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THE FEDERAL TORT CLAIMS ACT

It is now possible to sue the United States in tort actions without a special authorization from Congress. A judicial remedy has been provided to take the place of the political remedy that has been used for handling tort claims against the Government. The Congress found that it was necessary to streamline their work in order to keep up with the ever increasing demand on its time for more important legislative tasks and therefore it was necessary to find some other means of handling the less important details that have proven harassing and time-consuming and that could be shifted to other bodies or agencies for disposal. The result was the "Legislative Reorganization Act of 1946." Title IV of this act is known as the "Federal Tort Claims Act."[1]

Very briefly, the Federal Tort Claims Act fixes the liability of the United States for torts resulting from the negligent or unlawful acts or omissions of its officers or employees and provides two remedies. One remedy is by administrative action and the other is in the form of consent by the United States to be sued in the Federal District Courts on such claims.

In the field of tort, the Federal Government, as well as any sovereign, was not only immune from suit,[2] but there was no liability by the rules of law applicable to the sovereign.[3] Unless it has assumed such liability by legislative enactment, the rule is well settled that the Government is not liable for injuries arising from the negligent or other tortious acts or conduct of its officers, agents or servants, committed in the performance of their duties.[4] In other words, unless Congress assumes such liability voluntarily, the doctrine of *respondeat superior* does not apply to the United States,[5] and the same is true of any sovereign.

quired by statute to perform the duty being performed by the subordinate, or unless the official cooperates in the negligence or is negligent in appointing such subordinates. See Robertson v. Sichel (1888) 127 U.S. 507, 8 S. Ct. 1286; Vance v. Hale (1928) 156 Tenn. 389, 2 S.W. (2d) 94. See 12 Ann. Cas. 185; 22 R.C.L. 487.

Administrative officials may use the declaratory judgment procedure to clarify their duties and legal relations. See Borchard, *Judicial Relief for Insecurity*, 33 Col. L. Rev. 649 (1933); Borchard, *Judicial Relief for Peril and Insecurity*, 45 Harv. L. Rev. 793 (1932).

[1]60 Stat. 842-847 (1946), 28 U.S.C.A. 921-946.

[2]Minnesota v. United States (1938) 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235; Hill v. United States (1860) 9 How. (U.S.) 386, 13 L.Ed. 185.

[3]Gibbons v. United States (1869) 75 U.S. 269, 19 L.Ed. 543.

[4]Hill v. United States, supra note 2; Robertson v. Sichel 127 U.S. 507, 8 S.Ct. 1286, 32 L.Ed. 203.

[5]Mills v. Stewart (1926) 76 Mont. 429, 247 P. 332, 47 A.L.R. 424; Lewis v. State (1884) 96 N.Y. 71.

The rule is well established that by consenting to be sued, the state or nation does nothing more than waive its immunity from action.[6] It does not thereby concede its liability in favor of the claimant[7] or create a cause of action in his favor that did not therefore exist.[8] Thus the fact that the state has given a general consent to be sued by those having claims against it, is not a basis for assuming that the state has accepted liability equal to that of an individual in the same circumstances.[9] Neither does a special statute permitting suits on particular claims concede the justice of the claims.[10] Statutory consent to be sued only provides another remedy than an appeal to the legislature, and submits the state to the jurisdiction of the court, subject to its right to interpose any lawful defense, which in the case of torts would be the absence of liability of the sovereign for the torts of its officers or agents committed in the performance of their duties. The same rule of immunity applies to both the state and the United States.[11]

The state of Washington has a statute waiving its immunity from suit.[12] The statute provides that "any person or corporation having any action or claim against the State of Washington shall have a right to bring an action against the state in the superior court of Thurston County." In construing this law in the case of Riddoch v. State,[13] the Washington court said, "It creates no cause of action. It provides a remedy for existing causes but imposes no new liability. It does not waive any defense." In a long line of decisions, the United States Supreme Court denies liability of the United States in actions in tort based on the negligence or tortious acts or conduct of its officers or employees, and does not base the absence of liability on the ground that no remedy has been provided, the principle being that the exemption is based on absence of obligation and not mere absence of remedy.[14]

[6]Davis v. State (1917) 30 Idaho 137, 163 P. 373, Ann. Cas. 1918D 911; Lewis v. State (1922) 234 N.Y. 578, 138 N.E. 457; Smith v. State (1920) 227 N.Y. 405, 125 N.E. 841, 13 A.L.R. 1264.

[7]Green v. State (1889) 73 Cal. 29, 11 P. 602; Commonwealth v. Stevens (1881) 3 Ky. L. Rep. 165; Lewis v. State Supra note 6; Apfelbacher v. State (1918) 167 Wis. 233, 167 N.W. 244.

[8]Smith v. State supra.

[9]Barnett v. State (1917) 220 N.Y. 423, 116 N.E. 99, L.R.A. 1918C 400.

[10]Smith v. State supra.

[11]United States v. Lee (1882) 106 U.S. 196.

[12]Rem. Rev. Stat. Wash. (1931) §886.

[13](1912) 86 Wash. 329, 123 P. 450, Ann. Cas. 1913E 1033.

[14]Belknap v. Schild (1895) 161 U.S. 10, 16 S.Ct. 443, 40 L.Ed. 599; German Bank v. United States (1892) 148 U.S. 573, 13 S.Ct. 702, 37 L. Ed. 564.

In Bourn v. Hart,[15] the California court said, "The exemption of the state from paying damages for accidents of this nature does not depend on its immunity from being sued without its consent, but rests upon the grounds of public policy which deny its liability for such damages."

In Mills v. Stewart,[16] the Montana court said, "But the state is a public corporation and out of consideration of public policy the doctrine of *respondeat superior* does not apply to it unless assumed voluntarily. In other words, the state is not liable for the negligent acts of its agents unless through the legislative department of government it assumes such liability.

While there is at least one case to the contrary,[17] the general rule is that the exemption of the state from liability for the torts of its officers and agents does not depend upon the state's immunity from suit without its consent,[18] but rests upon the grounds of public policy which deny the liability of the state for such damages.[19] It is a result of the sovereign character of the state and the absence of liability does not rest upon its immunity from suit.[20]

The above rule is recognized and the liability of the United States is fixed in the Federal Tort Claims Act in the following words: "Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under the same circumstances . . ." Thus by legislative enactment, the United States has accepted liability for damages on account of personal injury or property damage resulting from the negligent or wrongful act or omission of any of its employees. This is plain and simple and there should be no question of the assumption of liability.

The Federal Tort Claims Act gives the consent of the government to be sued on any claim "on account of damage to or loss of property or on account of 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 for such damage, loss, injury, or death in accordance with the law

[15](1892) 93 Cal. 321, 28 P. 951.
[16]Supra note 5.
[17]Sandel v. State (1920) 115 S.C. 168, 104 S.E. 567, 13 A.L.R. 1268.
[18]As to the necessity of consent, see infra note 22.
[19]Bourn v. Hart, supra note 15.
[20]Smith v. State supra; Ridoch v. State supra; Anno. Ann. Cas. 1913E 1039.

of the place where the act or omission occurred." This consent is necessary to any remedy against the United States through the courts.[21] As a matter of sovereignty, the United States cannot be sued in any of its courts or in any other court by any individual association or state without its consent.[22] It is not an attribute of sovereignty peculiar to the United States but has been the very essence of sovereignty from the earliest time. If a government is to survive, it must protect itself, not only from foreign states, but also from its own subjects and citizens. If a government, amenable to suit at the will of subjects or others, it will find itself subject instead of potentate.

The sovereign prerogative of immunity from suit is one of the earliest principles of law. In Blackstone's Commentaries is found the following statement quoted from Puffendorf who preceded Blackstone: "A subject, so long as he continues a subject, hath no way to oblige his prince to give him his due when he refuse it.'"[23] Not verbose, but still the meaning is clear. Immunity of the sovereign.

Lord Coke reports that while he was at the bar it was resolved by all the judges that at common law in order to sue the King, he who had the right must resort to a petition of right.[24] The petition of right is nothing more nor less than the consent of the King for a subject to bring an action against the government.

While the sovereign may not be sued without its consent, it is also important that the consent be properly given by that part of the government having the power to grant such right.[25] In the case of the English petition of right, it must come directly from the Crown through the Secretary of State for the Home Department.[26] In the United States the authorization must come by enactment of Congress[27] in the regular manner. A bill must be passed by both branches of Congress and be signed by the President before it is a valid waiver of the sovereign prerogative of immunity from suit.

It is worthy of note that the petition of right does not issue in all cases but only in certain classes of cases. It is very

[21]Hill v. United States supra; United States v. Clarke (1834) 33 U.S. 436.
[22]Minnesota v. United States supra; Briggs v. The Light Boats (1865) 11 Allen 162.
[23]Blackstone's Commentaries Vol. 1, p. 243.
[24]Sadler's Case 4 Co. 54b, 55a.
[25]Carr v. United States (1878) 98 U.S. 433, 25 L.Ed. 209.
[26]Petition of Right Act (1860) 22 & 24 Vic. c. 34.
[27]Carr v. United States supra.

closely akin to the Tucker Act[28] in the United States in this respect. The scope of the petition of right is well stated in Feather v. Regina,[29] where Cockburn, C. J. says:

> "The only cases in which the petition of right is open to the subject are, where the lands or goods or money of a subject have found their way into the possession of the crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or where the claim arises out of a contract, as for goods supplied to the Crown or for public service. It is in such cases only that the instances of petitions of right having been entertained are to be found in our books."

And to the same effect a statement by Earle, C. J. in Tobin v. Regina:[30]

> "A petition of right will not lie to recover compensation for a wrongful act done by a servant of the Crown in the supposed performance of his duty, nor will it lie to recover unliquidated damages for a trespass.

Thus it appears that the petition of right does not furnish a consent of the Crown to be sued in tort actions, just as the Tucker Act excludes actions in cases "sounding in tort."

In the United States, Congress has been very careful in passing legislation giving consent of the government to be sued and that consent once given is strictly construed.[31] It is not within the power of the courts to allow suits against the government in the absence of proper consent from Congress. Justice Miller stated it very clearly in Gibbons v. United States,[32] saying: "Where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination. It certainly has not conferred it on the Court of Claims."

The Court of Claims was created in 1855[33] to handle claims against the government in contract cases and a few unimportant exceptions. The jurisdiction of the court was amended and revised by the Tucker Act of March 3, 1887.[34]

[28] Act of March 3, 1887, 24 Stat. 505, 28 U.S.C.A. 250, 28 U.S.C.A. 41 (20).
[29] (1865) 6 B. & S. 257, 35 L.J.Q.B. 200, 12 L.T. 114, 29 P. J. 709, 122 E.R. 1191.
[30] (1864) 16 C.B.N.S. 310, 4 New Rep. 274, 33 L.J.C.P. 199, 10 L.T. 762, 10 Jur. N.S. 1029, 12 W.R. 838, 2 Mar. L. C. 45, 143 E.R. 1148.
[31] United States v. Sherwood (1940) 312 U.S. 584, 61 S.Ct. 767, 85 L.Ed. 1058.
[32] Supra note 3.
[33] Act of Feb. 24, 1855, 10 Stat. at L. 612.
[34] Supra note 28.

The Tucker Act is the consent of the government to be sued in four distinct classes of cases. They are: (1) cases founded upon the Constitution or any law of Congress, with the exception of pension cases; (2) cases founded upon a regulation of the executive department; (3) cases of contract express or implied with the Government; (4) actions for damages liquidated or unliquidated, in cases *not sounding in tort*.

Attempts have been made to bring tort actions against the United States under the Tucker Act by treating them as cases of implied contract, but the decisions are uniform in their condemnation of this practice[35] and it was stated in Gibbons v. United States:[36]

> "But it is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the government responsible for the unauthorized acts of its officer, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers and agents."

This is stated in terms of liability of the Government, but in the same case Justice Miller also made the distinction in terms of remedy, as stated above.

Also, it has been attempted to bring a case under the Tucker Act by "waiving the tort and suing in implied contract."[37] This has also been held improper. The court admits that if the case has the elements of both contract and tort the party may forbear to sue in tort and bring an action on the contract,[38] but repeats with emphasis that "a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained."[39]

There have been other acts of Congress which have in effect granted the consent of the United States to be sued,[40] and some of the classes of cases covered have been torts. They have been the torts that have resulted from some particular operation of the Government or some special field in which

[35]Bigby v. United States (1902) 188 U.S. 400, 23 S.Ct. 468, 47 L.Ed. 519; Hill v. United States supra; Gibbons v. United States supra; Cooper v. Cooper (1888) 147 Mass. 370, 17 N.E. 892.

[36]Supra note 3.

[37]Cooper v. Cooper supra; Bigby v. United States supra.

[38]Cooper v. Cooper supra.

[39]Cooper v. Cooper supra.

[40]54 Am. Jur. United States §133.

it is engaged.[41] This is the first time that there has been a general consent of the Government to be sued in tort cases, and the first time that the Government has assumed liability for torts of its employees generally.

Prior to the passage of the Federal Tort Claims Act, the remedy for torts of employees of the Government committed in the scope of their employment was by private claim bills brought in the Congress.[42] There were hundreds of these claims sought each year, and since the remedy was entirely political, it is doubtful if there is any relation between the number of bills brought up and the number of claims of merit that arose. Also, only about 20 per cent of those sought were ever finally approved. Besides being a tremendous burden on the legislative department, it was at best a poor substitute for judicial determination of the merits of a tort claim. There was a purpose in the retaining of this control by Congress since it was against the policy of the Government to make itself liable for any indefinite amount,[43] and general liability in tort cases would mean absolute unpredictability since there is no way of knowing what amount of tort claims will accrue in any period. However, the method of handling the claims had outgrown its usefulness and a more efficient way had to be sought. Following the lead of many of the states, Congress passed the Federal Tort Claims Act.

The Federal Tort Claims Act waives the immunity of the United States from liability for the torts of its officers and employees arising out of their employment, assumes liability to the same extent as a private individual under like circumstances, consents to have the liability determined by the courts, or by administrative agencies if the claim is less than $1,000 at the choice of the claimant, submits to the law of the place where the injury occurred, and confers jurisdiction on the United States district court of the district wherein the plaintiff is resident or wherein the act or omission occurred to hear and determine such claims of liability.

Administrative adjustment is provided in all cases where the claim is $1,000 or less. The head of each Federal agency is given authority to "consider, ascertain, adjust, determine, and settle any claim against the United States for money only, accruing on or after January 1, 1945, on account of damage to

[41] 43 Stat. 112 (1925), 46 U.S.C.A. 781-790; 46 Stat. 1528 (1931) 28 U.S.C.A. 901.
[42] German Bank v. United States, supra.
[43] Langford v. United States (1879) 101 U.S. 341, 25 L.Ed. 1010.

or loss of property or on account of 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.'"[44] The liability of the United States is to be the same as if it were a private party, and the law to be applied is the law of the place where the act or omission occurred.

Any award made by a Federal Agency under this authorization is to be final and conclusive on all officers of the Government unless the award is procured by fraud. The award is to be paid by the head of the Federal Agency concerned out of appropriations that may be made therefor, and the act authorizes such appropriations. The acceptance of any award made operates as a complete release, both of the United States and of the employee of the Government involved. In other words, if a claimant recovers from the Government, he is precluded fron any action against the employee or official whose act or omission gave rise to the claim by reason of the same subject matter.

The act provides that the head of each Federal Agency shall annually make a report to Congress of the claims paid with name of claimant, amount asked and amount paid and a brief description of the claim.

Part three of the act gives to the Federal district courts the exclusive jurisdiction to hear, determine and render judgment on any claim, against the United States arising in the same manner and being the same claims as described in part two of the act except that in this section there is no limit as to the amount of the claims. If the claim is for less than $1,000 there are two remedies, but if the claim exceeds that amount, then it must be settled by the court. In hearing these claims, the court sits without a jury and the claimant has no right to a jury trial. In supplying a remedy where there was none, the Congress may use its discretion as to whether to provide a jury trial or not[45] and in this case has found it advisable to leave the matter in the hands of the court, much as in equity cases.

In keeping with well settled rules, the United States is not liable for interest prior to judgment,[46] nor is it liable for

[44]60 Stat. 843 (1946) 28 U.S.C.A. 921.
[45]Tutun v. United States (1925) 270 U.S. 568, 46 S.Ct. 425, 70 L.Ed. 738.
[46]United States v. Goltra (1940) 312 U.S. 203, 61 S.Ct. 487, 85 L.Ed. 776; Annotation 96 A.L.R. 30.

punitive damages.[47] Costs, not including attorney's fees shall be allowed to the successful claimant in all courts to the same extent as if the United States were a private litigant.

A judgment under this act will be a complete bar to any action against the employee of the Government whose act or omission gave rise to the claim by reason of the same subject matter, the same as an award by the Federal agency.

There are certain limitations on the institution of suits under this section. It is provided that a suit may not be brought on a claim that is before the Federal agency for administrative determination. The claim may be brought to the court after it has been withdrawn from the Federal agency by a written notice given fifteen days prior to conmmencement of the suit. Otherwise, once it has been submitted to the agency for settlement, the claim may not be sued upon until it has been finally disposed of by the agency. This will protect a claimant from having a claim pigeon-holed by the agency to which it is submitted, and all he need do is to give the agency a written notice that he is withdrawing it and in fifteen days he is free to start suit on it in the United States district court. There is a further limitation on the institution of suit after a claim has been submitted for administrative determination. The suit may not be for an amount greater than that asked in the claim submitted to the Federal agency, unless it is shown that the increase is based on newly discovered evidence not reasonably discoverable at the time of the presentation of the claim to the Federal agency.

The forms of process, writs, pleadings and motions, and the practice and procedure will be in accordance with the rules promulgated by the Supreme Court pursuant to the Act of June 19, 1934; and the provisions for counterclaim and setoff, interest on judgments, and payment of judgments are the same as for actions brought in the United States district court under the Tucker Act.

Judgments of the district court are final, subject to appeal. The appeal may be to the circuit court of appeals in the same manner and to the same extent as other judgments of the district courts, or with the written consent of all the appellees, it may be taken to the Court of Claims of the United States. Such appeals to the Court of Claims of the United States must be taken within three months after entry of the judgment in the district court.

[47]60 Stat. 843 (1946), 28 U.S.C.A. 931.

At any time after institution of the suit, the Attorney General has the authority to arbitrate, compromise or settle any claim cognizable under part three of the act, with the approval of the court in which the suit is pending. In practice, that will undoubtedly save considerable time and expense in litigation and will make it possible to clear the calendar of cases where there is no doubt of the validity and good faith of the claim.

Where Congress provides a remedy, it may also make all necessary limitations and restrictions on that remedy.[48] Congress has provided a one year statute of limitations on the presenting of the claim to the Federal agency in the case of claims for less than $1,000, or the instituting of suit in the district court. If the claim is taken to the Federal agency, the claimant has six months from the time of mailing of the notice of final disposition in which to institute a suit in the district court in pursuance of part three of the act. The one year is to be computed from the date of occurrence, or from the enactment of the act, whichever is later.

While this act in general covers the nonfeasance, misfeasance and malfeasance of employees, there are several important exceptions. Claims arising out of loss, miscarriage or negligent transmission of postal matters are excluded, as are those resulting from assessment or collection of tax or customs duties or the detention of goods by customs or excise officers or by any other law enforcement officials. Other exemptions include damage from the establishment of quarantines by the United States, liability for damage to ships while passing through the Panama Canal, regulation of the monetary system, activities of the Tennessee Valley Authority, combatant activities of the Armed Forces during time of war, and any claims arising in a foreign country. Also exempt are any claims arising out of assault, battery false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. These exceptions are of two classes. Those covered by other specific acts and those in which the Government does not wish to change the present rules of liability and immunity from suit.

As part of any judgment rendered under the act, the court may determine and allow reasonable attorney's fees, or the head of the Federal agency may make such findings in

[48]Schillinger v. United States (1894) 155 U.S. 163, 166.

case of administrative adjustment. These attorney's fees are a part of the judgment and not in addition to the judgment, award or settlement made. If the recovery is $500 or more, the fee set shall not exceed 10 per cent of the amount recovered under administrative adjustment or 20 per cent of the amount recovered in suit. A penalty is provided in case the attorney charges a greater fee. He shall be guilty of a misdemeanor and subject to a fine of not more than $2,000 and imprisonment not to exceed one year, or both.

There have been other acts providing for administrative adjustment of claims for property loss or damage or personal injury or death as the result of certain acts.[49] In so far as these claims are now cognizable under part two of the Federal Tort Claims Act, the former acts are repealed. In other words, this general act supersedes the other acts that dealt with special cases and all claims that are included within the new act will find their authorization there rather than in the numerous other acts. This will do away with overlapping remedies and will simplify and condense the statutes, which is a desirable result.

In accordance with the act and the rules applicable, the procedure will be simple and to the advantage of the attorney. The suit can be filed in the United States district court and service of summons be had on the local United States Attorney. The usual rule, forms and procedure of the court will apply with which the attorney is familiar. The new act should prove advantageous to all parties concerned.

C. C. Cook

[49]42 Stat. 1066 (1922), 31 U.S.C.A. 215-217; 41 Stat. 929 (1920) 33 U.S.C.A. 853; 49 Stat. 1184 (1936) 31 U.S.C.A. 224b; 57 Stat. 372-373 (1943) 31 U.S.C.A. 223b-223c; 40 Stat. 132 (1918) 34 U.S.C.A. 600; 42 Stat. 63 (1921) 31 U.S.C.A. 224c.