. 1006 (1978).

76. *Id.* at 1143. *Clemente* also involved allegations that the FAA negligently inspected an aircraft that subsequently crashed.

77. *Id.* at 1150.

extent that the *Clemente* analysis focuses on the purposes for the inspection, it represents a modification of the *Blessing* and *Scottish Insurance* approach.

C. *The Broad Approach*

In contrast to both the narrow and intermediate approaches, a number of decisions have taken a broad view and have found governmental liability without considering state law beyond applying negligence per se tort doctrine. These opinions stress that existence of a federal statute or regulation implementing government activity can, by itself, create a governmental duty for purposes of recovery under the Tort Claims Act.[78] For example, in *Betesh v. United States*[79] the court held that a federal regulation directing Selective Service examining physicians to advise rejected examinees concerning the need for private medical attention could serve as the sole basis for finding an actionable duty.[80] The court noted that under applicable state law, "a Federal regulation presumptively establishes a standard of care" and "establishes a presumption of a breach of a duty."[81] It then rejected the government's argument that no analogous private liability could exist because no private individuals were subject to the regulation. First, it noted that the "like circumstances" limitation on governmental liability does not require similarity in every aspect of a cause of action.[82] Second, the court stated that in order to impose an actionable duty it could properly take into consideration those aspects unique to governmental functions, such as governmental regulations.[83] To interpret the Act otherwise, the court concluded, would be contrary to its plain language and its intent to expand governmental liability.[84]

Similarly, in *Raymer v. United States,*[85] the court ruled that the United States, through promulgation of the Mine Safety Act,[86] assumed a duty to inspect and to regulate mining operations and could be held liable for negligent breach of that statutory duty.[87]

---

78. *See* United Scottish Ins. Co. v. United States, 614 F.2d at 197 n.9.
79. 400 F. Supp. 238 (D.D.C. 1974).
80. The court went on to show that applicable state law also could serve as a basis for liability. The court, however, offered this conclusion as an alternative to the independent holding that the federal regulations established a duty of care. *Id.* at 245.
81. *Id.* at 243.
82. *Id.* at 244.
83. *Id.*
84. *Id.*
85. 455 F. Supp. 165 (W.D. Ky. 1978).
86. *See* note 53 *supra.*
87. Plaintiffs' decedents were killed when the vehicle in which they were riding over-

The court reached this decision despite its acknowledgment that no state law placed a similar duty on private persons.[88] Instead, it concluded that the federal government, by statutorily imposing a duty to act in a safe manner, subjected itself to liability under the state's general common law rule of tort.[89] The court placed particular emphasis on what it perceived to be the purpose behind the mining act and reasoned that Congress intended to impose upon the government a nondelegable duty to supervise operation of the nation's coal mines.[90]

IV. ANALYSIS

Inconsistency concerning interpretation of the Tort Claims Act's liability test has developed in part because of competing policy considerations and in part because of the lack of a clearcut legal definition of when an actionable duty arises. According to proponents of the broad interpretation of the Act's test, use of a state's negligence per se rule for violation of statutes and regulations satisfies the requirement that courts must look to state law to determine private liability under similar circumstances.[91] Courts utilizing such an approach point to a number of public policy considerations to support this view. For example, if Congress intended to protect a class of persons or the public in general with a particular safety measure, then imposition of a statutory duty would fulfill this congressional purpose.[92] Further, the government would have a positive incentive to reduce injuries by careful monitoring if it knew it would be subject to liability for negligent inspections.[93] Also, governmental liability would guarantee the injured plaintiff a solvent defendant in situations in which recovery against private persons is impractical or is precluded.[94]

---

turned. Plaintiffs alleged that the vehicle and the roadway on which the accident occurred failed to meet federal safety standards and that the United States did not require compliance with these standards. 455 F. Supp. at 166.

88. *Id.* at 167.

89. *Id.*

90. *Id. See also* Reminga v. United States, 448 F. Supp. 445 (W.D. Mich. 1978) (considering various possible bases of liability, including justifiable reliance, and several duties in federal law, but not discussing elements of state law or good samaritan doctrine directly).

91. *See* notes 78-88 *supra* and accompanying text.

92. *See* 455 F. Supp. at 167.

93. *See* Note, *The Federal Seal of Approval: Government Liability for Negligent Inspection*, 62 GEO. L.J. 937, 960 (1974).

94. *Id.* For example, the negligent government employee may not be amenable to suit, or workmen's compensation may provide an employee only partial recovery for job-related injuries. *See* Price, *Workers' Compensation Programs in the 1970's*, 42 SOC. SEC. BULL. 5 (1979).

Although these arguments are persuasive, this broad approach to the scope of the Tort Claims Act is not warranted for several reasons. First, equally strong policy considerations mitigate against holding the government automatically liable for its employee's negligent actions. For example, to expand the relief available against the United States could have an inhibiting effect on utilization of authorized government safety programs.[95] Moreover, it may lead to a lessening of the degree of care exercised by employers and property owners subject to such inspections. Further, as several courts have pointed out, the expanded role of the federal government in the safety area does not necessarily indicate congressional intent to make the United States a joint insurer of all activity subject to safety inspections.[96]

The application of per se liability to breach of federal statutory duties also appears unjustified based on a close reading of the Supreme Court's development of the Act's liability test. In the area of governmental undertakings, *Indian Towing* and *Rayonier* provide specific support for the proposition that a more substantial nexus with state law than negligence per se theory must be found when considering the interrelationship of federal statutes and regulations with state law.[97] Even if these cases were distinguishable on the ground that they involved contractual undertakings and governmental control of property, logic would dictate that the Court be even more hesitant to impose an actionable duty on the United States absent such factors.

The only Supreme Court case that possibly justifies such a broad interpretation of the Act is *United States v. Muniz.* In *Muniz,* an action brought by federal prisoners, the Court held inapposite a state statute granting a jailer the defense of lack of duty, declaring that a federal duty is fixed by federal statute regardless of inconsistent state law.[98] *Muniz,* however, has not been relied upon as authority by lower federal courts for the proposition that violation of federal statutes automatically provides an actionable duty for faulty safety inspections. In addition, the *Muniz* Court had already found that appropriate state negligence law could be applied to the prisoners' claims.[99] Finally, it seems that if the Court

95. If the government chose not to conduct inspections at all, it would probably be protected from liability by the discretionary function exception. *See* note 8 *supra.*

96. *E.g.,* 567 F.2d at 107.

97. *See* notes 20-34 *supra* and accompanying text.

98. *See* notes 37-39 *supra* and accompanying text.

99. United States v. Muniz, 374 U.S. at 160-61.

had meant to modify the approaches utilized in *Indian Towing* and *Rayonier,* it would have discussed these cases in *Muniz* or in subsequent decisions. For these reasons, *Muniz'* potential reach should be limited absent greater clarity and direction from the Court.

Nevertheless, the Court's language in *Muniz* may be helpful in understanding the rationale behind the limited number of cases espousing a broad approach. For example, in *Raymer* the court pointed to the pervasiveness of the regulations concerning operation of the nation's mines and concluded that the United States was charged with the inescapable responsibility of monitoring the mines.[100] Similarly, in *Muniz* the federal statute provided specific statutory duties concerning the protection and care of federal prisoners.[101] In this regard, certain governmental undertakings may be considered "exceptional" and may therefore justify application of a rule of automatic liability when congressional intent clearly indicates establishment of a nondelegable duty.[102] The problem with developing such an approach, however, is that in many instances congressional intent is not always readily ascertainable from an act's language or its legislative history.[103] Thus, courts could easily reach different results if they tried to apply an exception to a general rule of nonliability based upon congressional intent.

Rejection of broad application of the Act's liability test, however, does not result in an immediate solution to the confusion surrounding interpretation of the Act. Although courts utilizing the narrow and intermediate approaches basically agree that the government should not become a joint insurer through performance of safety inspections, they differ in their consideration of state law pursuant to the mandate of the Act. Cases utilizing the narrow,

---

100. *See* note 90 *supra* and accompanying text.

101. *See* note 39 *supra.*

102. In an analogous situation, the district court in Marshall v. Donofrio, 465 F. Supp. 838 (E.D. Pa. 1978), held that warrantless inspections of mining operations were constitutional despite the Supreme Court's holding in Marshall v. Barlow's Inc., 436 U.S. 307 (1978), that warrantless inspections under OSHA were invalid. The court based its ruling on the "closely regulated industry exception" articulated by the Court in *Barlow's.* It cited the lengthy history of pervasive regulations in the industry, and it noted that the coal mine law, unlike OSHA, applies to a single industry that serves urgent federal interests. 465 F. Supp. at 841-42.

103. For example, OSHA's purpose clause states that the aim of Congress in enacting the statute was "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b) (1976). By contrast, the Act's general duty clause places upon the employer the obligation to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." *Id.* § 654(a)(1).

traditional approach justify denial of claims by stating that federal inspection statutes simply institute voluntary inspections of non-governmental projects or that the statutes place no corresponding duty on private persons to implement or enforce inspections.[104] The result, in effect, is to bar application of the Tort Claims Act to enforcement activities of federal inspection agencies.[105] On the other hand, courts utilizing the developing intermediate approach search for an analogous duty owed under state law independent of the language of the federal inspection statute. If state law would place a duty on private persons operating under similar circumstances, these courts also would impose an actionable duty on the United States.[106]

Of these two analytical frameworks, the intermediate approach best approximates the spirit and tone of the Supreme Court's expansive reading of the Act's liability test. Specifically, *Indian Towing* seems to be direct authority for the proposition that governmental liability may arise when the good samaritan doctrine is applicable and there has been reliance to the claimant's detriment.[107] Admittedly, *Indian Towing* involved a government project in which the government stood in the position of owner or possessor of property. This distinction, however, is not central to an interpretation of the Act. Instead, the key inquiry should be whether applicable state law requires such control or possession before a private person undertaking a similar function would be held subject to liability. In this regard, courts adopting the intermediate approach are correct in asserting that the crucial inquiry is whether the relationship created by the undertaking creates an actionable duty under state law.[108]

Although this intermediate approach is for the most part analytically sound, its utilization could have a significant impact on litigation of claims involving negligent governmental undertakings. First, depending on a state's good samaritan rule, a great expansion of governmental liability could result. For example, several federal inspection statutes provide for employee input, allowing them to request and participate in inspections.[109] Evidence that such procedures were invoked could justify a holding that the em-

104. *See* notes 42-56 *supra* and accompanying text.
105. *See* Mudlo v. United States, 423 F. Supp. 1373 (W.D. Pa. 1976).
106. *See* notes 58-77 *supra* and accompanying text.
107. *See* notes 20-29 *supra* and accompanying text. *See also* L. JAYSON, *supra* note 2, at § 83.
108. United Scottish Ins. Co. v. United States, 614 F.2d at 194.
109. *E.g.*, 29 U.S.C. § 657(f)(1)-(2) (1976).

ployee relied on the subsequent inspection as assurance of a safe work site.[110] Similarly, an actionable duty could arise under the theory that the government undertook to perform a duty already owed to the employee by the employer.[111] Besides this potential increase in allowable claims, a second obvious effect is lack of uniformity in application of the Tort Claims Act, since liability hinges on whether and to what extent the forum state has adopted a good samaritan rule. This approach could also lead to a limited amount of forum shopping, since the Act allows suit to be brought either where the injured claimant resides or where the act or omission complained of occurred.[112]

Although the intermediate approach most effectively implements the purpose of the Act, courts should resist using it as a vehicle to expand liability beyond warranted situations. In part, this approach operates as a buffer between competing policy interests underlying the narrow and broad interpretations of the Act's liability test. Thus, devices may be available for courts to accommodate these interests while still operating within the confines of a definite analytical framework. For example, although congressional intent should not govern actionability under the Act, the inclusion or omission of specific orders or precise standards in a statute may bear upon a claim of justifiable reliance for purposes of meeting a state's good samaritan doctrine.[113] Moreover, courts may be less willing to impose an actionable duty on the United States when circumstances indicate that an employer or owner of property is in a unique position to afford protection to his employees or third parties. Outside of such limited circumstances, however, any substantive modifications of the analytical framework should come only through legislative change.

V. CONCLUSION

The federal government presently conducts activities such as testing, inspection, and certification with ever-increasing frequency.[114] Inevitably, some of these undertakings are performed negligently, and unsafe conditions are allowed to remain in existence. Lower federal courts, in responding to claims of persons injured due to such conditions, have taken divergent approaches

110. *See* RESTATEMENT (SECOND) OF TORTS § 323 (1965).
111. *See id.* § 324A.
112. 28 U.S.C. § 1402(b) (1976).
113. *See* United Scottish Ins. Co. v. United States, 614 F.2d at 194 n.4.
114. *See* Note, *supra* note 93, at 937.

toward defining the duty owed by the government to these claimants. The court's inquiry generally focuses on the language of the Act's liability test, relevant Supreme Court interpretations of that test, and competing policy interests. Despite some shortcomings, the intermediate approach discussed in a series of recent cases provides a workable analysis consistent with the tone and spirit of the Court's expansive reading of the test. Moreover, this approach allows for an accommodation of the competing policy considerations while still operating within the confines of a definite analytical framework. For these reasons, its use should be continued by courts attempting to determine when an actionable duty arises under the Torts Claims Act.

THOMAS A. VARLAN