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Federal Tort Claims Act—A Liberalized Interpretation

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FEDERAL TORT CLAIMS ACT—A LIBERALIZED INTERPRETATION

In an action against the United States under the Federal Tort Claims Act, claimant sought recovery for cargo damage which resulted from the grounding of the tug and barge carrying the cargo. Claimant alleged that the grounding was caused by the failure of Coast Guard personnel to check and repair a navigational light, or to notify claimant that the light was not operating. A motion to dismiss on the theory that a private person would not be liable under "like circumstances," as required by the act, was granted by the district court. The court of appeals affirmed.[1] Certiorari was granted[2] and the judgment affirmed by an equally divided court.[3] On rehearing, *held*: reversed, on the ground that a private person would be liable under "like circumstances." For example, one undertaking to warn the public of danger and thereby inducing reliance would be liable for a failure to perform his good samaritan task in a careful manner.[4]

The instant case is important not only because it clarifies a previously hazy area but also because the logic of the case could be used to greatly liberalize recovery against the Government.

In 1946 the federal government generally waived its immunity to tort liability by the passage of the Federal Tort Claims Act.[5] Immunity was reserved, however, in specific areas.[6] In addi-

[1] Indian Towing Co. v. United States, 211 F.2d 886 (5th Cir. 1954).

[2] Indian Towing Co. v. United States, 348 U.S. 810 (1954).

[3] Indian Towing Co. v. United States, 349 U.S. 902 (1955) (per curiam decision).

[4] Indian Towing Co. v. United States, 350 U.S. 61, 64-65 (1955).

[5] 28 U.S.C. §§ 1346(b), 2671-80 (Supp. 1952).

[6] 28 U.S.C. § 2680 (Supp. 1952) exempts from its operation twelve classes of tort claims including (1) claims based upon acts or omissions of employees and agencies in the execution of a statute or regulation or based upon discretionary functions or duties; (2) claims arising out of loss, miscarriage, or negligent transmission of postal matter; (3) claims arising in respect of the assessment or collection of taxes or custom duties, or the detention of goods or merchandise by customs or law-enforcement officers; (4) claims for damages caused by the imposition of a quarantine by the United States; (5) claims arising from injuries to vessels or persons while passing through the Panama Canal locks or zone waters; (6) claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process. libel, slander, misrepresentation, deceit, or interference with contract rights; (7) claims for damages caused by the fiscal operations of the Treasury; (8) claims arising out of combatant activities of military or naval forces, or the Coast Guard, during time of war; (9) claims arising in foreign countries; (10) claims arising from activities of TVA; (11) claims arising from activities of the Panama Railroad Co.; and (12) claims relating to claims or suits in admiralty against the United States.

tion, the act states that "the United States shall be liable . . . in the same manner and to the same extent as a private individual *under like circumstances* . . . ."[7] (Emphasis added) in accordance with the law of the state where the alleged negligence occurs. The Government has contended that this phrase should be interpreted to exclude many claims not falling within the specific exceptions of the act. At first, the dichotomy urged by the Government was that of governmental functions as contrasted to proprietary functions, with liability only as to the latter.[8] But this view was rejected in a series of cases.[9] The Government has also argued that risky activities which are authorized by Congress should be immune.[10] This was also rejected. Finally, the Government narrowed its argument by asserting that only *uniquely governmental* activities were exempt from liability.[11] Such an activity is one, by Government definition, which has no exact private counterpart. Thus, military activities, prison activities, taxing activities, and explosions of nuclear devices would be termed uniquely governmental. In contrast, claimants have argued for a liberal construction; i.e., the use of an analogy to similar private activities.

The narrow construction urged by the Government was sustained in four cases. In *Feres v. United States*,[12] liability was denied when soldiers were injured by negligent medical treatment, and by negligent maintenance of quarters. The Supreme Court rejected the analogy to the doctor-patient and landlord-tenant relationships, and reasoned that the relationship of soldier to government is unique since no private individual can conscript an army. In *Sigmon v. United States*,[13] liability was denied when a prison inmate was injured in a prison machine shop. Rejecting the employer-employee relationship, a district court found the activity to be uniquely governmental since no private person could incarcerate another. Thus, in these two cases, by ignoring

7 28 U.S.C. § 2674 (Supp. 1952).

8 This argument was based upon implications from certain sections of the act. See 28 U.S.C. §§ 2674, 2680 (Supp. 1952).

9 Air Transport Associates v. United States, 221 F.2d 467, 470 (9th Cir. 1955); Mid-Central Fish Co. v. United States, 210 F.2d 263 (8th Cir. 1954), cert. denied, 347 U.S. 967 (1954); Somerset Seafood Co. v. United States, 193 F.2d 631 (4th cir. 1951); Claypool v. United States, 98 F. Supp. 702 (S.D. Cal. 1951); Cerri v. United States, 80 F. Supp. 831 (N.D. Cal. 1948).

10 Bullock v. United States, 133 F. Supp. 885, 891 (D. Utah 1951).

11 Supra note 4.

12 340 U.S. 134 (1950).

13 110 F. Supp. 906 (W.D. Va. 1953).

the activity at the operational level, and looking only at the *over-all* character of the activity, the courts have found that the activity was uniquely governmental. This uniquely governmental technique has also been applied to the operational level. In *Dalehite v. United States*,[14] a shipboard fire, caused by government negligence, was negligently allowed to spread by government fire-fighters. The negligent acts which caused the fire were held to come under the "discretionary act" exception of the act; thus, the question of whether the over-all aspect of the activity was uniquely governmental was not raised. But the Supreme Court found fire-fighting, the operational level activity, to be a uniquely governmental activity, thus barring recovery. In another case, a lower federal court used the same technique to deny liability for loss of personal property caused by government negligence in failing to properly supervise migratory workers.[15]

Thus, the uniquely governmental technique has been used to preclude liability under the act at the over-all or operational level of an activity.

In the instant case the Government relied on the claim that the activity at its operational level had no exact counterpart in private activity.[16] But the Court interpreted the phrase "like circumstances" to mean that recovery will be allowed if a private person *has carried or could carry* on an *analogous* activity at the operational level. Thus, since a private person could conceivably operate a lighthouse and since private persons do operate analogous activities, e.g., railroad crossing lights; recovery would be allowed.

This reasoning would seem to destroy the validity of the *Feres, Sigmon,* and *Dalehite* decisions since analogous private activities can be found for the so-called uniquely governmental activities of these cases. The doctor-patient and landlord-tenant situations are analogous to the *Feres* situations at the operational level.[17] In the *Sigmon* case, the employee-employer relationship

[14] 346 U.S. 15 (1953).

[15] Goodwill Industries v. United States, 218 F.2d 270 (5th Cir. 1954).

[16] Indian Towing Co. v. United States, 350 U.S. 61, 64 (1955).

[17] Even if the Court had found that there was an analogous activity at the operational level, the claimant would still have been blocked from recovery since the Court held that the Army's comprehensive compensation plan made the activity uniquely governmental at the over-all level. This reasoning was extended to the prison industries in the Sigmon decision. It should be noted, however, that there are comparable compensation plans in private industry in view of state workman's compensation laws and the health and accident insurance now carried by most

provides the analogy at the operational level. The analogy on the over-all plane is more difficult to find. But an analogy can be had to private sanitariums which maintain similar activities, i.e., security and rehabilitation. As to the *Dalehite* case, the fire-fighting departments of major corporations which do not wish to rely on municipal facilities provide an analogy in private activity to the federal fire-fighting crews.

At least one federal court has put this type of reasoning to use in holding the Government liable. A cause of action has been deemed to exist where damage was allegedly caused by negligence connected with the explosion of a nuclear device since it can be analogized to private blasting activities.[18]

It appears obvious, therefore, that for even the most uniquely governmental activity, a "like circumstance" can be found in private activity. For instance, taxing can be likened to the collection of private dues by a fraternal organization, the postal system can be likened to the privately operated railway express system, and the spread of pestilence can be compared to the spread of noxious weeds. But the question is whether the Court will carry this reasoning to its limits or whether it will seize upon distinguishing factors to act as a brake on the use of the analogy. The instant case, for example, involves the elements of volunteering and reliance. Lower federal courts have relied heavily on these elements in holding the Government liable,[19] and thus these elements may provide the Court with a convenient reason for refusing to apply its principles to other cases not involving reliance. In this connection, it should be noted that the

large corporations. But even if this hurdle is surmounted by the claimant, he is still faced with the fact that no private activity can conscript or incarcerate individuals. Thus. if the Court wishes to segregate these areas from liability, it has a sound basis on which to rest its uniquely governmental dichotomy.

[18] Bulloch v. United States, 133 F. Supp. 885 (1955).

[19] Eastern Air Lines v. Union Trust Company, 221 F.2d 62 (D.C. Cir. 1955), aff'd per curiam, United States v. Union Trust Co., 350 U.S. 907 (1955) (a control tower gave out information which resulted in plane crashes); United States v. Lawter, 219 F.2d 559 (5th Cir. 1955) (the Coast Guard negligently conducted a helicopter rescue which resulted in the death of a person being rescued); Bevilacqua v. United States, 122 F. Supp. 493 (W.D. Penn. 1954) (the Government failed to maintain a navigational light on a dam which resulted in a boat sailing over a dam). Where the quality of reliance is weak, as in relying on weather forecasts, liability has been denied. Mid-Central Fish Co. v. United States, 210 F.2d. 263 (8th Cir. 1954), cert. denied, 347 U.S. 967 (1954).

Court, in the instant case, specifically refused to over-rule the *Feres* and *Dalehite* decisions, perhaps because these cases didn't involve the essential element of reliance. Anyway, the path is clear for the Court's distinguishing the present case from future fact situations which have more elements in common with *Feres*, *Sigmon*, and *Dalehite*. In this connection, it should be noted that there is not an analogy which can be drawn to a government activity which would be more strained and far-fetched than the one drawn in the instant case, i.e., that a private person could operate a lighthouse. The restrictions placed on lighthouse operations by the Government make the operation of a lighthouse by a private individual practically impossible.[20] If the Court is not reluctant to draw such an analogy in this area, there is little to indicate that the use of the analogy won't result in quite a liberal interpretation being placed on the act.

The basic question becomes, therefore, whether the Court's reasoning in the instant case *should* be extended to its limits. This involves a consideration of the act's safeguards against excessive liability, the policy considerations inherent in the act, and other policy factors.

The act is sweeping in its waiver of immunity, and it seems inconsistent to whittle the scope of this immunity by refinements not spelled out in the act, especially since the act's exceptions are so clearly stated.[21] In addition, even if recovery is denied under the act because of narrow construction, Congress may be forced to enact relief legislation or the claimant may bring a private bill to remedy the inequity.[22] Thus, a narrow construction will defeat one of the primary reasons for the passage of the act, namely, the elimination of congressional consideration of tort claims.[23] A narrow construction has been rejected by some lower courts: viz, (1) the rejection of the governmental-proprietary dichotomy,[24] (2) the inclusion of maritime torts as well as common-law torts,[25] (3) inclusion of negligent acts following the use of discretion,[26] (4) the limitation of the assault and battery

[20] 33 C.F.R. § 66 (1949).

[21] Supra note 6.

[22] See, e.g., Pub. L. No. 378, 69 Stat. 707 (1955) (Texas City disaster relief); Priv. L. No. 194, 65 Stat. A74 (1951) (claim arising in foreign country); Priv. L. No. 135, 65 Stat. A52 (1951) (government employee acting outside scope of authority).

[23] Somerset Seafood Co. v. United States, 193 F.2d 631 (4th Cir. 1951); Cerri v. United States, 80 F. Supp. 831 (N.D. Cal. 1948).

[24] Supra note 8.

[25] Somerset Seafood Co. v. United States, 193 F.2d 631 (4th Cir. 1951).

[26] Supra note 4.

exception of the act to government employees' assaults as contrasted to assaults of prisoners who were given the opportunity to assault by the negligence of a government employee.[27]

It is argued that an extension of the reasoning of the instant case is likely to expose the government to novel causes of action or excessive claims.[28] First, it should be noted that just because a cause of action is novel does not mean that it is "spurious." If novel claims were never allowed, the law would forever stand still. Often an analogy can be used to break through fictitous and antiquated restrictions in tort law which hamper the administration of justice. For instance, the federal courts have found duties (1) to give adequate warning of dangerous conditions to navigators,[29] and (2) to limit the use of water as a riparian owner to a reasonable use,[30] even though the state law didn't directly support such principles. Also, a court has allowed the use of negligence as a theory of recovery where state law made the defendant liable without fault.[31] These cases follow the apparent desire of the courts to give a liberal construction to the act in an effort to effectuate its purpose.

The act provides additional safeguards against spurious, novel or excessive claims through the elimination of juries,[32] elimination of punitive damages,[33] and through the specific exceptions of the act. In addition, the normal rules of tort law, such as the risk theory, will often restrict liability.

With the growth of western civilization and its emphasis on government as existing for the individual, as well as vice-versa, the idea that "The King can do no wrong" has fallen into disrepute; one result being the Federal Tort Claims Act. There seems to be a reluctance on the part of the courts, however, to allow extensive claims. This has been suggested as one of the reasons for the *Dalehite* decision,[34] which involved approximately

27 Panella v. United States, 216 F.2d 622 (2d Cir. 1954).

28 Dalehite v. United States, 346 U.S. 15, 43 (1953); Nat. Mfg. Co. v. United States, 210 F.2d 263, 275 (8th Cir. 1954), cert. denied, 347 U.S. 967 (1954).

29 Dye v. United States, 210 F.2d 123 (6th Cir. 1954).

30 United States v. Praylou, 208 F.2d 291 (4th Cir. 1953), cert. denied, 347 U.S. 934 (1954).

31 Smith v. United States, 113 F. Supp. 131 (D. Del. 1953).

32 28 U.S.C. § 2402 (Supp. 1952).

33 28 U.S.C. § 2674 (Supp. 1952).

34 See Dalehite v. United States, 346 U.S. 15, 60 (1953) (dissenting opinion); 32 Tex. L. Rev. 474 (1954); 23 Tenn. L. Rev. 243 (1954); 5 Syracuse L. Rev. 101 (1953).

two hundred million dollars. While such a loss would add but a minute amount to the tax dollar of the multitude of taxpayers, it may be ruinous to the individuals sustaining the loss. It is difficult to see why a person should support a larger proportion of the expenses of maintaining the Government than is provided for in the taxation system. Congress has seen fit to appropriate huge amounts for natural disasters such as floods and droughts, and for military and economic disasters in foreign countries. Surely the disasters caused by the Government's own negligence can be compensated for out of tax funds. If Congress feels that liability for certain activities involves too great a possible drain upon the Treasury, it can, as it has done with flood control damage, amend the act to make a specific exception.[35] It seems far better for Congress to make exceptions in light of its knowledge of expected budget commitments, than for the courts to do so.

It is submitted that there are adequate protections within the act against spurious or excessive claims, and that the logic of the instant case can be used to establish guideposts which can result in a liberalization in tort law; that the policy of restricting private bills calls for a liberal construction as does the policy of equality of economic burden among taxpayers in maintaining any given governmental activity; and that the legislative body, with its vast fact finding powers and knowledge of expected demands upon the Treasury, is better equipped to add restrictions upon the act than is the judiciary. The instant case provides the vehicle of logic by which such a liberal interpretation can be attained.

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[35] 33 U.S.C. § 702(c) (Supp. 1952).