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Fred Blanton

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THE FEDERAL TORT CLAIMS ACT IN ACTION

By

FRED BLANTON*

The overwhelming uncertainty of many aspects of the Federal Tort Claims Act¹ as revealed by over two years of litigation is both challenging and intriguing. Statutory interpretation, avowedly for the purpose of arriving at Congressional intent, has resulted in decisions on diverse points that are contradictory; and the appellate tribunals are faced with the arduous task of resolving the complex questions involved. It is the purpose of this article to portray what has transpired judicially since the Act became law on 2 August 1946,² and to investigate very briefly a few of the major conflicts. Others have been but mentioned, mainly because of an insufficient number of cases.

Statute of Limitations and Related Problems

The passage of time has largely eliminated the early dilemma occasioned by the conflict between a state statute of limitation which has been construed as a substantive part of the right created, and that considered as merely procedural. The Act provides that the United States is liable under circumstances where a private person "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Since the Act recognized claims accruing after 1 January 1945,³ and by its clause of limitation extended the time for commencing a civil action thereon against the United States to one year after its effective date, or 2 August 1947, the problem to be decided was whether the state rule or the Act clause controlled.

The Fourth Circuit Court of Appeals in *State of Maryland to Use of Burkhardt v. United States*,⁴ resolved the question by holding that the Act limitation applied, and not Maryland's one year statute, construed as substantive. The Court reasoned that the Act contemplates the definition of a particular actionable wrong by the laws of the state where the act or omission occurred, but that the federal statute must be followed in regard to the timeliness of a civil action to enforce the liability so defined, especially in order to give any effect to the provision pro-

*A.B., Birmingham-Southern College, 1939; LL.B., University of Virginia, 1942; Professor of Law, Dickinson School of Law, 1948- ; Member of the Alabama and Birmingham Bar Associations.

1, 28 U.S.C.A. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680; Title IV, Public Law 601, Aug. 2, 1946, formerly 28 U.S.C.A. § 921 *et seq.*

² Cases are included up to 15 February 1949 where opinions were published.

³ This date was omitted in the codification of the Judicial Code, since it was felt that it was no longer applicable as the codification became law on 1 September 1948, well over a year after the Act became law.

⁴ 165 F.2d 869 (1947), overruling *State of Maryland to Use of Burkhardt v. United States*, 70 F. Supp. 982 (D.C. Md. 1947), noted in 28 NEB. L. REV. 122 (1948).

viding for the inclusion of events transpiring after 1 January 1945.⁵ Otherwise, the injured person would have no claim since the state period would have run prior to the date the Act became law. Although no state has been found which has less than a one year statute of limitations for claims covered by the Act's provisions,⁶ the same conclusion could and should be reached in the event the question arises by virtue of a state's having enacted a substantive limitation statute for a shorter period.

A consideration as to whether the Act creates a new cause of action or simply removes a procedural bar to an already existing cause is of assistance in analyzing cases involving the limitation feature⁷ and others which will be noted later. From the viewpoint of the practicing lawyer, who is interested primarily in the probability of relief for his client and not in the theory as to why he can or cannot obtain such relief, there has never been a cause of action against the United States for claims involving negligence. That in fact or theory he may have had a claim which he could not enforce because of a procedural impediment offered no comfort to him or his client. Practically, then, this is a new cause of action based on what the particular state where the act or omission occurred conceives to be an actionable wrong, and the federal government can enact its own statute of limitation. Thus, limitations of the various states, even though regarded by them as substantive, do not define any of those standards of care the breach of which leads to liability; and it is only those standards which bear any relationship to this new cause of action. However, should the Act be construed as merely removing a procedural bar, then the argument that the law of the state in which the act or omission occurred controls both as to standards of care and time is more convincing. The removal of the bar would give a forum for enforcing causes of action which have existed all the time, and their basis could only be the entire body of substantive law of the state.

Whichever view is taken, Congress must be considered as having delegated to the legislatures and the courts of the several states the power to determine the liability of the United States in tort in those situations covered by the Act. The standards of care expected and required of its agents, officers, and employees, and the methods of computing damages are as varied as the jurisdictions. Congressional consent to liability of governmental agencies in specific instances and the authorization of civil actions by and against them resulted in the state courts entertaining suits determined by the standards of state law. Now that the federal courts have exclusive jurisdiction in this type of case, relieving the state courts of their work in those cases in the tort field covered by the Act, one wonders if

⁵ *Sweet v. United States*, 71 F. Supp. 689 (D.C.N.D. Cal. 1948).

⁶ Several states have shorter periods for some torts specifically excluded by the Act, e.g., libel, slander.

⁷ See *Wiltse v. United States*, 74 F. Supp. 786 (1947); cf. *Durrance v. United States*, 101 F2d 109 (CCA 5th 1939).

Congress was not aiming at a uniform federal law.⁸ An amendment to the Act lends substance to this conjecture for although no civil action is allowed which is based on laws of a punitive nature, Congress has seen fit, and rightly so, to allow recovery for compensatory damages in wrongful death cases originating from a state that regards the action as one for punitive damages.⁹

In other fields, the courts have refused to apply state law in interpreting the effect of an act authorized by a federal statute. Thus, where the United States has leased property for governmental use in a state, it has been stated that the substantive law to be followed for determining the legal incidents flowing from the lease is not the law of the state wherein the land is located, but, to the contrary, federal law gleaned from federal cases and in their absence the general law of landlord and tenant.¹⁰ Justice Jackson, speaking for the Supreme Court in *United States v. Allegheny County*,¹¹ has said:

"The validity and construction of contracts through which the United States is exercising its Constitutional functions, their consequences, or the rights and liabilities of the parties, the titles and liens which they create or permit, all present questions of Federal law not controlled by the law of any state."

And Justice Douglas in *Clearfield Trust Co., et al. v. United States*¹² has said:

"The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the several states. The desirability of a uniform rule is plain."

Admittedly these are commercial cases, but certainly uniformity is as much to be desired in the tort field as in other fields. Cases under the Tucker Act¹³ and Suits in Admiralty Act,¹⁴ so frequently cited as analogies when interpreting the present legislation, do not afford much assistance. Admiralty is an exclusive federal jurisdiction, and the Tucker Act concerns claims arising from contract wherein the decisions referred to previously would allow state law little, if any, effect in arriving at a conclusion. *Erie Railroad Co. v. Tompkins*,¹⁵ intimated as compelling the application of state law,¹⁶ cannot be read to infer that the federal

⁸ The vast expansion of Federal agencies and corporations subject to suit had in some instances made it extremely difficult to ascertain what particular agency was the correct one to sue. See e. g. *National Housing Agency, et al. v. Orton*, 202 S.W. 2d 243 (1947).

⁹ Act of August 1, 1947, Public Law 324, 80th Congress. Ch. 446, 1st Sess. proviso to § 410 (2); 28 U.S.C.A. § 2674.

¹⁰ See *Girard Trust Co. v. United States*, 148 F2d 872, 874 (CCA 3rd 1945).

¹¹ 322 U. S. 174, 183, 64 S.Ct. 908, 913, 88 L. Ed. 1209 (1944).

¹² 318 U.S. 363, 744, 63 S.Ct. 573 (1943).

¹³ 28 U.S.C.A. §§ 791, 1333-1346, 1348, 1350, 1351, 1353-1357, 1359, 1397, 1399, 1402, 1491-1494, 1496, 1501, 1503, 2071, 2072, 2361, 2401, 2402, 2411, 2412, 2501, 2506, 2509-2511; formerly 28 U.S.C.A. § 41 *et seq.*

¹⁴ 48 U.S.C.A. § 741 *et seq.*

¹⁵ 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188 (1938).

¹⁶ Cf. *Durrance v. United States*, 101 F2d 109 (CCA 5th 1939).

government cannot determine standards of liability by a uniform rule. In any event the conclusion can be reached that Congress has abandoned its legislative function to the states and created a diversity of result where none is to be desired, although recognizing the patently just conclusion that the sovereign should be responsive as contemplated by the Act for damages occasioned by the act or omission of its employees. There can be no quarrel with the purpose of the Act; one can only question the method employed in attaining it.

With the one year statute of limitation imposed by the Act applying, the lawyer is then interested in whether or not his civil action has been commenced within that period so as to be timely. The answer depends first on when the cause of action arose, and secondly, when the action was commenced to enforce the claim. Normally, these situations present no difficulties. However, in *Le Maine v. United States*,¹⁷ the Court was confronted with a civil action setting forth facts which showed that the conduct of the United States complained of began in June 1942, well before the 1 January 1945 date of the Act, but that the conduct continued past the latter date. Without deciding exactly what the legal effect of the conduct was, a continuing nuisance or a continuing trespass, the Court held that the complaint was not subject to dismissal, although the plaintiff could not recover for damages accruing prior to 1 January 1945.

A more difficult problem involves the determination of when a civil action is commenced so as to be within the one year period. While the Tucker Act prescribes a definite method of filing and service before the action is deemed to have been commenced,¹⁸ the courts do not have the advantage of such a provision in the present act. *Turkett v. United States*¹⁹ turns on the question of payment of fees as a prerequisite to filing in the District Court. Where the complaint had been received in the clerk's office prior to the prescribed limit, and the plaintiff's attorney had failed to send a check for the filing fees and costs until after the clerk had written, and where the clerk did not receive these filing fees and costs until after the time limit, then it was held that the action was not timely. While many of our states permit the filing of complaints without payment of fees, the Federal District Courts, by rule of court, have insisted that a plaintiff either pay, or file a pauper's oath, thereby avoiding the huge backlog of uncollected court costs so prevalent in some states. One is not inclined to look with much favor upon a lawyer who is so unfamiliar with his rules of court as to overlook or disregard the payment of these costs, and thereby deny to his client his day in court. Claimant's alternative of a suit against his attorney is not a satisfactory solution, but the relaxation of the rules would result in the very chaotic state they are designed to remedy.

¹⁷ 76 F. Supp. 498 (D.C. Mass. 1948). Similarly, even though the statute of limitation is extended by the Act when minors are involved, 28 U.S.C.A. § 2401, it does not have the effect of causing a claim to accrue after 1 January 1945 when the event occurred previous to that date. *Perry v. United States*, 170 F.2d 844 (CCA 6th 1948).

¹⁸ See Note, 51 HARV. L. REV. 1087.

¹⁹ 76 F. Supp. 769 (D.C.N.D.N.Y. 1948).

Relating back of an amendment to the original date of filing was before the Court in *Bay State Crabmeat Co. v. United States, et al.*²⁰ There, counsel stated a cause of action that was styled by him as a "libel in personam", which the government's attorney attacked as not presenting a maritime cause of action. After the statute of limitations had run, counsel moved the Court for permission to amend, and in so doing stated that the amendment was to date back to the original filing. The Court permitted this, and the cause was removed from the admiralty to the civil docket. The essential facts upon which the civil action was based were not changed; indeed, counsel for plaintiff had merely been mistaken in his legal terminology, and the amendment did not change the legal effect of what he had previously pleaded. Obviously, the Court would be justified in denying a relation back when the cause of action itself was changed by the amendment, for then plaintiff's claim could not be considered to have been commenced within the statutory time.

Parties in the Action—Subrogees

The Tort Claims Act is so indefinite as to what persons may sue or what persons have a "claim" under its provisions that the courts have been occupied to a very large degree with determining what class or classes of people are included. Where an insurance company has paid all or part of the claim which has been made against it by someone who has been injured, or whose property has been damaged as a result of an act or omission of an employee of the United States, is the insurance company the "real party in interest" or a "proper party"? Does a subrogee in this event have a "claim" which can be enforced against the United States? Those courts which deny that the insurance company may enforce a claim stand on a strict interpretation of the statute, and the Federal Anti-Assignment Act.²¹ Four Circuit Courts of Appeals, the Sixth, Ninth, Second, and Fifth, have ruled that subrogees may sue.²² *Old Colony Insurance Co. v. United States*²³ is typical of the liberal viewpoint, and held that where the insurance company had paid the amount of the damage it could sue, the court feeling that "claimant" in the Act does not mean merely one who has sustained damage to his property, and further that the Anti-Assignment Act did not apply because the subrogation

²⁰ 78 F. Supp. 131 (D.C. Mass. 1948) (Admiralty).

²¹ 31 U.S.C.A. § 203 *et seq.*; *Rusconi, et al. v. United States*, 74 F. Supp. 669 (D.C.S.D. Cal. 1947), overruled by *Employers' Fire Insurance Co. v. United States, et al.*, 167 F2d 655 (CCA 9th 1948); *Bewick v. United States*, 74 F. Supp. 730 (D.C.N.D. Texas 1947) relying on *McCarey v. United States* (D.C.E.D. Mich.) (not published); *Cascade County, Montana, et al. v. United States*, 75 F. Supp. 850 (D.C. Mont. 1948). See *Suits on Tort Claims against the United States*, 7 F.R.D. 689 (1948). Compare *Augusta Broadcasting Co. v. United States*, 170 F2d 199 (CCA 5th 1948).

²² *Old Colony Insurance Co. v. United States*, 169 F2d 931 (CCA 6th 1948), overruling 74 F. Supp. 723 (D.C.S.D. Ohio 1947); *Employers' Fire Insurance Co. et al. v. United States, et al.* 167 F2d 655 (CCA 9th 1948), overruling 74 F. Supp. 669 (D.C.S.D. Cal. 1947); *Aetna Casualty and Surety Co. v. United States*, 170 F2d 469 (CCA 2nd 1948), overruling 76 F. Supp. 333 (D.C. E.D.N.Y. 1948); *South Carolina State Highway Department*, 16 CCH Neg. Cases 513 (CCA 5th 1948).

²³ 169 F2d 931 (CCA 6th 1948).

was by operation of law.²⁴ Even when there is a contract provision relating to the assignment of such claims to the insurance company on payment of the loss, there should be no distinction, since such a provision merely expresses the right of subrogation which would arise in any event by operation of law.²⁵ In the event of a partial subrogation, some courts would say the insured may sue on the entire claim as the real party in interest,²⁶ or in his name for the use of the insurance company.²⁷ A greater number allow the equitable subrogee to sue in his own name no matter whether totally or partially subrogated.²⁸ One insurance company assigned the claim back to the insured,²⁹ another denominated payment for the loss a loan,³⁰ and civil actions by the insured have withstood government motions to dismiss as not being by the "real party in interest". A statute that is obviously designed to give relief is properly construed to include those who have legitimate claims. The subrogee's right stems from the same set of facts, and when he is a party the Federal Government is by no stretch of the imagination subject to any additional liability. Common law subrogation, which is only *pro tanto*, is not the evil of voluntary assignment aimed at in the Anti-Assignment Act.

The main difficulty, granting the soundness of our Circuit Court opinions, that the subrogee has a claim under the Federal Act which he may institute a civil action on, is that the District Courts are looking to the state law to see whether or not he can do so, *i. e.*, the state may say that the suit must be brought in the name of the one who actually suffers the injury for the use of the insurer, or that he holds as trustee for the insurer. The simple solution is to consider this a procedural matter exclusively, and allow the insurance company alone to sue where it has paid the entire amount of the damage, and for both to join where there has been a partial payment.³¹ This recognizes that the state law is the basis for the standards of liability; but leaves in the Federal court the manner of enforcing that liability by ascertaining the proper parties who have a "claim".

Parties in the Action—Persons in the Armed Forces

The relation of the person in the Armed Forces to the United States has

²⁴ See Note, 28 NEB. L. REV. 111 (1948).

²⁵ Hill et al. v. United States, 74 F. Supp. 129 (D.C.N.D. Texas 1947).

²⁶ Van Wie v. United States, 77 F. Supp. 22 (D.C. Iowa 1948).

²⁷ Grace, et al. to Use of Granger Mutual Insurance Co. v. United States, 76 F. Supp. 174 (D.C. Md. 1948). Compare Augusta Broadcasting Co. v. United States, 170 F.2d 199 (CCA 5th 1948).

²⁸ Old Colony Insurance Co. v. United States, supra; Employers' Fire Insurance Co. et al. v. United States, supra; Aetna Casualty and Surety Co. v. United States, supra; Wojcick et al. v. United States et al., 74 F. Supp. 914 (D.C.E.D. Wis. 1947) (\$50 deductible policy); Niagara Fire Insurance Co. v. United States; Comm'r of State Insurance Fund v. United States (Two Cases), 76 F. Supp. 850 (D.C.S.D.N.Y. 1948); Insurance Company of North America v. United States, 76 F. Supp. 951 (D.C.E.D. Va. 1948); Gray, et al. v. United States, 77 F. Supp. 869 (D.C. Mass. 1948); Town of Amherst et al. v. United States, 77 F. Supp. 80 (D.C.W.D.N.Y. 1948); South Carolina State Highway Department, et al. v. United States, 78 F. Supp. 594 and 78 F. Supp. 598 (1948), *aff'd* 16 CCH Neg. Cases 513 (CCA 4th 1948); State Road Department of State of Florida v. United States, 78 F. Supp. 278 (D.C.N.D. Fla. 1948).

²⁹ Forrester v. United States, 75 F. Supp. 272 (D.C.E.D. Wis. 1947).

³⁰ Augusta Broadcasting Co. v. United States, 170 F.2d 199 (CCA 5th 1948).

³¹ See North American Fire Insurance Co. v. United States, 16 CCH Neg. Cases 483 (CCA

been injected as a factor in ascertaining what classes of persons are included or excluded by the Act. A member of the Armed Forces, *eo nomine*, is not within any stated exclusion, nor is his "claim" within those excluded. The Fourth Circuit Court of Appeals has considered a claim based on a so-called "non-service caused" injury sustained by a soldier on furlough while riding in a private automobile which was struck as the result of the negligence of the driver of an Army truck.³² The majority of the Court, speaking through Dobie, J., denied that the soldier was contemplated by the Act and hence was excluded, or did not have a claim, basing the decision in the main on the fact that Congress had previously passed benefits by way of pensions, etc., for the serviceman who was so injured. Some of Judge Dobie's argument is unconvincing, especially where he attempts to show that if one soldier were injured in Canada he would have no claim because it arose in a foreign country, while if another were injured at Plattsburg, just a few miles south of the Canadian border, he would have a claim, and this unequal result could not have been intended. However, the identical result is reached if civilians be injured in like circumstances, and if his argument is followed then no civilian is covered by the Act. For injuries arising in a foreign country, no cause of action is given by the Act, which is determinative of nothing connected with the status of the person injured. One District Court has reached the conclusion that there is nothing in the Act which excludes "soldiers as a class, and therefore a soldier may sue, especially where the injury is non-service connected".³³

Judge Parker in a dissent in *United States v. Brooks*,³⁴ referred to previously, points up the question of whether or not the soldier's case has a basis in state law, *i. e.*, does the state set up standards of conduct the breach of which will lead to liability in these cases involving soldiers? The Act reads that the United States shall be liable, "if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred."³⁵ With nothing more, if the Federal Government were a private person it would be liable; the standards of conduct have been breached. There is a "claim" enforceable in a civil action given by the Tort Claims Act. But does the state where the act or omission occurred make an exception in the event one soldier sues another soldier and conclude that there is no liability because of the *status* of the parties involved? In an action in a state court could the driver of the army vehicle have successfully defended on the *sole* ground that both he and the plaintiff were soldiers?

A serviceman is clearly exempt from prosecution by civilian authorities if he acts within the scope of his authority as a serviceman. Persons in the military

9th 1948); *Yorkshire Insurance Co. v. United States*, 16 CCH Neg. Cases 412 (CCA 3rd 1948).

³² *United States v. Brooks*, 169 F2d 840 (CCA 4th 1948).

³³ *Sansom v. United States*, 79 F. Supp. 406 (D.C.S.D.N.Y. 1947). Plaintiff was an Army private injured on a bus operated by the War Department. Held, soldier's claim was not excluded.

³⁴ 169 F2d 840 (CCA 4th 1948).

³⁵ 28 U.S.C.A. § 1346.

are not, by reason of their military character, relieved of their duties and liabilities or deprived of their rights as citizens.³⁶ No cases have been found specifically involving the negligence point. However, to sue another person in the service for damages arising out of a trespass it must be shown that the defendant acted outside the scope of his office or abused his discretion.³⁷ Our law has provided for remand from the state courts to the federal courts of actions commenced against a person in the Armed Forces where the suit is based on an event which was done "under color of his office or status."³⁸ It would seem then that the denial of liability is not based on the sole consideration that one serviceman is suing another; but instead on whether or not what he was doing was within the line and scope of his office as to the plaintiff serviceman. If he was acting within such line and scope, then the defendant serviceman would not be personally liable; if he was not acting within such line and scope, then he would be personally liable. If the former, and the action is based on negligence, then it should be within the terms of the Act. If the latter, then it would not be "caused by the negligent or wrongful act or omission. . . while acting within the scope of his office or employment".³⁹ The Tort Claims Act says:

"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 whose act or omission gave rise to the claim."⁴⁰

This section, when applied to the serviceman situation as developed here, is merely a restatement of what the law already is; for there would be no right of action in the first place against the defendant serviceman who has acted within the line and scope of his office as regards the injured serviceman.

Our pension laws state that to be eligible for a pension a serviceman must be "injured while in the service of the United States and in the line of duty".⁴¹ A person while on authorized furlough is "in the line of duty". However, the man who goes A. W. O. L. does not have such a status and if injured would not be entitled to a pension. If such a person is injured under the circumstances of the *Brooks* case, could it be said with any degree of conviction that "status" alone would be sufficient to deny him or his representatives a recovery? His absence from his station is not the cause of his injury, but there would exist the anomalous situation that he could not recover against the driver because the negligence has occurred in the line of the driver's office or employment, nor could he recover

³⁶ 6 Corpus Juris Secundum § 36, p. 419.

³⁷ *Wilkes v. Dinsman*, 7 How. 89, U. S. (1849). Cf. *Wilson v. Mackenzie*, 7 Hill (N.Y.) 95 (assault); *Clark v. Cumins*, 47 Ill. 372 (property).

³⁸ 10 U.S.C.A. § 1059. See *Pendleton v. Bussey et al.*, 30 F. Supp. 211 (D.C.W.D. Va. 1939) where it was held in a case of slander that the District Court did not have original jurisdiction. However, the basis of the suit in Virginia was pointed out and it was intimated that two service people could sue each other in these circumstances.

³⁹ 28 U.S.C.A. § 1346. Cf. *Cropper v. United States*, 81 F. Supp. 81 (D.C.N.D. Fla. 1948).

⁴⁰ *Ibid.*

⁴¹ See 38 U.S.C.A. § 152 for an example of the many such provisions.

against the government because he was a soldier and was injured by a soldier. This suggests that the test as to a cause of action should be based on the service relation between the parties involved, *i. e.*, the determination should be made as to whether the negligent serviceman was *in the position of a serviceman* to the plaintiff at the time the event happened. If he were in such a position, then the state would not interfere with something strictly a service matter and under the absolute control of the Federal Government. If he were not in such a position, then the state law as to negligence would not be intruding on a strictly federal function. *Jefferson v. United States*,⁴² involving a serviceman allegedly injured by a service doctor, would be a clear case wherein state law would not be a basis for liability for there the relationship was service doctor to service patient. *Alansky, et al, v. Northwest Airlines, Inc. et al*,⁴³ which involved a soldier under orders flying on an aircraft operated by Northwest Airlines, Inc., but owned and under the control of the War Department, could be placed on similar grounds. The Court there dismissed the action of his representatives purely on the "status" theory. This distinction between "service caused" and "non-service caused" injuries certainly appears to be justified, and merely recognizes that although a person is in the Armed Forces he is not to be denied a right when he is not specifically excluded from its enjoyment.⁴⁴

Parties in the Action—Respondeat Superior

In *Perucki v. United States*,⁴⁵ the state law of Pennsylvania concerning *respondeat superior* was urged in a motion to dismiss a civil action based on the alleged negligence of a Veteran's Administration doctor in examining the plaintiff. Pennsylvania decisions have consistently held that charitable institutions are not liable in the case of injuries occasioned by the negligence of their agents or servants. The Court here correctly examined the rationale of the rule,⁴⁶ and stated that the reason for the immunity was destroyed, especially as regards the United States. There may be the further consideration that the Pennsylvania rule should not apply because "a private person" within the meaning of the Act would not include "a charitable institution," and a private person would be responsive in damages if the doctor-agent were acting within the line and scope of his employment.

The wisdom of this District Court in reaching the instant decision on this point is manifest. To have limited liability in the manner contended for by the United States would have left the individual veteran at the complete mercy of the law of the state where he happened to receive treatment. A rigid application

⁴² 74 F. Supp. 209 (D.C. Md. 1947) and 77 F. Supp. 706 (D.C. Md. 1948).

⁴³ 77 F. Supp. 556 (D.C. Mont. 1948).

⁴⁴ In *Stoddard v. United States*, 75 F. Supp. 823 (D.C. Mass. 1948), plaintiff had just been discharged at Fort Bragg, North Carolina, and was injured on a government bus which collided with an Army ambulance. "Status" alone could create many difficulties here because of the technical position of a dischargee to the service until he has returned to his home. Plaintiff obtained a verdict for \$6065.00.

⁴⁵ 76 F. Supp. 34 (D.C.M.D. Pa. 1948) and 80 F. Supp. 939 (D.C.M.D. Pa. 1948).

⁴⁶ See PROSSER on TORTS, p. 1079 *et seq.*

of the state law in such situations will destroy the equal treatment which is so necessary in the relationship that exists between the Federal Government and veterans.

Parties in the Action—Joinder of the United States and Another

Actions under the Act are tried by a judge sitting without a jury, although one court, apparently not too familiar with the law, stated that the parties had waived a jury trial,⁴⁷ and another made it known that a jury would have been most welcome in a particularly difficult case.⁴⁸ Since individual defendants are entitled constitutionally to a jury trial, the propriety of a suit against joint tortfeasors—the United States and an individual—has raised a problem. One District Court has approached the matter quite realistically and allowed joinder, because, although not specifically mentioned by the Act, the Federal Rules of Civil Procedure look to this method, and no greater obligation is placed thereby on the United States.⁴⁹ But the Court must have jurisdiction over the civil action against the individual defendant, or the court will dismiss it on its own motion.⁵⁰ It would seem then that if an individual defendant is sued in the Federal court that the United States may be impleaded in the action,⁵¹ though there is considerable authority to the contrary.⁵² When the state law provides for contribution against joint tortfeasors, one District Court has not allowed joinder of defendants on the ground that contribution is not a part of the original tort and that to allow joinder would subject the United States to a liability to which it has not consented.⁵³ The lines of approach have been clearly delineated. Some courts will deny joinder and, *a fortiori*, impleader, even though the state law does not permit contribution, on the theory that a strict construction of the Act demands it, and that there is no jurisdiction over such a cause. Others, where the state law so provides, consider contribution another or derivative cause of action to which the United States has not consented, hence no joinder.

Exclusions—General

By the terms of the Act, corporations established by the Federal Government are no longer entities to be sued in those causes therein covered. One district court has had to dismiss a civil action naming the Inland Waterways Corporation as a defendant.⁵⁴ The Act covers only civil actions for negligence and could

⁴⁷ See *Spell v. United States*, 72 F. Supp. 731 (D.C. Fla. 1947).

⁴⁸ See *Wilsam v. United States*, 76 F. Supp. 581, 586 (D.C. Hawaii 1948).

⁴⁹ *Englehardt v. United States*, 69 F. Supp. 451 (D.C. Md. 1947). *Contra*: *Donovan et al. v. McKenna*, 80 F. Supp. 691 (D.C. Mass. 1948); see *Suits on Tort Claims against the United States*, 7 F.R.D. 689 (1948).

⁵⁰ *Bullock et al. v. United States, et al.*, 72 F. Supp. 445 (D.C.N.J. 1947).

⁵¹ *Cf. Newsum v. Pennsylvania Railroad Co.*, 79 F. Supp. 225 (D.C.S.D.N.Y. 1948).

⁵² *Donovan v. McKenna*, 80 F. Supp., (D.C. Mass. 1948); *Urate v. United States*, 7 F.R.D. 705; see 7 F.R.D. 689 (1948).

⁵³ *Drummond v. United States, et al.*, 78 F. Supp. 730 (D.C.E.D. Va. 1948). *Cf. Oahu Railway and Land Co. v. United States*, 73 F. Supp. 707 (D.C. Hawaii 1947). Compare *Newsum v. Pennsylvania Railroad Co.*, *supra*.

⁵⁴ *Wickman v. Inland Waterways Corp.*, 78 F. Supp. 284 (D.C. Minn. 1948):

not be interpreted as covering assault and battery or an invasion of rights protected by the Fourth and Fifth Amendments to the Federal Constitution;⁵⁶ claims for overtime and bonus pay as an employee of the Army Transport Service;⁵⁶ illegal imprisonment;⁵⁷ or false arrest.⁵⁸ An ingenious argument as to jurisdiction was advanced in *Bates v. United States*,⁵⁹ predicated on the theory that since the amount in this particular case was only \$2,000.00 the court would not have jurisdiction over a "private person", and the United States was liable only "if a private person would be liable to claimant". The court correctly stated that this provision has reference to the creation or existence of a substantive right or claim, and that jurisdiction is conferred by the Act itself. Where there is an individual defendant joined, of course, the jurisdictional requirements as to him would have to be met.⁶⁰

Exclusions—Combatant Activities

Damages arising from the "combatant activities" of the Armed Forces are excluded by the Act's provisions, and one court has ruled that "training" activities, even though conducted during a period of war, did not fall within this exception.⁶¹ The injury complained of occurred six miles off the shore of Texas in the Gulf of Mexico, which is outside the territorial waters of the United States. No question was raised as to whether or not the high seas would be included within the exception relating to acts occurring in foreign countries. Under the court's theory that the negligence which was the proximate cause of the injury was the failure to establish bombing zones or to warn craft in the area used, which omission occurred in the United States, there was no necessity for such a consideration. However, with long-range bombers spanning the oceans with ease, the United States plane involved might well have taken off from a foreign country, with the same injury resulting, or, similarly, if plaintiff in the instant case had had to rely on a theory of negligence which could not be so easily attributed to an event in the United States, the court would have been called upon to decide this problem. The ingenuity of counsel for plaintiff will be put to the test of devising a negligence formula which will put the act or omission in the United States.

In *Perucki v. United States*, *supra*, the plaintiff involved had been wounded in action, and the alleged negligence occurred during an examination after his discharge. The court fell into the trap of a "but for" argument and stated that but for the fact that plaintiff had been injured in combatant activities he would have had no injury here, and reached the conclusion that the claim which was the subject of the civil action was one arising from combatant activities and hence

⁵⁵ Bell et al., v. Hood et al., 71 F. Supp. 813 (D.C.S.D. Cal. 1947).

⁵⁶ Jentry v. United States, 73 F. Supp. 899 (D.C.S.D. Cal. 1947).

⁵⁷ Ecborg v. United States, 76 F. Supp. 99 (Ct. Claims 1948) (Nor is there original jurisdiction in the Court of Claims under the Act).

⁵⁸ Denahy v. Isbrandsten Co., 80 F. Supp. 180 (D.C.S.D.N.Y. 1948).

⁵⁹ 76 F. Supp. 57 (D.C. Neb. 1948).

⁶⁰ Bullock et al. v. United States et al., 72 F. Supp. 445 (D.C.N.J. 1947).

⁶¹ Skeels v. United States, 72 F. Supp. 372 (D.C.W.D. La. 1947).

excluded. This claim *in fact* did not arise from combatant activities, but from the alleged negligence of a doctor acting within the scope of his office. That a *reason* that plaintiff submitted to the examination was a combat wound would not justify the conclusion that an injury resulting from the examination is a claim which is excluded. The combat wound is not the proximate cause of what plaintiff here complains;⁶² the proximate cause is the alleged negligence of the doctor. This result seems to be an unwarranted limitation of governmental liability, and if followed would result in immunity in every case of negligence during an examination by a government doctor of a combat inflicted condition after the discharge of the person in the Armed Forces. That he may have another remedy does not add support to the contention that he does not have this remedy. The problem may become one of election of remedies as mentioned later.

Exclusions—Foreign Countries

Claims are excluded which arise in a foreign country and exactly what is a foreign country, in fact, has received considerable attention in the courts because citizens have been visiting the global outposts of the Armed Forces. Okinawa,⁶³ Japan,⁶⁴ Belgium,⁶⁵ Newfoundland,⁶⁶ and Saipan⁶⁷ have been held to be foreign countries. In Newfoundland, the injury complained of occurred on property held under the terms of a 99 year lease, and the case is somewhat clouded by a decision which extended the coverage of the Fair Labor Standards Act to a similar base in Bermuda as constituting a possession of the United States.⁶⁸ In the case of foreign enemy territory conquered and held by our Armed Forces, emphasis is placed on the international law aspect, and the United States has not asserted jurisdiction over these places. Indeed, as to the Pacific territory the United States has specifically denied that it has any intention of doing so. In the case of liberated friendly territory, *e. g.* Belgium, the United States never acquired jurisdiction and it remained a foreign country. Considering the fact that venue for the civil action may be in the district court where the tort occurred, then Congress must have intended to limit the jurisdiction to those causes which occur within the territorial limits of a district court. This gives a satisfactory basis to a denial of the cause of action from injuries arising on territory held by long-term lease where the nominal sovereign has ceded jurisdiction to the United States.⁶⁹

"Within the Scope of His Office or Employment"

Several cases have turned on whether or not the act or omission of the

⁶² Compare *Johnson v. United States*, 16 CCH Neg. Cases 409 (CCA 9th 1948).

⁶³ *Brewer v. United States*, 79 F. Supp. 405 (D.C.N.D. Cal. 1948).

⁶⁴ *Denahy v. Isbrandsten Co.*, 80 F. Supp. 180 (D.C.S.D.N.Y. 1948).

⁶⁵ *Straneri v. United States*, 75 F. Supp. 240 (D.C.E.D. Pa. 1948).

⁶⁶ *Spelar v. United States*, 77 F. Supp. 68 (D.C.S.D.N.Y. 1948), overruled by 16 CCH Neg. Cases 472 (CCA 2nd 1948).

⁶⁷ *Brunell v. United States*, 77 F. Supp. 68 (D.C.S.D.N.Y. 1948).

⁶⁸ *Connell v. Vermilya-Brown Co. Inc.*, 164 F2d 924.

⁶⁹ *Contra: Spelar v. United States*, 16 CCH Neg. Cases 472 (CCA 2d 1948).

employee of the government was "within the scope of his office or employment".⁷⁰ Some courts have dismissed complaints on government affidavits under the federal rules; others have put the parties to their proof. The R. O. T. C. instructor is partly under federal and partly under state control, and the court has rejected affidavits to show that he was not under federal control;⁷¹ but summary judgment for the United States, on the pleadings and affidavit of a naval petty officer stationed as a recruiter that he was driving his own car after duty hours, has been granted.⁷² A sailor traveling under orders cross-country by train who leaves the train at a stop for refreshments and while rushing back to the train injures a person was found to be acting within the scope of his employment.⁷³ And it is clear that California's "permissive use" statute which makes the owner of a car liable for the negligence of the user will not apply to the government, where the employee is not acting within the scope of his employment.⁷⁴ Nor is an employee of the Public Health Service, although paid from United States budgeted funds, acting within the scope of such employment when he is performing duties under the local supervisor of a local project.⁷⁵

Other Aspects

Several problems have not reached major proportion before the courts thus far, and it will suffice to briefly summarize them by a reference to the cases. A settlement for medical bills and property damage prior to the passage of the Act has been held not to be a bar to a subsequent recovery for pain and suffering⁷⁶ but the Fifth Circuit has ruled otherwise in the same situation.⁷⁷ A New Jersey District Court has held that the acceptance of benefits under the Federal Employee's Compensation Act is not a bar to subsequent recovery under the Tort Claim Act, where the acceptance was prior to the passage of the Act.⁷⁸ However, such acceptance would be a bar where in fact there is an election, *i. e.* the benefits were taken after the passage of the Act.⁷⁹

⁷⁰ 28 U.S.C.A. § 1346.

⁷¹ *Cobb v. United States*, 74 F. Supp. 713 (D.C.W.D. La. 1947) (R.O.T.C. instructor); and 81 F. Supp. 9 (D.C.W.D. La. 1948) (proof showed not a United States employee).

⁷² *Rutherford v. United States*, 73 F. Supp. 867 (D.C.E.D. Tenn. 1947).

⁷³ *Campbell v. United States*, 75 F. Supp. 181 (D.C.E.D. La. 1948).

⁷⁴ *Long v. United States*, 78 F. Supp. 35 (D.C.S.D. Cal. 1948); *Cropper v. United States*, 81 F. Supp. 81 (D.C.N.D. Fla. 1948).

⁷⁵ *Fries v. United States*, 76 F. Supp. 386 (D.C.W.D. Ky. 1948), *aff'd* 170 F.2d 726 (1948).

⁷⁶ *Wade et al. v. United States*, 75 F. Supp. 729 (D.C. Mass. 1948).

⁷⁷ *Jordan v. United States*, 170 F.2d 211 (CCA 5th 1948).

⁷⁸ *White v. United States*; *Crowley v. Same*, 77 F. Supp. 316 (D.C.N.J. 1948). Compare *Jefferson v. United States*, 74 F. Supp. 209 (D.C. Md. 1947).

⁷⁹ *Parr v. United States*, 78 F. Supp. 693 (D.C. Kans. 1948). Compare *Perucki v. United States*, 80 F. Supp. 959 (D.C.M.D. Pa. 1948); *Wham v. United States*, 81 F. Supp. 126 (D.C. Dist. Col. 1948).

State law as to a showing of negligence as a matter of law,⁸⁰ and contributory negligence and its effect has been applied rather consistently, and also the local negligence and its effect⁸¹ has been applied rather consistently, and also the local rule as to the computation of damages.⁸² Each of these may result in situations where the same set of facts occurring in different states would produce different results as to the liability of the United States, and, if liable, as to the actual amount of damages which may be recovered.

Conclusion

This article will have served its purpose if the reader has been as impressed as the writer with the enormous task placed in the federal courts by the Tort Claims Act. The tremendous size of the federal establishment and its variety of activities will assure a steady flow of civil actions based on its provisions. In the past, claimants have undoubtedly been deterred by the very slowness of Congress in acting on the private bills which were necessary for relief in cases of this kind. The Congress has, it seems, quite correctly made this a matter for judicial determination.

The lack of uniformity in the results obtained under the Act is to be regretted. That a citizen of the United States should be treated differently merely because he happens to be injured in one state and not another is not expressive of that equal treatment to be expected when one deals with the Federal Government. That a citizen's relation is made to depend on the state law is unfortunate when Congress could have provided for that uniformity which is desirable in other spheres of federal activity.

⁸⁰ *Johnson v. United States*, 168 F.2d 886 (CCA 2nd 1948); *Madden v. United States*, 76 F. Supp. 41 (D.C.N.D. Fla. 1948). Compare *Ira S. Bushey & Sons, Inc. v. United States*, 78 F. Supp. 673 (D.C.E.D.N.Y. 1948) (Maritime tort); *Duff, etc. v. United States*, 16 CCH Neg. Cases 507 (CCA 4th 1949); *Denny et ux v. United States*, 16 CCH Neg. Cases 448 (CCA 5th 1948).

⁸¹ *Norton v. United States*, 74 F. Supp. 278 (D.C.S.D. Texas 1947); *Madden v. United States*, supra; *Van Wie v. United States*, 77 F. Supp. 22 (D.C.N.D. Iowa 1948); *Reyes v. United States*, 80 F. Supp. 555 (Puerto Rico 1948); *Cobb v. United States*, 81 F. Supp. 9 (D.C.W.D. La. 1948).

⁸² Sec. e. g. *Spell v. United States*, 72 F. Supp. 731 (D.C.S.D. Fla. 1947); *Norton v. United States*, supra; *McMullen v. United States*, 75 F. Supp. 164 (D.C.E.D.N.Y. 1947); *Campbell v. United States*, 75 F. Supp. 181 (D.C.E.D. La.); *Parmiter v. United States*, 75 F. Supp. 823 (D. C. Mass. 1948); *Stoddard v. United States*, 75 F. Supp. 823 (D.C. Mass. 1948); *Wilscam v. United States*, 76 F. Supp. 581 (D.C. Hawaii 1948); *Van Wie v. United States*, 77 F. Supp. 22 (D.C.N.D. Iowa 1948); *Bickley v. United States*, 77 F. Supp. 454 (D.C.D.S.C. 1948); *Colerick v. United States*, 77 F. Supp. 953 (D.C.N.D. Fla. 1948); *Corkan v. United States*, 79 F. Supp. 222 (D.C.S.D.W. Va. 1948); *Potto v. United States*, 78 F. Supp. 833 (D.C.W.D. Ky. 1948); *Crown et al. v. United States*, 78 F. Supp. 840 (D.C.M.D. Pa. 1948); *Barnett v. United States*, 78 F. Supp. 186 (D.C.N.D. Fla. 1948).