Denver Law Review

Volume 33 | Issue 6 Article 3

May 2021

# The Federal Tort Claims Act and the Application of Local Law

Arnold M. Chutkow

# THE FEDERAL TORT CLAIMS ACT AND THE APPLICATION OF LOCAL LAW

By ARNOLD M. CHUTKOW

**Arnold M. Chutkow: University of Chicago, Ph. B., University of Chicago Law School, J. D.; admitted Colorado Bar 1951; editor, University of Chicago Law Review 1950-51; author of numerous articles in University of Chicago Law Review and Dicta; member Phi Beta Kappa and Order of the Coif; member Denver, Colorado and American Bar Associations; editor of Dicta; member of faculty of University of Denver College of Law.**

## I.

## INTRODUCTION

The Federal Tort Claims Act, the effective date of which was 2 August 1946, contains, as one of the most essential provisions thereof, the statement that the United States consents to liability to the same extent as a private individual under like circumstances.[1]

It would appear then, at the outset, that when an action is instituted under the terms of the Federal Tort Claims Act, that the local law will be applied to the same extent as an action in the State Courts between two private parties. However, in actions brought under the terms of the Federal Tort Claims Act the federal courts apparently are independently applying federal law and are not applying strictly the injunction that the United States consents to liability as if it were a private person. The following material indicates but a few of the fields and problems presented where this trend seems to be apparent.

## II.

## THE STATUTE OF LIMITATIONS

The Federal Tort Claims Act originally provided for a one year period of limitation from the time a claim accrued, or from the effective date of the Act (2 August 1946), whichever was later. This provision was amended in 1949 to provide for a two year period of limitation. When considered with the injunction contained in the Act that the United States consents to liability under circumstances in which a private party would be liable to the claimant in accordance with the law of the place, the statutory provision for limitation of actions has caused the courts some difficulty.

Periods of limitation have been described by the writers as either substantive or remedial in character. Should local periods of limitation be described as remedial, it would seem that an action based on the Federal Tort Claims Act would be governed by the limitation of the Act. However, if a state statute or period of limitation is classified as substantive—affecting the right not the remedy —it would seem that under the terms of the Federal Tort Claims Act local law should govern at least in cases where the period of

1 Tit. 28, Sec. 1346; USCA.

limitation does not exceed that prescribed in the federal law.

This approach has not been adopted by federal courts which have faced the problem. Shortly after the passage of the Federal Tort Claims Act the question was presented in a series of cases involving local wrongful death legislation. In *Burkhardt v. United States*, 165 F 2d 869, an action was brought for the benefit of the widow of Burkhardt who was killed on 2 September 1945. The action was instituted on 5 December 1946 in the United States District Court. It was dismissed because it was not instituted within the one year required by the Maryland Wrongful Death Act. On Appeal the plaintiff contended that the decision of the lower court was erroneous because the action was instituted within one year after the effective date of the Federal Tort Claims Act.

Under the law of Maryland, the one year statutory period of limitation had been described as a condition precedent to the institution of an action. The Court of Appeals reasoned that it was enjoined to look to state law for the definition of the wrong and the extent of liability, but that it is to look to the Act itself for the limitations of time. To Judge Parker it made no difference that the local limitation was held by the state courts to be a condition on the exercise of the right rather than a limitation on the remedy. "This holding is based upon the narrow ground that this limitation is imposed by statute creating the cause of action and is, to say the best of it, technical and legalistic reasoning, which is not followed in all states."

The rationale of the *Burkhardt* case was extended in *Young v. United States*, 184 F 2d 587. In this case an action was filed for a death which occurred in the District of Columbia. The local wrongful death act provided for a one year period of limitation. The deceased suffered an injury on 25 March 1948, died on 4 April 1948, and the action was filed on 9 May 1949, more than a year after the death. The action, then, ordinarily would have been barred not only under local law, but also by the period of limitation contained in the Federal Tort Claims Act. However, on 25 April 1949, the Act was reenacted and partially amended. Included in the amendments was the present period of limitations:

> "A tort claim against the United States shall be forever barred unless action is begun thereon within two years after such claim accrues or within one year after the date of the enactment of this amendatory sentence, whichever is later. . . ."

The government argued as it did in the *Burkhardt* case that because a right of action for wrongful death was not authorized at common law and is of statutory origin, the right does not survive the period of limitation contained in the statute which creates it. A majority of the Court, accepting the argument that the period of limitation was substantive, reasoned that the Federal Tort Claims Act extended the right which originally was created by the local statute. Where it provides for a longer period than is granted in the local legislation, the Federal Tort Claims Act controls as it does where the local period is longer than that contained in the Act.

The dissenting opinion fundamentally disagreed with the majority, stating that since the Federal Tort Claims Act amounts to nothing more than a waiver of sovereign immunity from suit; the two year limitation was but a maximum time in which suits could be brought against the government, and did not foreclose shorter local periods of limitation which are construed to be substantive.

The majority opinion was followed and restricted in *Moran v. United States,* 102 F. Supp. 275. In this case the Court refused to apply the *Burkhardt* decision and said that the *Young* case was applicable in those situations where Congress had created the law defining the substantive rights and therefore could extend the rights so created.

In another decision, *United States v. Westfall,* 197 F. 2d 765, an injury occurred in the State of Washington on 20 February 1946, and the action was commenced 21 April 1950 (within one year after the Federal Tort Claims Act was amended). It was contended that since the action was created by and brought under the terms of the Washington Statute, the local three year statute applied. It was held, however, that inasmuch as the action was brought within the period prescribed by the 1949 Amendment to the Federal Tort Claims Act, it was not barred by any local period of limitation. Accordingly, the reasoning of the *Moran* case was not followed and the 9th Circuit Court of Appeals applied the federal period of limitation independently of whether or not the substance of action was created by federal or state law.

There appears to be no doubt that where the local period of limitation is construed to be remedial in nature, or where the local period, regardless of its character, is longer than that contained in the Federal Tort Claims Act, the latter will govern.

If the Federal Tort Claims Act is assumed to be substantive in nature, apparently the theory of the *Young* case, applying the longer period of the Act and foreclosing shorter substantive provisions contained in local legislation, is logically supported. However, if the position of the dissent in the *Young* case is adopted, the United States should not be held liable since the Act amounts only to a waiver of immunity, and the courts are enjoined to apply local substantive law which does not conflict with the provisions of the

enabling federal legislation; the United States does not assume liability any greater than that of a private party under similar circumstances. It has been said that the legislative history supports both positions, but that practical considerations perhaps would support the majority position. By providing a longer period in which to commence actions, fewer private relief bills will be introduced to Congress.

The federal courts seem to be following the *Burkhardt-Young* line of decisions. In the case of *Foote v. Public Housing Commissioner of The United States*, 107 F. Supp. 270, the court emphasized that in an action against the United States under the Federal Tort Claims Act, the time within which the suit may be commenced should be determined by the provisions of the Act and not the state statute of limitation.

This case presented a relatively new facet of the problem. The Act provides that a claim must be submitted within two years from the time it accrues. The problem facing the court in the *Foote* case was a construction of the word "accrues." The plaintiffs occupied a dwelling unit in a public housing project for veterans at Cadillac, Michigan, which project was developed by the public housing authority and the city of Cadillac. On 14 February 1949, a coal stove in this unit exploded, resulting in the death of plaintiffs' two children on the following day.

On 21 July 1950, the probate court for Wexford County, Michi-

gan, appointed the plaintiff-father administrator of the estate of his deceased children, and on 27 July 1951, an order was entered authorizing him to institute a suit against the government. On 17 October 1951, more than two years after the death of the children, a complaint was filed alleging that the death was due to the negligence of the agents of the government. The defendant moved to dismiss on the ground that the action was barred by the period of limitation contained in the Federal Tort Claims Act.

Plaintiff contended that under the law of Michigan a claim or cause of action for wrongful death, which is a new cause of action in the personal representative of the decedent, does not accrue until the administrator is appointed. The court ruled that the claim "accrued" upon the death of the children. It decided this question as a matter of federal law, the state law to the contrary notwithstanding. In support of its conclusion, it relied heavily on the case of *Reading Company v. Koons, Administrator,* 271 US 58, in which the Supreme Court construed similar language contained in the Federal Employers' Liability Act. It also relied on *Piascik v. United States,* 65 F. Supp. 430, which construed the language contained in the Suits in Admiralty Act.

It is submitted that these cases easily are distinguishable. The Federal Employers' Liability Act deals with death or personal injury due to negligence of the employer or his agents. However, nowhere in this Act is there any injunction to apply the law of the situs as is found in the Federal Tort Claims Act. In the *Piascik* case the court construed language on the Suits in Admiralty Act, and itself relied on the decision in the *Koons* case. Because there was no requirement to follow local law, construction of the word "accrues" was properly decided as a matter of federal law. However, state decisions construing such language in state legislation involves an interpretation of local substantive law—an essential phase of the locally created cause of action, and under the Provisions of the Federal Tort Claims Act, such interpretations should be followed. It is submitted that the decision in *Foote v. Public Housing Commissioner of the United States* goes a long way from the injunction to follow local law.

The conclusion in the *Foote* case was underscored in *Bizer v. United States,* 124 F. Supp. 949 (N. D. Calif.). In this case the defendant moved for a summary judgment on the basis that the two year period of limitations had run in a malpractice suit brought under the terms of the Federal Tort Claims Act. The problem again, as emphasized by the court, was the conflict between the injunction to apply local law and the period of limitations contained in the Act. Under California law, the Statute of Limitations does not commence until the patient knows, or should know, the cause of his disability or until the doctor-patient, or hospital-patient relationship is severed. Under local law the statute had not run because of the definition of the accrual of the action. It was held, however, that the question of when the period has run is a matter of Federal law and not state law even though the latter determines the existence of the cause of action. Since under the *Foote* case, the action

"accrues" at the date of the injury, the action was barred. "If Section 2401 (b) is a real period of limitation as distinguished from a yard stick of time, it must prescribe this beginning."

Accordingly, with regard to the period of limitations to be applied, that which is set forth in the Act will apply even though the state law is interpreted by local courts to be substantive, whether shorter or longer than the period contained in the Federal Tort Claims Act. Further, even though the local substantive law defines and creates the cause of action, and as a part thereof the time when it accrues, the federal courts will independently apply "federal law" to determine the time of accrual of the action. Such an approach is difficult to follow in the light of the injunction contained in the Act itself and in light of the apparently erroneous but commonly accepted notion that there is no independent body of federal common law.

## III.

### Scope of Employment and Local Law

Title 28, Sec. 1346, USCA, provides in essence that the United States consents to liability under the Federal Tort Claims Act for acts of its employees acting within the scope of their office or employment under circumstances where a private person would be liable to the claimant according to the law of the place where the act or omission occurred. This principle, apparently easy to apply, has given the federal courts some trouble in at least two situations:

(1) The military personnel and their relationship to the Government.
(2) Local legislation of the "Permissive Use" variety.

The first situation has provided a source of controversy because of the fact that the soldier-government relationship is an oddity so far as state law is concerned. There would appear to be no question that if a member of the armed forces is engaged in activity which has a counterpart in civilian life, the question of whether the act or omission occurred within the scope of the employment of the soldier, could be answered by the application of local law. However, a member of the armed forces not only is an employee

as commonly defined, but he also assumes a 24 hour status relationship to the Federal Government, the counterpart of which is lacking in civilian life. It is in this latter field that the federal courts have had great difficulty in applying local law.

In the case of *U. S. vs. Campbell,* 172 Fed. 2d 500, a claim was based upon evidence that while the plaintiff was standing on the sidewalk near a railroad station, she was negligently and wrongfully collided with and knocked down by a sailor who "in line of duty" was running to board the troop train. Obviously there was no local law which dealt with "line of duty" and its impact on the doctrine of respondeat superior. The concept of "line of duty" is one which has particular reference only to governmental agencies and their relationships to their own employees. It was held in the *Campbell* case that the Government would not be liable because of the "line of duty" concept, but only if the member of the armed forces was acting within the scope of his employment such that a private party would be held liable under like circumstances.

In *Feres vs. U. S.,* 340 U. S. 135, an action was brought because of the death of a soldier during a barracks fire due to negligence. The Supreme Court held that the question of the relationship of military personnel to the Government is one strictly of federal law and that traditionally one in such a status has no claim against his superior because of negligence.

Such a notion of the application of independent federal law was applied in the case of the *United States vs. Sharpe,* 189 Fed.

2d 239 (4th Cir.) where an action was brought to recover for injuries under the Federal Tort Claims Act. A whole company was ordered to move from Fort Bragg, North Carolina, to Elgin Field, Florida. A few members of the company who owned private automobiles were given permission to drive the same independently of the convoy consisting of the remainder of the company. No specific orders were issued to the private car owners other than the date to report to destination. During the course of the journey, one of the select few was involved in an accident due to his negligence and thereafter an action was instituted against the government. It was held:

> "Attempt is made to distinguish the *Eleazer* case on the ground that the collision occurred there in North Carolina and was governed by North Carolina law. The question at issue, however, is whether Sgt. Thompson was 'acting within the scope of his office or employment' within the meaning of the statute in operating his automobile; and this involves the question of statutory construction to which the federal courts are not bound by local decision but apply their standards *** We look to the federal law and decisions to determine whether or not the person who inflicted the injury was 'an employee of the government acting within the scope of his office or employment'. We look to local law for the purpose of determining whether the act with which he is charged gives rise to liability. The Tort Claims Act adopts the local law for the purpose of defining the tort liability, and not for the purpose of determining the relationship of the government to its employees."

This group of cases would seem to indicate that if the activity of the Government employee is such that there is a counterpart in civilian life, so that there are precedents to be found, the federal courts will apply local law to determine liability. However, where no such counterpart exists, the liability of the United States will be decided on the basis of federal law. Such a conclusion would appear to be consistent with the intent of the Federal Tort Claims Act, because the Government apparently did not intend to subject itself to liability any greater than that of a private party under similar circumstances; if a private party could not be liable under such circumstances, there is no reason to suppose that the United States has consented to any other greater liability.

Another problem which has arisen under the Act is that of whether the Government consented to liability in all situations where a private party would be liable under local law. This is not the same problem as whether it will be liable in situations where a private party would not be liable, and should not be confused with the problem of being "non-civilian" activity discussed above. This problem arises out of situations where a private party ordinarily would be held liable under local law; the specific ques-

tion is whether or not the United States will also be held liable in the same fashion as a private party. The area of consideration involves recent legislation found in a number of states which is termed "Permissive Use" legislation.

The federal courts first faced such legislation in the State of California. In the case of *Long vs. United States,* 78 Fed. Supp. 35, an action was instituted by the plaintiff under the Federal Tort Claims Act because of personal injuries sustained in an automobile accident. One of the causes of action contained allegations that a civilian employee of the army was operating a government vehicle "with the permission and consent of the defendant". The Court concluded under California precedent, that the employee was not acting within the scope of his employment but was on a frolic and detour resulting in a material deviation. However, under the California "Permissive Use Law," regardless of the scope of employment, the negligence of the employee was imputable to the employer:

> "Every owner of a motor vehicle is liable and responsible for the death of, or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner, or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages." (Sec. 402, California Vehicle Code)

The court, however, refused to apply the "Permissive Use Statute" because it held:

> "Thus the lex loci delicti is in effect incorporated into the Act, enabling the Federal Courts to refer to the common law and statutes of the state or territory where the act or omission occurred in order to determine (1) what act or omission of an employee of the Government while acting within the scope of his office or employment, is negligent or wrongful."

However, where a private party will be held liable even for acts not based upon notions of respondeat superior, local law will not be applied; the Government has only consented to liability where the employee was acting within the scope of his office or employment. Liability imposed to any greater extent than this is beyond the scope of the waiver of sovereign immunity, and accordingly the federal courts cannot and will not apply the local law.

A case arising out of Minnesota provides an interesting comparison to the *Long* case. In *Clemens vs. United States,* 88 Fed. Supp. 971, the Court was faced with the Minnesota statute which provides that where a vehicle is operated

> "by a person other than the owner, with the consent of the owner, express or implied, the operator thereof shall *** be deemed to be the agent of the owner of such motor vehicle ***".

The Court ruled that although the statute broadens the field of respondeat superior, it only established the agency by prima facie evidence which could be rebutted by the defendant. Since the evidence was to the contrary and rebutted the presumption, no agency was established and the United States was held not liable.

Apparently, where liability is imputed as a matter of law, local law, as in the *Long* case, will not be applied. But where the statute is only evidentiary in character, although "broadening" the scope of respondeat superior, it will be applied by the federal courts.

## IV

## Conclusion

Although it is commonly stated that an action brought under the Federal Tort Claims Act will be governed by the law of the situs, there are situations where local law will not be followed by the federal courts. A few of these have been discussed above, including such questions as the Statute of Limitations, the strictly military activity, and local law which extends the common law notions of respondeat superior. These exceptions to the application of the law of the situs are growing, and it is believed that practicing lawyers who file an action against the Government for negligence, should be apprised and aware of them. In any event, it certainly is not true that under and by virtue of the Federal Tort Claims Act, the United States is now liable under the local law where a private party would also be liable under like circumstances.

# Every American is Born With A Lawyer At His Side

When an American citizen is born, there's a doctor and usually a proud father on hand—besides the mother, of course. But there's another, too. A lawyer you can't see, but he's there just the same. You see, among the many rights that Americans are born with is the right to the help of a lawyer if ever accused of a crime. For those who can't afford a lawyer, the court must provide one.

This right is guaranteed us in the Bill of Rights in the Constitution. It is one way our founding fathers sought to protect Americans from the injustices that were common in their day. Injustices symbolized by the Bastille prison, the Tower of London.

Today in the Soviet sector of Berlin looms Lubianka prison. A sinister monument to present-day tyranny. Inside its dank confines crowd the victims of political injustice in our time. Men who were arrested without warrants, tried—if at all—without lawyers. Convicted on trumped-up charges.

The right to legal counsel is only *one* of our precious American rights like freedom of speech, religion and the right to own property. But if one right is denied or misused, we could lose them all. Let's know our rights. Because if we know them, we value them—and protect them.