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## Torts—Federal Tort Claims Act—Exception as to Assault and Battery

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**TORTS—FEDERAL TORT CLAIMS ACT—  
EXCEPTION AS TO ASSAULT AND BATTERY**

Plaintiff's decedent, the first mate, returned to his ship accompanied by the chief steward, second mate and two other friends who were civilian employees of the United States. The sentry, pursuant to orders, refused to allow the civilians aboard the ship and asked them to leave. An argument ensued whereupon the sentry drew his pistol and fired one shot wildly. Both the deceased and the chief steward lunged for the sentry in an effort to disarm him and in the ensuing struggle for the pistol the deceased was shot. Plaintiff, wife of the deceased, brought suit against the United States under the Federal Tort Claims Act. *Held*: the court rejected the government's contention that this injury came within the assault and battery exception of the Federal Tort Claims Act and awarded the plaintiff \$68,000 damages.<sup>1</sup>

The federal government has waived its general immunity from tort claims through passage of the Federal Tort Claims Act. The act provides that the United States shall be liable in the same manner and to the same extent as a private individual under like circumstances.<sup>2</sup> This waiver does not extend to certain situations which are expressly set forth as exceptions in the act.<sup>3</sup> The scope of this note will be limited to the assault and battery exception contained in Section 2680. This section provides:

The provisions of this chapter and Section 1346 (b) of this title shall not apply to . . . (h) 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.

<sup>1</sup> *Tastor v. United States*, 124 F. Supp. 548 (S.D. Cal. 1954).

<sup>2</sup> 62 Stat. 933 (1948), 28 U.S.C. § 1346(b) (1952).

<sup>3</sup> 60 Stat. 845 (1946), 28 U.S.C. § 2680(b) (1952).

The plaintiff's recovery in the instant case depended upon whether her claim was one "arising out of assault, battery..." within the meaning of Section 2680(h). Legislative history repeatedly refers to this section as the exception dealing with "deliberate torts such as assault and battery."<sup>4</sup> Specific testimony at the committee hearings indicated that the language of Section 2680(h) did not encompass "negligent assaults" but included only those torts of a deliberate nature.<sup>5</sup> The instant case seems consistent with these expressions of congressional intent in that the sentry's handling of his pistol was probably mere negligence and certainly no more than a "negligent assault."<sup>6</sup>

The instant case is the most recent in a series wherein the plaintiff or plaintiff's decedent was injured by a sentry or guard. These cases may be readily classified according to the sentry's conduct.

At opposite poles are cases in which the injured party was denied recovery. *Stapp v. United States*<sup>7</sup> illustrates one extreme. A sentry shot and wounded X who was fleeing arrest. It was held that the sentry's conduct constituted a deliberate tort within Section 2680(h); hence the government was immune from liability.

At the other extreme are cases like *Folk v. United States*.<sup>8</sup> As a sentry pursued X, who was fleeing arrest, the sentry's gun discharged accidentally killing X. The court held that the sentry was exercising due care in his pursuit and no negligence was proved, so the government was not held liable.

Between these two extremes are situations like *Cerri v. United States*.<sup>9</sup> A sentry shot at X who was fleeing arrest, but the bullet missed X and injured Y. It was held that the sentry's

<sup>4</sup> Sen. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946); H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945).

<sup>5</sup> Hearing before Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. 34 (1942).

<sup>6</sup> When a defendant has exhibited wanton negligence or exceedingly reckless conduct, the resulting injury is sometimes termed a negligent assault; intent is supplied through the concept of implied intent (one is presumed to intend the natural and probable consequences of his acts). For example, if A shoots into a crowd of people he is said to have intended the resulting harm. However, most authorities reject the concept of negligent assault either expressly or by ignoring it. See Restatement, Torts §§ 20, 21 (1934); Prosser, Torts 47 (1941).

<sup>7</sup> 207 F.2d 909 (4th Cir. 1953), cert. denied, 347 U.S. 933 (1954); *Lewis v. United States*, 194 F.2d 689 (3d Cir. 1952).

<sup>8</sup> 199 F.2d 889 (4th Cir. 1952).

<sup>9</sup> 80 F. Supp. 831 (N.D. Cal. 1948).

conduct was negligent but did not constitute an assault or battery;<sup>10</sup> hence the government was liable.

Apparently the instant case fits into the latter of the above categories. Viewed in its worst light<sup>11</sup> the sentry's conduct merely constituted a "negligent assault," which legislative history clearly indicates is not within the exceptions of Section 2680(h). Such a conclusion is buttressed by Supreme Court opinions indicating that the Federal Tort Claims Act must be liberally construed.<sup>12</sup> If the statute as a whole is to be liberally construed, the exceptions section which limits the application of the statute must be strictly construed. Of course a strict construction<sup>13</sup> of the exceptions section would include only truly deliberate torts and exclude grossly negligent or reckless conduct amounting to a "negligent assault."

Aside from the problem of applying the exceptions section to particular fact situations, this section by its very presence poses an interesting problem. The main policy basis for the act is in general twofold: (1) to reduce the multitude of private bills thrown upon the Congress, and, more important, (2) to provide

<sup>10</sup> The court ruled that an assault or battery based on the doctrine of transferred intent was not an assault or battery within the meaning of Section 2680(h), thereby adopting a strict construction of that section. As to transferred intent generally, see Restatement, Torts § 21 (1934); Prosser, Torts 47 (1941).

<sup>11</sup> Note 6 supra. indicates that the concept of "negligent assault" is not widely recognized. At any rate the facts of the instant case reveal nothing more than an ordinary case of negligence and would not constitute a "negligent assault" even in those jurisdictions where the concept is recognized.

<sup>12</sup> *United States v. Yellow Cab Co.*, 340 U.S. 543, 554 (1951); "We think that the Congressional attitude in passing the Tort Claims Act is more accurately reflected in Judge Cardozo's statement in *Anderson v. Hayes Const. Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30: '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.'" *Aetna Casualty Co. v. United States*, 338 U.S. 366, 383 (1949).

<sup>13</sup> Despite the opinions of the Supreme Court, some lower courts continue to construe the exceptions section liberally. *Moos v. United States*, 118 F. Supp. 275 (D. Minn. 1954); *Wilcox v. United States*, 117 F. Supp. 119 (S.D. N.Y. 1953); *Duenges v. United States*, 114 F. Supp. 751 (S.D. N.Y. 1953). In the *Wilcox* case the plaintiff, while an inmate at a United States hospital was stabbed by another inmate. Plaintiff alleged that the proximate cause of his injury was the failure of the government to provide proper supervision through the use of sufficient guards and attendants. Nevertheless, the court held that plaintiff's claim was one arising out of an assault and battery.

adequate relief for those injured by negligent acts of government employees.<sup>14</sup> In many situations an individual's opportunity to obtain relief through the passage of a private bill depended more upon his eligibility for a political favor than upon the merits of his particular claim. Once a bill was introduced it was sometimes subjected to the further uncertainties of legislative "log-rolling." In addition Congress was greatly handicapped in its consideration of tort claims because it did not possess the machinery of the judiciary for hearing and deciding a particular case or controversy.<sup>15</sup> Opponents of the Federal Tort Claims Act, of course, raised the classic argument that an injured party has a remedy against the individual who caused the harm and hence needs no remedy against the government. The fact that the individual is often judgment-proof presents a ready answer to this argument.

Valid reasons for the exception for deliberate torts are difficult to ascertain. The following have been suggested as reasons: (1) such suits are difficult to defend;<sup>16</sup> (2) there is a likelihood of judgments out of proportion to actual damage because of the inflammatory nature of such claims and the possibilities for exaggeration;<sup>17</sup> (3) the F.B.I. and other federal law enforcement agencies might subject the government to liability through third degree tactics in the questioning of suspects;<sup>18</sup> (4) the exception is in harmony with Section 2674<sup>19</sup> which disallows punitive damages under the act;<sup>20</sup> and (5) most of the claims against the government relate to traumatic injuries from public vehicles and private property damage, claims for negligence and not deliberate torts.<sup>21</sup>

<sup>14</sup> Shumate, *Tort Claims Against State Government*, 9 *Law & Contemp. Prob.* 242, 249 (1942).

<sup>15</sup> This is true despite the fact that in more recent years the congressional investigating committee has assumed many of the powers and procedures of a court. In addition, the time element is important. Although by no means conclusive, it is enlightening to consider the time devoted to tort claims in the legislatures of the states. In the State of Nebraska, for example, the legislature spent an average of 21 and 18 minutes in 1939 and 1940 respectively considering private claim bills. See Shumate, *op. cit. supra* note 14, at 250. It cannot seriously be contended that a plaintiff's claim can properly be heard in such a short period of time.

<sup>16</sup> Hearings before the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess. 39 (1940).

<sup>17</sup> *Ibid.*

<sup>18</sup> Comment, 56 *Yale L.J.* 534, 547 (1947).

<sup>19</sup> 62 Stat. 938 (1948); 28 U.S.C. § 2674 (1952).

<sup>20</sup> Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 *Geo. L.J.* 1, 49 (1946).

<sup>21</sup> *Id.* at 50.

Since the tort claims under the act are to be tried before a judge without a jury,<sup>22</sup> the objections as to difficulty of defense and possible exaggerations bear little weight. If the conduct of the F.B.I. supports a claim for injuries arising out of an assault and battery, it seems entirely proper that relief should be granted. As to punitive damages, Section 2674 specifically excludes them. And of course normal damages should be paid even though occasioned by conduct which would incidentally support punitive damages in the usual civil suit.<sup>23</sup> Finally, the fact that there are not a great number of cases involving deliberate torts is hardly a valid reason for denying relief in those cases where intentional injury has been inflicted.

It is indeed anomalous that a person should be allowed recovery when the defendant's agent is merely negligent and yet denied recovery when the defendant's agent, within the scope of employment, deliberately injures him. The overriding policy of providing the injured party some remuneration dictates that the exception for deliberate torts be limited by strict judicial interpretation, or, perhaps, entirely eliminated through legislative amendment.

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<sup>22</sup> 62 Stat. 971, 28 U.S.C. § 2402 (1952).

<sup>23</sup> Such liability is contemplated by the express terms of section 2674. Most deliberate torts, such as false imprisonment, cause little actual damage and the bulk of awards is based primarily upon the theory of punitive damages. In many situations it would be difficult to separate punitive from actual damages, and in others some courts might unconsciously award greater damages for harm resulting from deliberate conduct than for like harm resulting from mere negligence. Nevertheless, enlightened judicial administration should solve these problems inherent in the exclusion of punitive damages and yet allow adequate redress for actual damages.