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LEGISLATION-FEDERAL TORT CLAIMS ACT-APPLICABLE TO MILITARY PERSONNEL

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LEGISLATION—FEDERAL TORT CLAIMS ACT—APPLICABLE TO MILITARY PERSONNEL—An automobile containing two furloughed soldiers and their father was struck by a negligently operated army vehicle, resulting in the death of one soldier and injury to the other two occupants. In a suit against the government under the Federal Tort Claims Act¹ the father and injured soldier recovered in their own right and the father also recovered as administrator of the deceased soldier's estate. The Circuit Court of Appeals reversed² the judgments in favor of the servicemen, holding that there was an implied exception in the act prohibiting such suits because of benefits available to servicemen in the form of disability payments and death gratuities. On appeal, *held*, reversed. The language of the statute is clear; "any claim"³ does not mean "any claim but that of a serviceman." *Brooks v. United States*, 337 U.S. 49, 69 S.Ct. 918 (1949).

The Federal Tort Claims Act waives the federal government's sovereign immunity to suit in certain classes of torts cases, being designed primarily to cut down the flood of private bills to indemnify injuries inflicted by negligent government officers and employees. Nothing in the general language of the act⁴ specifically exempts servicemen's claims; under the list of exceptions to the scope of the act

¹ 60 Stat. L. 842 (1946), 28 U.S.C. (1948) §2671 et seq.

² *United States v. Brooks*, (C.C.A. 4th, 1948) 169 F. (2d) 840.

³ Sec. 410(a), allowing recovery for "any claim . . . where the United States if a private person would be liable to the claimant. . . ."

⁴ Note 3, *supra*.

is included any claim arising out of the combatant activities of the services in time of war.⁵ The main line of authority implying an exception in such general language when applied to servicemen developed under the Public Vessels Act,⁶ which was interpreted so as to exclude suits by naval personnel receiving benefits because of their service status.⁷ It is submitted that the principle underlying the decision in the principal case provides a proper basis for interpreting both the particular act in question and other similarly worded statutes. First, no Congressional intent to force an election of remedies where administrative benefits are available is indicated. All prior tort claims bills contained provisions exempting claims under the World War Veterans' Act;⁸ no such provision appears in the act. There are certain provisions in the act specifying election of remedy,⁹ but none of them is applicable to the facts of the principal case. Second, the peculiar government-soldier relationship¹⁰ should not be used as a bar to suit by military personnel, unless possibly where the injury arises directly out of particular assigned military duties.¹¹ A serviceman still retains rights which may be infringed: for example, a soldier struck on or off post by a negligently operated post office vehicle ought to be able to recover despite his peculiar status as a soldier. His subservience to military law and discipline, and thus to the government in a particular field of its operations, should not affect the rights against the government which he possesses as a private citizen. Third, acceptance of benefits accruing because of a person's status as a member of the armed forces or as a government employee¹² should not bar right of suit where such benefits are not granted because of any fault on the part of the government, but merely following an administrative determination that a certain percentage disability has been suffered. Such pay-

⁵ Section 421(j).

⁶ 43 Stat. L. 112 (1925), 46 U.S.C. (1946) §§781-790.

⁷ *Dobson v. United States*, (C.C.A. 2d, 1928), 27 F. (2d) 807; *Bradey v. United States*, (C.C.A. 2d, 1945) 151 F. (2d) 742. *Accord*, *Dahn v. Davis*, 258 U.S. 421, 42 S.Ct. 320 (1922), interpreting the Railway Control Act of 1918, 40 Stat. L. 451 (1918). *Contra*, *United States v. Marine*, (C.C.A. 4th, 1946) 155 F. (2d) 456, affirming (D.C. Md. 1946) 65 F. Supp. 111, interpreting the Suits in Admiralty Act, 41 Stat. L. 525 (1920), 46 U.S.C. (1946) §§741-752, in relation to the Federal Employees Compensation Act, 39 Stat. L. 742 (1916), 5 U.S.C. (1946) §750 et seq.

⁸ 43 Stat. L. 607 (1924), 38 U.S.C. (1946) §§421-576.

⁹ Sec. 403(d) makes small claims settlements in full satisfaction and bars further suits against the government or its employees; sec. 410(b) makes elections under the suits provisions final, prohibiting suit against the employee; and sec. 423 makes recovery under the suits section exclusive, thus prohibiting suit under other authority allowing a federal agency to sue or be sued in its own name.

¹⁰ Set out in *United States v. Standard Oil Company*, 332 U.S. 301, 67 S.Ct. 1604 (1947).

¹¹ But see *Jefferson v. United States*, (D.C. Md. 1948), 77 F. Supp. 706, refusing recovery under the act by a former serviceman injured by a negligent army surgeon. Cf. *Alansky v. Northwest Airlines*, (D.C. Mont. 1948), 77 F. Supp. 556, allowing recovery by next of kin of military personnel killed en route to discharge center through negligent operation of military aircraft.

¹² Under the Federal Employees Compensation Act, 39 Stat. L. 742 (1916), 5 U.S.C. (1946) §750.

ments ought to be regarded as a form of health and welfare insurance provided because of the individual's employment status,¹³ and should not be regarded as a binding election of remedy barring the right to sue, particularly where the benefits received are inadequate compensation for the wrong.¹⁴ It is not likely that the courts will be flooded by these statutory actions, for most individuals receiving such certain benefits will not hazard suit for additional compensation. However, as indicated in the principal case, the government should be allowed the right of set-off in the amount of such benefits, on the ground that the individual's damages have been reduced pro tanto.

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¹³ See *Smith v. United States*, (C.C.A. 4th, 1948), 167 F. (2d) 550, for an analogous case.

¹⁴ In the principal case the death benefit for the next of kin of the deceased soldier amounted to only \$468.