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Federal Tort Claims Act Digest

Timothy Woolston

in evidence.[8] *The Restatement, therefore, is in accord with the Colorado rule. It allows recovery based on negligence alone, and it makes the use of the rule available only when a specific factual situation is present.*

The last clear chance rule in Colorado has been made simple and useful. The rule provides a means of presenting a complicated factual situation in a simple manner. We see from the Colorado decisions that the last clear chance rule is a factual situation that must be proved the same as all other facts, a factual situation that must go along with all other facts to the jury for their determination. A person seeking recovery under the rule does not have a separate and distinct cause of action; instead he has a cause of action based on negligence alone.

FEDERAL TORT CLAIMS ACT DIGEST

TIMOTHY WOOLSTON*

By passing the Federal Tort Claims Act [1] in 1946, the United States has, with certain exceptions to be noted later, consented to waive her immunity from suits founded in tort. To appreciate the full significance of the Tort Claims Act, an understanding of what has gone before is essential.

Prior to 1887, the private relief bills presented to Congress were the sole means by which a person could satisfy a tort claim against the United States. The time consuming work resulting from the consideration of all of these private bills finally prompted Congress to pass the Tucker Act [2] in 1887. The Tucker Act was directed at this congestion in Congress and it did alleviate some of the distress by extending the jurisdiction of the district courts to include claims for less than $10,000 where such claims were founded upon the Constitution, a Federal statute, an executive regulation, or a contract to which the United States was a party. Because ordinarily, simple tortious conduct is infrequently based upon a statute or regulation, the Tucker Act did nothing to rid Congress of the hundreds of claims that were based upon the simple torts of government agents.

[8] Section 479 *Restatement of Torts:* A plaintiff who has negligently subjected himself to a risk of harm from the defendant's subsequent negligence may recover for harm caused thereby if, immediately preceding the harm, (a) the defendant (i) knows of the plaintiff's situation and realizes the helpless peril involved therein; or (ii) knows of the plaintiff's situation and had reason to realize the peril involved therein; or (iii) would have discovered the plaintiff's situation and thus had reason to realize the plaintiff's helpless peril had he exercised the vigilance which it was his duty to the plaintiff to exercise . . .

* Student, University of Denver College of Law.

[1] 62 Stat. 992, 28 U.S.C. secs. 1346 (b), 1402 (b), 2401 (b), 2402, 2411, 2412 (b), 2671-2680 (1950). All section references are to Title 28 U.S.C. unless otherwise indicated.

[2] Sec. 1346 (a) (2).

In 1920, the Suits in Admiralty Act[3] was passed. This Act extended the jurisdiction of the district courts to cover merchant ships that were either owned or operated by the government where such ships caused money damages to private persons or corporations. This Act did relieve Congress of those torts connected with admiralty.

The Public Vessels act[4] of 1925 extended the jurisdiction of the district courts to include the public vessels of the United States.

The greatest waiver of governmental immunity from suit came with the passage of the Federal Tort Claims Act in 1946. That the passage of this Act was also prompted by a congressional desire to be rid of the private relief bills can be realized from the fact that the Tort Claims Act came into being as a part of the general plan of Congress to streamline its own procedure by enactment of the Legislative Reorganization Act.[5]

LIBERAL ACT SHOULD BE INTERPRETED LIBERALLY

The Tort Claims Act is one of the most progressive pieces of legislation ever to have come out of Congress. That a liberal attitude should accompany the interpretation of the Act may be seen from the following language in *United States v. Aetna Casualty and Surety Co.*[6]:

> In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity should be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson v. John L. Hayes Construction Co.*, 243 N. Y. 140, 153 N. E. 28, "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

While construction of the Act has been toward a direct waiver of sovereign immunity, the Act itself merely extends the jurisdiction of the district courts to include:[7]

> Civil action on claims against the United States, for money damages, accruing on and after January 1, 1945, for 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 be liable to the claimant in accordance with the law of the place where the act or omission occurred.

In substance, the Act[8] provides for venue, appeals, trial without jury, interest, time for commencing actions, definition of terms,

[3] 46 U.S.C. sec. 742 (1949).
[4] 46 U.S.C. sec. 781 (1949).
[5] 60 Stat. 812 c. 753 (1946). The Tort Claims Act is Title IV of this Reorganization Act.
[6] 70 S. Ct. 207, 216 (1949). ACCORD: Niagara Fire Ins. Co. v. United States, 167 F. Supp. 850, 856 (S.D.N.Y. 1948).
[7] Sec. 1346 (b).
[8] *Supra*, note 1.

administrative agency settlement of claims for less than $1,000, withdrawal of claims from administrative determination, barring of further action against the employee, compromise of a claim, attorney's fees, applicability of the Federal Rules of Civil Procedure, and the twelve exceptions from coverage by the Act.

SERVICE-CONNECTED CLAIMS

While the terms of the Act are quite broad, thus far the courts have not been willing to grant a cause of action to military personnel where the injuries complained of were service-connected.[9] The Supreme Court has said that there is merit in an action by members of the armed forces, but that no recovery exists. In the very recent case of *Feres v. United States*,[10] the Supreme Court said that the relationship of the Government to its military personnel was distinctively "federal in character" and continued:

> No federal law recognizes a recovery such as claimants seek. The Military Claims Act, 31, U. S. C. sec. 223 (b) (now superseded by 28 U. S. C. sec. 2672), permitted recovery in some circumstances, but it specifically excluded claims of military personnel "incident to their service."
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> This court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain and uniform compensation for injuries or death of those in armed services . . . If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.

The deceased in the *Feres Case* died as a result of a barracks fire on an army post when he was on active duty as a member of the United States Army. An interesting decision would no doubt result if the recently decided case of *Wham v. United States*[11] were analogously asserted on the prior compensation argument. In the *Wham* case, a District of Columbia policeman was negligently injured by an employee of the Treasury Department. In allowing the cause of action, the court said that the receipt of benefits from the policemen and firemen's funds was no bar to the action notwithstanding the fact that such funds were augmented by federal money. The court also said that no election of remedies is necessary under the Federal Tort Claims Act. Again, in *Bandy v. United States*,[12] a veteran receiving benefits from the Veterans' Administration while in a veteran's hospital was not precluded from suing under the Act when the agents of the hospital injured him through their negligent acts.

[9] Feres v. United States, Jefferson v. United States, and Griggs v. United States, 340 U. S. 135 (Single opinion for all cases).
[10] 340 U. S. 135 (1950).
[11] 180 F. 2d 38 (D.C.D.C. 1950).
[12] 92 F. Supp. 360 (D.C. Nev. 1950).

The courts have found no difficulty at all in allowing actions and recovery in the cases of non service-connected injuries where the claimants have been military personnel.[13] At present the leading case on this point is the recently decided *Brooks v. United States,*[14] in which the claimants were soldiers on leave. They were riding in their private automobile and were struck by an army truck driven by soldiers who were acting in line of military duty at the time of the accident. The court said that while the relationship of the government to its military personnel was "federal in character", a different relationship exists when such persons are on authorized leave. Perhaps the learned court has overlooked the fact that military personnel while on authorized leave are still subject to federal law and the military regulations of the district in which they are located.

PROCEDURAL ASPECTS OF THE ACT

In any new legislation by which the sovereign abdicates inherent power, certain procedural difficulties necessarily arise. In the Tort Claims Act itself and in the cases construing the Act, it is apparent that the Federal Rules of Civil Procedure apply to the Act.[15] The difficulty is in determining to what extent and under what circumstances they do apply. In *Howey v. United States,*[16] the claimants were injured when the taxicab in which they were riding collided with a mail truck of the government. In the suit against the taxicab company, the defendant company asserted the negligence of the postal department employee who was driving the truck and sought to join the United States as a third party defendant. In allowing the joinder, the court explained that since the substantive law of Pennsylvania allowed a joinder of joint tort feasors prior to judgment, such local law controlled in accordance with the provisoins of 28 U.S.C. sec. 1346 (b). In *Capital Transit Co. v. United States,*[17] the claimants were similarly situated but the court denied the joinder, saying in part that the Act refers only to substantive laws of torts, not to all the incidents of litigation such as the joinder of parties and further, that the purpose of the Act was to provide convenient administration and judicial remedies for torts committed by government agents and to relieve congressional committees of the overburdening work of considering special bills for relief. Thus it would appear that there is now a split of decisions on the matter of joinder of or with the United States. It might be well to note that the specific language of the Act provides that the liability of the government shall be determined " . . . under circumstances where the United States, *if a*

[13] Brooks v. United States, 337 U. S. 49 (1950).
[14] 337 U. S. 49 (1950).
[15] Sec. 1402 (b) ; F. G. Ryal v. United States, 184 F. 2d 616 (7th Cir. 1950), Evans v. United States, 10 F.R.D. 255 (1950), Brauner v. United States, 10 F.R.D. 468 (1950).
[16] 181 F. 2d 967 (3rd Cir. 1950).
[17] 183 F. 2d 825 (C.A.D.C. 1950), Certiorari granted 71 S. Ct. 61.

private person, would be liable . . ."[18] (Italics supplied.)

To come within the coverage of the Act, the claimant must affirmatively plead the specific provisions of the Act as outlined in 28 U.S.C. sec. 1346 (b). This pleading aspect is important because the jurisdiction of the Federal courts will not be presumed and proper pleading demands that such jurisdiction be asserted. Thus, there can be only one remedy and if it appears that the Suits in Admiralty Act or the Tucker Act provide remedies, the jurisdictional question must be answered by resort to the particular act involved. In *Aktiebolaget Bofors v. United States*,[19] a suit was instituted under the Tort Claims Act for damages in the sum of $2,000,000 for the alleged illegal use of a secret process. The claimant licensed the United States to produce the Bofors naval cannon for "United States' use". The government then made the weapon and equipped the other Allies with it. The court denied the cause of action under the Tort Claims Act because the action sounded in contract, not tort and the Tucker Act is controlling in cases in which the government is a party to a contract. The court also noted that, where the action is based upon a contract and the amount is in excess of $10,000, the Court of Claims alone has jurisdiction.

The time period for bringing an action under the Act has been designated to be no later than one year after August 2, 1946, or one year after the cause arises, whichever is later.[20] In *Young v. United States*,[21] a cause of action arose in the District of Columbia where there is a one year statute of limitations for tort actions. The cause of action was older than one year, but not barred by the Tort Claims Act. The court allowed the suit on the ground that a federally created right cannot be barred by a local statute where the federal statute has its own period of limitations. It follows that where a local statute grants a greater period for bringing a tort action than that provided in the Act, the federal statute will control if the action is begun under the Tort Claims Act. Also, a local revival statute will not have the effect of reviving a cause of action that has expired under the Act's provisions.

The Agency Question

To show the liability of the government, the negligent or wrongful conduct of the government's employee must have occurred while the employee was acting "within the scope of his office or employment".[22] Such employee is defined:[23]

> Officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or per-

[18] Sec. 2672.
[19] 91 F. Supp. 131 (D.C.D.C. 1950).
[20] Conner v. United States, 93 F. Supp. 681 (D.C.E.D. Penna. 1950).
[21] 184 F. 2d 587 (C.A.D.C. 1950).
[22] Sec. 1346 (b); Cannon v. United States, 84 F. Supp. 820 (D.C. Calif. 1949).
[23] Sec. 2671.

> manently in the service of the United States, whether with or without compensation.

The usual rules of the law of agency are determinative of the capacity. Thus, the government was not liable when an employee of the Alaska Railroad, a governmental corporation, was on a frolic of his own when he was injured by a speeder belonging to the railroad.[24] Members of the armed forces are within the scope of their employment when they are acting in line of duty.[25] In the recent case of *United States v. Fotopulos*,[26] a civilian was injured when the automobile in which he was waiting for a red traffic light to change was smashed into by an army truck driven by a soldier who was on an official errand. The court said that the soldier was acting in line of duty and the government must respond in damages for his act. Where the act of the agent is both personal and official, the court employed this language as controlling of its policy:[27]

> Where a servant is attending to both his own and his master's business at the same time, no nice inquiry will be made as to which business the servant is actually engaged in, . . . but the master will be held responsible, unless the servant clearly could not have been directly or indirectly serving the master.

In *Christian v. United States*,[28] the United States Army furnished a truck and soldier-driver to take some persons into a nearby town. While in town and after having deposited the passengers, the soldier visited several bars and became disorderly. A deputy sheriff who was attempting to arrest the soldier was killed by him. The court said that the soldier had completely deviated from his employment and the government was not liable for his acts.

EXCEPTIONS UNDER THE ACT

There are twelve exceptions from the Tort Claims Act.[29] There has been litigation in very few of the excepted fields. Perhaps the most important exclusion is that dealing with discretionary actions.[30] The Act provides:[31]

> Any claim based upon an act or omission of any 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.

It is clear that the reasoning behind the exceptions is that the sovereign may stipulate any conditions he sees fit when he is allowing

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[24] Tucker v. United States, 91 F. Supp. 527 (D.C. Alaska 1950).
[25] Sec. 2671.
[26] 180 F. 2d 631 (9th Cir. 1950).
[27] United States v. Johnson, 181 F. 2d 577 (9th Cir. 1950).
[28] 184 F. 2d 523 (6th Cir. 1950).
[29] Sec. 2680.
[30] Costley v. United States, 181 F. 2d 723 (5th Cir. 1950), Coates v. United States, 181 F. 2d 816 (8th Cir. 1950), Olson v. United States, 93 F. Supp. 150 (D.C. N.D. 1950).
[31] Sec. 2680 (a).

suit to be brought against him, and the prerequisite to bringing the suit is conformance with the stipulated conditions. This may be readily analogized from the language in a case defending the position of trial without a jury in actions under the Act.[32] The cases construing the *"discretionary clause"* follow the general rules for determining whether a function is discretionary or ministerial. In *Coates v. United States*,[33] a farm was damaged when the course of the Missouri River was changed incident to the reclamation of arid lands. The reclamation work was said to be discretionary because of the wide scope and general policy of the project. In *Olson v. United States*,[34] suit was commenced under the Act for damages arising from injury to livestock and realty when a flood gate was opened at a time when the regular course of the river was blocked by ice and snow. The court denied a cause of action because the complaint fell within the "discretionary function" exception of the Act. On the other hand, in *Costley v. United States*,[35] the wife of a master sergeant was admitted to the maternity ward of an army hospital and while a patient there, she was given a harmful substance instead of a spinal anasthesia. As a result of the harmful injection, she was permanently paralyzed. The court held the government liable, saying that the discretion of the agents is at an end once they admit the patient and from that time forward, they owe a duty of due care, diligence and skill.

Generally, the other exceptions are those claims which arise from loss, miscarriage or negligent transmission of postal matter, an act of tax assessment or customs, matters covered by the Admiralty Act, an act or failure of an agent in administering secs. 1-31 of Title 50, appendix, fiscal operation of the treasury or regulation of the monetary system, establishment of a quarantine by the United States, the operation of a vessel in the Canal Zone,[36] a willful tortious act, combatant activities of the military during time of war, a tort committed in a foreign country, and the operation of T. V. A.

DAMAGES

Unless the local law limits the amount of damages recoverable in any particular action, there is no limitation upon the amount of recovery for suits instituted under the Federal Tort Claims Act.[37] The Act has not abrogated the necessity for a congressional appropriation before the amount of the award is paid to the successful claimant.

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[32] Uarte v. United States, 7 F.R.D. 705 (D.C. Calif. 1948).
[33] Note 30, *supra*.
[34] Note 30, *supra*.
[35] Note 30, *supra*.
[36] Sec. 2680 (g). Repealed Sept. 26, 1950 64 Stat. 1043, c. 1049, sec. 13 (5).
[37] Secs. 2672, 2674, Wham v. United States, 180 F. 2d 38 (D.C.D.C. 1950).
NOTE: For an excellent analysis of the Act, see Yankwich, Judge Leon R., *Problems Under the Federal Tort Claims Act*, 9 F.R.D. 143 (1949).