Vanderbilt Law Review

Volume 7
Issue 2 *Issue 2 - February 1954*

Article 1

2-1954

Dalehite v. United States: A New Approach to the Federal Tort Claims Act?

Massillon M. Heuser

VANDERBILT LAW REVIEW

VOLUME 7 FEBRUARY, 1954 NUMBER 2

DALEHITE v. UNITED STATES: A NEW APPROACH TO THE FEDERAL TORT CLAIMS ACT?

MASSILLON M. HEUSER*

The decision for the United States in *Dalehite v. United States*,[1] though by a closely divided Supreme Court, possibly indicates a turning point in litigation involving the construction of the Federal Tort Claims Act.[2] The trend theretofore had been to expand the concept of suability and liability expressed in the Act. In *United States v. Aetna Casualty and Surety Co.*[3] the Court had established the right of an insurer-subrogee to sue in its own name on a portion of a claim arising in favor of the insured-subrogor, despite the Anti-Assignment Statute[4] and the obvious procedural and administrative difficulties not dealt with in any wise by the statute. As a rhetorical conclusion to the Court's opinion, Chief Justice Vinson quoted[5] Judge Cardozo:

> "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."[6]

The decision in *United States v. Yellow Cab Co.*[7] upheld the right of plaintiffs to join private parties as co-defendants with the United

* Attorney, United States Department of Justice, Chief of the Tort Section 1948-53; member of Virginia bar since 1928. The views expressed are those of the author and not necessarily those of the Department of Justice.

1. 346 U.S. 15, 73 Sup. Ct. 956, 97 L. Ed. 1427 (1953).
2. 60 STAT. 842 (1946), reenacted in the codification of Title 28 (Judicial Code), 62 STAT. 869 (1948), without substantive changes and now appearing as 28 U.S.C.A. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412 and 2671-80 (1950).
3. 338 U.S. 366, 70 Sup. Ct. 207, 94 L. Ed. 171 (1949).
4. REV. STAT. 3477 (1875), 31 U.S.C.A. § 203 (1927).
5. United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 383, 70 Sup. Ct. 207, 94 L. Ed. 171 (1949).
6. Anderson v. Hayes Const. Co., 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926). A New York statute provided that the state might be joined as a defendant in proceedings to foreclose a mechanic's lien. The state contended, nevertheless, that such a lien could not be enforced unless the state conceded that it owed its contractor, the co-defendant. The court found the statute granting jurisdiction to determine such controversies to be "explicit" and that it contained no condition "that the remedy is to fail if the debt shall be disputed." *Id.* at 147.
7. 340 U.S. 543, 71 Sup. Ct. 399, 95 L. Ed. 523 (1951).

States as alleged joint tort-feasors, and the right to implead the United States as a third-party defendant for the purpose of contribution, where local law contemplates contribution, although the jurisdictional statute is completely silent on this important adjunctive branch of tort law. In reaching its conclusion, the Court relied in part upon the fact that "the Act expressly makes the Federal Rules of Civil Procedure applicable, and Rule 14 provides for third-party practice."[8] The requirement of the Act that claims against the United States be tried without a jury, and the right of private litigants under the Seventh Amendment to a trial by jury in such cases, were held not to present insurmountable difficulties. The Court added: "If the Act develops unanticipated complications, Congress can then meet them to such extent as it may desire to fit the demonstrated needs."[9]

This is in interesting contrast with the Court's approach in *United States v. Sherwood*,[10] where a judgment-creditor joined his judgment-debtor and the United States in a suit under the Tucker Act.[11] The plaintiff alleged a breach of contract by the United States with the judgment-debtor, and the entitlement of the judgment-creditor under local (New York) law to enforce and to be reimbursed from the claim of its judgment-debtor. The United States district court dismissed the complaint as being outside its jurisdiction. The United States Court of Appeals for the Second Circuit reversed,[12] holding that under Rule 17(b) of the Federal Rules of Civil Procedure plaintiff's capacity to sue was governed by New York law and also that within the meaning of that law the United States was a "person indebted." The Supreme Court reversed the court of appeals, affirming the opinion of the district court that the Tucker Act did not grant jurisdiction to hear such a suit. The Court held that the procedural provisions of the Federal Rules of Civil Procedure added nothing to the jurisdiction of the district court and that the basic federal statute "must be strictly interpreted."[13] The opinion, by Chief Justice Stone, also pointed out that the basis of the jurisdiction of the district court (and of the Court of Claims) under the Tucker Act is derived not from the Judiciary Article of the Constitution, but from the Congressional power "to pay the debts . . . of the United States," which Congress is free to exercise through either non-judicial or judicial agencies. The only constitutional basis for the Federal Tort Claims

8. *Id.* at 553.
9. *Id.* at 556.
10. 312 U.S. 584, 61 Sup. Ct. 767, 85 L. Ed. 1058 (1941).
11. 10 STAT. 612 (1855), as amended, 24 STAT. 505 (1887). See 28 U.S.C. §§ 41(20), 250 (1946).
12. 112 F.2d 587 (2d Cir. 1940).
13. United States v. Sherwood, 312 U.S. 584, 590, 61 Sup. Ct. 767, 85 L. Ed. 1058 (1941).

Act is the legislative power to "pay the debts" of the United States,[14] but, strangely enough, this fundamental principle has rarely been adverted to in cases construing the Act.

There has also been a marked judicial thrust toward the finding of liability on the United States in airplane crash cases, although little or no evidence is adduced to support the necessary contention that the claimed injury, loss or death was "caused by the negligent or wrongful act or omission of any employee of the government."[15] Illustrative are two cases decided by the Court of Appeals for the Tenth Circuit, *United States v. Kesinger*[16] and *United States v. Gaidys*.[17] In the *Kesinger* case the court resorted to the *res ipsa loquitur* rule to uphold liability. In *Gaidys*, after finding that the Government plane "for some unknown reason" was flying at a low altitude before its crash, the court said that it was its "view that the flying of the plane below a safe altitude . . . the crash, and the resulting injuries . . . constituted a redressible wrong in the nature of trespass."[18] The same tendency is reflected in *Parcell v. United States*.[19] The Court of Appeals for the Fourth Circuit in *United States v. Praylou*, and *United States v. Walker*,[20] affirmed a finding of liability based on a South Carolina statute which enacts the Uniform Aeronautics Act. That statute imposes absolute liability on owners of aircraft for injuries to persons or property on land caused by the ascent, descent or flight of the aircraft or the dropping or falling of any object therefrom. The Government is seeking Supreme Court review of the decision.

The *Feres* case,[21] however, should be noted as a deviation from the tendency to approach problems under the Federal Tort Claims Act from the premise that the Act is primarily a sweeping waiver of sovereign immunity. At the outset, the Court in that case observed that the Act "should be construed to fit . . . into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole."[22] After stating that there were four dif-

14. "Congress has . . . recently conferred on the district courts exclusive jurisdiction of tort claims cognizable under the Federal Tort Claims Act . . . enacted pursuant to Art. I powers." National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 593-94, 69 Sup. Ct. 1173, 93 L. Ed. 1556 (1949).

15. 28 U.S.C.A. § 1346(b) (1950). The proposition that the Federal Tort Claims Act creates only a *respondeat superior* liability had become well established prior to its affirmance by the *Dalehite* decision. United States v. Campbell, 172 F.2d 500, 503 (5th Cir.), *cert. denied*, 337 U.S. 957 (1949); United States v. Eleazer, 177 F.2d 914, 916 (4th Cir. 1949), *cert. denied*, 339 U.S. 903 (1950). See also Hubsch v. United States, 174 F.2d 7 (5th Cir.), *remanded*, 338 U.S. 440 (1949), *cert. dismissed*, 340 U.S. 804 (1950); United States v. Hull, 195 F.2d 64 (5th Cir. 1952); Jackson v. United States, 196 F.2d 725 (3d Cir. 1952).

16. 190 F.2d 529 (10th Cir. 1951).

17. 194 F.2d 762 (10th Cir. 1952).

18. *Id.* at 764, 765.

19. 104 F. Supp. 110, 116 (S.D.W. Va. 1951).

20. 208 F.2d 291 (4th Cir. 1953) (heard together).

21. Feres v. United States, 340 U.S. 135, 71 Sup. Ct. 153, 95 L. Ed. 152 (1950).

22. *Id.* at 139.

ferent conclusions that might be reached in the case, Mr. Justice Jackson's opinion — from which there was no dissent — said: "There is as much statutory authority for one as for another of these conclusions."[23] The Court adopted a conclusion that affirmed the validity of an important implied exception to the apparent scope of the liability provisions of the Act. The postulate from which the Court began its reasoning plainly foreshadowed the result that was reached.

Only in a subsidiary way did the *Dalehite* case deal with conflicts arising from the planned integration of local law and federal statutory requirements, procedural difficulties or any auxiliary aspect of the Federal Tort Claims Act. The Court was faced with a complex fact situation, reflected by an enormous record, and the practical construction and application of the most gravid of the express exceptions to the Act. It is significant that the Court did not rely upon any "sweeping language"[24] in the statute, nor shrink from "refinement of construction" in reaching a solution of the controversy before it. In an almost admonitory manner the Court commenced its discussion of the case with the statement that the "Act waived sovereign immunity from suit for certain specified torts of federal employees. It did not assure injured persons damages for all injuries caused by such employees."[25] Further on in the opinion the Court said: "Turning to the interpretation of the Act, our reasoning . . . starts from the accepted jurisprudential principle that no action lies against the United States unless the legislature has authorized it."[26]

The Supreme Court's change of vantage in approaching problems of interpretation under the Federal Tort Claims Act encourages a criticism of the common description of the Act as a "waiver of sovereign immunity." Perhaps the use of the expression by both courts and counsel indicates the general disfavor with the "jurisprudential principle" of non-liability of governments for the harmful conduct of their employees. The description cannot, however, serve as an accurate exposition of the scope and legal effect of the Federal Tort Claims Act. Whatever the historical origin, purpose or social need of the principle of immunity, it is older than the nation and cannot now be "waived" as an individual would forego the privilege of pleading the bar of a statute of limitation. The United States of America, whether regarded as a governmental organization, a people, the public treasury, or all of them together, is not an individual, a business corporation, a municipality or an eleemosynary institution.

23. *Id.* at 144.
24. See United States v. Yellow Cab Co., 340 U.S. 543, 547, 71 Sup. Ct. 399, 95 L. Ed. 523 (1951).
25. Dalehite v. United States, 346 U.S. 15, 17, 73 Sup. Ct. 956, 97 L. Ed. 1427 (1953).
26. *Id.* at 30.

The evolved concepts of the legal rights and duties of such entities can hardly be made to apply to the United States by the device of waiving or removing a procedural bar to suit. In other words, a statute waiving sovereign immunity might be more appropriately called — and construed as — a statute creating government liability. In one case under the Federal Tort Claims Act, it was necessary for the court to decide whether the immunity of the United States from tort liability prior to the date of the passage of the Act "was merely a procedural impediment." The court held that it was more than that, and that "the immunity of the United States from suit necessarily implies that no substantive right of action existed against it."[27] It is submitted that this is a correct view. If it is, then the statute that removes the impediment, in order to be effective at all, defines the right of action permitted against the formerly nonliable sovereign. "For a tort is a tort in a legal sense only because the law has made it so."[28]

It is not the purpose of this comment to analyse the Court's several holdings in the *Dalehite* case or to discuss the probable precedential force of its interpretation of the "discretionary function" exception to the Federal Tort Claims Act. The factual situation in the case and the theory on which the plaintiffs chose to present their claims against the Government make the case one that is not likely to be closely paralleled. This important exception will, no doubt, receive future judicial consideration and there will be a further process of inclusion and exclusion of programs and activities of federal agencies and employees of the Government with relation to the ambit of "discretionary function or duty." The diverse situations in which the exception has already been applied is the subject of several thoughtful law review comments.[29]

It may be that the decision will become more of a landmark for its rejection of absolute liability than as a definitive interpretation of Section 2680(a) of the Judicial Code. As herein indicated, it appears that the case is also noteworthy in that the court for almost the first time regarded the Federal Tort Claims Act as a schematic whole that creates a limited range of liability rather than a mere immunity-waiving declaration of the legislature.

27. Commissioners of the State Ins. Fund v. United States, 72 F. Supp. 549, 554 (S.D.N.Y. 1947).
28. The *Western Maid*, 257 U.S. 419, 433, 42 Sup. Ct. 159, 66 L. Ed. 299 (1922).
29. Notes, 66 HARV. L. REV. 488 (1953), 45 ILL. L. REV. 791 (1951), 27 IND. L.J. 121 (1951); Comment, 36 MARQ. L. REV. 88 (1952); 37 GEO. L.J. 646 (1949); 5 MIAMI L.Q. 634 (1951); 101 U. OF PA. L. REV. 420 (1952).