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COMMENTS

THE NATIONAL GUARD AND THE FEDERAL TORT CLAIMS ACT*

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In a comment appearing in a previous issue of the *Vanderbilt Law Review*, there was a discussion of the application to military personnel of the Federal Tort Claims Act.[1] One part of that comment may now be expanded. The torts of National Guardsmen whose units have not been called into federal service do not create a cause of action under the Federal Tort Claims Act.[2]

The National Guard of the United States is a reserve component of the Army of the United States.[3] It is made up of the National Guard of the several states, territories and the District of Columbia. The statute governing the Guard, however, is explicit that:

> "Except when ordered thereto in accordance with law, members of the National Guard of the United States . . . shall not be on active duty in the service of the United States. When not on active duty in the service of the United States, they shall be administered, armed, uniformed, equipped, and trained in their status as the National Guard . . . of the several States, Territories, and the District of Columbia . . . ."[4]

This provision is taken to make it clear that the National Guard remains a state institution until called into federal service.[5] The Guard may be ordered into active federal service by the President and continued in such service as long as is necessary, whenever Congress determines that troops are needed for the national security in excess of those in the Regular Army. At the time of such order, the members

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* The views expressed in this comment are personal to the writer and do not necessarily represent the position of any Government agency with which he is, or has been, associated.

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1. Comment, McNiece and Thornton, *The Federal Tort Claims Act and Its Application to Military Personnel*, 5 VAND. L. REV. 57 (1951).

2. McCranie v. United States, 199 F.2d 581 (5th Cir. 1952); Dover v. United States, 192 F.2d 431 (5th Cir. 1951); Williams v. United States, 189 F.2d 607 (10th Cir. 1951); Satcher v. United States, 101 F. Supp. 919 (W.D.S.C. 1952); Glasgow v. United States, 95 F. Supp. 213 (N.D. Ala. 1951); Mackay v. United States, 88 F. Supp. 696 (D. Conn. 1949).

3. Armed Forces Reserve Act of 1952, Pub. L. No. 476, 82d Cong., 2d Sess. § 701 *et seq.* (July 9, 1952). This Act supersedes the pertiment provisions in Title 32 of the Code.

4. *Id.* at § 709.

5. For the statutory history of the National Guard and its predecessors see: Colby and Glass, *The Legal Status of the National Guard*, 29 VA. L. REV. 839 (1943); Colby, *The Status of the National Guard*, 98 CENT. L.J. 240 (1925); Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940).

of the units shall "stand relieved from duty in the National Guard of their respective states . . . ."[6]

In addition to the clear statutory intent, there were also a number of judicial holdings, federal[7] and state,[8] prior to 1946, that the Guard was a state institution. Nevertheless, following the passage in 1946 of the Federal Tort Claims Act, numerous suits were filed based upon the legal conclusion that National Guardsmen were federal employees under the Act.[9] The courts have uniformly rejected this contention.

In *Glasgow v. United States*,[10] a Tennessee National Guardsman was involved in an accident while en route to summer maneuvers which had been ordered by the Secretary of the Army. He was driving an Army vehicle loaned for use on these maneuvers. Summary judgment for the Government was granted on the ground that the Guardsman was not a federal employee. This result was unaffected by the fact that Guardsmen receive the same benefits as the Regular Army[11] and,

6. Armed Forces Reserve Act of 1952, Pub. L. No. 476, 82d Cong., 2d Sess. § 710 (July 9, 1952). "The National Guard is only a potential part of the United States Army, and does not in fact become a part thereof until Congress has made the requisite declaration of the existence of an emergency . . . . [T]he Governor is commander in chief of the National Guard until Congress declares an emergency to exist and the guard becomes an actual part of the National Army, when the President becomes commander in chief." Bianco v. Austin, 204 App. Div. 34, 197 N.Y. Supp. 328, 330, 331 (1st Dep't 1922). See also Gibson v. State, 173 Misc. 893, 19 N.Y.S.2d 405 (Ct. Cl. 1940), *aff'd*, 21 N.Y.S.2d 362 (3d Dep't); Baker v. State, 200 N.C. 232, 156 S.E. 917 (1931); State v. Johnson, 186 Wis. 1, 202 N.W. 191 (1925). The state character of the Guard in another phase was emphasized in the testimony of Maj. Gen. Milton A. Reckord, the Adjutant General of the Maryland National Guard, in opposing the Armed Forces Reserve Act of 1952, an effort to reorganize the reserve elements of the Armed Forces. He said that the Guard opposed the bill for several reasons, one of which was that "The bill as written is one more attempt to federalize the National Guard." *Hearings before a Subcommittee of the Senate Committee on Armed Services on H. R. 5426*, 82d Cong., 2d Sess. 114 (1952). The Senate Subcommittee denied having any such intent to alter the traditional place of the National Guard in our defense structure. SEN. REP. NO. 1795, 82d Cong., 2d Sess. 11 (1952).

7. In United States *ex rel.* Gillett v. Dern, 74 F.2d 485 (D.C. Cir. 1934), it was held that Congress had authority to determine the extent of the aid, support and assistance which shall be given the National Guard of the various states and the terms upon which it shall be granted without affecting the state character of the Guard.

8. It has been held that a Guardsman injured or killed in the line of duty, *e.g.*, on summer maneuvers, is entitled to recover from the state either under the workmen's compensation statute or by filing a claim in the state court of claims. Spence v. State, 159 Misc. 797, 288 N.Y. Supp. 1009 (Ct. Cl. 1936); Dicicco v. State, 152 Misc. 541, 273 N.Y. Supp. 937 (Ct. Cl. 1934); Baker v. State, 200 N.C. 232, 156 S.E. 917 (1931); State v. Johnson, 186 Wis. 1, 202 N.W. 191 (1925). See Hays v. Illinois Terminal Transportation Co., 363 Ill. 397, 2 N.E.2d 309, 311 (1936). But see Andrews v. State, 53 Ariz. 475, 90 P.2d 995 (1939); Goldstein v. State, 281 N.Y. 396, 24 N.E.2d 97 (1939).

9. For purposes of the Federal Tort Claims Act, an employee of the Government "includes . . . members of the military or naval forces of the United States. . . ." 62 STAT. 982 (1948), as amended, 63 STAT. 106 (1949), 28 U.S.C.A. § 2671 (1950).

10. 95 F. Supp. 213 (N.D. Ala. 1951).

11. All members of the Armed Forces, including National Guardsmen called to duty for 14 days or more shall be automatically insured by the United

further, that the Federal Government pays and equips the units.[12] It was not enough to confer jurisdiction that either the truck or the driver had been lent by the Army to the Guard.[13] The lack of significance of federal assistance was explained in the *Glasgow* case: "Not every person who accepts or is eligible to receive its bounty is an employee of the Government. In an era of subsidies and grants in aid, such a conclusion would be a complete non sequitur."[14]

Having determined that the National Guard remains a state organization regardless of benefits and assistance received from the Federal Government, it should be surprising to find the courts now having difficulty with the status of National Guard unit caretakers. The statute provides that funds appropriated for use of the National Guard may be used to hire caretakers. A caretaker may be an enlisted man of the National Guard or he may be a civilian. If he is such an enlisted man, his pay as caretaker shall be in addition to that which he is paid as a guardsman.[15] This provision, when read in context, appears to be one more section prescribing regulations to govern the operation of the National Guard. When taken as a whole, the laws of Congress have been held not to affect the state character of the Guard, and yet, the unit caretaker has been held to be an employee of the United States.[16] This finding is not easily arrived at since the caretaker is usually an enlisted Guardsman who has the additional duties of unit caretaker. In the *Holly* case, the criteria for determining Government liability was stated to be whether the tortfeasor was acting as a member of the National Guard or "as a caretaker of United States property as contemplated by the foregoing statutes."[17]

States without cost against death in the amount of $10,000. 65 STAT. 33 (1951), 38 U.S.C.A. § 851 (Supp. 1951). National Guardsmen if injured or killed while on active duty for any period shall be entitled to the same pensions, compensation awards, pay, allowances, and other benefits as are granted to Regular Army personnel of corresponding rank or grade. 63 STAT. 202 (1949), 32 U.S.C.A. § 160a (Supp. 1951).

12. For the fiscal year ending in June, 1953, Congress has appropriated $153,300,000 for the Army National Guard and $106,000,000 for the Air National Guard. Pub. L. No. 488, 82d Cong., 2d Sess. tit. II, V (July 10, 1952).

13. Mackay v. United States, 88 F. Supp. 696 (D. Conn. 1949).

14. Glasgow v. United States, 95 F. Supp. 213, 214 (N.D. Ala. 1951). "The mere fact that the United States government supplied the money and the equipment to carry on the training program did not take the enlisted guardsmen out of the control of the officers of the National Guard or make them any less agents of the state of New York." Dicicco v. State, 152 Misc. 541, 273 N.Y. Supp. 937, 939 (Ct. Cl. 1934).

15. 61 STAT. 501 (1947), 32 U.S.C.A. § 42 (Supp. 1951). The Army Regulations governing these caretakers are rather elaborate except that specific details are in most instances left to the state adjutant generals. The regulations are printed in United States v. Holly, 192 F.2d 221 (10th Cir. 1951).

16. Elmo v. United States, 197 F.2d 230 (5th Cir. 1952); United States v. Duncan, 197 F.2d 233 (5th Cir. 1952); United States v. Holly, 192 F.2d 221 (10th Cir. 1951). *Contra*: Williams v. United States, 189 F.2d 607 (10th Cir. 1951); Nietupski v. United States, Civ. No. 2095 (W.D. Wis.) (motion to dismiss granted on May 8, 1950).

17. United States v. Holly, 192 F.2d 221, 224 (10th Cir. 1951).

This seems to be a clean distinction and its application should not be too difficult. It narrows this type of case down to the single issue of exactly on whose business was the caretaker when he committed the tort. This distinction makes understandable the five cases that have covered the point thus far. In the *Williams* case, the caretaker, a sergeant in the Guard, told *X*, a minor, to wash a truck and prepare it for a National Guard inspection. *X* drove the truck negligently in the performance of this mission and killed plaintiff's decedent.[18] In the *Holly* case, which was decided against the Government, the caretaker was "carrying supplies, among other things anti-freeze solution, to be used by him in the performance of his duties as a caretaker of United States property." The caretaker hit the Holly car while on this mission.[19] The case was apparently decided on the ground that the caretaker was taking care of United States property at the time of the accident. In the *Duncan* case, the caretaker "was ordered by the Governor, acting through the Adjutant General of Texas, to make a trip to Camp Mabry, at Austin, Texas, for the purpose of receiving a vehicle for the Terrill unit."[20] The district court made the express finding that this act was performed by the soldier in his capacity of unit caretaker. The court of appeals specifically confirmed this finding.[21] The finding was not so inherently unreasonable or arbitrary as to merit a prolonged fight for reversal. Finally, in the *Elmo* case, we simply find that before trial in the district court, there was a stipulation that at the time of the accident, the soldier was acting within the scope of his employment as unit caretaker. The court of appeals pointed to this stipulation twice and never once mentioned that there was an agreed summary of testimony which demonstrated that at the time of the accident the soldier was on a regular trip as mail orderly for his National Guard unit.[22] The stipulation thus triumphed. These experiences should alert counsel in these cases, and, in the future, the fight over these findings will probably be decisive.

This tolerance of the *Holly* criterion is not to be taken as agreement as to its validity. The distinction there made was not at all necessary. In every case likely to arise it will be found that the caretaker, be he civilian or National Guardsman, is working under the direct supervision and control of a National Guard officer. Under such circumstances, the tortfeasor may be regarded as either an employee of the

18. Complaint, Williams v. United States, Civ. No. 2700 (E.D. Okla.)
19. Findings of Fact and Conclusions of Law, Holly v. United States, Civ. No. 2436 (N.D. Okla., Dec. 6, 1950). In the *Nietupski* case, decided for the Government, the caretaker was also on a mission of picking up supplies for his Guard unit. The *Nietupski* complaint alleged "in the course of his employment as a civilian employee of the United States National Guard. . . ."
20. Duncan v. United States, 96 F. Supp. 277 (N.D. Tex. 1951).
21. United States v. Duncan, 197 F.2d 233 (5th Cir. 1952).
22. Government's Brief, p. 47, Elmo v. United States, 197 F.2d 230 (5th Cir. 1952).

Guard or a federal employee lent[23] to the Guard who in both cases will be performing Guard business and in neither case should the torts of such a person render the Federal Government liable.[24]

23. See Fries v. United States, 170 F.2d 726, 731 (6th Cir. 1948) for discussion of the lent servant doctrine. The controlling case is Denton v. Yazoo & Mississippi Valley R.R., 284 U.S. 305, 52 Sup. Ct. 141, 76 L. Ed. 310 (1932), which distinguishes Standard Oil Co. v. Anderson, 212 U.S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480 (1909). See also Cobb v. United States, 81 F. Supp. 9 (W.D. La. 1948). The RESTATEMENT, AGENCY § 227 (1933) indicates that the rule is not self-operating but in comment *a* it declares that "the important question is . . . whether or not, as to the act in question, he is acting in the business of and under the direction of one or the other [masters]."

24. Since 1946 in all acts appropriating funds for the Department of the Army there have been funds provided for the payment by the Secretary of Defense of certain claims founded upon torts of National Guardsmen. In Title II of the Department of Defense Appropriations Act, 1953, funds are appropriated for the payment of "claims (not to exceed $1,000 in any one case) for damages to or loss of private property incident to the operation of Army and Air National Guard camps of instruction, either during the stay of units of said organizations at such camps or while en route thereto or therefrom." Pub. L. No. 488, 82d Cong., 2d Sess. tit. II, V (July 10, 1952).