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The Federal Tort Claims Act and Its Construction

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NOTES

THE FEDERAL TORT CLAIMS ACT AND ITS CONSTRUCTION

The Federal Tort Claims Act,[1] representing the greatest waiver of the federal government's immunity from suits for the tortious conduct of its employees, has now been evolved by three years of litigation. As can be expected in the wake of any such novel legislation, problems have arisen to which the translations given the terms of the Act by the courts have not been in harmony. A review of such problems and the principles governing their determination can best illustrate the treatment the Act has received since its enactment.

Passage of the Act was prompted by the desire of Congress to free itself from the flood of private claims bills which had been the only means of satisfying tort claims against the government.[2] Seemingly, it places the government in the

1. 60 Stat. 843 (1946), 28 U.S.C. sec. 921 et seq. (Supp. 1948). New Title: 62 Stat. 992 (1948), 28 U.S.C. secs. 1291, 1346b, 1402, 1504, 2110, 2402, 2411, 2412, 2671-2680. The revision of Title 28 has effected several changes in the wording of the Act, but the substance has not been changed. Reference will hereafter be made to the newly revised Judicial Code.
2. The Legislative Reorganization Act of August 2, 1946, of which the Tort Claims Act is a part, is "An Act to provide for increased efficiency in the legislative branch of the government," 60 Stat. 812 (1946). See, Burkhardt v. United States, 165 F. (2d) (C. C. A. 4th 1947); Samson v. United States, 79 F. Supp. 406 (S.D.N.Y. 1947).

same class and under the same rules with a private litigant who submits his claims to a court of justice, and thus reflects the highest sense of American concepts of justice.

Waiver of immunity is accomplished by granting to the district courts exclusive jurisdiction of "civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[3] The comprehensive terms of the Act also provide for venue,[4] appeals,[5] trial without jury,[6] interest,[7] costs,[8] time for commencing actions,[9] definitions of terms,[10] administrative agency settlement of claims for less than $1,000,[12] withdrawal of claims from administrative determination,[13] barring of action against the employee,[14] compromise of a claim,[15] attorney's fees,[16] exclusiveness of remedy,[17] applicability of the Federal Rules of Civil Procedure,[18] and twelve exceptions to the coverage of the Act.[19]

Although as enacted the Tort Claims Act referred to "any claims,[20] founded on tort against the United States, the claims of servicemen[21] and claims of insurers[22] who had become subrogated to the rights of the insured were rejected as not being within the construction accorded the Act by some of the courts presented with such claims.

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3. 28 U.S.C. sec. 1346b.
4. 28 U.S.C. sec. 1406b.
5. 28 U.S.C. sec. 1291, 1504, 2110.
6. 28 U.S.C. sec. 2402.
7. 28 U.S.C. sec. 2411.
8. 28 U.S.C. sec. 2412.
9. 28 U.S.C. sec. 2401.
10. 28 U.S.C. sec. 2671.
11. 28 U.S.C. sec. 2672.
12. 28 U.S.C. sec. 2674.
13. 28 U.S.C. sec. 2675b.
14. 28 U.S.C. sec. 2676.
15. 28 U.S.C. sec. 2677.
16. 28 U.S.C. sec. 2678.
17. 28 U.S.C. sec. 2679.
18. 28 U.S.C. sec. 2072.
19. 28 U.S.C. sec. 2680.
20. 28 U.S.C. sec. 1346b, formerly 28 U.S.C. sec. 931, which was worded, " . . . any claim against the United States . . . etc."
21. Jefferson v. United States, 77 F. Supp. 707 (D.C.Md. 1948) aff'd, 78 F. (2d) 518 (1949; Troyer v. United States, 79 F. Supp. 558 (W.D. Mo. 1947); United States v. Brooks, 169 F. (2d) 840 (C. A. 4th 1948), rev'd, 69 Sup. Ct. 918 (1949).
22. United States v. Hill, 171 F. (2d) 404 (C. A. 5th 1948); Cascade County v. United States, 75 F. Supp. 850 (D. C. Mont. 1948); Gray v. United States, 77 F. Supp. 896 (D. C. Mass. 1948); rev'd, 172 F. (2d) 737; Rusconi v. United States, 74 F. Supp. 669 (S. D. Calif. 1947), rev'd, 167 F. (2d) 655 (C. A. 9th 1948); Old Colony Insurance Co. v. United States, 74 F. Supp. 723 (S. D. Ohio 1947), rev'd, 168 F. (2d) 931 (C. A. 6th 1948); Bewick v. United States, 74 F. Supp. 730 (N. D. Tex. 1947).

The controversy as to the rights of servicemen under the Act has reached the Supreme Court which, in *United States v. Brooks*,[23] held that claims of servicemen not incident to their service are within the Act's coverage. In deciding the first case to reach it under the Tort Claims Act, the Court said, "The statute's terms are clear. They provide for District Court Jurisdiction over any claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.' The statute contains twelve exceptions . . . Without resorting to an automatic maxim of construction, such exceptions make it clear to us that Congress knew what it was about when it used the term 'any claim.' It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain. . . . When the present Tort Claims Act was first introduced, the exception concerning the servicemen had been dropped. . . . Provisions in other statutes for disability payments to thier survivors . . . indicate no purpose to forbid tort actions under the Tort Claims Acts."[24]

In the *Brooks* case two brothers, soldiers in the United States Army, on leave, were injured in a collision between the automobile in which they were riding and an Army truck driven by a civilian employee of the Army. The Court of Appeals had held[25] that the brothers were precluded from recovering under the Act on the theory that there is provision elsewhere for compensation of servicemen's injuries which the plaintiffs had already resorted to. The Supreme Court remanded the case to the Court of Appeals for its consideration of the problem of reducing the damages obtained in the tort action as there was no indication that Congress meant to pay twice for the same injury; and the Court also specifically declined to announce an election of remedies doctrine.

The court avoided expressing an opinion on accidents incident to military service. However, other cases[26] have denied service-connected claims arising under the Public Vessels Act because of the provision of compensation elsewhere for the injury sustained. Such a service-connected claim was also rejected under the Tort Claims Act in *Jefferson v. United States*[27] in which case the plaintiff sued to recover for injuries caused by the negligence of an army surgeon in leaving a bath-towel in the plaintiff's stomach after an operation. The Court of Appeals in its decision of the *Brooks* case said, "We are quite unable to find in the Act anything which would justify us in holding that Congress intended to include death of, or injury to, a soldier, which was not service-caused (the instant case) and to exclude service-caused injury or death (the Jefferson

23. Brooks v. United States, 337 U.S. 49, 69 Sup. Ct. 918 (1949); cf. Alansky v. Northwest Airlines, 77 F. Supp. 556 (D. C. Mont. 1948).

24. Id. at 919,920.

25. United States v. Brooks, supra note 21.

26. Jefferson v. United States, supra note 21; Brady v. United States, 151 F. (2d) 742 (C. C. A. 2d 1945); Dobson v. United States, 27 F. (2d) 807 (C. C. A. 2d 1928). The latter two cases barred a suit by a member of the armed forces under the Public Vessels Act, March 3, 1925, sec. 1-10, 46 U.S.C.A. secs. 781-790.

27. Supra note 21.

case)."[28] The Supreme Court's justification for the distinction is that the government's fears of the tort actions that would arise from such accidents as "a battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury"[29] would have point in reflecting a purpose to leave injuries incident to service where they were, despite literal language to the contrary.

Inasmuch as the Tort Claims Act expressly repealed the Military Personnel Claims Act of July 3, 1943,[30] which authorized the Secretary of War to adjust claims of servicemen up to $1,000 when the claims were not incident to their service, the Act could be said to be intended to replace this remedy for claims not incident to service, and thus further substantiate the Court's distinction, which also had been made by a lower court[31] in allowing a serviceman's tort claim under the Act. The decision in the *Brooks* case has been subsequently treated in *Feres v. United States*[32] as a recognition of an exception, as to situations where the military personnel were not on active duty, to the interpretation of the statute that military personnel are no within the provisions of the Tort Claims Act because the provisions for compensation under other acts indicate that Congress would not have left such relief to be implied from the general terms of the Tort Claims Act, but would have specifically provided for it.

But such an interpretation is apparently contra to the afore quoted statement of the Court in the *Brooks* case that provisions in other statutes for disability payments to their survivors indicate no purpose to forbid tort actions under the Tort Claims Act. Either construction should apply with equal force to both service-connected injuries and those not service-connected. Although provisions have been made elsewhere for compensation of Federal employees, they have not been barred under the Act. Instead they are granted an election of remedies.[33] Inasmuch as the Act defines "employee" as a member of a federal agency or a member of the military or naval forces, it is difficult to see why the courts should have ever gone beyond the clear wording of the Act in the case of servicemen's claims to bar such actions and to not do so in the case of civilian employees although the same objection to allowance of the claim could have been made. Only as the actual situations arise can the distinction be clarified by the courts, but for the present the door is kept open to avoid an outlandish result in determining the claims of servicemen. However, in view of the divergent interpretations reached by able judges as to Congress' intent, it would seem that some Congressional action would be in order to settle servicemen's rights under the Act.

The claims pressed against the government by insurers subrogated to the

28. 169 F. (2d) at 845.
29. Supra note 23 at 920.
30. 60 Stat. 846 (1946).
31. Samson v. United States, supra note 2.
32. 177 F. (2d) 535 (C. A. 2d 1949); contra, Griggs v. United States, 178 F. (2d) 3 (C.A. 10th 1950).
33. Parr v. United States, 172 F. (2d) 462 (C.A. 10th 1949); White v. United States, 77 F. Supp. 316 (D.C. N.J. 1948).

rights of their insured were at first denied[34] by the courts on the basis that a statute waiving sovereign immunity must be strictly construed and the claimant must bring his action within the exact statutory description, or on the basis that the Anti-Assignment Act bars such claims. However, the majority of the Courts of Appeal that have considered the question allow such claims.[35] In *United States v. Aetna Casualty & Surety Co.*[36] the Supreme Court upheld the right of the insurers to sue under the Act by holding that since subrogation occurs by operation of law rather than by act of the parties, the Anti-Assignment Act is inapplicable. The Court also rejected the argument that statutes waiving sovereign immunity must be strictly construed.

Procedural problems have also arisen in attempting to treat the liability of the United States as that of a private person. The courts are at a variance as to whether the Act permits the United States to be joined as a pary defendant with a private person as a joint tort-feasor. In the first case involving the problem, *Englehardt v. United States*,[37] joinder was allowed over the objections of the private person joined. The government had contended that the Act should not be construed to restrict the jurisdiction of the court to the cases where the United States alone is the defendant, particularly since the court was granted jurisdiction in instances where the United States, if a private person, would be liable to the plaintiff for damages, in accordance with the law of the place where the act or omission occurred. Accordingly, the court did adopt the government's contention and also pointed out the pecuniary interest of the United States to have the individual defendant retained as a joint tort-feasor so that the right of contribution between the joint defendants may be preserved where it exists in accordance with the local law.[38] *Sherwood v. United States*,[39] not allowing joinder under the Tucker Act,[40] was distinguished on the basis of different grants of jurisdiction in the two Acts. Instead reference was made to the common practice of joinder of tort-feasors under the Suits in Admiralty Act,[41] its jurisdiction being considered more analgous to the Tort Claims Act. The Tucker Act grants original jurisdiction concurrently to the Court of Claims and the District Courts of claims founded on any contract with the United States or for damages in cases not sounding in tort. Since the Court of Claims sits without a jury, the District Courts must exercise similar procedures as to its jurisdiction

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34. Supra note 22.
35. Chicago R. I. and P. Ry. Co. v. United States, 171 F. (2d) 377 (C.A. 10th 1949); Employer's Fire Insurance Co. v. United States, 167 F. (2d) 655 (C.A. 9th 1948); Old Colony Insurance Co. v. United States, 168 F. (2d) 931 (C.A. 6th 1948); Yorkshire Insurance Co. v. United States, 171 F. (2d) 374 (C.A. 3d 1948); Aetna Casualty and Surety Co. v. United States, 170 F. (2d) 469 (C.A. 2d 1948). Contra, United States v. Hill, supra note 22. See Note (1949) 3 Wyo. L.J. 235.
36. —U.S.—, 70 Sup. Ct. 207 (1949).
37. 69 F. Supp. 451 (D.C. M. 1947); accord, Bullock v. United States, 72 F. Supp. 445 (D.C. N.J. 1947).
38. Maryland had provided by statute for contribution between joint tort-feasors. Englehardt v. United States, supra note 36 at 452.
39. 312 U.S. 584, 61 Sup. Ct. 767, 85 L.Ed. 1058 (1941) (waiver of sovereign immunity must be strictly construed).
40. 24 Stat. 505 (1887), 28 U.S.C.A. sec. 41 (20) (1927). New Title: 28 U.S.C. secs. 1346, 2401, 2402.
41. 41 Stat. 525 (1920); 46 U.S.C.A. sec. 742 (1944).

under the Tucker Act, thus a private person would be deprived of the right of jury trial if joinder were allowed to bring him into a suit under the Tucker Act. But under the Tort Claims Act, the Court of Claims has appellate jurisdiction only, the District Courts exercising original jurisdiction with a jury available for private litigants.

The court also noted that the Tort Claims Act specifically provides[42] that procedure under the Act should be in accordance with the Federal Rules of Civil procedure which authorize joinder as well as the ordering of separate trails.[43] Thus, if a jury is claimed for the individual defendant joined, only a trial problem is presented. The claim against the United States must be decided by the judge, but he and a jury called to determine the claim against the private defendant could hear together the evidence presented at the one trial with the jury making its own decision as to the private person's liability. Thus, duplicitous suits in the same court with the same evidence being presented would be avoided. Such a treatment of the problem would fulfill one of the objectives of the Rules, to expedite the final determination of litigation by inclusion in one suit all parties directly connected therein.

Respectable authority to the contrary[44] can be found which relies in part upon the legislative history of the Act. In commenting upon a similar proposed bill containing identical provisions to the Tort Claims Act, a House committee stated that joinder was not allowed.[45] The *Sherwood* case is also cited as controlling, and two of the courts [46] bolstered their decision by stating that the Act must be construed strictly since it is a waiver of soverign immunity.

It would seem that if the court has jurisdiction over the plaintiff's tort claim against the individual tort-feasor on independent grounds of the usual diversity of citizenship and jurisdictional amount of $3,000, it could properly allow the joinder of the United States as a party defendant when common questions of law and fact are involved.[47] Not to do so is seemingly contrary to the declaration of Congress that the government shall be liable as a private person and that the broad and liberal Federal Rules shall apply to claims under the Act.

An amendment to a complaint was denied in one instance[48] on the theory that the Act must be strictly construed. The original complaint had erroneously set out the claimed amount, and as a result it was said the complaint had been a nullity since the time of its filing. Since the one year limitation period for

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42. Supra note 18.
43. Federal Rules of Civil Procedure, Rule 42.
44. Drummond v. United States, 78 F. Supp. 730 (E.D. Va. 1948); Donovan v. McKenna, 80 F. Supp. 690 (D.C. Mass. 1948); Uarte v. United States, 7 F.R.D. 705 (S.D. Calif. 1948).
46. Donovan v. McKenna and Uarte v. United States, supra note 44.
46. Donovan v. McKenna and Narte v. United States, supra note 44.
47. See Wasserman v. Perugini, 173 F. (2d) 305 (C.A. 2d 1949).
48. Franzino v. United States, 83 F. Supp. 10 (D.C. N.J. 1949).

commencing an action had expired, the court would not entertain further proceedings. However, other courts have liberally allowed amendments within the spirit of Rule 15.[49]

On another procedural point, it was held [50] that the Tort Claims Act placed the government on a par with a private litigant and that the government could not assert a privilege arising under statute to protect documents in the files of the Department of Justice. Furthermore, the procedural consequences under the Rules for failure to grant the discovery asked by the plaintiffs would apply as Congress had accepted them by its action.

50. Wunderly v. United States, 8F.R.D. 356 (E.D. Penn. 1948).

The courts have applied the substantive law of the place, as specified in the Tort Claims Act,[51] in determining liability, but have rejected state doctrines or statutes providing for absolute liability of the owner of a car regardless of whether or not the driver was acting as an agent at the time of the act.[52] The usual rules of respondeat superior are applied[53] in determining the government's liability for the negligent acts or omissions of civilian employees, and such rules have also been held[54] to limit the government's liability for the tortious conduct of military personnel although the Act provides that " 'acting within the scope of his office or employment' . . . means acting in the 'line of duty'."[55] In so holding, the court pointed out that under the liberal intrepretations given the term "line of duty" in the past, the tort of the serviceman would fall within its meaning. However, such interpretations had little relationship to concepts of respondent superior which, the court said, the whole structure of the Act indicated were to govern the government's liability. Accordingly the claim was denied because the serviceman was not acting within the scope of his employment as determined by the usual agency rules.

The divergent results reached by the courts in construing the terms of the Federal Tort Claims Act have been partially due to the influence of the common-law doctrine of strict construction of a waiver of sovereign immunity. Nevertheless, the predominant trend of the decisions has been to disregard the doctrine. Illustrative of the trend is the comparison of decisions of the same Court of Appeals. As late as 1944 in a case under the Tucker Act, the court reluctantly followed the rule of strict construction as established by precedent.[56] When presented with a case under the Tort Claims Act it said that the policy

49. Bay State Crabmeat Co. v. United States, 78 F. Supp. 131 (D.C. Mass. 1948); Petrizzo v. United States, 8 F.R.D. 367 (D.C. Conn. 1948).
51. Supra note 3; see Burkhardt v. United States, 70 F. Supp. 982 (D.C. Md. 1947); rev'd. 165 F. (2d) 869; Van Wie v. United States, 77 F. Supp. 22 (N.D. Iowa 1948); Bickley v. United States, 77 F. Supp. 454 (E.D. S.C. 1948).
52. Hubsch v. United States, 174 F. (2d) 7 (C.A. 5th 1949); Long v. United States, 78 F. Supp. 35 (S.D. Calif. 1948).
53. State of Maryland v. Manor Real Estate and Trust Co., 176 F. (2d) 414 (C.A. 4th 1949); Beasley v. United States, 81 F. Supp. 518 (E.D. S.C. 1948); Cobb v. United States, 81 F. Supp. 9 (W.D. La. 1948).
54. United States v. Prouden, 172 F. (2d) 503 (C.A. 5th 1949); cf. United States v. Campbell, 172 F. (2d) 500 (C.A. 5th 1948).
55. Supra note 10.
56. Wallace v. United States, 142 F. (2d) 240, 243 (C.C.A. 2d 1944).

of governmental generousity toward tort claimants established by the Federal Tort Claims Act "should not be set aside or hampered by a niggardly construction based on formal rules made obsolete by the very purpose of the Act itself."[57] The trend has culminated in the recent Supreme Court decision of the *Aetna* case which repudiates the doctrine's application to the Tort Claims Act. The Court said it thought that the congressional attitude in passing the Act was more accurately reflected by Justice Cardozo's statement that "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."[58]

With the exception of those cases denying joinder under the Act and those disagreeing as to Congress' intent as to servicemen's claims, the prevailing attitude of the courts is to describe the Act as being skillfully drawn in clear and unambiguous language and to give effect to the expressed intent of Congress that the United States shall be liable as a private person on claims within the coverage of the Act.

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THE FUNCTION OF CHEMICAL TESTS IN DETERMINING DRUNKENESS

The great increase in the number of motor vehicles on our highways in recent years[1] has been paralleled by an even greater proportionate rise in the consumption of alcoholic beverages.[2] In Wyoming, 463 drivers had their licenses revoked for drunken driving during the first ten months of 1949.[3] It is safe to assume that for every arrest many violators went unpunished because no traffic violation or accident resulted from their intoxication.

What kind of evidence should convict or exonerate the defendant when he is charged with drunken driving? Should testimony of the arresting officer and casual witnesses be sufficient, or are more reliable results reached through using chemical tests? That tests are becoming more common is shown by the recognition in 1944 by the American Medical Association's Committee to Study Problems of Motor Vehicle Accidents of a standardized criterion of inebriation,

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57. Spelar v. United States, 171 F. (2d) 208 (C.A. 1948), rev'd. 70 Sup. Ct. 10.
58. —U.S.—, 70 Sup. Ct. 207,216 (1949).
1. In 1947 there were 37,883,265 motor vehicles registered in the United States as contrasted with 25,163,789 in 1935, an increase of about 34 per cent, despite a halt in production from 1942-1945. Figures from World Almanac 1949 Ed., 252.
2. In 1947 the total value of liquors, wines, and beers sold in the United States was $3,469,000,000 as contrasted with a sale of but $699,000,000 in 1935. While much of this difference can be traced to increased costs and excise taxes, the 1947 consumption was far in excess of that of 1935 per capita. Figures from Economic Almanac, 1949 Ed., 335.
3. Associated Press release appearing in the Rocky Mountain News, Nov. 2, 1949.