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Torts - Federal Torts Claims Act- Pertinence of Governmental Proprietary Distinction

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TORTS — FEDERAL TORT CLAIMS ACT — PERTINENCE OF GOVERNMENTAL-PROPRIETARY DISTINCTION—The tug *Navajo* went aground and its cargo was severely damaged by water. The owners and insurers of the tug and its cargo brought an action under the Federal Tort Claims Act alleging that the grounding of the *Navajo* was caused by the failure of the light in the lighthouse on Chandeleur Island, and that this failure was attributable to negligent acts and omissions on the part of Coast Guard personnel whose duty it was to check the light. The district court dismissed the action on the ground that the United States had not consented to be sued in the manner in which this suit was brought, and the court of appeals affirmed.[1] The Supreme Court granted certiorari[2] and affirmed per curiam;[3] then, after granting a petition for rehearing,[4] vacated its former judgment and *held,* reversed, four justices dissenting. The Federal Tort Claims Act cannot be construed to provide that the United States has consented to be

1 (5th Cir. 1954) 211 F. (2d) 886.
2 348 U.S. 810, 75 S.Ct. 60 (1954).
3 349 U.S. 902, 75 S.Ct. 575 (1955).
4 349 U.S. 926, 75 S.Ct. 769 (1955).

sued only when it is engaged in a type of activity that private persons perform. *Indian Towing Co. v. United States,* 350 U.S. 61, 76 S. Ct. 122 (1955).

The Federal Tort Claims Act was enacted to waive federal tort immunity and alleviate the burden of private relief bills imposed on Congress.[5] Judicial interpretation has so limited the act, however, that recent writers have lamented its conversion into a motor vehicle accident law.[6] The decision in the principal case suggests a trend toward a more liberal construction of the entire statute. The act provides that the United States shall be suable for torts committed by its agents "to same extent as a private individual under like circumstances,"[7] subject to certain exceptions.[8] It was argued in the principal case that since private persons do not operate lighthouses a private person could never be liable in these circumstances; consequently, the United States could not be liable. The Court's interpretation of the clause—that "like circumstances" does not mean "the same circumstances"[9]—would seem to be sound statutory construction, yet there is a group of cases which support the argument rejected in the principal case. *Feres v. United States*[10] held that servicemen could not sue for injuries incident to military service. In that case, the Court said that the reason for its decision was that no private person has power to "conscript . . . a private army," that there is no "analogous" liability in the law of torts, and that the action brought was "novel and unprecedented."[11] The present decision limits the *Feres* case to military situations, although one is left to wonder upon what ground the distinction rests. To add to the confusion the cases following the *Feres* case relied on the language quoted, not only in cases of military service,[12] but in some instances applied it to injuries arising from other types of purely "governmental" activity. In *Dalehite v. United States* the Court decided that the federal government could not be sued for injuries caused by negligent fire fighting, relying on the *Feres* decision and citing the precise language referred to above.[13] It has also been held that there is no waiver of immunity for injuries to federal prisoners,[14] or injuries arising from an erroneous flood forecast,[15] since private persons do not operate prisons or disseminate flood

5 See S. Hearing Before Subcommittee of the Committee on the Judiciary on S. 2690, 76th Cong., 3d sess., p. 5 (1940).

6 See Gellhorn and Lauer, "Federal Liability for Personal and Property Damage," 29 N.Y. UNIV. L. REV. 1325 at 1326 (1954).

7 28 U.S.C. (1952) §§2674, 1346 (b).

8 28 U.S.C. (1952) §2680.

9 Principal case at 64.

10 340 U.S. 135, 71 S.Ct. 153 (1950).

11 Id. at 141-142.

12 See Archer v. United States, (9th Cir. 1954) 217 F. (2d) 548, cert. den. 348 U.S. 953, 75 S.Ct. 441 (1955). But cf. United States v. Brown, 348 U.S. 110, 75 S.Ct. 141 (1954).

13 346 U.S. 15, 73 S.Ct. 956 (1953). See also Rayonier v. United States, (9th Cir. 1955) 225 F. (2d) 642.

14 Sigmon v. United States, (D.C. Va. 1953) 110 F. Supp. 906; Shew v. United States, (D.C. N.C. 1953) 116 F. Supp. 1.

15 See National Mfg. Co. v. United States, (8th Cir. 1954) 210 F. (2d) 263, cert. den.

information. More often than not, however, the courts have refused to apply the reasoning of the *Feres* case except to injuries incident to military service. Thus, such acts as exploding a nuclear device,[16] guarding a sunken vessel,[17] protecting a parking lot by a military policeman,[18] and operating an airport control tower,[19] have been found to fall within the waiver, although in all these cases it was urged that private persons do not engage in these activities. In most of these cases the courts flatly refused to give weight to the reasoning of the *Feres* case.[20] However, some courts have sought to distinguish the *Feres* case by finding identical private activity.[21] Purely as a matter of construction, one court suggests, although in a different context, that the canon "expression of one thing is the exclusion of another" applies to that section which delineates the exceptions to the act, hence precluding any exceptions based on other sections.[22] Clearly the *Feres* doctrine would not stand this test. The soundest suggestion put forth on the statutory construction problem is that the "private person" clause was meant to describe the kind of liability intended, and not to prescribe limits for the operation of the act.[23] The legislative history of the act is inconclusive, but the scattered comments that are available support this suggestion.[24] The policy issue lying at the heart of the construction problem presented by the principal case is whether or not the provisions of the act incorporate a distinction between federal activities that are governmental and those that are proprietary in nature. At the municipal corporation level the state courts overwhelmingly hold that there is immunity from suit for functions of a governmental nature, whereas the municipality can be sued when it inflicts injuries while acting in a proprietary capacity.[25] Despite the adoption of a statute waiving sovereign immunity in New York,[26] the courts of that state still distinguish between governmental and proprietary functions when a suit is brought for

347 U.S. 967, 74 S.Ct. 778 (1954). But see Mid-Central Fish Co. v. United States, (D.C. Mo. 1953) 112 F. Supp. 792.

16 Bulloch v. United States, (D.C. Utah 1955) 133 F. Supp. 885.

17 See Somerset Sea Food Co. v. United States, (4th Cir. 1951) 193 F. (2d) 631, a case with facts quite similar to those of the principal case.

18 Cerri v. United States, (D.C. Cal. 1948) 80 F. Supp. 831.

19 Eastern Air Lines v. Union Trust Co., (D.C. Cir. 1955) 221 F. (2d) 62.

20 E.g.: Cerri v. United States, note 18 supra; Somerset v. United States, note 17 supra.

21 See Air Transport Associates v. United States, (9th Cir. 1955) 221 F. (2d) 467; Bulloch v. United States, note 16 supra.

22 Wojciuk v. United States, (D.C. Wis. 1947) 74 F. Supp. 914.

23 See Gilroy v. United States, (D.C. D.C. 1953) 112 F. Supp. 664; Pennsylvania R. Co. v. United States, (D.C. N.J. 1954) 124 F. Supp. 52.

24 S. Hearing Before Subcommittee of the Committee on the Judiciary on S. 2690, 76th Cong., 3d sess., pp. 34, 37, 44 (1940); H. Hearing Before Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d sess., pp. 31, 32, 33, 61 (1942). For a general summary of the legislative history of the act, see Dalehite v. United States, note 13 supra.

25 See Smith, "Municipal Tort Liability," 48 MICH. L. REV. 41 (1949).

26 Court of Claims Act, N.Y. Laws (1939) c. 860, §8.

negligent failure to act,[27] although these courts have recognized that the waiver statute abolishes the old distinction for positive acts of negligence.[28] The language used in the principal case to reject the distinction at the federal level indicates that no provision of the act should be construed to include it. Viewed in this light, the case indicates an attitude on the part of the Court to give a broader interpretation to the act generally.

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[27] Murrain v. Wilson Line, 270 App. Div. 372 at 377, 59 N.Y.S. (2d) 750 (1946), affd. 296 N.Y. 845, 72 N.E. (2d) 29 (1947); Lloyd, "Municipal Tort Liability in New York—Sequel," 24 N.Y. UNIV. L.Q. REV. 38 (1949). But see Runkel v. City of New York, 282 App. Div. 173, 123 N.Y.S. (2d) 485 (1953).

[28] Bernadine v. City of New York, 294 N.Y. 361, 62 N.E. (2d) 604 (1945).