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COMMENTS

THE FEDERAL TORT CLAIMS ACT AND ITS APPLICATION TO MILITARY PERSONNEL

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I. INTRODUCTION

The background and history of the Federal Tort Claims Act[1] are well known. Stemming in part from the medieval political theory that the King could do no wrong, a doctrine evolved in English law that the Crown was, in the absence of its consent, immune to suit.[2] This concept became a part of the American common law, and in the main was enforced as rigorously on this side of the Atlantic as in the mother country.[3]

The oft-times inequitable consequences of sovereign immunity in the United States were at first sought to be ameliorated through the device of private legislative enactments which appropriated monies for the relief of persons injured by the negligence of Government servants. With the constant increase and diversification of Governmental activity and the concomitant inevitable rise in the volume of injuries inflicted upon members of the public by Governmental employees, the machinery of the private bill

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1. The statute was enacted on August 2, 1946, as Title IV of the Legislative Reorganization Act of 1946, 60 STAT. 842-47; the provisions were embodied in 28 U.S.C. §§ 921-46 (1946). By Act of June 25, 1948, Title 28 was revised, codified and re-enacted in substantially its present form. It will be noted that §§ 2671 to 2680 comprise Chapter 171 of present Title 28 and are entitled "Tort Claims Procedure," whereas the other sections pertaining to tort claims are interspersed in Title 28 in §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411 and 2412. Any tort claim against the United States under 28 U.S.C.A. § 1346(b) (1949) "may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred." 28 U.S.C.A. § 1402(b) (1949). The general time limitation on suits for tort claims against the Government is two years after the accrual of the claim, 28 U.S.C.A. § 2401(b) (1949). No jury trial may be had in such a suit, 28 U.S.C.A. § 2402 (1949).

2. An enactment similar to our tort claims statute was passed a few years ago in England (Crown Proceedings Act., 1947, 10 & 11 GEO. 6, c. 44, § 2). For an excellent comparison of the American and British practices, see Street, *Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act,* 47 MICH. L. REV. 341 (1949). A history of the situation in this country prior to the Tort Claims Act is found in Anderson, *Tort and Implied Contract Liability of the Federal Government,* 30 MINN. L. REV. 133 (1946); and in Hudson, *The Federal Tort Claims Act,* 22 TULANE L. REV. 299 (1947). A good synopsis of the judicial construction of the statute is available in Note, *The Courts and the Federal Tort Claims Act,* 98 U. OF PA. L. REV. 884 (1950).

3. See, *e.g.,* Ickes v. Fox, 300 U.S. 82, 57 Sup. Ct. 412, 81 L. Ed. 525 (1937); Reeside v. Walker, 11 How. 272, 290, 13 L. Ed. 693 (1850); United States v. McLemore, 4 How. 286, 11 L. Ed. 977 (1846).

system began to break down. At best such a system had been cumbersome and unsatisfactory. Congress had no adequate investigatory facilities to ascertain the facts in a particular case, and the compensating of a claimant would often depend not on the merits of his cause but on the extent of the political and personal pressure he was able to exert. Therefore in 1946 Congress, which had already waived the immunity of the United States in connection with contract claims,[4] extended the waiver to tort actions.

The general plan of the Tort Claims Act is to give to the district courts exclusive jurisdiction of tort actions based on negligence claims against the United States for property damage, personal injury or death caused by an employee of the Government while acting within the scope of his office under circumstances where the United States, if a private person, would be responsible; liability is to be determined in accordance with the law of the place where the tortious act or omission occurred.[5] Power is given to the head of each federal agency or his designee to consider and dispose of any claim for damages of $1,000 or less,[6] and the Attorney General, with court approval, may arbitrate, compromise or settle any claim after the commencement of an action.[7]

It is proposed here to consider only one aspect of the Tort Claims Act, the phase relating to persons in the military service. Our concern is with the circumstances under which claims may arise against the United States by virtue of the activities of military personnel, and also with the situations wherein such personnel may themselves assert causes of action against the Government. The inquiry is, then, a two-fold one and embraces the activities of servicemen as agential tortfeasors and as the victims of torts committed by others in the government service.

II. STATUTORY PROVISIONS

The pertinent provisions of the Tort Claims Act relative to military personnel are as follows:

> ". . . the district courts . . . shall have exclusive jurisdiction of civil actions . . . for injury or loss of property, or personal injury or death caused by the negligent or

4. 28 U.S.C.A. § 1491 (1949).

5. 28 U.S.C.A. § 1346(2) (b) (1949). Congress was so desirous of eliminating the pestilence of private bills based on tort claims that it expressly provided that no such bills should be received or considered in the Senate or House. 60 STAT. 831 (1946).

6. 28 U.S.C.A. § 2672 (1949). Prior to the passage of the Tort Claims Act the Secretary of War or his designee was given power to settle claims arising out of the noncombatant activities of the War Department and Army within the United States. 57 STAT. 705 (1943). A similar act pertained to the Navy. 40 STAT. 704 (1918). See, Walker, *Administrative Settlement of Claims Under the Federal Tort Claims Act*, 9 OHIO ST. L.J. 445, 454, 455 (1948), and Note, *The Federal Tort Claims Act*, 42 ILL. L. REV. 344, 346, 347 (1947).

7. 28 U.S.C.A. § 2677 (1949).

> wrongful act or omission of any employee of the Government while acting within the scope of his office . . ."[8]
>
> "'Employee of the government' includes . . . members of the military or naval forces of the United States . . ."[9]
>
> "'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in line of duty."[10]
>
> "The provisions [of the act] . . . shall not apply to . . .
>
> (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war . . ."[11]

Thus it is clear that the Act was designed generally to cover claims arising out of the negligence of servicemen acting in the line of duty except such claims as came about through combatant activities in wartime. The statute is, however, silent as to the extent to which such persons may be plaintiffs in tort suits against the Government; at least it contains no express directions in that regard.

III. Claims by Third Parties Against the United States Arising Through Activities of Servicemen

A. *When is a Serviceman an "Employee of the government"?*

Since the United States is only responsible for the activities of such military personnel as are employees of the Federal Government, it becomes important to ascertain the meaning of that statutory phrase. This question arose in *Mackay v. United States*;[12] there plaintiff's automobile collided with a United States Government vehicle bearing an army registration number and driven by a member of the Maine National Guard. At the time of the collision the truck was being returned from Maine to the supply base of the Connecticut National Guard, having been borrowed by the Maine National Guard for use during a forest fire emergency. The district court found that, since the truck driver was "not in the active service of the United States," he was not an employee, and accordingly it granted summary judgment to the Government.[13] This holding was in accord with an earlier

8. 28 U.S.C.A. § 1346 (2) (b) (1949). Such intentional torts as assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit and interference with contract rights, are expressly excluded from the coverage of the Act. 28 U.S.C.A. § 2680(h) (1949).

9. 28 U.S.C.A. § 2671 (1949).

10. *Ibid.* Also important, of course, is 28 U.S.C.A. § 2674 (1949), which states: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

11. 28 U.S.C.A. § 2680 (1949). A judgment obtained against the United States under the Tort Claims Act is made a bar to an action against the Government employee. 28 U.S.C.A. § 2676 (1949).

12. 88 F. Supp. 696 (D. Conn. 1949).

13. *Id.* at 698.

decision of the Court of Appeals for the Sixth Circuit which had reached a similar result in respect to an accident involving an automobile owned by the United States Public Health Service and furnished to a local board of health.[14] It would appear, therefore, that the federal bench is reluctant to interpret the phrase "employee of the government" broadly and is not inclined to extend its meaning to doubtful situations. The problem is not completely resolved, however, and can be expected to recur in other contexts, as, for example, in connection with torts committed by active, inactive, organized and volunteer reserve personnel in their various types of training programs.

B. *What Constitutes "acting in line of duty"?*

Intimately related to the question of whether a particular serviceman is an employee of the Government is the problem of whether he is "acting in the line of duty," for it is only then that liability against the United States may attach. Here again a trend of strictness in interpretation may be discerned.

In *Clemens v. United States,*[15] an army private, for personal reasons, drove another soldier into St. Paul, Minnesota in an army automobile. This was a departure from the specified official route for the day and was in disobedience of orders. A district court found that under Minnesota law[16] the driver was not an agent of the United States, and hence the United States was not liable to a pedestrian who was struck by the vehicle while he was operating it. On the other hand, liability was imposed in a case where a soldier, under the authority of his commanding officer, conveyed military personnel in a Government-owned vehicle from the military post to town for their off-duty entertainment.[17] But again the usual strictness of approach came to the fore in a holding in the Fourth Circuit which absolved the Government from liability where a Marine Corps officer, traveling home on deferred leave prior to reporting at another base and driving his own automobile, collided with plaintiff's oncoming car; the officer was

14. Fries v. United States, 170 F.2d 726 (6th Cir. 1948) (applying Kentucky law), *cert. denied,* 336 U.S. 954 (1949).

15. 88 F. Supp. 971 (D. Minn. 1950) (applying Minnesota law).

16. The statute provided that in the operation of a motor vehicle "by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall . . . be deemed the agent of the owner of such motor vehicle in the operation thereof." MINN. STAT. ANN. § 170.54 (1946).

17. Murphey v. United States, 179 F.2d 743 (9th Cir. 1950), *reversing* 79 F. Supp. 925 (N.D. Cal. 1948). To the same effect is Hubsch v. United States, 174 F.2d 7 (5th Cir. 1949) (applying Florida law), *referred to the District Court for settlement,* 338 U.S. 440, 70 Sup. Ct. 225, 94 L. Ed. 244 (1949). *Cf.* United States v. Fotopulos, 180 F.2d 631 (9th Cir. 1950) (United States liable where driver of army truck was negligent in line of duty); State Farm Mut. Liability Ins. Co. v. United States, 172 F.2d 737 (1st Cir. 1949).

viewed as acting for his own use and benefit and not in the scope of his employment.[18]

Perhaps the most important case on the question of "line of duty" is *United States v. Campbell*.[19] There a woman was standing near a railroad station when she was negligently knocked down by a sailor who was running to board a troop train which was slowly moving out of the station. The Court of Appeals for the Fifth Circuit rejected the contention that the phrase "line of duty" in the Tort Claims Act was to be given the same liberal construction which opinions of the Attorney General had given it in connection with claims of military personnel *against* the Government in other situations. It was decided that the phrase must rather be construed to mean the same as "scope of employment" under the applicable state law. Because the decision is such a momentous one it is well to examine the exact language of the holding. The Court stated:

> "The whole structure and content of the Federal Tort Claims Act makes it crystal clear that in enacting it and thus subjecting the Government to suit in tort the Congress was undertaking with the greatest precision to measure and limit the liability of the Government, under the doctrine of respondeat superior, in the same manner and to the same extent as the liability of private persons under that doctrine were measured and limited in the various states. . . .
>
> "The attempt then to wrench the phrase . . . 'acting within the scope of his office or employment,' out of its context . . . and thus to give it a new and entirely different meaning, the greatly expanded one attributed to 'in line of duty,' when members of the armed forces themselves are claimants, is nothing more than an attempt to . . . have the tail wag the dog. Such a construction would be to give to the phrase 'within the scope of his office or employment' not one consistent meaning throughout the act, but two inconsistent meanings, one of these applying to acts of all government employees except members of the armed forces, would subject the United States to liability to third persons for acts of its employees only as and to the same extent that a person in private employment would be liable under the law of the state where the accident occurred. The other, applying to acts of military personnel would subject the Government to fantastic claims of liability having no relation to the doctrine of respondeat superior . . ."[20]

The intermediate appellate tribunal thereupon reversed the judgment which the district court had granted the plaintiff;[21] the Supreme Court refused

18. United States v. Eleazer, 177 F.2d 914 (4th Cir. 1949) (applying North Carolina law), *cert. denied*, 339 U.S. 903 (1950). A very similar case is Bach v. United States, 92 F. Supp. 715 (S.D.N.Y. 1950). The same problem arose in Rutherford v. United States, 73 F. Supp. 867 (E.D. Tenn. 1947), *aff'd* 168 F.2d 70 (6th Cir. 1948) (United States not liable for injury inflicted by Navy petty officer while driving his automobile home from radio station where he had broadcast a naval recruting program). See also Cropper v. United States, 81 F. Supp. 81 (N.D. Fla. 1948); *cf.* Burton v. United States, 90 F. Supp. 957 (M.D. Ala. 1950) (employee of Veteran's Administration held to be acting in line of duty while driving vehicle belonging to the Administration).

19. 172 F.2d 500 (5th Cir. 1949), *cert. denied* 337 U.S. 957 (1949). *Cf.* Stewart v. United States, 186 F.2d 627 (7th Cir. 1951), *cert. denied*, 341 U.S. 940 (military authorities' failure to comply with Illinois statutory requirements for storing explosives renders United States liable for injuries received by children from explosion of grenade); and United States v. Chicago, R.I. & P. Ry., 171 F.2d 377 (10th Cir. 1948).

20. 172 F.2d at 503.

21. 75 F. Supp. 181 (E.D. La. 1948).

certiorari, which, while it cannot, of course, be taken as an indication of the highest court's agreement with the reasoning of the decision,[22] may possibly at least demonstrate that the supreme bench was not so disturbed by the holding as to see fit to review it.[23]

The *Campbell* decision was followed in a later case in the same circuit disallowing liability when it appeared that an Air Force cadet left an army post, got drunk, returned, and without authority took off in an airplane which later crashed into plaintiff's house.[24] Thus it appears clear that the courts are disposed to require a definite showing by a plaintiff that the serviceman was acting within the scope of his employment and are not prone to give any different meaning to the phrase "line of duty" than they would give to the employment concept in a suit between private litigants.[25]

C. *What Is a "claim arising out of the combatant activities" of the Services?*

As already noted, the statute specifically excludes any liability for claims arising out of combat activities of the military arm.[26] Perhaps because of the

22. The denial of a petition for a writ of certiorari simply meant that "fewer than four members of the Court deemed it desirable to review [the] decision of the lower court as a matter 'of sound judicial discretion.'" Maryland v. Baltimore Radio Show, 338 U.S. 912, 917, 70 Sup. Ct. 252, 94 L. Ed. 562 (1950).

23. The court of appeals in the *Campbell* case was most disturbed at the "so-called liberal, but really radical" construction placed on the "line of duty" phrase in connection with claims by military personnel against the Government. 172 F.2d 500, 502 (5th Cir. 1949).

24. King v. United States, 178 F.2d 320 (5th Cir. 1949), *cert. denied*, 339 U.S. 964 (1950); *cf.* D'Anna v. United States, 181 F.2d 335 (4th Cir. 1950) (res ipsa loquitur applicable where auxiliary gas tank fell from naval airplane and justified finding of liability on the part of the United States).

25. A novel case dealing with the extent to which claims may be created against the United States is Aktiebolaget Bofors v. United States, 93 F. Supp. 131 (D.D.C. 1950), where it was held that the owner of a secret process for manufacturing an anti-aircraft gun who granted the United States an exclusive license to make such gun "for the United States use" could not maintain a suit under the Tort Claims Act based on the United States' conduct in furnishing the gun to allied and friendly powers. See also Fulmer v. United States, 83 F. Supp. 137 (N.D. Ala. 1949). As to the liability of the Government for acts of prisoners of war, see Nicholson v. United States, 177 F.2d 768 (5th Cir. 1949).

The interesting problem of when the Government's negligence must take place in order to create liability has recently been considered in Carnes v. United States, 186 F.2d 648 (10th Cir. 1951), a decision which may open up new visitas of liability. 28 U.S.C.A. § 1346 (1949) provides for the district courts to have jurisdiction over "claims . . . accruing on and after January 1, 1945. . . ." The *Carnes* case, involving injuries sustained by a 14-year old boy as the result of an explosion on February 2, 1945 of a device which he had picked up in 1944 in the wreckage of an Army airplane, held that the claim accrued when the explosion happened and not when the Government's negligence occurred, and hence was cognizable under the act. *Cf.* Ryan Stevedoring Co. v. United States, 175 F.2d 490 (2d Cir. 1949), *cert. denied*, 338 U.S. 899 (1949); Jordan v. United States, 170 F.2d 211 (5th Cir. 1948); Perry v. United States, 170 F.2d 844 (6th Cir. 1948).

As to the right of an insurance company as subrogee to maintain an action under the Tort Claims Act for the amount paid an insured for destruction of a dwelling due to negligent operation of a military airplane, see National American Fire Ins. Co. v. United States, 171 F.2d 206 (9th Cir. 1948). See also United States v. Aetna Casualty

relative unambiguity of this phrase the litigation involving its interpretation has not been particularly extensive. A case worthy of comment, however, is *Johnson v. United States*.[27] There, after the termination of hostilities with Japan, naval cargo ships previously used to supply combat vessels with ammunition at sea were placed in Discovery Bay, State of Washington, to await consignment to other ports for unloading. Such vessels polluted waters of the bay by discharging oils and sewage, and damaged plaintiffs who were owners of a clam farm. It was held that the phrase "combat activities" connoted the physical violence of war and activities in connection with actual hostilities but did not embrace actions, such as the pollution in question, which occurred after the end of the fighting.[28] This decision evinces a liberality of interpretation which is rather unusual in the face of the apparent strictness already noted in other areas.

IV. Claims by Servicemen Against the United States

The other side of the liability coin is the question of under what circumstances a member of the armed forces can sue the United States for injuries sustained. Thus far we have been considering the creation of liability on the part of the Government by reason of the actions of servicemen, and now we take up the converse situation. In this connection two decisions of the United States Supreme Court are of critical importance.

& Surety Co., 338 U.S. 366, 70 Sup. Ct. 207, 94 L. Ed. 171 (1949); Old Colony Ins. Co. v. United States, 168 F.2d 931 (6th Cir. 1948); Employers' Fire Ins. Co. v. United States, 167 F.2d 655 (9th Cir. 1948).

26. 28 U.S.C.A. § 2680(j) (1949).

27. 170 F.2d 767 (9th Cir. 1948).

28. See also Troyer v. United States, 79 F. Supp. 558 (W.D. Mo. 1947), *appeal dismissed*, 170 F.2d 480 (8th Cir. 1948); Perucki v. United States, 80 F. Supp. 959 (M.D. Pa. 1948); Skeels v. United States, 72 F. Supp. 372 (W.D. La. 1947). The *Skeels* case is important for its reasoning, which is particularly pertinent in the light of the near state of war now existing. There the injury occurred while the army was engaged in target practice with its planes. A piece of pipe fell from either an airplane or a target, striking deceased who was fishing in a boat in the Gulf of Mexico. It was held that, even though the United States was at war with Japan at the time, this was not an injury arising out of the "combatant activities" of the military and thus was not excluded from coverage under the act.

A somewhat analogous problem of interpretation arises in connection with the exclusion of coverage under 28 U.S.C.A. § 2680(k) (1949) of "Any claim arising in a foreign country." The implications of that phrase are illustrated by a case barring recovery for accidental death at a Newfoundland air base leased from Great Britain, United States v. Spelar, 338 U.S. 217, 70 Sup. Ct. 10, 94 L. Ed. 3 (1949), 19 Ford L. Rev. 228 (1950). See Cobb v. United States, 91 F. Supp. 717 (N.D. Cal. 1950); and Brewer v. United States, 79 F. Supp. 405 (N.D. Cal. 1948), applying the same rule to the island of Okinawa under United States military domination; Straneri v. United States, 77 F. Supp. 240 (E.D. Pa. 1948), reaching a similar result in regard to Belgium while under United States military occupation; and Brunell v. United States, 77 F. Supp. 68 (S.D.N.Y. 1948), holding an analogous principle applicable to the island of Saipan when under trusteeship granted by the United Nations. See also Boyce v. United States, 93 F. Supp. 866 (S.D. Iowa 1950) (dealing with "discretionary function" exception of statute in case involving Corps of Engineers of the Army), and see Note, *"Discretionary Function" Exception under the Federal Tort Claims Act*, 45 Ill. L. Rev. 791 (1951); *cf.* Dishman v. United States, 93 F. Supp. 567 (D.Md. 1950).

In the first of these, *Brooks v. United States*,[29] an automobile in which two servicemen were riding, not in the performance of their duties, was struck at a highway intersection by an army truck, thereby causing the death of one and the injury of the other. The circumstances were such that in the case of persons not members of the armed forces there would have been a right of action under the Tort Claims Act. It was held by seven justices of the court[30] that the fact that the injured persons were members of the armed forces did not preclude the maintenance of their action; it was, however, intimated that the damages recoverable should be reduced by the amount payable to the claimants under servicemen's benefit laws.[31]

The latest Supreme Court case in point, *Feres v. United States*,[32] involved the situation which was expressly left undecided by the highest tribunal in the *Brooks* case—that is, where the serviceman's injury was sustained as "incident to the service." The *Feres* case was actually composed of three decisions from three different circuits. In one case decedent perished by fire at Pine Camp, New York, while on active duty, and negligence was alleged in quartering him in unsafe barracks. In the second a towel was asserted to have been negligently left in plaintiff's abdomen by an army doctor who had performed an operation upon him. In the third it was alleged that plaintiff met death while on active duty because of unskillful treatment by army surgeons. The common theme underlying all three situations was that each serviceman, while on active duty and not on furlough, sustained injury allegedly due to negligence of others in the armed forces. The Supreme Court, speaking through Justice Jackson, unanimously concluded[33] that no recovery could be had in any of the cases. The Court said: "We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving."[34] It then went on to point out that the relationship between

29. 337 U.S. 49, 69 Sup. Ct. 918, 93 L. Ed. 1200 (1949), 10 LA. L. REV. 94. A trenchant criticism of the circuit court decision in the *Brooks* case is found in Note, 58 YALE L.J. 615 (1949). See also Blanton, *The Federal Tort Claims Act in Action*, 53 DICK. L. REV. 163, 168-71 (1949); Notes, 44 ILL. L. REV. 212, 221 (1949), 27 TEXAS L. REV. 807, 814-816 (1949); 35 CORNELL L. Q. 233 (1949); 11 LA. L. REV. 125 (1950); 48 MICH. L. REV. 534 (1950), 28 N.C.L. REV. 137 (1949); 28 NEB. L. REV. 614 (1949).

30. Justices Frankfurter and Douglas dissented. They wrote no opinions but indicated their dissents were substantially for the reasons set forth in the opinion of Judge Dobie below. 169 F.2d 840 (4th Cir. 1948). See also Samson v. United States, 79 F. Supp. 406 (S.D.N.Y. 1947) (action maintainable by Army private injured on War Department bus); and Alansky v. Northwest Airlines, 77 F. Supp. 556 (D. Mont. 1948) (action maintainable by officer killed in crash of airplane owned by the United States; crash occurred while he was being transported prior to discharge).

31. Such benefit laws include 38 U.S.C.A. § 701 (Supp. 1950), and 10 U.S.C.A. § 903 (Supp. 1950). See also Costley v. United States, 181 F.2d 723 (5th Cir. 1950) (soldier's wife injured by negligence at army hospital); *cf.* Denny v. United States, 171 F.2d 365 (5th Cir. 1948), *cert. denied*, 337 U.S. 919 (1949).

32. 340 U.S. 135, 71 Sup. Ct. 153, 95 L. Ed. 134 (1950).

33. Mr. Justice Douglas concurred in the result.

34. 340 U.S. at 141 (1950). *Cf.* Dinsman v. Wilkes, 12 How. 390, 13 L. Ed. 1036 (1851); Weaver v. Ward, Hob. 135, 80 Eng. Rep. 284 (K.B. 1616).

members of the armed forces and the Government was "distinctively federal in character"[35] and in no wise the same as any relationship between private litigants; the court also took pains to show that the compensation payable to injured servicemen under various benefit laws[36] was not niggardly. The *Brooks* case was distinguished on the basis that there the injury did not arise out of or in the course of military duty.[37]

V. Summary and Conclusions

This brief study of some of the problems which have arisen in respect to servicemen during the first five and a half years of the administration of the Tort Claims Act does not, of course, purport to be exhaustive. The fire has been selective rather than broadside, and the effort has been only to sketch in broad sweep some of the questions which have confronted the courts. The Act is still in its infancy, and it would be premature to state anything more than tentative conclusions as to what has occurred. Thus this discussion seeks to pose problems rather than to offer solutions.

With this *caveat* in mind a few observations may be made. It appears that the courts have been quite strict in their interpretation of the Act both as to claims arising against the United States by virtue of the activities of servicemen and as to claims pressed by military personnel against the Government. With respect to claims against the Government, litigants seem to be experiencing considerable difficulty in establishing that the claim arose out of the serviceman's employment. The phrase "in the line of duty" has been regarded as synonomous with the common law concept of agency[38] and unless the situation is such as would create a common law cause of action between private litigants it will not create a liability against the United States. What fact situation will make the serviceman an agent acting on behalf of the Government must be determined by reference to the applicable state

35. United States v. Standard Oil Co., 332 U.S. 301, 67 Sup. Ct. 1604, 91 L. Ed. 2067 (1947).

36. See, for example, the provisions of the statutes mentioned at note 31 *supra*. Compare the somewhat different reasoning in Wham v. United States, 180 F.2d 38 (D.C. Cir. 1950) (member of District of Columbia police force not precluded from recovering under Tort Claims Act beeause he received benefits from police and firemen's relief fund), and United States v. Wade, 170 F.2d 298 (1st Cir. 1948).

37. A result similar to the *Feres* case was reached by the New York Court of Appeals in Goldstein v. New York, 281 N.Y. 396, 24 N.E.2d 97 (1939) with reference to a soldier in the state militia. Some have argued for an extension of the *Brooks* case, however. See, *e.g.*, Note, *Recovery for "Service-Incident" Injuries under the Federal Tort Claims Act*, 50 Col. L. Rev. 827, 833 (1950).

38. Some of the commentators had supposed that the phrase "line of duty" would receive a broader interpretation than the common law notion of "scope of employment". See, *e.g.*, Street, *Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act*, 47 Mich. L. Rev. 341, 355 (1949) and Note, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 540 (1947). It would now appear that such is not to be the ease.

law of negligence and agency, and the courts will not strain to bring a claim within the Act.

When a serviceman asserts a claim for negligence it must appear that the injury suffered did not result as an incident of his military duties. If his injury is traceable to such duties he will be precluded from recovery under the Act and will be relegated to the remedies given by the various veterans' benefit statutes.

In summary it can be said that the courts are moving forward slowly and thoughtfully in this new and uncharted area. No novel or startling principles are being put forward; rather is reliance being placed on established rules of the common law. In doubtful cases recovery against the Government is being disallowed. The panorama of liability is not yet clear but it is evolving, and in the next few years we can expect many decisions which gradually will demarcate the metes and bounds of this field. In essence what we are witnessing is an illustration of the familiar and changeless common law growth pattern pressing forward and "making haste slowly" in a new area of the law.

This relatively slow movement of the courts has evoked the ire of some; it has been said, for example, that "Frequent reiteration of the much-criticized maxim that 'statutes in derogation of sovereign immunity must be strictly construed' serves to rationalize the courts' refusal to accept Congress' repudiation of immunity at its broad face value."[39] As this review of the cases has demonstrated, undeniably there is some basis for this criticism. The lower courts particularly have evinced a tendency towards restricting the base of liability in areas where broadening would perhaps have been more desirable. Yet we should not be too quick to judge nor too harsh in our judgment. "A vast new field of litigation in the Federal Courts has been opened by the Federal Tort Claims Act. Few cases have been decided under the Act, and each factual situation presents novel and difficult problems as to the construction and application of the Act."[40] It cannot be expected that miracles of enlightened construction will happen in every case, and allowances for errors must be made as the courts carefully thread their way through the language of the statute.

In conclusion it may be hoped that courts will remember that this Act is a new chapter in the law of torts, a chapter which represents a recognition that it is a desirable and necessary thing in our modern complex economy to spread the economic loss from accidents, which would be catastrophic to the

39. Note, 58 YALE L.J. 615 (1949).

40. Chief Judge Watson in Perucki v. United States, 80 F. Supp. 959, 960 (M.D. Pa. 1948).

individual, over the community as a whole. Liberality in interpretation should be the aim. A good guide is the statement by the Chief Justice of the Supreme Court in *United States v. Aetna Casualty and Surety Co.*[41] "In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement . . . '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.' "

41. 338 U.S. 366, 383, 70 Sup. Ct. 207, 94 L. Ed. 171 (1949). See also Tooze, *Uncle Sam—A Tort-Feasor,* 29 ORE. L. REV. 245 (1950).