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TORT LIABILITY OF THE STATE:
THE FEDERAL TORT CLAIMS ACT AND THE
CROWN PROCEEDINGS ACT

*Harry Street**

ANGLO-AMERICAN legal systems have for so long lingered behind the Continent of Europe in developing a satisfactory basis of governmental civil liability that the enactment of the Federal Tort Claims Act of 1946¹ in the United States, and the Crown Proceedings Act of 1947² in Great Britain are events justifying a comparison and evaluation of these belated attempts to provide the citizens with an adequate remedy against the State.

I

BACKGROUND OF LEGISLATION

A. Basis for Governmental Immunity from Suit

The rule in England that the king could never be sued in the courts as were his subjects had its roots in feudalism. Just as no lord could be sued in the court which he held to try the cases of his tenants, so the king, at the apex of the feudal system, could not be sued in the royal courts.³ Nevertheless, even in the thirteenth century it was recognized that the king, as the fountain of justice, should redress grievances when petitioned to do so by his subjects, and it became an established rule that the subject could bring his petition of right, which, if acceded to by the king, enabled the ordinary courts to give redress. Judges in the fifteenth century⁴ were saying that petition of right would not lie for a pure tort by the king, and this developed in the sixteenth century into the theory that the king can do no wrong. This notion "is probably to be associated with the growth of the prerogative, the strengthening of the kingship, the ideas of divine right and of the absolute sovereign."⁵

It is important to recognize that these rules that the king is immune

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¹ 60 Stat. L. 842, 28 U.S.C. (1946) § 921.

² 10 & 11 Geo. 6, c. 44.

³ See 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 2d ed., 515-518 (1899); 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 8 (1926).

⁴ See Y.B. 1 Hen. 7 Mich. pl. 5, per Hussey, C.J.

⁵ Borchard, "Government Responsibility in Tort," 36 YALE L.J. 1 at 31 (1926).

from suit and that he can do no wrong were entirely separate.⁶ Had the effect of the latter maxim merely been confined to absolving the king from liability for his personal torts, little harm would have been done. However, the British courts later refused to apply the doctrine of employers' liability to the Crown,⁷ asserting that the maxim that the king can do no wrong had as a corollary that the king cannot authorize wrong. The principles of vicarious liability were then imperfectly understood, it being thought that the employer was liable because, when he authorized the tort it was his tort. Had it been realized that vicarious liability was a duty laid down by public policy analogous to the duties imposed with various degrees of stringency on the owner of things which are or may be sources of danger to others, then the rule that only the individual public servant performing the act, and not his employer, the Crown, was liable for his torts might have been avoided. Until 1947, it was the rule of English law that a petition of right "will lie when in consequence of what has been legally done any resulting obligation emerges on behalf of the subject"⁸ and that the main limitation on its availability was that it could not be used in respect of torts.

Why the English theory of sovereign immunity, in origin personal to the king, came to be applied in the United States is one of the mysteries of legal evolution. Clearly, in the United States the government is not sovereign, but rather "sovereignty itself remains with the people by whom and for whom all government exists and acts."⁹ Indeed, the first important United States Supreme Court case¹⁰ decided that the doctrine of state immunity from suit was inconsistent with popular sovereignty. This decision was most unpopular with the states, who were heavily in debt after the Revolution, and, in consequence, the Eleventh Amendment, prohibiting litigation in the federal courts by a citizen of one state against another state, was passed.

Since *Cohens v. Virginia*¹¹ the courts have consistently held that the government is immune from suit except by its own consent. Various reasons have been assigned in support of the rule, the most common

⁶ Writers who do not so distinguish them, for example, SINGEWALD, *THE DOCTRINE OF NON-SUABILITY OF THE STATE IN THE UNITED STATES* 45-46 (1910), cannot explain why the petition of right was available for contract, but not for tort.

⁷ *Viscount Canterbury v. Attorney General*, 1 Phill. 306 (1842); *Tobin v. The Queen*, 16 C.B.N.S. 310 (1864); *Feather v. The Queen*, 6 B. & S. 257 (1865).

⁸ *Attorney-General v. De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508 at 530.

⁹ *Yick Wo v. Hopkins*, 118 U.S. 356 at 370, 6 S.Ct. 1064 (1886).

¹⁰ *Chisholm v. Georgia*, 2 Dall. (2 U.S.) 419 (1793).

¹¹ 6 Wheat. (19 U.S.) 264 (1821).

one being that it "is a privilege of sovereignty."¹² Mr. Justice Holmes said: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."¹³ A further justification has been that it is "a policy imposed by necessity."¹⁴ In *United States v. Lee*, after a full historical investigation, the conclusion was reached "that it has been adopted in our courts as a part of the general doctrine of publicists, that the supreme power in every State, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts."¹⁵ In *Briggs v. Light-Boats*, it was said that "it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on the government in war and peace, and the money in his treasury."¹⁶ Dean Pound bases the immunity on "a public interest in the dignity of the political organization of society."¹⁷

Governmental immunity from suit being firmly entrenched in American law, a substitute remedy for the injured citizen had to be found. Instead of the English method of a petition of right ultimately adjudicated in the ordinary courts, the method chosen was private legislation. This is due to the fact that under the Constitution the residuary powers vested not in the courts, nor in the executive, but in the legislature.¹⁸ Dissatisfaction with this method led to the setting up of a Court of Claims in 1855, which, since the Tucker Act of 1887, has

¹² *Railroad Co. v. Tennessee*, 101 U.S. 337 at 339 (1879). It is interesting to speculate why other litigation privileges associated with sovereignty in England have not been incorporated in American law, for example, the presumption that the government is not bound by statute, or the inability of military and civil servants to sue for breach of contract of service because they are "dismissible at His Majesty's pleasure."

¹³ *Kawananakoa v. Polyblank*, 205 U.S. 349 at 353, 27 S.Ct. 526 (1907).

¹⁴ Per Mr. Justice Miller, *Langford v. United States*, 101 U.S. 341 at 346 (1879).

¹⁵ 106 U.S. 196 at 206, 1 S.Ct. 240 (1882).

¹⁶ 11 Allen (93 Mass.) 157 at 162-163 (1865).

¹⁷ "A Survey of Public Interests," 58 HARV. L. REV. 909 at 916 (1945).

¹⁸ Freund, "Private Claims against the State," 8 POL. SCI. Q. 625 at 626-627 (1893); Richardson, "History, Jurisdiction, and Practice of the Court of Claims of the United States," 7 SO. L. REV. 781 et seq. (1882) describes in detail the legislative process.

had jurisdiction over suits against the United States "not sounding in tort."¹⁹

The Tucker Act also gave the court jurisdiction over claims founded "upon the Constitution of the United States." It might have been thought that wherever there was an appropriation of property contrary to the Fifth Amendment, there would be an action under this act. It is here that the influence of the rule that the king can do no wrong is felt. Only if the taking is authorized and also effects permanent injury and deprivation, so as to raise the implication of a contract and be free from any tortious taint, will there be a remedy.²⁰ Again, where in some states legislative consent to suit has been granted in the broadest language, the courts have interpreted it as excluding actions in tort and quasi-contract.²¹

This attitude of the Anglo-American jurisdictions is in sharp contrast with that prevailing on the Continent. There they began from the premise that legislative silence was to be interpreted as consent to suit, and their main concern was with the question of how far social theory and public policy necessitated State responsibility for injuries inflicted on the citizen by the operation of governmental activities.²² Innumerable are the juristic theories put forward to explain the present Continental view, "administrative fault," "fault of the service," "equality of burdens," "assumption of risk," "special sacrifice," but they all rest on the operative fact of individual injury inflicted by the governmental machine, and a recognition that public law demands that these losses sustained in the administration of the public service must be borne by the community as a whole.

B. Early Attempts to Limit Governmental Immunity

In the United States, some attempt has been made during this century to limit governmental immunity in tort. The courts have denied governmental immunity to many of the corporations set up to

¹⁹ For a full account of the work of this court see WATKINS, *THE STATE AS A PARTY LITIGANT* (1927).

²⁰ See 32 YALE L.J. 725 (1923); 43 YALE L.J. 674 (1934); Anderson, "Tort and Implied Contract Liability of the Federal Government," 30 MINN. L. REV. 133 (1946).

²¹ For example, the State of Washington in *Riddoch v. State*, 68 Wash. 329, 123 P. 450 (1912). And see *Smith v. State*, 227 N.Y. 405, 125 N.E. 841 (1920).

²² See Blachly and Oatman, "Approaches to Governmental Liability in Tort: A Comparative Study," 9 L. AND CONTEMP. PROB. 181 at 196 et seq. (1942); Trotabas, "Liability in Damages under French Administrative Law," 12 J. OF COMP. LEG. AND INT. L. 44 (1930).

perform public functions.²³ Statutes have been passed making the United States liable for patent infringements,²⁴ for maritime torts, whether involving merchant ships²⁵ or public vessels,²⁶ and for damage to oyster beds.²⁷ Congress has also made arrangements for the administrative settlement of claims by federal employees,²⁸ of claims for property damage up to \$1000 caused by the negligence of government employers,²⁹ and of various claims against the War Department, the Postmaster General and the Secretary of the Treasury,³⁰ with a usual maximum of either \$500 or \$1000.

Nevertheless, the inadequacy of remedies against the government, particularly in tort, caused both United States and England to provide some other relief. In the United States this took the form of private acts of Congress. For instance, the 74th and 75th Congress each considered more than 2,300 private claim bills demanding relief exceeding \$100,000,000.³¹ Private bills were not used in England, but a practice grew up of the action being brought against the government official personally on the understanding that the government would defend the action on his behalf and meet any liability. So far was this carried that in deference to complaints in Parliament with reference to motor vehicle accidents, in 1941 the government appointed a leading barrister to determine in advance whether the alleged tort was committed in the course and within the scope of the official's employment.³² If he so found, then the government would automatically defend the action on behalf of the official.

C. *Immediate Motivation for Legislation in United States and England*

In view of these respective extra-judicial devices, why has each country passed recent legislation on the matter? Has each country's

²³ *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U.S. 381, 59 S.Ct. 516 (1939).

²⁴ 36 Stat. L. 851 (1910); 40 Stat. L. 705 (1918), 35 U.S.C. (1946) § 68.

²⁵ 41 Stat. L. 525 (1920), 46 U.S.C. (1946) §§ 741, 742.

²⁶ 43 Stat. L. 1112 (1925), 46 U.S.C. (1946) § 781.

²⁷ 49 Stat. L. 1049 (1935); 57 Stat. L. 553 (1943), 28 U.S.C. (1946) § 250(a).

²⁸ 39 Stat. L. 742 (1916).

²⁹ 42 Stat. L. 1066 (1922), repealed by 60 Stat. L. 846 (1946).

³⁰ For a list of these statutes see Gellhorn and Schenck, "Tort Actions against the Federal Government," 47 Col. L. Rev. 722 at 724, note 15 (1947); and 53 YALE L.J. 188 at 191, note 22 (1943).

³¹ See Holtzoff, "The Handling of Tort Claims against the Federal Government," 9 L. AND CONTEM. PROB. 311 at 322 (1942); Moore, "Federal Tort Claims Act," 33 A.B.A.J. 857 at 858, note 14 (1947).

³² 122 HANSARD 533.

legislature suddenly adopted the continental theories of social justice? Much more mundane considerations than this explain the statutory changes.

In the United States, dissatisfaction with the private bill system has long been widespread and vociferously expressed.³³ Congress itself realized that it was devoting a disproportionate amount of time to non-legislative matters. Beyond that, injustice and political favoritism resulted from the system. After a series of setbacks the Federal Tort Claims Act was finally adopted on August 2, 1946³⁴ as Title IV of the Legislative Reorganization Act. The measure was introduced under the heading "More Efficient Use of Congressional Time." Jurisdiction is given to the federal district courts sitting without juries, with an appeal to the circuit court of appeals, or, with the consent of all parties, to the Court of Claims.

In England, two 1946 decisions led to the legislative reform. In *Adams v. Naylor*³⁵ an action was brought against an army officer for injuries to children received when they wandered onto a minefield in charge of the defendant. The House of Lords said, obiter, that only by a fiction could the army officer be the defendant, because the action lay (if at all) against the occupier of the land, which was the Crown and not the officer. When, later in the same year, an action was brought against the superintendent of a government munitions factory for injuries received on the premises by an invitee who fell into an unlit trench, the Court of Appeal, following the obiter dictum in *Adams v. Naylor*, refused to allow the proceedings to continue against a fictitious defendant.³⁶ Bowing to the protests of the legal profession and the press, the government introduced the Crown Proceedings Bill which became law on July 31, 1947, and came into operation on January 1, 1948.³⁷

³³ For example, MEMOIRS OF JOHN QUINCY ADAMS 480 (1876); Luce, "Petty Business in Congress," 26 AM. POL. SCI. REV. 815 at 818-819 (1932); Shumate, "Tort Claims Against State Governments," 9 L. AND CONTEMP. PROB. 242 at 249 et seq. (1942); Anderson, "Tort and Implied Contract Liability of the Federal Government," 30 MINN. L. REV. 133 at 149 (1946). For a collected list of Congress' criticisms, see Memorandum for House Committee on Judiciary, Federal Tort Claims Act, Appendix II printed in record of Hearings before House Committee on Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d sess., p. 49 et seq. (1942).

³⁴ For a summary of the legislative history, see Report of the Joint Committee on the Organization of Congress to Accompany S.2177, S. Rep. 1400, 79th Cong., 2d sess., p. 30 (1946).

³⁵ [1946] A.C. 543.

³⁶ *Royster v. Cavey*, [1947] K.B. 204.

³⁷ The Crown Proceedings Act 1947 (Commencement) Order 1947, S.R. & O. 1947 (No. 2527) 10 & 11 Geo. 6, c. 44.

II

ANALYSIS OF LEGISLATION

The English Act is much more comprehensive than the American. Besides imposing a general liability in tort, it abolishes petitions of right, with the object of assimilating, as far as possible, suits against the Crown to suits against subjects. It also deals in detail with procedure in suits both by and against the Crown and gives jurisdiction of these suits to those courts which would have jurisdiction in actions between subjects. By contrast, the United States statute deals solely with suits in tort against the federal government.

A. Liability of Government for Torts of Its Agents

I. "*Employees of the government.*" The United States is liable, under the act, only for the torts of "any employee of the Government while acting within the scope of his office or employment."³⁸ "Employee of the government" is defined in the act as including:

"... officers or employees of any Federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation."³⁹

This definition should be compared with the English requirement that:

"... That officer has been directly or indirectly appointed by the Crown and was at the material time paid in respect of his duties as an officer of the Crown wholly out of the Consolidated Fund of the United Kingdom, moneys provided by Parliament, the Road Fund or any other Fund certified by the Treasury for the purposes of this subsection or was at the material time holding an office in respect of which the Treasury certify that the holder thereof would normally be so paid."⁴⁰

The definition in the Federal Tort Claims Act is in general terms and has latent ambiguities.⁴¹ If the legislative history of earlier bills is relied on, it will be broadly construed, with emphasis not on the

³⁸ F.T.C.A., § 410(a).

³⁹ F.T.C.A., § 402(b).

⁴⁰ Crown Proceedings Act, s. 2 (6).

⁴¹ Gellhorn and Schenk, "Tort Actions against the Federal Government," 47 COL. L. REV. 722 at 727 (1947).

officer's main employment, but rather on his actual work when the tort was committed.⁴² A surfeit of litigation on the definition seems inescapable. English courts have long had difficulty in framing a definition of a servant of the Crown at common law.⁴³ The English statute is an attempt to obviate the necessity for more litigation by furnishing an exact and inclusive definition, but it is open to criticism because it is not all-embracing.⁴⁴ There is an intermediate class of English public official who, although appointed by a local or municipal authority, is not the servant of that authority because his duties are imposed on him by statute or common law as a government representative, and who is outside section 2(6) because he is not appointed by the Crown. For example, since policemen are in that intermediate class, neither the municipality which appoints them nor the Crown is answerable for their torts;⁴⁵ only the individual himself can be sued. The conclusion seems to be that the American definition, despite its uncertainty, is likely to lead to more just results than the definite but narrow English definition. Both definitions provide for the "dollar a year man"; but the English statute necessarily excludes the mere volunteer and it seems likely that persons such as federal bond drive volunteers would not be "employees" for the purposes of the Federal Tort Claims Act, because there would be no contract of service and no papers of appointment.

2. *Independent contractors.* Sometimes, the ordinary employer is liable for the torts of independent contractors, and there seems no reason why governments should not be similarly liable. This is accomplished in the English Act by the following provisions. The Crown is liable for the torts of servants or "agents," and "agent," when used in relation to the Crown, includes an independent contractor employed by the Crown.⁴⁶ Section 40 (2) (d) provides that:

"Except as therein otherwise expressly provided, nothing in this Act shall . . . subject the Crown to any greater liabilities in respect of the acts or omissions of any independent contractor

⁴² Hearings before the House Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d sess., p. 16 (1942).

⁴³ See Moore, "Liability for Acts of Public Servants," 23 L.Q. REV. 12 (1907); and Street, "Crown Proceedings," (paper delivered at Anglo-French Legal Conference, June, 1947), p. 11.

⁴⁴ See Street, "Defendants under the Crown Proceedings Act 1947," 97 L.J. 685 (1947).

⁴⁵ Fisher v. Oldham Corporation, [1930] 2 K.B. 364; Stanbury v. Exeter Corporation, [1905] 2 K.B. 838 (sanitary inspector).

⁴⁶ Crown Proceedings Act, s. 38 (2).

employed by the Crown than those to which the Crown would be subject in respect of such acts or omissions if it were a private person. . . .”

Since the Federal Tort Claims Act has no express provision on the matter, the United States can be so liable only if “employee” includes “independent contractor.” This seems unlikely, at least if the New York interpretation is any indication of the way in which the federal statute will be construed. There, under section 12a of the Court of Claims Act of 1929 the State of New York was liable for the torts of “its officers and employees,” but this was taken to exempt the state from liability for the negligence of an independent contractor.⁴⁷

3. *Government corporations.* Will the respective governments be liable for the acts of employees of government corporations? In England, no express reference is made to these bodies, and therefore the answer depends solely on application of the arbitrary rules laid down by section 2(6) and referred to in the preceding paragraph. Only if the employee is within that definition will the Crown be liable. The United States will be liable for the acts of employees of a federal corporation if its primary function is to act as, and it is at the time of the tort in fact acting as, the agency or instrumentality of the United States. Both countries had difficulty at common law in determining when such bodies could shelter under the cloak of the immunity of the government, and it seems that both acts fail to end the common law ambiguities.⁴⁸ It is to be hoped that the courts take the line that whenever under the respective acts the government is not liable for acts committed by a servant within the scope of his employment, then the governmental corporation is liable at common law. The matter may be more serious in the United States than in England, because in the latter country joinder of the corporation and the government is permitted; whereas, if the doubts as to the availability of joinder procedure in the United States are well-founded, a plaintiff making the wrong choice may find his action against the other barred by lapse of time.

4. *Employee acting “within the scope of his office or employment.”*

⁴⁷ SECOND ANNUAL REPORT OF THE LAW REVISION COMMISSION OF THE STATE OF NEW YORK, 941 at 947 and 951 at 973 (1936).

⁴⁸ See “Litigation with Nationalized Industry,” 96 L.J. 297, 311 at 312 (1946); Sellar, “Government Corporations,” 24 CAN. B. REV. 383, 489 at 506 (1946). The agency and the Crown may well be jointly liable under English law, whereas F.T.C.A., § 423 provides that the agency can never be sued if the United States is liable.

The United States act defines "scope of his office or employment" only to the extent of stating that it means "acting in line of duty"⁴⁹ in the case of a member of the military or naval forces. One remembers the thousands of cases litigated in England to interpret "scope of employment" in the Workmen's Compensation Acts and hopes that the United States will be spared that. Obviously, the phrase is susceptible either of a conservative or liberal interpretation at the whim of the courts. This difficulty is overcome in the English Act by assimilating governmental liability to the common law rule of *respondeat superior*, section 2(1) providing that "the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:— (a) in respect of torts committed by its servants or agents."⁵⁰

B. *Liability of Government Arising Out of Ownership
of Property*

The United States is liable under the act only for the "negligent or wrongful act or omission of any employee." Some torts, however, cannot be regarded as the act of the servant, but liability for them depends entirely on the ownership of the instrumentality causing the damage. For instance, when there is a liability for the carrying on of an ultra-hazardous activity, no one servant is responsible; the tort is solely that of the owner of the instrumentality. Under the act it seems that the United States will not be liable for any such acts or omissions which cannot be attributed to an employee. This would constitute a most serious deficiency in the act. Conscious of this situation, the framers of the English act introduced a special provision making the Crown liable in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property.⁵¹ It is surprising that the United States act uses the words "negligent or wrongful" instead of "tortious." It has led to discussion whether a tort creating liability without fault can be called "wrongful";⁵² but presumably the courts will interpret "wrongful" as covering all legal wrongs of a delictual nature.

⁴⁹ F.T.C.A., § 402(c).

⁵⁰ New York State has a similarly phrased provision. N.Y. Court of Claims Act, § 8, enacted by N.Y. Laws (1939) c. 860.

⁵¹ Crown Proceedings Act, s. 2(1)(c).

⁵² 56 YALE L.J. 534 at 540-542 (1947).

C. *Quasi-Contract Liability*

The United States is held not liable under the Tucker Act for quasi-contract, and the courts have also refused to permit the plaintiff to waive a tort and sue in *assumpsit*.⁵³ Nothing in the new act can be said to create a liability in quasi-contract. Commentators on the act, mindful that the alternative choice of the Court of Claims and the federal district court sometimes available under the Tucker Act is not here available, have thought that, even so, "the issue will be not *whether* the claimant may maintain his suit but *in which court* he should bring it."⁵⁴ That is perhaps the least of the unfortunate results of this situation. Firstly, an action in tort is not always an alternative to an action in quasi-contract.⁵⁵ Secondly, even where the facts are such that quasi-contract is merely an alternative to tort, the plaintiff's remedy in tort may be inadequate. For instance, in some states, in an action for trespass, damages for use and occupation of the land of the plaintiff cannot be recovered where the plaintiff's land has not been damaged, yet in an action in quasi-contract for unjust enrichment the court will award damages for that use.⁵⁶ English courts have never denied waiver on a petition of right,⁵⁷ and with the abolition of petition of right in the act⁵⁸ there seems no obstacle, whether jurisdictional or of substantive law, to waiver by the plaintiff, or to suing in quasi-contract.

D. *Damages for which Recovery May be Had*

The United States is liable only for money claims "on account of damages to or loss of property or on account of personal injury or death."⁵⁹ Why these words were introduced at all is perplexing,⁶⁰ for

⁵³ *Harley v. United States*, 198 U.S. 229, 25 S.Ct. 634 (1905).

⁵⁴ 56 *YALE L.J.* 534 at 541 (1947).

⁵⁵ For example, if *A* preserves *B*'s belongings from impending harm, *A* has an action in quasi-contract for the value of his services and expenditure, but no action in tort.

⁵⁶ *Raven Red Ash Coal Co. v. Ball*, 185 Va. 534, 39 S.E. (2d) 231 (1946); see Corbin, "Waiver of Tort and Suit in *Assumpsit*," 19 *YALE L.J.* 221 (1910), and for further instances, *Bavins v. London and South Western Bank*, [1900] 1 Q.B. 270; *Cohen v. City of New York*, 283 N.Y. 112, 27 N.E. (2d) 803 (1940).

⁵⁷ *Brocklebank, Ltd. v. The King*, [1925] 1 K.B. 52 at 68; *Marshall Shipping Co. v. Board of Trade*, [1923] 2 K.B. 343 at 356.

⁵⁸ Crown Proceedings Act, s. 1.

⁵⁹ F.T.C.A., § 410 (a).

⁶⁰ Some light may be thrown on the matter by the evidence of the Special Assistant to the Attorney General (A. Holtzoff) on an earlier Bill, Hearings before the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d sess., p. 36 (1940), where he indicates that the Small Claims Act of 1922 included only property damage,

without them the United States would still be rendered liable only for torts. Perhaps a court seeking a meaning for them may say that a husband suing for the loss of his wife's society and services is not suing for property damage or personal injury.⁶¹ So much is likely, but there is the further but less probable chance that a court will say that the act, referring expressly to property damage and personal damage, excludes merely pecuniary damage; for example, a man knocked down by an automobile may claim property damage for his broken watch, personal damage for his broken leg, but can he also recover under this act pecuniary damage for his broken contract of employment? That such an interpretation is possible, however remotely, indicates that a more precise form of words should have been used. The English act, by rendering the Crown subject to "all those liabilities" of the subject, avoids any such ambiguity.

E. *Exceptions to Government Tort Liability under the Acts*

1. *Non-negligent torts and abuse of discretion.* There are several exceptions in the United States Act, perhaps the most important of which is:

"Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or 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 an employee of the Government, whether or not the discretion involved be abused."⁶²

This exception saves the United States from liability for unconstitutional acts (which of course could not arise in England). It also excepts non-negligent torts committed "*in the exercise of a statute or regulation.*" The italicised words are vague, and how remote an act can be from the actual command of a statute without going outside this

and that that bill was drafted so as to make it clear that claims for personal injury as well as property damage were included. New York State, which had a similar form of wording in its Court of Claims Act of 1922, wisely avoids the pitfall in its 1939 Act, section 8 of which provides: "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations. . . ."

⁶¹ See *Wilson v. Grace*, 273 Mass. 146, 173 N.E. 524 (1930), for such an interpretation of a statute creating liability for "injury to the person."

⁶² F.T.C.A., § 421 (a).

exception can only be determined by the courts.⁶³ Examination of policy suggests that only consequences intended and contemplated by the rule-making body are included,⁶⁴ and that the government is unwilling to accept liability for bad administration as distinct from actively reprehensible conduct. No express provisions being included in the English act, common law rules must be applied. The Crown will never be liable for acts carried out in performance of an imperative statutory direction (that is, one saying what shall be done and how it is to be done) unless there is negligence (query whether the United States will be liable for the negligent performance of such a compulsory statutory obligation) or for non-tortious performance executed with permissive statutory authority.⁶⁵

The second part of this exception excludes claims based on the exercise of discretionary functions. This would seem to restate the existing law with regard to public officers and is not mentioned in the English act. Nothing contained in the legislation will prevent mandamus from lying against the officer himself where he refuses to exercise a discretionary function. It is clearly undesirable that the operation of a government agency should be hindered by litigation alleging negligent or abusive use of discretion. The justification for also exempting non-exercise of discretion is not so clear. The same policy factors which have influenced the development of the law relating to public officers should be relevant here, and it seems that both acts are deficient in not allowing even mandamus to lie against the government in such cases.

The English statute provides that:

"... Where the Crown is bound by a statutory duty which is binding also upon persons other than the Crown and its officers, then, ... the Crown shall, in respect of a failure to comply with that duty, be subject to all those liabilities in tort (if any) to

⁶³ It has been suggested that on the introduction of this act, the courts may reverse their tendency to find a "taking" within the Tucker Acts because there will now be a remedy in tort. This does not take account of the fact that most of the "taking" cases would fall within this exception to the act. To narrow the interpretation of the Tucker Act would be to deprive many plaintiffs of all remedy.

⁶⁴ See Hearings before the House Committee on the Judiciary on H.R. 5375 and H.R. 6473, 77th Cong., 2d sess., p. 29 (1942).

⁶⁵ For example, *Metropolitan Asylum District v. Hill*, 6 App. Cas. 193 (1881); an asylum erected under statutory powers constituted a nuisance, and because the statute merely authorized the creation of an asylum, but not in the particular place and manner chosen by the defendants, statutory authority was no defense to an action for nuisance.

which it would be so subject if it were a private person of full age and capacity.”⁶⁶

The Federal Tort Claims Act is silent on the matter, but the express reference to “failure to exercise or perform a discretionary function or duty” suggests there was no intention to exempt from such liability. All seems to depend on whether a breach of statutory duty is a wrongful omission, and it seems probable that the courts will so hold.

2. *Torts of the Post Office Department, etc.* Section 421 (b) exempts “any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.” There is a similar provision in section 9(1) of the English Act.⁶⁷ The latter compares unfavorably with its American counterpart in that it adds:

“... nor shall any officer of the Crown be subject, except at the suit of the Crown, to any liability for any of the matters aforesaid.”

That a person witnessing his letter torn to pieces by the postmaster should not even have a remedy against the postmaster has been the subject of protest by Viscount Simon in Parliament.⁶⁸ The English section also provides, for the first time, that a person registering a postal packet shall have a legal cause of action against the government.⁶⁹ Since Congress justified the exception in the United States act by pointing out the ease with which postal matter is registrable,⁷⁰ it is regrettable that the act does not impose a clear-cut civil liability for registered mail similar to that in the English statute.

The further exemptions in section 421 of claims arising out of the administration of the Trading with the Enemy Act, the quarantine law and the fiscal and monetary systems, have no parallel in the English statute. No clear and conclusive explanation for them is traceable in the legislative history, and it seems possible that section 421(a) would have been adequate protection. It certainly appears harsh that the victim of a quarantine imposed by gross negligence should have no action against the United States.

3. *Claims arising out of “assault, battery, false imprisonment,” etc.*

⁶⁶ Crown Proceedings Act, s. 2 (2).

⁶⁷ This extends also to telephonic communications, since they too are under the control of the Post Office.

⁶⁸ 146 HANSARD, no. 39 at 76 (1947).

⁶⁹ Crown Proceedings Act, s. 9 (2).

⁷⁰ Hearings before the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d sess., p. 38 (1940).

The exemptions of maritime torts, Tennessee Valley and Panama Canal operations, and Customs and Tax Collectors, need not be considered here because other statutory provision for compensation has been made. Far more important is the exclusion of "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."⁷¹ This is the most serious flaw in the United States act; none of these torts is exempted from the operation of the English act. The reasons adduced in support of the provisions are unsatisfactory. Only in committee hearings in earlier bills was any justification attempted, and it was then said that such suits were difficult to defend and likely to result in awards of high damages. The first argument is untenable, and the second loses its force when it is remembered that no jury actions are permitted under the act. This provision appears the more remarkable when it is noted that jury actions are allowed in proceedings under the English act. It is much to be feared that unless the English example is here followed in amending legislation, a spate of private claim bills will be unavoidable.

4. *Torts committed by the armed forces.* The United States has accepted a larger degree of responsibility for the acts of the armed forces than has the British government. True, the former exempts "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war,"⁷² but in administrative regulations and interpretations⁷³ "combatant activity" has been given a restricted meaning not extending to practice maneuvers or to any operations not directly connected with engaging the enemy, an interpretation which the courts may well follow.⁷⁴ That exemption apart, the United States accepts liability for acts of military and naval personnel performed in "line of duty,"⁷⁵ a phrase which will presumably receive a broader interpretation than "scope of employment."⁷⁶ The Crown Proceedings Act does not make any extension for service personnel of

⁷¹ F.T.C.A., § 421 (h).

⁷² F.T.C.A., § 421 (j).

⁷³ The phrase does not seem to have been litigated.

⁷⁴ On the contrary, the Assistant Attorney General said it was intended to avoid the inconvenience that would result from bringing military personnel from their duties to the courts in time of war. Hearings before House Committee on Judiciary on H.R. 5373 and H.R. 6473, 77th Cong., 2d sess., p. 12 (1942).

⁷⁵ F.T.C.A., § 402 (c).

⁷⁶ For example, in *O'Hagan v. United States*, 103 Ct. Cl. 408 (1945), an officer moving from one unit to another in his automobile, and not proceeding by the most direct route, was held to be "in line of duty" for the purposes of an allowance claim.

the ordinary principle of vicarious liability adopted in section 2(1). On the contrary, section 10 provides that neither the Crown nor the individual service member responsible should be sued for causing the death or personal injury of another service member, if the latter were either on duty or on service property, and if also "his suffering that thing has been or will be treated as attributable to service" for pensions purposes. Moreover, section 11 provides that the act shall not "extinguish or abridge any powers or authorities exercisable by the Crown, whether in time of peace or of war, for the purpose of the defence of the realm or of training, or maintaining the efficiency of any of the armed forces of the Crown." It is to be noted also that England has no provision for administrative determination of civil claims against the Crown in respect of military operations whether in war or in peace.

5. *Claims arising in foreign countries.* Finally, the Federal Tort Claims Act exempts "any claim arising in a foreign country."⁷⁷ Rather surprisingly, no such exclusion is made in the English act. Perhaps the fairest provision would be one empowering the government to make separate arrangements with foreign countries, allowing actions against each other on a reciprocal basis, an arrangement which might have been expected to have been included in the United States act since reciprocity arrangements operate in the field of contract under the Tucker Act. England seems to have placed herself at a disadvantage by what may well have been an oversight, since the matter was not raised in Parliament. The United States has empowered the Secretary of State to settle claims for personal injuries to an alien caused by acts of her employees in foreign countries.⁷⁸

F. *Provisions for Administrative Settlement of Claims*

It is the provision in the Federal Tort Claims Act for administrative settlement of claims which constitutes the greatest single advantage of the United States act over the English one. Section 403 empowers the head of each federal agency or his nominee "to consider, ascertain, adjust, determine and settle any claim against the United States for money only . . . where the total amount of the claim does not exceed \$1000." The claimant is free to accept or reject the award; if he accepts,

⁷⁷ F.T.C.A., § 410 (k). The reason for this exception (not in the earlier bills) added in 1942 by the Assistant Attorney General was that under the act the *lex situs* determines the liability of the United States. Hearings before the House Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d sess., p. 35 (1942).

⁷⁸ 49 Stat. L. 1138 (1936), 31 U.S.C. (1946) § 224(a).

the award is final and constitutes a complete release; if he refuses he may commence normal court proceedings. The provision seems well-drafted with this exception: it could have been made clear (as is probably the case) that there could be an administrative settlement of a claim exceeding \$1000 if the claimant is prepared to accept, eventually, an award within the \$1000 limit.⁷⁹

This provision for administrative settlement, in line as it is with earlier but more limited provisions, is wholly admirable. However, complaints about the method have been numerous. It is said that there is no restraint on overgenerosity by officials, but the provision for each agency head to make annual reports to Congress of claims paid would seem to be adequate.⁸⁰ Further criticisms are that there should be only one governmental claim agency and that the settlements should be effectively reviewed by Congress. The answers to these objections are that the essential features of administrative settlement must be cheapness, flexibility, accessibility and speed, and that these essentials will be met by the system provided. The claims staff of agencies have experience and appear to have functioned satisfactorily. A valid objection to the provisions may be that a time limit for filing the claim or notice of intention to claim might have been included.⁸¹ There seems no force in the objection that no appeal is possible from the agency decision, when it is remembered that the claimant may reject the proposed agency settlement and commence court proceedings.

The English Act contains no provisions for administrative settlement. Unlike the United States, England has no history of statutory provision for settlement of civil claims against the government, and the matter was not even discussed in the parliamentary preliminaries to the enactment of the legislation. The explanation for the English attitude may be as follows. The statute was regarded as essentially lawyers' law, and, among English lawyers, that dislike of extra-judicial proceedings exemplified by Lord Hewart⁸² still persists. Beyond that, the avowed aim of the English act was to assimilate the Crown to the position of the private subject, and there are no statutory arrangements for administrative settlement of claims against him. Only two points can be made in defense of the English attitude. There is nothing to

⁷⁹ See Borchard, "Tort Claims against the Government: Municipal, State and Federal Liability," 33 A.B.A.J. 221 at 222 (1947).

⁸⁰ F.T.C.A., § 404.

⁸¹ And see McGuire, "Tort Claims against the United States," 19 GEO. L.J. 133 at 141, note 12 (1931).

⁸² THE NEW DESPOTISM (1929).

prevent unofficial compromise of civil claims outside court, whether they are against the government or the private citizen, and, in practice, most claims are settled there. Moreover, suits against the government not exceeding \$800 can be instituted in the county courts where costs are low and trials are speedy and less formal than in the High Court.⁸³

G. *Finality of Decisions under Legislation*

When suits are brought under section 410(a) of the Federal Tort Claims Act,

"The judgment in such an action shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government. . . ."⁸⁴

Similarly, the acceptance of an administrative settlement:

". . . shall be final and conclusive on the claimant, and shall constitute a complete release by the claimant of any claim against the United States and against the employee of the Government . . . by reason of the same subject matter."⁸⁵

The common law rules of *res judicata* provide that a former judgment is a bar to a subsequent action if it is between the same parties, on identical subject matter, and in respect of one and the same cause of action. This act extends these rules at least by providing that actions against the United States bar actions against the employee. Beyond that, does the statute merely restate the rules of *res judicata*? It is submitted that the loose expression "by reason of the same subject matter" would cover identity of subject matter, but not identity of cause of action, and that therefore this act extends the common law rules by barring further suits even though based on a different cause of action. For instance, it was held in *Brunsdon v. Humphrey* that "the real test is not . . . whether the plaintiff had the opportunity of recovering in the first action what he claims to recover in the second"⁸⁶ and that a driver of a cab who had in a previous action recovered for damage to the cab caused by the defendant's negligence was not barred from further proceedings for personal injuries, since actions for property damage and personal injuries constitute separate causes of action. Under

⁸³ Crown Proceedings Act, s. 15.

⁸⁴ F.T.C.A., § 410(b).

⁸⁵ F.T.C.A., § 403(d).

⁸⁶ 14 Q.B.D. 141 at 151 (1884).

the act it seems that such a second action would be denied to the plaintiff. The English act leaves untouched the common law rules, so that the plaintiff could even maintain a separate action against the employee after having sued the Crown.⁸⁷

If a judgment is obtained against the United States government the question arises whether the government has a right of subrogation against the employee. In 1941, the Attorney General advised that the Secretary of Agriculture had no authority to require an employee to reimburse the government for a payment made in settlement of a claim for property damage resulting from the employee's negligence.⁸⁸ This opinion must be limited to administrative settlements: it seems that the ordinary rules of subrogation will apply to judicial decisions against the government. Of course, the government is more likely to resort to disciplinary than to legal action against its employees. The English position is identical, except that joinder of the employee is definitely permitted in the original proceeding.

H. *Rules of Evidence—Production of Government Documents*

There has been some discussion as to whether admissions of officers will bind the government in subsequent litigation.⁸⁹ There seems no reason why, in both jurisdictions, the ordinary rules of agency in evidence should not apply to these situations. Another more perplexing problem, not covered in the Federal Tort Claims Act, but the most hotly contended portion of the Crown Proceedings Act, is that of production of government documents. The latter act for the first time allows discovery of documents against the Crown as of right but absolves the Crown from the requirement of producing documents if it would be injurious to the public interest. Most controversial of all, the Minister, not the court, is the sole judge of whether production is in the public interest.⁹⁰ This has a marked tendency toward bureaucratic oppression, yet, in fairness, it must be admitted that none of the experienced members of the judiciary who spoke on the matter in the

⁸⁷ Part II of the Law Reform (Married Women and Tortfeasors) Act of 1935 which authorizes (on certain conditions) suits against a joint tortfeasor after earlier proceedings have been instituted against another joint tortfeasor, shall bind the Crown. Crown Proceedings Act, s. 4 (2).

⁸⁸ 40 OP. ATTY. GEN. (March 25, 1941).

⁸⁹ Spilman, "Evidence and Admissions of Government Employees under the Act," 33 A.B.A.J. 958 (1947).

⁹⁰ Crown Proceedings Act, s. 28. *Duncan v. Cammell Laird & Co.*, [1942] A.C. 624.

House of Lords on the passage of the bill thought that judges were competent to decide this matter.⁹¹

The American position seems unsettled. Whether discovery against the United States is permissible at all is doubtful. At least one writer has said recently that freedom from discovery is part of the immunity of the government, and that the Federal Rules are inapplicable.⁹² Certainly the American authorities seem in a chaotic state, particularly as regards the validity and effect of departmental regulations forbidding disclosure. Wigmore suggests that all documents should be disclosed unless they relate to secrets of state in military or international affairs, and that regulations purporting to extend the privilege beyond these limits are void,⁹³ but no cases have been found which reached that conclusion. Just what the United States as plaintiff must produce is uncertain. For instance, *United States v. General Motors*⁹⁴ indicates that it must produce its files, but *Walling v. Comet Carriers, Inc.*,⁹⁵ and *Fleming v. Bernardi*⁹⁶ deny that proposition. What documents cannot be produced because it would be contrary to the public interest is not settled,⁹⁷ nor is it clear whether the judge should himself look at the documents to settle this question. The opinion of the Attorney General has been that the return made by the head of the department is conclusive, but it is doubtful whether the courts will accept that ruling.⁹⁸ A great opportunity was lost by not dealing with these matters in the 1946 act, for it may take years to unravel the common law complexities. The English legislation is to be commended for tackling the problem, at least, but the United States courts still have the opportunity, now denied to their opposite numbers in England, of formulating what the writer believes to be desirable rules, namely, that the government should be compelled to produce in litigation all relevant documents

⁹¹ Cf. the voluntary and at least partial abandonment by the Supreme Court of its claims to review questions of fact on appeals from administrative tribunals.

⁹² O'Reilly, "Discovery Against the United States: A New Aspect of Sovereign Immunity," 21 N.C. L. REV. 1 (1942). Contra: Pike and Fischer, "Discovery against Federal Administrative Agencies," 56 HARV. L. REV. 1125 (1943). But see *United States v. General Motors Corporation*, (D.C. Ill. 1942) 2 F.R.D. 528.

⁹³ 8 WIGMORE, EVIDENCE, 3d ed., § 2378a (1940).

⁹⁴ (D.C. Ill. 1942) 2 F.R.D. 528.

⁹⁵ (D.C. N.Y. 1944) 3 F.R.D. 442.

⁹⁶ (D.C. Ohio 1941) 1 F.R.D. 624.

⁹⁷ *Robinson v. United States*, 50 Ct. Cl. 159 (1915); *United States v. General Motors Corporation*, (D.C. Ill. 1942) 2 F.R.D. 528.

⁹⁸ 13 OP. ATTY. GEN. 539 (1871). See *Crosby v. Pacific Lines, Ltd.*, (C.C.A. 9th, 1943) 133 F. (2d) 470; *Pollen v. Ford Instrument Co.*, (D.C. N.Y. 1939) 26 F. Supp. 583.

(whether or not it is a party), that the only exceptions should be state secrets in international and military affairs, and that the court, assisted by affidavit evidence from the head of the department, should be the sole judge whether production is to be allowed.

I. *Limitation Provisions*

Both acts prescribe a limitation period of one year.⁹⁹ The objects of this shortened period of limitation must be to prevent the government's having outstanding financial liabilities hanging over its head for an excessively long time, to reduce the risk of fraudulent claims¹⁰⁰ and at the same time to protect the citizen claimant from prejudice in his action. In the light of these tests, a limitation period of one year seems reasonable, but one difference between the two acts calls for investigation. The Tort Claims Act furnishes no extension for disability of the plaintiff. It is usual for statutes of limitation to extend the period by the duration of the infancy or insanity of the plaintiff. It may have been thought by the framers of the act that if, for instance, a six year old were the victim of negligent driving of a government servant, the possibility of the action being brought at any time within the next sixteen years could not be countenanced by the government. It is agreed that to extend the period in that fashion would be unwise, yet it is contended that there is much to be said for the British compromise. The Crown Proceedings Act incorporates by reference the Limitation Act of 1939. After providing generally for an extension of the period of infancy or lunacy, section 22(d) of the latter statute enacts that in actions against public authorities (now including the Crown) the period of one year shall be extended only when the plaintiff proves that "the person under a disability was not, at the time when the right of action accrued to him, in the custody of a parent."¹⁰¹ Such a clause prevents

⁹⁹ F.T.C.A., § 420; Crown Proceedings Act, s. 30(2).

¹⁰⁰ Cf. Mr. Justice Cardozo in *Thomann v. Rochester*, 256 N.Y. 165 at 170, 172, 176 N.E. 129 (1931); "A judgment against a municipal corporation must be paid out of the public purse. Raids by the unscrupulous will multiply apace if claims may be postponed till the injury is stale. The law does not condemn as arbitrary a classification of rights and remedies that is thus rooted in the public needs. . . .

" . . . Prompt service of the notice would have made it possible for the defendant to investigate the loss and ascertain whether the claim had been swollen in disfigurement of truth. Scrutiny becomes futile with the lapse of the obscuring years."

¹⁰¹ The Public Authorities Protection Act of 1893, which formerly controlled actions against public authorities, contained no extension for infants, and the Court of Appeal, in *Jacobs v. London County Council*, [1935] 1 K.B. 67, held that none could be implied. The Law Revision Committee set up by the Lord Chancellor in

injustice being done where the infant plaintiff has no parent available to sue on his behalf, and might be followed with advantage in the United States. This would appear to be the main case where hardship might ensue to the plaintiff if a rigid period of twelve months were insisted on. One article has suggested (without particular reference to disability) that the courts should be given general discretion to extend the time limit for reasonable cause.¹⁰² The writer thinks the occasions when a time limit of twelve months is inadequate are limited to cases where the plaintiff is disabled and has no legal guardian at that time, and that these specific instances could be met by a particular clause on the order of the English one. To vest the courts with such a discretion might embarrass the government, and it seems that the analogies of private law are best followed here.

J. Joinder of Parties

Uncertainty as to how far the Federal Rules of Civil Procedure apply to suits under the act makes it doubtful whether joinder of private parties as defendants is permitted under the act. The recent case of *Englehardt v. United States*¹⁰³ held that joinder was permissible where the plaintiff and the defendants were citizens of different states, but whether that decision will be generally followed, or be applicable where the plaintiff and defendants are citizens of the same state can be finally decided only by the Supreme Court.¹⁰⁴ The English Act avoids these pitfalls by providing that "subject to the provisions of this Act, all such civil proceedings by or against the Crown . . . shall be instituted and proceeded with in accordance with rules of court and not otherwise."¹⁰⁵

K. Rights of Set-off and Counterclaim

Under the English Act the subject sued by the Crown has the same rights of set-off and counterclaim as against another subject, with

1934, in their Fifth Interim Report, on statutes of limitation (December, 1936, Cmd. 5334) recommended the inclusion of the extension.

¹⁰² Gellhorn and Schenck, "Tort Actions against the Federal Government," 47 COL. L. REV. 722 at 734 (1947).

¹⁰³ (D.C. Md. 1947) 69 F. Supp. 451. And see *United States v. Sherwood*, 312 U.S. 584 at 590, 61 S. Ct. 767 (1941).

¹⁰⁴ Cf., 56 YALE L.J. 534 at 554 (1947); Gellhorn and Schenck, "Tort Actions against the Federal Government," 47 COL. L. REV. 722 at 733 (1947); Gottlieb, "Federal Tort Claims Act—A Statutory Interpretation," 35 GEO. L.J. 1 at 36 (1946).

¹⁰⁵ Crown Proceedings Act, s. 13.

certain limited exceptions in tax proceedings.¹⁰⁶ This is another example of the wider scope of the English legislation affording more comprehensive relief to the citizen. The Federal Tort Claims Act, while giving the government those full rights of counterclaim and set-off found in the Tucker Act, does not extend the rights of the citizen sued by the United States,¹⁰⁷ whose rights of counterclaim seem to be limited as follows. If he seeks an affirmative money judgment it must be a claim over which the court could have exercised jurisdiction in an original suit.¹⁰⁸ Any counterclaim must either arise out of the same transaction as the government's cause of action or be one over which the court could have had original jurisdiction.¹⁰⁹ Therefore, a United States tort can be the subject of a counterclaim only when the government bases its case on the same cause of action and the amount of the counterclaim is such that a judgment against the United States would not result.

L. *Costs*

It has always been a principle of American law that the government shall not pay costs unless clearly required to do so by statute. In England there have been great statutory inroads on that rule since 1855: costs have been payable on petition of right since 1860,¹¹⁰ and since 1933 the Crown has paid and received costs like a private litigant.¹¹¹ By contrast, the United States does not pay costs (although it receives them) under the Tucker Act. Section 410 of the 1946 act allows costs (except attorneys' fees) to the successful litigant, and section 422 provides that the court, or the Attorney General or other official settling a case before judgment,

"... may, as a part of the judgment, award, or settlement, determine and allow reasonable attorney's fees, which, if the recovery is \$500 or more, shall not exceed ten percentum of the amount recovered under part 2, [without suit] or 20 percentum of the amount recovered under part 3, [suit filed] to be paid out of but not in addition to the amount of the judgment, award or settlement. . . ."

¹⁰⁶ *Id.*, s. 35(2)(g).

¹⁰⁷ F.T.C.A., § 411.

¹⁰⁸ *United States v. Shaw*, 309 U.S. 495, 60 S.Ct. 659 (1940).

¹⁰⁹ *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653 (1940).

¹¹⁰ *Petitions of Right Act of 1860*, s. 12, 23 & 24 Vict. c. 34.

¹¹¹ *Administration of Justice (Miscellaneous Provisions) Act of 1933*, s. 7, 23 & 24 Geo. 5, c. 36.

There seems no reason why the United States should be in a privileged position, and the citizen's lawyer handicapped in suits between government and citizen, and the equal treatment of subject and king in regard to costs achieved in England might be copied by the United States.

M. Limitation on Remedies Available

Money claims only may be pursued against the United States, and no relief by way of injunction, specific performance, recovery of specific chattels or execution of a judgment is permitted. Section 21 of the Crown Proceedings Act forbids injunction, specific performance and specific delivery, but authorizes the court in lieu thereof to make orders declaratory of the rights of the parties, which orders will no doubt in practice be carried out. In neither act is any effective means provided for enforcing judgments against the government. It is true that the English Act details a procedure for satisfaction of orders, but in the last analysis there is no enforcement provision, and execution is forbidden. The suitor has no legal remedy if the legislature makes no appropriation.¹¹² The fact that in nuisance actions against the United States not even a declaratory order or injunction is available constitutes a serious limitation on the plaintiff's rights. The English statute authorizes interest at the ordinary rates to be available against the government on judgment debts, on costs, and even on the damages before the date of judgment.¹¹³ The United States act gives a lesser remedy to the plaintiff by forbidding interest before judgment and also punitive damages.¹¹⁴

III

CONCLUSION

Thus, without regard to any particular social theory, force of circumstances has compelled both England and the United States to acknowledge governmental liability for wrongs inflicted on the citizen through the functioning of governmental agencies. The approach of both English and American acts is an extension of private law concepts of agency and vicarious liability to the government.

It may be said that the object of both acts is to assimilate the posi-

¹¹² *Hetfield v. United States*, 78 Ct. Cl. 419 (1933); See Laski, "Responsibility of the State in England," 32 HARV. L. REV. 447 at 455 (1919); Gottlieb, "Federal Tort Claims Act—A Statutory Interpretation," 35 GEO. L.J. 1 at 36, note 47 (1946).

¹¹³ Crown Proceedings Act, s. 24.

¹¹⁴ F.T.C.A., § 410(a).

tion of the citizen as against the government to his position when suing another citizen, as far as reasonably practicable. It has been seen that the assimilation is far from complete in either system. The English act is too tender to the executive, and shows traces throughout of compromises with government departments. The latter have long been opposed to such legislation, and lingering traces of this hostility are seen in the limits imposed on military¹¹⁵ and post-office liability and, above all, in the rules relating to discovery. Where, however, to give a complete remedy to the citizen would not interfere with the executive, there seems a readiness in the English act to accord him that remedy. Nothing in the act suggests that Parliament seized every chance to cut down financial liability; on the contrary, the act is marked by its generosity. One is struck, too, by its orthodoxy. It never goes beyond the limits of existing private law, and when it does not go so far, the explanation seems to be executive pressure. In this very orthodoxy lies one of the act's greatest weaknesses, the absence of provision for administrative settlement.

The United States statute bears less trace of executive interference, and also provides for administrative determination of small claims. On the other hand, the determination of Congress to avoid what are thought to be pecuniarily excessive liabilities is manifest throughout. This seems to explain such serious gaps as the exemption of assault, defamation and numerous other torts. Moreover, it suffers in comparison with the English act by covering a narrower field. Too many procedural matters such as joinder and discovery are left unsettled. It is unfortunate that this act and the Tucker Act have not been dovetailed more completely, for this has led to such lacuna as the total failure to provide for quasi-contract actions, and to differences between the treatment of government contract and government tort, for instance, in costs provisions. These are neither logical nor defensible.

Each act would be improved if it assimilated more exactly the rules between citizen and government with those operating between citizen and citizen. That so much, at least, should be done in each country the writer has no doubt. The hesitancy of Congress and the

¹¹⁵ For example, Viscount Jowitt, Lord Chancellor, speaking with reference to the military exemptions (46 HANSARD, no. 139 at 60) said: "Let me be quite frank: this clause . . . is one of the clauses I have been pressed and indeed compelled by the Service Departments to insert in order to overcome the misgivings or, if you like, the reluctance which they feel, and have traditionally felt, about the introduction of this Bill. . . . I must make it plain that this is one of the clauses which I have had to say I will see is in the Bill."

British departments must be overcome, and the above-mentioned flaws of the respective acts put right. Such reform is surely not ahead of current lay and legal opinion, and could be expected to be implemented without serious public opposition.

There remains the further question: Is it enough merely to extend the private law to the government? If the fire brigade floods your shop while extinguishing a fire next door, if you are knocked down accidentally by a state ambulance rushing a critically ill patient to the hospital, if in attempting the arrest of a street bandit you are fired upon, are you to have a right of action for damages against the government? There is ethical justification for the assumption of liability in such cases, but the difficulty is to decide where to draw the line, once the boundaries of fault are violated. A man may suffer economic loss through broad decisions of policy worked out by the government. If, for instance, the government institutes gasoline rationing, the man who depends on an automobile for his livelihood suffers more than his neighbor. If, at a lower level of administrative policy, admission of children to public places of amusement in Blanktown is temporarily prohibited during an epidemic, are the cinema owners to be compensated? And what of the owner of the candy store in the cinema foyer? If a shopkeeper has his application for a license turned down through error, is he entitled to damages?

It is a hard task to define the criteria which determine when, beyond the bounds of existing common law, the government should assume liability. Perhaps, where the limits of the injury ensuing on governmental operations can reasonably be foreseen, or when it is to be anticipated that the effects of governmental action will be felt by certain individuals, and the damage is not too remote, the government ought to be liable. The government can predict that its vehicles may knock down pedestrians, and that policemen in firing at a gunman may kill a by-stander. On the other hand, surely the candy-store keeper in the closed cinema fails in his action because his damage is too remote. But the damage caused to the commercial traveller by gasoline rationing is neither too remote nor unforeseeable, and yet the government cannot be expected to compensate him. Further criteria must be sought in cases such as these: the test cannot be whether the act is legislative in form, for there seems no reason why the determination that the decision is rule-making rather than adjudicatory should affect the rights of the injured citizen. The point is that individual well-being is not in itself absolutely assured by any government, and that whenever

private interest conflicts with public good, the former must be subordinated to the latter. The individual must pay for the privilege of living in an ordered society. Rules must be framed which, in the light of economic conditions, administrative needs and juristic considerations, will determine when the citizen is paying too high a price. When he suffers a bad bargain let him be compensated for his loss.

Here, then, is an important problem, and one to which no simple and universal solution is applicable. Each fact situation calls for a careful weighing in the balance of the public interest against that of the individual, an estimation of the remoteness and foreseeability of the damage, and an assessment of the expense and administrative difficulty involved. Since it is impossible to categorize the circumstances when these vague criteria are present, a detailed statute providing that in certain prescribed cases the government shall be liable in tort seems impracticable at the present time.

It is tempting to think the situation analogous to that where the courts of Chancery worked out remedies for situations not covered by the common law, and ultimately built up the system of Equity. Or again, the continental handling of these issues can be looked at for comparison. In France, the *Conseil D'Etat*, an administrative tribunal, has jurisdiction over civil claims against the government, and has regularly awarded compensation to subjects injured by operations of the government even though there was no fault. It is significant that that tribunal has continually refused to lay down any fixed principles, and that the attempts made by French jurists such as Hauriou, Jèze, Duguit, Berthélémy, Appleton and Waline to develop philosophical and juristic theories have led to no appreciable measure of agreement as to the basis of liability. Just as Equity courts treated each case on its merits in the early stages, so do the continental administrative tribunals dealing with governmental liability. Because of the limitations imposed by the doctrine of *stare decisis*, Anglo-American courts cannot even follow in the path of the courts of Chancery unless they are given statutory authority. Perhaps the most that should be done is that some general statutory provision embodying only the broad principles outlined in the previous paragraph should be passed.

A further query is outstanding: Should the courts entrusted with the development of this new body of law be the ordinary courts? It may be argued that the examples of Equity and *droit administratif* point to the desirability of special courts untrammelled by private law concepts being set up to work out these principles. If that contention

is to be accepted, then the further point as to whether such a new court is to have jurisdiction of all claims against the government must be decided. In France, the original intention appears to have been that the *Conseil D'Etat* should adjudicate on all claims in respect of injuries inflicted by the government, yet, that having been found unworkable, the doctrine of administrative trespass (*Voie de fait*) has been invoked to empower the ordinary civil courts to adjudicate on claims against the government where the protection of the rights and liberties of the subject is in issue.¹¹⁸ England and the United States would have to decide whether they were to entrust all civil claims against the government to a new court. If they did, the new court could hardly be expected to follow the common law courts exactly, even on facts to which a common law rule would be readily applicable. Inevitably, a new and completely separate body of law for government claims cases, a body of public law, in fact, not merely an extension in certain directions of private law, would be built up. The alternative would be to assign only cases under the new proposed statute to the administrative court. This would be difficult to administer because the plaintiff would frequently be uncertain whether the common law gave him a remedy. Would he then have to lose a common law action before claiming a separate relief in the administrative court? Furthermore, it is out of harmony with the Rule of Law and Anglo-American legal tradition to set up separate administrative courts to deal with matters normally within the scope of the ordinary courts.

If, therefore, the legislature were to recognize the need for an extension of governmental liability, then it would seem best to entrust to the ordinary courts the task of dealing with each case on its merits by the application of the criteria suggested above. The problem is complex, it admits of no ready solution, and the courts cannot be expected to work out any coherent doctrine for a long time. If an enlightened legislature is willing to acknowledge these aspects of governmental liability, it must also let the courts handle these further cases in an empirical fashion, and not complain if a consistent body of principles is not rapidly developed.

¹¹⁸ See UHLER, REVIEW OF ADMINISTRATIVE ACTS 141 et seq. (1942).