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Notes

FEDERAL TORT CLAIMS ACT—LIABILITY OF THE GOVERNMENT FOR SERVICE CONNECTED INJURIES TO MEMBERS OF THE ARMED FORCES

A United States Army officer on active duty was regularly admitted to an Army Hospital for surgical and medical care. Death caused by the negligence of members of the Medical Corps occurred while the officer was under treatment, and the officer's widow, as executrix, brought action under the Federal Tort Claims Act.¹ *Held*, the United States is liable under the Federal Tort Claims Act to members of the armed forces on noncombatant active duty for service connected injuries caused by the negligent conduct of army personnel. *Griggs v. United States*, 178 F. 2d 1 (10th Cir., 1949).

The precise question presented in the *Griggs* case was adjudged to the contrary in the district court decision of *Jefferson v. United States*.² Since the *Griggs* decision, the *Jefferson* case has been appealed and affirmed³ by the court of appeals for the fourth circuit. Previous to the affirmation of the *Jefferson* case, the court of appeals for the second circuit held in *Feres v. United States*⁴ that the estate of an army officer killed by fire in unsafe barracks in which he had been quartered through the negligence of superior officers was not entitled to recover for his death. In January, 1950, the second circuit again denied recovery in *Ostrander v. United States*,⁵ citing the *Feres* case as a basis for its decision. As a result of these cases, the second and fourth circuits have taken the position that the government is not liable under the Tort Claims Act for service connected injuries to members

1. 28 U.S.C.A. §§ 1346(b), 2671-2680 (Supp. 1950). Section 1346(b) provides: "Subject to the provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

2. 77 F. Supp. 706 (D.C. Md. 1948).

3. 178 F. 2d 518 (4th Cir., 1949).

4. 177 F. 2d 535 (2d Cir., 1949).

5. 178 F. 2d 923 (2d Cir., 1950).

of the armed forces while the tenth circuit in the *Griggs* decision allowed the plaintiff to recover. The United States Supreme Court has not had occasion to decide the issue.

The case of *Brooks v. United States*,⁶ in which the Supreme Court allowed recovery for the death of a soldier *on furlough* caused by a collision with a negligently driven army truck, can be distinguished from the *Griggs* decision in that the *Brooks* case dealt with a *non-service connected* injury because the soldier was on furlough and the injury was not incidental to his military service, whereas the *Griggs* case dealt with a *service connected* injury in that the soldier's injury was incidental to the performance of his duties.

The problem presented in the case at hand is primarily one of construing the language of the Federal Tort Claims Act so as to give effect to the intention of Congress. The plaintiff relied on the plain meaning maxim, and as Judge Murrah stated, "The terms of the statute are clear, and appellant's action . . . states a cause for relief under the act, unless it falls within one of the twelve exceptions specifically provided therein; or, unless from the context of the Act it is manifestly plain that despite the literal import of the legislative words, Congress intended to exclude from coverage civil actions on claims arising out of a Government-soldier relationship."⁷ The government made no contention that the case fell within any of the twelve exceptions, but it did strongly insist that regardless of the words of the statute, Congress did not intend to include service caused injuries to members of the armed forces. In support of this view the government contends, ". . . to sustain the instant case, this court must conclude that it was Congressional intent to give every serviceman who was ever hospitalized a malpractice action as well as others of a hundred different varieties against the Government, if he should conceive that his medical care was in any respect inadequate, or that other matters give rise to injury or grievance. The very statement would seem to bring the matter into the category 'of outlandish' results. It would determine that a cause of action arose in favor of soldiers for accidents incident to service, which no court has as yet decided and which the Supreme Court expressly refused to consider because not involved in the *Brooks* case."⁸ Counsel for the government further

6. 337 U.S. 49 (1949). See Note, 10 LOUISIANA LAW REVIEW 94 (1949).

7. *Griggs v. United States*, 178 F. 2d 1, 2 (10th Cir., 1949).

8. *Griggs v. United States*, brief of appellee to court of appeals, page 5. The language referred to in *Brooks v. United States*, 337 U.S. 49, 52 (1949)

pointed out that one of the most undesirable of these results would be to subject injuries sustained in the execution of orders to the examination of our courts, thereby impairing military discipline and encouraging public criticism.

To counter the argument of "outlandish results" made by the defense, it was emphasized that the traditional defenses of fellow servant, voluntary assumption of risk and contributory negligence are available, and exception (1), subsection (a), of the Tort Claims Act,⁹ which exempts the Government from liability in tort in execution of laws or for the misuse of executive discretion, may be used to reduce the number of claims. Further, it may be noted that the government's position could also lead to outlandish results if service connected injuries are excluded and non-service connected injuries are included. This can be illustrated by the example of two soldiers riding in a jeep, one on official business and the other on furlough. If both are killed by a negligently driven army truck, the family of the soldier on furlough could recover thousands of dollars under the Federal Tort Claims Act¹⁰ while the other family would recover only several hundred dollars in the form of gratuity payments¹¹ to the survivors of servicemen. The court of appeals in the *Griggs* case takes the view that the defense of "outlandish results" is not valid and frankly admits, "If the results of its (Congress's) omission to exempt such claims leads to dire consequences and absurd results, it is for Congress and not this court to provide rational limitations."¹²

From an interpretation of the Tort Claims Act made by the Supreme Court in the *Brooks* case,¹³ there is a strong inference

was "The Government envisages dire consequences should we reverse the judgment. A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, all would ground tort actions against the United States. *But we are dealing with an incident which had nothing to do with Brooks' Army Careers*, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented."

9. The twelve exceptions are listed in 28 U.S.C.A. § 943 (now § 2680) (1950).

10. *Brooks v. United States*, 337 U.S. 49 (1949).

11. 38 U.S.C.A. 701 (1949).

12. 178 F. 2d 1, 3 (10th Cir., 1949).

13. *Brooks v. United States*, 337 U.S. 49, 51 (1949): "The statute's terms are clear. . . . We are not persuaded that 'any claim' means 'any claim but that of servicemen.' The statute does contain twelve exceptions. Section 421 (now 28 U.S.C.A. § 2680 [1950]). None exclude petitioner's claim. One is for claims arising out of the military or naval forces or Coast Guard during time of war. . . . Without resorting to an automatic maxim of construction, such exceptions make it clear to us that Congress knew what it was about

that the Supreme Court will hold that Congress "knew what it was about when it used the term 'any claim'" and that Congress certainly must have had the present problem in mind. If this be true and there were no intent to give servicemen such cause of action, it seems that Congress would have stated so in precise language. To hold that there is an implied exception excluding all servicemen on active duty would, in effect, take all the legal significance away from the overseas and combatant activities exceptions and render them meaningless.

Claimants find a very strong point in the legislative history of the Tort Claims Act. "There were eighteen tort claims bills introduced in Congress between 1925 and 1935. All but two contained exceptions denying recovery to members of the armed forces. When the present Tort Claims Act was introduced, the exception concerning servicemen had been dropped."¹⁴ Also, the claimants point to the original draft of the Tort Claims Act, which provided that claims "arising out of the activities of the military or naval forces or of the Coast Guard during time of war" and "arising in foreign countries" were excluded. By an amendment on the floor of the House,¹⁵ the word "combatant" was inserted before the word "activities." This tends to show that Congress considered the "dire consequences" resulting if coverage be extended to members of the armed forces and it seems that if it were not the intention of Congress to include such torts, the amendment would have been defeated, thereby excluding from coverage all "activities" instead of only "combatant activities." Legislative intent in support of claimant's position is further manifested by the fact that the bill which embodied the Tort Claims Act of 1946 was introduced in the 79th Congress with all of the twelve exceptions plus a thirteenth excluding "any claim for which compensation is provided by the . . . World War Veterans Act of 1924, as amended." The World War Veterans Act¹⁶ provides disability benefits to "any person who served in the *active* military or naval service and who is disabled as a result of disease or injury or aggravation of a pre-existing disease or injury incurred *in line of duty in such service.*" (Italics supplied.) This thirteenth exception was rejected, there-

when it used the term 'any claim'. It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when the statute was passed. The overseas and combatant activities exceptions make this plain."

14. *Brooks v. United States*, 337 U.S. 49, 51 (1949).

15. 92 Cong. Rec. 10143 (1946).

16. 38 U.S.C.A. § 701(a) (1949).

by evidencing a congressional intention to include injuries received in line of duty under the Tort Claims Act.

The exact significance of the repeal of the Military Claims Act¹⁷ by Section 424(b) of the original Tort Claims Act¹⁸ was a point of major controversy between the plaintiff and the government. A provision of the Military Claims Act excluded all claims for personal injury or death of military personnel or civilian employees of the army, if such injury or death occurred as an incident of their service. One court¹⁹ has taken the position that this was indicative of the general policy of Congress not to recognize such claims and that there was no indication of a reversal of this policy arising from the repeal of this act by the Tort Claims Act. But it has been very effectively argued²⁰ that prior to the Tort Claims Act it was the policy of Congress by the Military Claims Act to recognize claims for injuries incurred by military personnel when *not* performing their official duty; and that the Military Claims Act was repealed because thereafter such claims were covered by the Tort Act. It appears that if Congress desired to continue its policy (as set out in the Military Claims Act) of denial to servicemen of liability for injuries received incidental to service, it would have so stated in the Tort Claims Act in exact language and not by remaining ambiguously silent; such silence might reasonably be taken as an indication of an intent to discard the policy of the Military Claims Act. In addition, it is questionable whether the Military Act should play any part in the interpretation of the Tort Act, as liability under the Military Act could exist without fault, whereas under the Tort Act the traditional requisites of tort liability apply.

Since the Tort Claims Act waives the sovereign immunity of the United States and adopts the law of the state in which the injury occurred,²¹ with respect to establishing liability, this would seem to indicate that service connected injuries were not intended to be included under the act, for the relationship between the government and the soldier has always been exclusively federal.²² However, such an apparent "radical departure"

17. 57 Stat. 372, 31 U.S.C.A. § 223(b) (1949).

18. 28 U.S.C.A. § 946 (1949).

19. *Jefferson v. United States*, 77 F. Supp. 706 (D.C. Md. 1948).

20. *Jefferson v. United States*, plaintiff's petition for certiorari to United States Supreme Court, page 6.

21. 28 U.S.C.A. § 931(a), now § 1346(b) (1950).

22. *United States v. Standard Oil*, 332 U.S. 301, 305 (9th Cir., 1947): ". . . the scope, nature, legal incidents, and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority." *Jefferson v. United*

may be explained by assuming that if Congress *did* intend to extend coverage to service connected injuries, the easiest method of providing for governmental liability would be to determine responsibility according to the state law wherein the injury occurred, thereby eliminating the necessity of creating an entire new body of federal tort law applicable only to servicemen.

The contention that acceptance by the injured soldier of benefits under the military and veteran's laws precludes recovery does not now seem to be valid for the Supreme Court has allowed²³ the family of a deceased soldier to recover under the Tort Claims Act despite provisions in other statutes for disability payments to servicemen, and gratuity payments to their survivors.

From the foregoing contentions, it is apparent that the question is not one that can be easily resolved. The claimants relied mainly on the "clear words of the statute" and the legislative history of the act while the government based its position on the consequent "outlandish results" and radical departures from policy if recovery were allowed. In regard to the "dire consequences" urged by the defense, it appears that not all of the results from such an extension of liability would be "outlandish." One very desirable consequence might be increased efficiency in the armed forces. It is reasonable to assume that if the government has to answer in court for the negligence of servicemen, more care would be taken to see that duties are carried out in a competent manner, and there would be fewer examples of such incidents as a surgeon leaving a two foot towel in the abdomen of his soldier-patient.²⁴ Also, it should be recognized that public attitude toward servicemen has taken an almost complete about-face in the past decade, and it seems inconsistent that Congress, while taking unprecedented steps to make the armed forces equivalent to other vocations in pay and opportunity, intended that the individual soldier or his family should receive an insignificant sum (as compared to civilian vocations) for tortious injuries received by the serviceman in the performance of his duty. Such a burden should be borne not by the claimant, but by the taxpayer. It is submitted, notwithstanding the language

States, 178 F. 2d 518, 520 (D.C. Md. 1948): ". . . but it is not reasonable to suppose, in the absence of an express declaration on the point, that Congress intended to adopt so radical a departure from its historic policy as to subject internal relationships (of the armed forces) to the law of negligence as laid down by the courts of the several states."

23. Brooks v. United States, 337 U.S. 49, 52 (1949).

24. Jefferson v. United States, 178 F. 2d 518 (4th Cir., 1949).

of the Supreme Court,²⁵ that to allow recovery to a soldier on furlough and then deny governmental liability for service connected injuries would be an unjustified instance of judicial legislation.

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25. *Brooks v. United States*, 337 U.S. 49, 52 (1949): "Interpretation of the same words may vary, of course, with the consequences, for those consequences may provide insight for determination of congressional purpose. . . . The Government's fears may have point in reflecting congressional purpose to leave injuries incident to service where they were, despite literal language and other considerations to the contrary. The result may be so outlandish that even the factors we have mentioned would not permit recovery. But that is not the case before us."