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**THE PRODUCTION AND ADMISSIBILITY OF  
GOVERNMENT RECORDS IN FEDERAL  
TORT CLAIMS CASES†**

By GOODLOE E. BYRON\*

The twelve year history of the Federal Tort Claims Act<sup>1</sup> since its enactment in 1946 as a part of the Legislative Reorganization Bill of the Seventy-ninth Congress, has been marked by procedural disputes in litigation brought under the Act. Since Congress had as its main purpose in enacting the Federal Tort Claims legislation the substitution of the Federal Courts as a proper forum for adjudicating civil actions against the United States in place of the cumbersome private bill legislative method,<sup>2</sup> it was anticipated that the new procedure would not only remove this burden from the Congressional deliberations, but also that it would prevent many of the injustices which had been done in the past to the claims of private citizens against the sovereign. There was a natural inclination behind its passage for the Government to assume the obligation to pay damages for the misfeasance of employees in carrying out its work and this Act was therefore Congress' solution, affording easy and simple access to the Federal Courts for torts within its scope.<sup>3</sup> Consequently, most of the Circuit Courts and some of the District Courts which have considered the question have held that the Act should receive a liberal construction in view of its purpose.<sup>4</sup> And in connection with a liberal construction, the United States was considered to be on a par with private litigants in litigation properly brought under the Federal Tort Claims Act.<sup>5</sup>

In spite of this benevolent purpose and liberal construction, Federal Tort Claims litigation has become a fertile area for the growth of procedural and evidential

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<sup>1</sup> 28 U.S.C.A. (1950) § 1346.

<sup>2</sup> By 1944 the 78th Congress was obliged to review 1,644 bills for private relief, of which 549 were approved for a total of \$1,355,767.12. H. R. Report No. 1287, 79th Congress, 1st Session, p. 2.

<sup>3</sup> *Dalhite v. United States*, 346 U. S. 15 (1953).

<sup>4</sup> *United States v. Campbell*, 172 F. 2d 500 (5th Cir. 1949); *Panella v. United States*, 216 F. 2d 622 (2nd Cir. 1954); *Jones v. United States*, 126 F. Supp. 10 (D.C. D.C. 1954).

<sup>5</sup> *Wunderly v. United States*, 8 F.R.D. 356 (E.D. Pa. 1948); *Cresmer v. United States*, 9 F.R.D. 203 (E.D. N.Y. 1949).

disputes, especially in connection with problems involving the production and admissibility of Government records and reports. Although it shortly became well established that the Federal Rules of Civil Procedure were applicable to Federal Tort Claims litigation,<sup>6</sup> the many interpretations given in such cases to the rules, and particularly the discovery rules, have caused numerous procedural headaches. Moreover, the problem of admissibility of evidence once obtained by discovery, while not as significant, has also created much concern in Tort Claims cases.

Federal Government activities in gigantic proportions and increased complexity in the already complex governmental operations are responsible for thousands of accidents involving damages or loss of property and personal injury or death. Accidents involving military aircraft, post office vehicles, federal doctors and hospitals,<sup>7</sup> nuclear tests and experimental activities conducted by the Atomic Energy Commission, National Park Service Activities,<sup>8</sup> and activities on United States owned property have been common sources of Tort Claims' litigation. Government regulations provide for extensive investigations and complete reports as an immediate aftermath of even the smallest accident involving a governmental operation. This is particularly true in the armed services where for example an airplane crash may be investigated in painstaking detail by highly trained investigators not only for the purpose of improving future flight safety, but also for the preparation for future claims and litigation.<sup>9</sup> Many of the records and reports filed as an adjunct to such investigations are classified as confidential or secret by government regulations.<sup>10</sup>

On the other hand, plaintiffs in such cases involving alleged government negligence are often unable to make a satisfactory investigation due to factors of time, inaccessibility, and expense, not to mention unfamiliarity with the technicalities of the investigative procedures, and must therefore turn to the Government's records and reports in their quest for information in order to prepare

<sup>6</sup> *United States v. Yellow Cab Co.*, 340 U. S. 543 (1951) and language in 28 U.S.C.A. (1946) § 932.

<sup>7</sup> There were over 392 U. S. Hospitals treating approximately 1,461,289 patients in the year 1953. *AMA Journal* May 15, 1954, Vol. 155, No. 3, Hospital Service in the United States.

<sup>8</sup> A rather bizarre case involved a suit by Yellowstone National park campers, whose camping ground was raided by bears after the plaintiffs had been informed by park rangers that there was no danger from bears. *Claypool v. United States*, 98 F. Supp. 702 (S.D. Cal. 1951).

<sup>9</sup> *Cf.* Air Force Regulations 62-14.

<sup>10</sup> Title IV of the Civil Aeronautics Act of 1938, 49 U.S.C.A. (1951) § 581.

their cases. Obviously, plaintiffs must then resort to the discovery rules and in particular to Rule 34 which provides in part for the production of documents, records, etc.,<sup>11</sup> and in many instances the Government's refusal to produce because of lack of good cause or privilege or other reason then creates the issue. In the event plaintiffs succeed in obtaining the requested records and reports from the Government, there may be an additional question as to whether or not such evidence is admissible during the trial. Ordinarily, however, since the court tries claims under the Tort Claims Act without a jury, questions regarding the admission or exclusion of evidence are not so important as in jury trials and it is therefore to the problem of obtaining evidence that primary consideration should be given.

#### PRODUCTION OF GOVERNMENT RECORDS AND REPORTS

Although the Federal Rules of Civil Procedure provide various discovery weapons such as depositions under Rule 26, written interrogatories under Rule 33, and production of documents under Rule 34, the most effective and most used method in the more complex Federal Tort Claims litigation has been Rule 34. There is a good reason for this and again the airplane crash situation provides the best example. In the typical military plane crash case involving injuries or death to private persons, the instrumentality involved is usually within the exclusive possession and control of the United States and it is virtually impossible for the plaintiffs to make an independent investigation of the cause of the accident. Even if detailed interrogatories are submitted to the Government requesting the names of witnesses who gave testimony at the accident investigation board hearing held immediately after the crash, it may often be exceedingly difficult for technically-unskilled plaintiffs to obtain adequate information by depositions of such witnesses. Such difficulties were encountered by plaintiffs in the case of *Reynolds v.*

<sup>11</sup> Rule 34 Fed. R. Civ. P. provides in part:

"Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody or control . . ."

*United States*,<sup>12</sup> and the District Court, in rejecting the Government's contention that plaintiffs could take the depositions of the Government's witnesses stated:

"The plaintiffs have no knowledge of why the accident happened. So far as such knowledge is obtainable, the defendant has it. When the airplane crashed, it was wrecked and much of the evidence of what occurred was destroyed. Only persons with long experience in investigating airplane disasters could hope to get at the real cause of the accident under such circumstances. The Air Force appointed a board of investigators immediately after the accident and examined the surviving witnesses while their recollections were fresh. With their statements as a starting point the board was able to make an extensive investigation of the accident. These statements and the report of the board's investigation undoubtedly contain facts, information, and clues which it might be extremely difficult, if not impossible, for the plaintiffs with their lack of technical resources to obtain merely by taking the depositions of the survivors . . .

"Beside all this, the accident happened more than 18 months ago and what the crew would remember now might well differ in important matters from what they told their officers when the event was fresh in their minds. Even in simple accident cases requiring no technical knowledge to prepare for trial, the fact that a long period of time has elapsed between the accident and the taking of the deposition of a witness gives a certain unique value to a statement given by him immediately after the accident when the whole thing was fresh — particularly when given to an employer before any damage suit involving negligence has begun."

Thus it is apparent that Federal Tort Claims plaintiffs when faced with the task of obtaining information for preparation for trial will make every effort to require production of government records, and most frequently they will then encounter the Rule 34 requirement of showing good cause and the Government's refusal to produce because of privilege.

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<sup>12</sup> 10 F.R.D. 468, 470 (E.D. Pa. 1950), rev'd on other grounds 345 U. S. 1 (1953).

Generally in determining what amounts to good cause under Rule 34 the trial court has a wide discretion. To keep the Federal discovery procedure flexible there has been no attempt to establish rigid rules and the problems of each particular case have been considered uniquely.<sup>13</sup> In all of the reported Federal Tort Claims cases in which plaintiffs have resorted to the production power of Rule 34 and in which the Government has raised the question of "good cause" the courts have almost uniformly treated the issue separately and have been liberal in their requirements as to what constitutes "good cause." Thus in *Evans v. United States*<sup>14</sup> involving a Federal Tort Claims action to recover for the alleged negligently caused death of a certain cotton picker who was killed when an Army Air Force plane crashed into a field in which deceased was working, plaintiffs filed a motion under Rule 34 for the production of the official Air Force accident investigation report and copies of signed statements given by eye-witnesses. The United States in resisting the motion alleged in part that good cause had not been shown. The District Court granted the motion and stated:

"In view of the allegations of the complaint and the motion to produce to the effect that all of the sources of information, documents, and witnesses with respect to what caused the accident are in the possession of and under the control of the government such as the officers, enlisted men, employees and records of the Army Air Base at Barksdale Field, who refuse complainants request to see them, and *the latter have no other source from which the information sought can be had*, it is the view of this court that the same constitutes good cause sufficiently within the meaning of the rule justifying the granting of the motion to produce."

And in *Bentley v. United States*,<sup>15</sup> a Tort Claims action by the widow of a deceased Air Force sergeant who was found beside the tracks of the Santa Fe Railroad after he had been permitted to board the train allegedly through the defendants' negligence, despite a recent attack of insanity, plaintiff moved for the production of the Army-Air Force investigation report (the so-called "line-of-duty determination") into the cause of the death of deceased. The

<sup>13</sup> *Ibid.*, 470.

<sup>14</sup> 10 F.R.D. 255, 258 (W.D. La. 1950). [Emphasis supplied].

<sup>15</sup> 16 F.R.D. 237, 239 (M.D. Ga. 1954).

United States Attorney, without formally answering the motion to produce, insisted on oral argument that the plaintiff be held to the requirement of "good cause." The Court in rejecting the lack of good cause argument noted:

"The magnanimity of the sovereign in laying aside its immunity from suit to the extent expressed in the Federal Tort Claims Act must be paralleled by a fairly liberal interpretation of procedural provisions to the end that, in the case of a tragedy under such unusual circumstances as these, the facts may be known by the next of kin."

A similar ruling was announced by the Delaware District Court in *Eastern Air Lines v. United States*,<sup>16</sup> when the defendant United States sought to prevent the production of a confidential investigation file made by the Air Force Inspector General, by claiming that plaintiff, which had suffered extensive property damage to an airliner in a collision with an Army bomber whose pilot was practicing military maneuvers, had not shown good cause. The Federal Tort Claims case of *Synder v. United States*<sup>17</sup> is a rather noteworthy exception to the liberality given the good cause requirement in the previous cases. In proceedings on plaintiff's motion to strike out the Governments' answer and for incidental relief upon the ground that the hearing records of the aircraft accident board and records of repairs, inspections, and for maintenance of the airplane alleged to have caused the damage, the Court announced that under all of the circumstances, plaintiff had not established good cause for invading the privacy of his adversary's preparation for trial. The unusual reasoning then given was that the hearing records constituted the so-called "work product" of an attorney and that it was contrary to public policy to require a lawyer to furnish his adversary with his work product. Here the rule against the compulsory disclosure to an adversary of the "work product" of an attorney was applied to statements obtained by others for the use of counsel as well as to statements taken personally by counsel, and the court indicated that the fact that statements of witnesses had been obtained by government investigators for use in connection with claims or suits against it would not deprive the Government of the benefit of the rule against com-

<sup>16</sup> 110 F. Supp. 491 (D.C. Del. 1953). It is interesting to note that the question of confidential privilege was not raised by the United States in this case although it arose after the Supreme Court decision in *United States v. Reynolds*, *supra*, n. 12.

<sup>17</sup> 20 F.R.D. 7 (E.D. N.Y. 1956).

pulsory disclosure, where such statements had been channeled to the United States Attorney who was charged with defending a suit against the Government arising out of accidents. Even though it was announced that the point involving the sanctity of the so-called "work product" was based on public policy as established in *Hickman v. Taylor*,<sup>18</sup> and as modified by *Alltmont v. United States*,<sup>19</sup> the Court further stated that production might be justified where the witnesses are no longer available or can be reached only with difficulty. It would seem, therefore, when adequate consideration is given to the liberal treatment of good cause in the other Tort Claims cases, that even in the event the witnesses, whose statements are sought to be made available, are within easy reach for deposition purposes, where the subject involves non-privileged technical matter requiring for its discovery especially trained investigators, production under Rule 34 should be required in spite of the work product rule. This in effect was recognized by the District Court in the *Reynolds* case<sup>20</sup> in ruling that plaintiffs had shown good cause.

While there has been some difficulty with the good cause requirement of Rule 34 in Tort Claims' litigation, there has also been considerable confusion caused by the production of material not privileged aspect of the rule. Although the courts universally recognize the common law privilege against revealing state secrets of a diplomatic or military nature,<sup>21</sup> a less clearly defined privilege against disclosure of confidential communications and official information of other kind (i.e., information obtained in the so-called governmental "house-keeping" investigations) has caused doubt on several occasions.<sup>22</sup> The additional dilemma raised by the Government's refusal on a claim of privilege to submit the material in question to the court

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<sup>18</sup> 329 U. S. 495 (1947).

<sup>19</sup> 116 F. Supp. 54 (E.D. Pa. 1953). Here on motion for production of written statements of certain witnesses in a libel in admiralty the discovery was denied as to those witnesses whose depositions libelant had made no effort to obtain and who were within easy reach. Although the court modified the work product rule by extending it to cover statements obtained by others for the attorney in connection with his preparation for trial, it touched the heart of the problem by distinguishing the situation involving technical matters which counsel, without the experience and knowledge necessary, might not be able to elicit upon depositions and which might have been disclosed in the witnesses' original statements given to technically trained investigating officers.

<sup>20</sup> *Supra*, n. 12.

<sup>21</sup> 32 A.L.R. 2d 391.

<sup>22</sup> See Berger and Krash, *Government Immunity from Discovery*, 59 Yale L. J. 1451 (1950).



for an "in camera" inspection for the purpose of considering the claim has been no less of a problem.<sup>23</sup> These issues involving the question of privilege and its determination have been considered in several military plane crash cases. The plaintiffs, in each case, brought a claim under the Federal Tort Claims Act for wrongful death and in the course of the proceedings moved under Rule 34 for a copy of the official investigation report of the crash.

The case of *Cresmer v. United States*,<sup>24</sup> involved a Federal Tort Claims action for the death of plaintiff's intestate who was killed by the crash of a naval aircraft into his home at Bayside, Long Island. Plaintiff, pursuant to Rule 34 moved for the production for inspection and copying of the report of the Navy Board of Inquiry. The Government opposed the motion on the ground that the report was privileged. To make certain that the report contained no military secrets the Court requested Government counsel to produce the report for examination, and after reading it and ascertaining that no such secrets were contained therein, granted the motion. Since the very nature of the defense made necessary an inspection of the data which plaintiff required in order to sustain his case, in the absence of a showing that a war secret or any secret appliance used by the armed forces was involved, it was considered to be unseemly for the Government to thwart the efforts of plaintiffs to learn as much as possible concerning the cause of the disaster. In *Evans v. United States*<sup>25</sup> as previously mentioned, a Rule 34 motion for production of certain reports was resisted in part by the defendant for the alleged reason that the documents were confidential. In allowing the motion the Court stated:

" . . . It is not the exclusive right of any such agency of the Government to decide for itself the privileged nature of any such documents, but the court is the one to judge of this when such contention is made. *This can be done by presenting to the judge, without disclosure in the first instance to the other side whatever is claimed to have that status. The court then decides whether it is privileged or not.* This would seem to be the inevitable consequence of the Government's submitting itself either as a plaintiff or defendant to litigation with private persons. . . ."<sup>26</sup>

<sup>23</sup> 32 A.L.R. 2d 391.

<sup>24</sup> 9 F.R.D. 203 (E.D. N.Y. 1949).

<sup>25</sup> 10 F.R.D. 255 (W.D. La. 1950).

<sup>26</sup> *Ibid.*, 257. [Emphasis supplied.]

*Reynolds v. United States*<sup>27</sup> brought a change of direction from that of the previous two cases and somewhat modified the "in camera" technique of inspection by the court where the Government asserts privilege. Here the widows of three deceased civilian observers brought consolidated suits against the United States under the Tort Claims Act alleging that their deaths had occurred as a result of negligence in the crash of a B-29 aircraft which was testing secret electronic equipment. In pre-trial procedure plaintiffs moved under Rule 34 for production of the Air Force's official accident investigation report and after the Government moved to deny access to its files on the basis in part that privilege applied under Air Force Regulations,<sup>28</sup> the claim of privilege was rejected for the reason that the United States in such cases waived any privilege based upon executive control over government documents. After the District Court's decision, the Secretary of the Air Force, in a letter to the court, indicated that it had been determined that it would not be in the public interest to furnish the reports in question since the aircraft, together with its personnel, had been engaged in a highly secret mission for the Air Force. A formal claim of privilege was then filed along with an affidavit by the Judge Advocate General of the Air Force, asserting that national security would be impaired by the production of the demanded material and offering to produce the witnesses and to allow them to testify as to all matters except those of a classified nature. The District Court then ordered the Government to produce the documents in order that the Court might determine whether they contained privileged matter and when the Government declined, an order was entered under Rule 37(b)(2) that the issue of negligence be decided in plaintiffs' favor. The Court of Appeals affirmed as to both the showing of good cause and the ultimate disposition of the case as a consequence of the Government's refusal to produce the documents. The case was then reviewed by the Supreme Court,<sup>29</sup> which *held* through the majority opinion of Mr. Chief Justice Vinson that there was a valid claim of privilege under Rule 34 and that the judgment entered after application of Rule 37 subjected the

<sup>27</sup> 10 F.R.D. 468 (E.D. Pa. 1950).

<sup>28</sup> R.S. 161, 5 U.S.C.A. (1958) § 22. Air Force Regulation No. 62-7 (5) (b) provides:

"Reports of boards of officers, special accident reports or extracts therefrom will not be furnished or made available to persons outside the authorized chain of command without the specific approval of the Secretary of the Air Force."

<sup>29</sup> 345 U. S. 1 (1953).

United States to liability on terms to which Congress did not consent by the Tort Claims Act. The Court decided further that where, as in the instant case, the Government asserts a formal claim of privilege based on military secrets lodged by the head of the department which has control over the matter after actual personal consideration by that officer, the claim should prevail and the Court should rely upon the executive determination without forcing a disclosure of the very thing the privilege is designed to protect. As noted in the opinion, matters of current importance involving preparation for national defense and the reasonable certainty that the accident investigation report would contain references to secret electronic equipment along with the opportunity provided plaintiffs to interview the witnesses certainly influenced the majority of the Court. A standard of necessity was established by the Court wherein in each case the showing of necessity should determine how far the Court should probe in satisfying itself that the Government's claim of privilege should prevail, and stated:

“. . . where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. A fortiori, where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail . . .”<sup>80</sup>

Thus the Supreme Court established a difficult test for future cases and it left unexplained how a court is to determine, except in the most obvious cases of military privilege, the validity of a claim of privilege without an examination of the questioned documents. Apparently a court must take an executive officer's word that the report contains military information, without inspecting the report, thus abdicating judicial control over the evidence in a case to the caprice of executive officers. The earlier procedure, wherein if the court was in doubt as to the validity of the Government's claim of privilege it would request that the information be submitted to it for an “in camera” inspection and if the Government refused (as it might) it would have to suffer the procedural consequences, seems to be more equitable to both parties. Since the *Reynolds* case the scope of the “in camera” practice has been limited,

<sup>80</sup> *Ibid.*, 7.

certainly on similar facts; however, the judge still has the ultimate power to determine whether the military secrets exist, although he must make the determination without examining the alleged secret documents and reports.<sup>31</sup>

It would seem therefore that although *Reynolds* would be applicable where privilege based on pure military or state secrecy is raised by the Government, the less-clearly defined executive privilege against disclosure of official information should not apply in Federal Tort Claims cases where the Government is liable in the same manner as a private individual. The latter concept was considered in *Wunderly v. United States*,<sup>32</sup> involving Tort Claims litigation to recover from the United States for damages resulting from a collision between plaintiffs' automobile and an army jeep. The Government refused to furnish a copy of a statement made by the jeep driver's superior officer on the basis that official correspondence of the United States Army was privileged. The Court, in considering plaintiff's motion under Rule 37, refused to recog-

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<sup>31</sup> In this connection, dictum in *Synder v. United States*, *supra*, *circa* n. 17, 9, decided three years after *Reynolds*, is directly to the contrary when it is stated that:

"As to item No. 1 relating to military secrets, the Government should realize that at such time as it comes before a court of law, it is subjected to and bound by the rules of law and may not, without regard to the law, arbitrarily decline to produce information upon the claim of a self-imposed restriction that it is classified information or that its disclosure would injure national security. As stated in the aforesaid earlier decision herein, if an adversary party in a pending action properly requests the information and the Government declines to respond because of alleged military secrecy, then it is obligated to submit the information or records to the court for its determination as to whether the claim of privilege is well-founded. The point is that when the matter is in litigation the court and not a government agency must ultimately adjudicate the question of privileges." [Emphasis supplied].

Furthermore, there are convincing arguments against the limitation imposed on the "in camera" practice by the *Reynolds* case and they are aptly stated in *United States v. Certain Parcels of Land*, 15 F.R.D. 224, 232 (S.D. Cal. 1953):

"Even in a case where the matter sought to be discovered from the Government is an object of rarest secrecy it is a high probability that duplicates have been made by subordinates in the department. Thus the secret is known to one or more stenographers or file clerks or photographers or other craftsmen, and likely as not to others including the United States Attorney, as well as his deputy who stands at the bar asserting the Government's privilege."

And in 8 WIGMORE (3d Ed.) 779, § 2379, it is said:

". . . It would rather seem that the simple and natural process of determination was precisely such a private perusal by the Judge. Is it to be said that even this much of disclosure cannot be trusted? Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coordinate body of government share the confidence? . . ."

<sup>32</sup> 8 F.R.D. 356 (E.D. Pa. 1948).

nize the claim of privilege<sup>33</sup> to protect documents in the files of the Department of Justice and indicated that where, as here, no contention is made that any military secrets possibly protected by the scope of the common law privilege are involved, the Government should produce the protected materials, or alternatively, face the procedural consequences of Rule 37.

The dilemma of the Tort Claims plaintiff, when faced with the problem of failure of proof to sustain his case because of the bar of military secrecy, could be resolved under some situations by a resort to the doctrine of *res ipsa loquitur*, although on at least one occasion reliance on *res ipsa* was to no avail. In *Williams v. United States*<sup>34</sup> plaintiffs relied upon *res ipsa loquitur* to sustain their burden of showing negligence on the part of the Government and introduced limited evidence showing only that an accident had occurred due to the falling of flaming fuel from an exploded jet plane. Government counsel stated that because the national security might be imperiled thereby, no witnesses would be called on behalf of the Government. The Florida District Court decided in favor of the Government apparently on the theory that, since Section 421(a) of the Federal Tort Claims Act provides that the sections of the Act granting jurisdiction to the United States District Courts and establishing the general liability of the Government "shall not apply" where injury is the result of the exercise of a discretionary function,<sup>35</sup> the plaintiff has a duty of negating this exception before he can properly qualify as a Tort Claims' plaintiff. Translated into the proceedings of the instant case, this would indicate that the plaintiff had failed to show that the jet plane was not on an experimental flight (discretionary function) and thus had not established that the explosion was probably the result of operational negligence. On the other hand, the Tort Claims case of *O'Connor v. United States*<sup>36</sup> brought a different result where the Government's motion to dismiss the complaint was denied. Plaintiff's husband had been killed in a plane crash while aboard a B-36 in Oklahoma on a training mission as a civilian employee of the Sperry Gyroscope Company and plaintiff, having been denied access to the Air Force Investigation Board hearing reports, relied upon

<sup>33</sup> 5 U.S.C.A. (1958) § 22.

<sup>34</sup> 218 F. 2d 473 (5th Cir. 1955).

<sup>35</sup> 28 U.S.C.A. (1952 Supp.) § 2680(a).

<sup>36</sup> 251 F. 2d 939 (2d Cir. 1958).

res ipsa loquitur to establish her case. Here the court made no mention of plaintiff's failure to prove that her case did not fall within the discretionary function aspect of the Tort Claims Act, but indicated that the reasons underlying the theory of res ipsa are particularly applicable where, as here, plaintiffs are refused access to government records and reports. This would appear to be the more equitable approach, accepting the Government's dilemma of being forced to deny access to secret information, "as a risk necessarily concomitant to allowing suits against itself."<sup>87</sup>

#### ADMISSIBILITY OF GOVERNMENT RECORDS AND REPORTS

Having once obtained evidence from the Government in Federal Tort Claims litigation, the plaintiff is still confronted with the problem of presenting it to the court in order to sustain his burden of proof. Thus the all-important investigation report may contain information of a most compelling nature in favor of plaintiff's case and yet may be of little or no probative value and consequently inadmissible in evidence, and, as already seen, this can have disastrous effects on plaintiff's case, especially where there is material testimony in the report given by witnesses who are no longer available. Furthermore, in cases involving matters of a highly technical and complicated nature it may be most important for the court to have available not only the evidence contained in the report, but also the findings of fact and conclusions of the investigating board. In *Chapman v. United States*<sup>88</sup> plaintiffs sued the Government to recover for the death of their son who died in a military plane crash and after obtaining the investigation report which contained the Board's conclusion that the crash resulted from the exercise of poor judgment on the part of the pilot, offered the entire report into evidence. The District Court sustained defendants' objection to the admissibility of the report and found no negligence. This was affirmed by the Fifth Circuit, indicating that the exclusion of the report, if error, was harmless, but that there was no error in its exclusion.

On the other hand, in cases of a less sophisticated nature, the results are more frequently different. Hence, an employer's treatment record from the Medical Depart-

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<sup>87</sup> See Note, 67 Harv. L. Rev. 1279 (1958).

<sup>88</sup> 194 F. 2d 974 (5th Cir. 1952).

ment of plaintiff's employer was admitted under the Federal Shop Book Rule<sup>39</sup> over defendant's objection, after the doctor in charge of the traumatic section of the company's hospital not only testified to his own treatment of the plaintiff, but also identified the record as one made in the regular course of business of his department.<sup>40</sup> And, an investigation report made by the clinical director of a United States Marine Hospital into the attendant circumstances of plaintiff's treatment while a patient in the hospital was held to be admissible as a whole in an action for personal injuries sustained by plaintiff after jumping out of a fourth floor window in the hospital, as the aftermath of an alcoholic binge while out of the hospital on a three-day pass.<sup>41</sup> Photostatic copies of letters from the Bureau of Employees Compensation and the War Shipping Administration have been admitted for the purpose of determining whether plaintiff was an employee of the United States and therefore not entitled to recover under the Federal Tort Claims Act.<sup>42</sup> Even the summarized record of an Army Special Court martial at which the private, whose vehicle struck the plaintiff's, pleaded guilty to a charge of wrongfully appropriating the Army vehicle, was considered to be appropriate to prove that the defendant's employee was outside the scope of his employment.<sup>43</sup>

Perhaps the liberal approach to admissibility of Government records in Tort Claims cases would be more desirable since the cases are tried by the court without a jury and the court is less likely to be influenced by extraneous matter. This view was taken in *Eastern Air Lines v. United States*<sup>44</sup> during determination of the admissibility of the so-called "Booth Letter". General Booth, an executive in the office of the Under Secretary of War, had written to Associated Aviation Underwriters admitting contributory negligence on the part of the Government with respect to the collision in question. The Court admitted the letter but indicated that the statements with reference to contributory negligence could have no probative value unless it was shown that the General had authority to make such admissions.

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<sup>39</sup> 28 U.S.C.A. (1948) § 1732.

<sup>40</sup> *Landon v. United States*, 197 F. 2d 128 (2d Cir. 1952). Here the entire record was admitted in spite of the fact that it contained the diagnosis of another doctor identified by the testifying doctor, who did not himself make the diagnosis.

<sup>41</sup> *Googe v. United States*, 101 F. Supp. 830 (E.D. N.Y. 1951).

<sup>42</sup> *Faleni v. United States*, 125 F. Supp. 630 (E.D. N.Y. 1949).

<sup>43</sup> *Miller v. United States*, 144 F. Supp. 734 (S.D. Ga. 1956).

<sup>44</sup> 110 F. Supp. 491 (D.C. Del. 1953).

## CONCLUSIONS

Apparently the courts in most instances have applied a liberal treatment to questions of discovery and admissibility of Government evidence (generally records and reports) in Federal Tort Claims litigation. Certainly as to most issues of good cause under Rule 34 in the production of such Government records plaintiffs have received ample leeway in establishing their own inability to obtain substitute sources of information. Equally favorable treatment has been received in connection with the Government's refusal to produce because of confidential privilege or privilege as defined by Executive Regulations. Although the well-established rule protecting state secrets of a military or diplomatic nature has been recognized without question, the problems created by the *Reynolds* decision<sup>45</sup> continue to plague the courts. Especially troublesome is the question of how a court can adequately decide whether or not military secrets are involved without examining the records and reports alleged to contain such secrets. *Reynolds* clearly establishes the rule for future Federal Tort Claims cases that even in the event of the most compelling necessity (i.e., where there is no other evidence except that contained in the Government's file) the Government through the Executive Department Head may refuse to make its file available to the court for inspection. Although it would then be entirely possible for the court to decide, without examination, that no secrets were involved and to subject the Government to liability under Rule 37(b), this result would be most unlikely without some indication in the Federal Tort Claims Act suggesting it as an alternative.

Perhaps then the logical solution to this dilemma would be by Congressional expression of intent on the subject. Congress in establishing the basis and procedure for Federal Tort Claims litigation was apparently aware of the difficulties involved in suing the Government.<sup>46</sup> It

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<sup>45</sup> 10 F.R.D. 468 (E.D. Pa. 1950), rev'd. 345 U.S. 1 (1953).

<sup>46</sup> WRIGHT, THE FEDERAL TORT CLAIMS ACT (1957) 141, says:

"The Government is represented in the defense of its cases by able attorneys. The injured plaintiff needs someone to protect his interests who is on a par with the lawyers employed by the Government and should be permitted to pay him a reasonable fee for his services. To assist the United States Attorney who will defend the case, there is a corps of lawyers in the Justice Department in Washington with all of the law at their finger tips, gathered from the hundreds of cases defended by the Department. The attorney for the plaintiff usually has to start from scratch in an unusual case.

"In a serious personal injury case, the plaintiff is generally in no position physically even to think intelligently for some time after



would seem that a procedure which would satisfy the otherwise meritorious claim of the Tort Claims plaintiff who is denied access to Government reports and records, and at the same time preserve the sanctity of the secret matter contained therein, would not be unattainable and would make continued reliance on the rather vague procedures established by *Reynolds*<sup>47</sup> completely unnecessary.

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the accident. But during this period, one or more investigators for the Government are busy in securing any and all evidence that might later prove useful in the defense. On the happening of an accident in which it is likely that a claim may be filed against the United States, the investigating agencies of the Government immediately spring into action. If the injury is caused by an employee of the Post Office Department, the Post Office inspectors will commence an investigation, interviewing witnesses and securing their version of the accident. The Federal Bureau of Investigation is charged with the investigation of many accidents. Many government agencies make their own investigations, which are often thorough. Plaintiff's attorney must make his own investigation, sometimes not being employed to do so until witnesses are scattered or their memories are dimmed. As a consequence, the plaintiff's lawyer is generally placed at a disadvantage from the minute he accepts the case."

<sup>47</sup> *Supra*, n. 45.