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Torts - Federal Tort Claims Act - Liability of United States for Negligence of Government Firemen

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TORTS—FEDERAL TORT CLAIMS ACT—LIABILITY OF UNITED STATES FOR NEGLIGENCE OF GOVERNMENT FIREMEN—Plaintiff brought suit under the Federal Tort Claims Act[1] against the United States for damages resulting from the negligence of the United States Forest Service in combating a fire that destroyed plaintiff's property. The Forest Service had entered into an agreement with the State of Washington to prevent and suppress any fires in the area in which plaintiff's land was situated. The federal district court dismissed the complaint for failure to state a cause of action and the court of appeals affirmed. On certiorari, to the United States Supreme Court, *held,* judgment vacated and case remanded to the district court for trial. The United States is liable under the act for the negligence of government fire fighters in the performance of their duties. *Rayonier, Inc. v. United States,* 352 U.S. 315 (1957).

Under the Federal Tort Claims Act federal courts were given jurisdiction to hear claims when the United States, "if a private person, would be liable . . . in accordance with the law of the place where the act or omission occurred."[2] The act also states that the government shall be liable "in the same manner and to the same extent as a private individual under like circumstances."[3] It was argued in behalf of the government in the principal case that there were no "like circumstances" within the statutory meaning because private individuals do not enter into the activity of organized fire-fighting.[4] In the absence of identical individual activity, the government reasoned that the act imposed liability only under circumstances where governmental bodies are traditionally responsible for the negligence of their agents. The law of municipal

1 28 U.S.C. (1952) §§1346 (b) and 2671-2680.
2 28 U.S.C. (1952) §1346 (b).
3 Id., §2674.
4 Precedent for this theory under the act can be found in Feres v. United States, 340 U.S. 135 (1950), in which a soldier's executrix was denied recovery against the government for the negligent death of her husband. The Court could find no analogous private tort liability "for no private individual has power to conscript or mobilize a private army." (p. 141) This decision can be distinguished on the distinctly federal relationship involved and the adequacy of the compensation the executrix would receive as a serviceman's widow. See the court's discussion at 145.

corporations generally immunizes local governments from suits arising from the negligence of firemen by classifying the activity as a governmental function as distinguished from a proprietary function.[5] The government contended that a similar immunity should extend to the United States in its operation of the Forest Service.[6] There is language of the Supreme Court to support this position in *Dalehite v. United States*,[7] a case in which the Court rejected a tort claim based in part upon the negligence of the Coast Guard in fighting a fire.[8] The major issue in the *Dalehite* case revolved around the "discretionary functions" exception in the act.[9] On the facts of the present case, *Dalehite's* analysis of the "discretionary functions" provision is undisturbed, but it seems equally clear that the portion of the *Dalehite* opinion that denies a cause of action for the negligence of the Coast Guard in fighting fires is no longer the law. The present ruling relies on recent significant precedent[10] in refusing to apply the "governmental-proprietary" distinction, argued for by the government. The decision points up the fact that use of this artificial distinction imported from another area of the law conflicts with congressional intent.[11] After thirty years' consideration, Congress passed the act with numerous

5 Stated simply, the distinction rests on the theory that "a municipal corporation is liable for torts committed by its agents in the performance of private, proprietary, corporate or ministerial functions but, in the absence of statute, is not responsible for torts committed in the performance of governmental functions." Smith, "Municipal Tort Liability," 48 MICH. L. REV. 41 at 43 (1949).

6 This reasoning was approved by the court of appeals. Rayonier, Inc. v. United States, (9th Cir. 1955) 225 F. (2d) 642.

7 346 U.S. 15 (1953). This litigation arose from the explosion and fire at Texas City, Texas. See N.Y. TIMES, April 17, 1947, §1, p. 1:5-7. The suit was brought to recover for the government's negligent supervision in the manufacture, packaging and shipment of fertilizer with volatile qualities. The Court denied a cause of action because the negligence occurred at a high governmental level, called the "planning" or "cabinet" level, and was excepted under the "discretionary functions" clause. See also note 9 infra.

8 "It [the act] did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. . . . [I]f anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire." Dalehite v. United States, note 7 supra, at 43-44. The Court felt Feres v. United States, note 4 supra, was controlling.

9 28 U.S.C. (1952) §2680 (a). This provision excepts the liability of the government for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government. . . ." Clearly, in Dalehite the Court did not immunize the Coast Guard while fighting fires because that activity is discretionary, but rather because it is governmental as opposed to proprietary. See note 8 supra. For an interesting discussion see Peck, "The Federal Tort Claims Act, A Proposed Construction of the Discretionary Function Exception," 31 WASH. L. REV. 207 (1956).

10 Indian Towing Co. v. United States, 350 U.S. 61 (1955) noted in 54 MICH. L. REV. 875 (1956). Plaintiff recovered for damages incurred as a result of the Coast Guard's negligence in maintaining a lighthouse. There is no analogous liability in private tort law. The Court stated, at 67, that it would be "attributing bizarre motives to Congress . . . to hold that it was predicating liability on such a completely fortuitous circumstance—the presence or absence of identical private activity." Justice Frankfurter for the majority described (at p. 65) the "governmental-proprietary" distinction as a "quagmire that has long plagued the law of municipal corporations," and which is "inherently unsound."

11 See Indian Towing Co. v. United States, note 10 supra, at 64-65.

exceptions and safeguards.[12] Had it intended that governmental activity at the "operational" level should retain its traditional immunity, the scope of the act would be quite narrow.[13] The Court felt that Congress intended for the United States to be liable if the State of Washington would impose liability on private persons under "similar," though not identical, circumstances.[14]

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12 28 U.S.C. (1952) §2680.

13 The interpretation of the "discretionary functions" exception as set down in Dalehite v. United States, note 7 supra, immunizes the government for negligence at a high "planning or cabinet" level, where policy decisions are made. If governmental activity at the operational level, where policy decisions are carried out, was also immunized by application of the "governmental-proprietary" distinction, there would be a very narrow spectrum of liability, e.g., "proprietary-operational" functions, and "non-discretionary" acts at the planning level.

14 While this conclusion greatly extends the scope of recovery under the act, it cannot be doubted that Congress intended such broad liability. The Court in the principal case, at 320, said: "Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees." See generally H. Hearings Before Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d sess., p. 11 (1942).