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FEDERAL TORT CLAIMS ACT

TWO MORE YEARS OF THE FEDERAL TORT CLAIMS ACT

By

FRED BLANTON*

Some two years ago in this Law Review, a survey of cases arising for approximately the first two years under the Federal Tort Claims Act was undertaken. Therein was discussed some of the principal problems which had been presented to and adjudicated by the courts in the administration of this important legislation. Since that time the Supreme Court has had occasion to resolve some of the then existing conflicts of statutory construction; others which had been but briefly considered have received a fuller consideration by the lower federal courts; and there are quite a few new ones worthy of discussion. As was the purpose in that earlier article, this one proposes simply to treat what has happened in the courts and to briefly evaluate the results reached. To some future article or articles necessarily must be postponed the task of a fuller and more detailed analysis of any particular problem. In general, the same pattern of presentation employed then will be followed now.

Statute of Limitation and Related Problems

The original language of the Act provided for a one year statute of limitation in tort claims against the United States. This provision created some difficulty.

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3 Cases are included which have been published in the reporter system through 71 S. Ct. 507 (1951) of 15 March 1951; 186 F.2d 1023 (1951) of 19 March 1951; and 81 F. Supp. 518 (1951) of 19 March 1951. On occasion reference will be made, of necessity, to some cases covered in the previous article.
but what difficulty there was vanished with the passage of time. However, on April 25, 1949, the earlier language of limitation was changed by the Congress to read as follows:

"A tort claim against the United States shall be forever barred unless action is begun thereon within two years after such claim accrues, or within one year after the date of the enactment of this amendatory sentence, whichever is later."

Two questions of interpretation have arisen in connection with this provision. One has to do with a state statute of limitation operating on the right and not the remedy, or, in other words, a state statute of limitation construed as substantive as contrasted with one denominated by the state court as procedure. The other required a determination as to whether between 26 April 1949, and 25 April 1950, inclusive, a civil action could be filed on a claim accruing after 1 January 1945 where the former one year statute of limitation had run. This latter problem was eliminated by the expiration of one year after the amendatory sentence became law, and will be disposed of briefly before consideration of the more pertinent conflict between state statutes of limitation construed as substantive and the federal statute of limitation set forth previously.

Admittedly, by the very provisions of the Act, the claim must have accrued after 1 January 1945 and the court has no jurisdiction over claims which matured prior to that date. Even though the particular claim sued on is deemed to have accrued after this date by an application of state law, as in the situation where a claim for indemnity accrues on payment to the one injured, this claim is not enforceable if the injury which has been compensated for occurred prior to the 1 January 1945 date. The rationale of such a result recognizes that at the time the injury happened there came into being only an "ethical" or "moral" claim against the United States and not a legal one. Although it could be argued that a private individual would not be liable until payment by the one seeking indemnity, and that this is "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," nevertheless it is felt that the language of the Act in granting jurisdiction clearly restricts actions to ones where a claim against the United States came into being at the time of the original act. Similarly, where the payment is made after the original claim has been barred by the statute of limitation, it has been held that the claim for indemnity is not timely. The broader questions in indemnity and contribution will be

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7 Only claims after this date are cognizable in the courts, 28 U. S. C. A. § 1346(b).
10 28 U. S. C. A. § 1346(b).
treated later in this article for here our attention is directed solely to a consideration of the statute of limitation.

In Ballance v. U.S. the factual situation called for a solution based squarely on the effect of the amendatory language of 25 April 1949. Claimant therein was injured on 15 December 1945. The complaint was filed on 25 April 1950. Clearly the action was barred by the terms of the original limitation provision of the Act, since it would have had to have been filed at least by 2 August 1947 to be timely. The court looked to the legislative history of the amendatory sentence and was impressed by this statement—"The bill would, therefore, revive all those otherwise expired claims accruing on or after January 1, 1945." Basing its decision on this disclosure of legislative intent, the court overruled the motion of the government to dismiss the complaint. Ignoring for the moment the legislative history, which courts have done for years, another interpretation of the statute could have been evolved. On those claims wherein the one year limitation had not run, i.e., those accruing in the year prior to 25 April 1949, the time limit was extended for a period of one year. On claims accruing after that date the time limit would be two years. This would be consistent with the language of the original one year statute which stated that if an action was not brought within one year the claim "shall be forever barred." This interpretation would have eliminated the question of whether rights which have been "forever barred" may be revived. In effect, under the decision of this case, the Congress created a cause of action or gave new rights to those persons whose claims were otherwise barred.

More difficult of solution is the first problem of interpretation posed above. There, the local law on which the federal cause of action is based has provided for a termination of the rights created as opposed to a termination of the remedy. A reference to the former article and the discussion of whether the Act created a new cause of action or merely removed a procedural bar to an already existing cause of action will place in proper perspective the comments which follow. There are indications that there is still doubt on this matter because a District Judge recently said:

"It is my opinion that the broad terms of the Act effect only the removal of the procedural bar to a suit against the United States and that they do not create a new liability where none existed under the substantive law theretofore."
In *Young v. U. S.*\textsuperscript{17} the action was filed within one year after the amendatory sentence became law and within two years after accrual of the cause of the action. However, it was commenced more than one year after the accrual of the cause of action. The claim was for a wrongful death in the District of Columbia which has a one year statute of limitation for actions of this type which is construed as substantive, i.e., the right is extinguished and not merely the remedy. If a private individual had been sued under these same circumstances there would have been no liability because the rights of the plaintiff would have expired automatically. The court held that Congress changed any conflicting limitation period in the local statute, but there was a vigorous dissent which indicated that the result of the majority would be proper only if the limitation merely affected the remedy. It is felt that the court reached the proper result on the theory that this is a new federal cause of action based upon the standards of conduct established by the local jurisdictions, and being a new federal cause of action the limitation set by Congress controls. Under this theory, Congress did not actually change for the purposes of this action the substantive law of the state, but merely inserted a limitation which would bar the new federal cause of action.

*Perry v. U. S.*\textsuperscript{18} poses the problem of causes of action accruing to minors. The claimant therein was a minor when injured in 1943 by an Army military policeman. His suit was instituted on 21 July 1947, and he contended that it was timely because of the following provision:

"The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases."\textsuperscript{19}

The court ruled against the contention of the plaintiff and held that this clause did not postpone the accrual of the tort claim. There is a serious question as to whether this clause applies to tort claims at all, though the court did not mention such a possibility. The minor who is injured may prosecute his claim within the normal two year period through his next friend, guardian ad litem, or however a particular state may provide.\textsuperscript{20} The very language of the clause extending the time of filing for persons under a legal disability indicates that it is not applicable to tort claims. A person "beyond the seas at the time the claim accrues" would hardly be covered by the tort claims law.\textsuperscript{21} Furthermore, this language codified a section of the code in effect prior to the enactment

\textsuperscript{17} 184 F.2d 587 (C. A. D. C. 1950).
\textsuperscript{18} 170 F.2d 844 (C. A. 6th 1948).
\textsuperscript{19} 28 U. S. C. A. § 2401(a).
\textsuperscript{20} Federal Rule of Civil Procedure 17(c) "Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."
\textsuperscript{21} See 28 U. S. C. A. § 2680(k) excluding claims arising in a foreign country.
of the Tort Claims Act. 22 Section 2401 (b) codifies the previous provision of the Act which did not contain such an extension for the claims of minors, 23 and the section does not add one. Too, the language quoted is combined with that providing for claims which have a six year statute of limitation and which obviously includes claims other than those covered by the tort provisions of Section 2401 (b). It is extremely doubtful that a court faced with the problem would allow the extension intimated by Perry v. U. S. to apply to the claims of minors. Certainly no lawyer would risk an adverse decision on this point by allowing the two year period to run.

Marino v. U. S. 24 illustrates both the alternative method of seeking relief against the United States for claims of $1000 and less and the expanded period within which to bring suits when such a claim has been filed and either subsequently withdrawn or disposed of finally. Briefly stated, such claims can be filed with the appropriate government agency which is given the power to make an administrative determination as to the liability of the United States. 25 The two year statute of limitation is applicable to the filing of such a claim. 26 If the claim has been timely filed with an agency within this two year period then an additional six months period is granted in which to file a civil action measured from "either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim." 27 Withdrawal is accomplished by giving fifteen days written notice to the federal agency involved. 28 In Marino v. U. S., previously mentioned, several claims arose from the alleged negligence of a Coast Guard jeep on 21 December 1946. On 22 April 1947 a claim of $4550 was forwarded to the Coast Guard. Because three separate claims of $50.00, $3000.00, and $1500.00 had been consolidated, the Coast Guard gave proper notification on 23 October 1947 to submit three separate claims and also advised the latter two claimants, one of which was the plaintiff, that there could be no administrative action on claims over $1,000.00. Separate claims were submitted in the amounts stated in November, 1947, and on 22 January 1948 there was another notification that there was no authority to consider claims over $1,000.00. On 28 January 1948 these two claimants, including Marino, authorized a reduction to $1,000.00. This authorization came after the running of the then existing statute of limitation of one year. On 8 April 1948 Marino was notified that his claim had been disapproved, and he commenced his action on 12 July 1948, which was within six months after the final disposition by the agency. The claimant for $50.00, whose claim had not been finally disposed of,

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22 28 U. S. C. A. § 41 (20) (1940 ed.)
joined in this action. The court held that Marino’s claim had not been timely filed since no claim over which the agency had jurisdiction was submitted within the period allowed. The claimant for $50.00 had brought his suit prematurely since the claim had been neither withdrawn nor had there been a final disposition by the agency involved. This case should forewarn counsel that a claim presented to an agency should be for $1,000.00 or less, if, after the statute of limitations has expired, he expects to have available the six months extension in time for filing suit.

29 Anderegg v. U. S.30 is a confusing case on this very question of the extension of time for filing a suit when a claim has been presented. There the damage occurred on 2 January 1945 and the civil action was commenced on 14 April 1948. Anderegg had apparently filed a claim with the War Department, but the date is not stated in the opinion of the court. However, it was denied on some unspecified date in November, 1947. The court dismissed the action saying that the claim filed with the government agency did not defeat the then one year statute of limitation. It has been pointed out that this is incorrect and that if a claim has been presented then an additional six months period in which to file is available.31 Only if Anderegg’s complaint was filed over six months after the date of final disposition in November, 1947, could this decision be correct. The broad language of the court is inconsistent with the provisions of the statute in cases of this kind. On one point, however, there is some considerable authority. Neither agencies of the government nor its agents can waive the statute of limitations.32 Some jurisdictional problems involving suits filed after claims have been presented will be considered later in this article.

Turner Terminal Co. v. U. S.33 involves a question of the effect of the amendatory sentence on the jurisdiction of the court. On the night of May 19-20, 1946, the wharf of the plaintiff was damaged by a boat on navigable waters. At this time, the United States had consented to be sued in Admiralty,34 but not at law; and this type of action was denominated a law action.35 The former one year statute of limitation ran as to the action under the Tort Claims Act, and on 18 May 1948, a libel in admiralty was filed. At this time, the admiralty court had no jurisdiction; it not being extended to this type of action until 19 June 1948.36 In that libel the court held that the statute had run on the admiralty suit. Plaintiff filed again in law on 22 April 1950 contending that

29 See also Franzino v. U. S., 83 F. Supp. 10 (D. C. N. Y. 1949). The court in this case made an obvious error by stating that since the accident occurred on 1 July 1945 that an action was barred on 1 July 1946. This was over a month before the Tort Claim Act became law!
30 171 F.2d 127 (C. A. 4th 1948).
31 § 420 of the Act of 2 August 1946 contained a similar provision which would have been applicable on the date of this decision.
33 93 F. Supp. 441 (D. C. Ala. 1950).
the extension of time in the Act of 25 April 1949 relating to tort claims enlarged
the jurisdiction of the court to hear and determine cases of this type. However,
the terms of the Extension of Admiralty Jurisdiction Act made a libel in admiralty
the exclusive remedy available since suit had not been previously filed under
the Tort Claims Act. Since the court did not have jurisdiction, and since it was
not enlarged by the amendatory sentence, the court properly dismissed the civil
action for want of jurisdiction. Counsel for a party damaged under the circumstances
of this case and similar situations will have to reassure himself that the action is
brought on the proper side of the District Court. Otherwise, a subsequent dis-
missal for want of jurisdiction may mean that the statute of limitation has run
in the meanwhile on the claim and it cannot thereafter be presented to any court.
There is one other consideration to examine however. Assume the plaintiff
has filed timely in the district court pleading a cause of action under the Tort
Claims Act. As a matter of fact, his case is really one for the admiralty jurisdiction.
After the two years limitation has expired it is brought to the attention of the
court that this is a matter properly cognizable in admiralty. Should the plaintiff
be allowed to amend to plead the proper admiralty act, to relate such amendment
back to the original date of filing, and to have the case removed from the civil
to the admiralty docket? The operative facts which plaintiff states to show that
he is entitled to relief would be the same in either case. This mistake in termin-
ology does not change the fact that his situation is one for which relief is
available although under a different statute than the one pleaded. However, since
the court takes judicial notice of Congressional enactments, it would seem that
the plaintiff should not be penalized for his error. To dismiss would signify a
return to the formalistic conceptualism of the common law and the technical rules
of pleading thereunder.

State workmen's compensation laws merit a brief consideration. Matovac
v. U. S., concerning the New York Workmen's Compensation Law, is illustrative
of the impact the statute of limitation contained therein has in connection with
the Tort Claims Act. Plaintiff was injured on 11 January 1945 and his right to
sue the third person involved expired prior to the enactment of the Tort Claims
Act. By an amendment to the state law the period to institute a third party
action was extended to nine months after passage of a law creating new or additional
remedies, e.g., the Federal Tort Claims Act of 2 August 1946. Hence 2 May
1947 was the last day for filing an action against the United States as the third

87 "Provided, that as to any suit against the United States for damage or injury done or consum-
ated on land by a vessel on navigable waters the Public Vessels Act or Suits in Admiralty Act, as
appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948,
and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act."
88 Compare Bay State Crabmeat Co. v. U. S., 78 F. Supp. 131 (D. C. Mass. 1948) where the
court allowed the amendment to relate back and transferred the cause from the admiralty to the civil
docket.
90 Workmen's Compensation Law N. Y. § 29.
party under the Workmen’s Compensation Act. The insurance carrier who had paid the claim then on 3 May 1947 had the right of subrogation to the original claim of the plaintiff by state law. Plaintiff sued on 17 July 1947, which was timely under the original federal statute. The court granted the motion of the United States for a summary judgment on the ground that the rights of the plaintiff had expired by operation of law under the New York statute and that the insurance company had been subrogated. This result would appear to differ from that reached in the wrongful death case, Young v. U. S., cited previously, where the state statute of limitation was held not to apply. However, the result can be justified by pointing out that, in effect, the plaintiff has made an election under the Workmen’s Compensation Law, and to allow the federal statute of limitations to control here would interfere with the rights of the insurance carrier granted by way of subrogation. In the wrongful death situation no rights of third persons were involved.

Parties in the Action—Subrogees

U. S. v. Aetna Casualty and Surety Co.41 resolved the conflict in the judicial decisions, indicated in the previous article, as to whether subrogees had a “claim” within the meaning of the Act, and, further, if there existed such a “claim” whether the Anti-Assignment Act42 permitted an action on it. The Supreme Court, in an opinion by Mr. Chief Justice Vinson, held that the Anti-Assignment Act did not apply to an assignment by operation of law and that an insurance company has a “claim” within the meaning of the Tort Claims Act by virtue of subrogation when there has been payment made to an insured who would have been able to bring an action based on the original occurrence. As to the manner of enforcing the claim, the insurance company where it has paid the entire amount of the claim of the insured it will sue in its own name as the real party in interest under Federal Rule of Civil Procedure 17(a).43 Where the insurance company has been only partially subrogated, there is a different problem. At common law the suit would have been prosecuted in the name of the insurer. However, Federal Rule 17(a), mentioned above, would permit each party to sue on that part of the entire claim which may be considered as belonging to him. The court denominates these plaintiffs “necessary parties,” and an omitted party could be added under the provisions of Federal Rule 19(b)44.
by the motion contemplated in Federal Rule 21. An insurance company or another initiating an action should specifically state those others who hold portions of the claim. In the event that both parties file separate civil actions against the United States, whether they be partial subrogees or a partial subrogee and the person originally injured, the court may order the actions consolidated under Federal Rule 42(a). One problem recognized and specifically not passed upon concerns the rights of the United States when it has a counterclaim or set-off against the original injured person in the event the insurance company brings the action as permitted by this case. This will not be very often undoubtedly, while there will be many subrogees. The case reaches, then, a very workable result. Finally, the fact that there was an actual written assignment would be of no operative importance factually since the writing would have no legal significance.

Parties in the Action—Persons in the Armed Forces

That "status" alone is not sufficient to defeat an action brought against the United States where one serviceman has been injured by the negligence of another serviceman was determined by the Supreme Court in two cases, Brooks v. U. S. and Jefferson, v. U. S. In the Brooks case the court refused to make a judicial exclusion in the case of servicemen when they had been injured by the negligence of another serviceman in a "non-service connected" incident. The automobile accident involving an Army truck occurring while the injured soldier was on furlough, which was the foundation of the civil action against the United States, clearly had nothing to do with the assigned duties of the injured soldier nor with the obligation which devolved upon him by virtue of his being a soldier. The state law would give a cause of action in those circumstances and hence there would be standards of conduct on which to base a federal cause of action. However, where the injury was "service-connected" then there would be no state cause of action because of the possible interference by the state in a totally federal matter, and hence no claim under the Act. Thus, in the situations considered by the court in this type of case, the injured serviceman could not recover. Death caused by the negligence of a service doctor, death caused by the negligence resulting in a barracks fire, and an injury re-

45 "* * * Parties may be dropped or added by order of the court on motion of any party * * * ."
46 Federal Rule 19(c). "In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted."
47 "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."
51 See previous discussion in 53 Dick. L. Rev. 163 at p. 169 et seq (1949).
sulting from the negligence of a service doctor in leaving a towel in the abdomen of the plaintiff all illustrate the "service-connected" disability or injury which does not give rise to a cause of action in state law and consequently there is no claim under the act. Should anyone question the results in these last cases on the grounds of harshness it must be remembered that the services had previously established a plan of pensions and gratuities which compensate the parties involved. For a "non-service connected" injury the Tort Claims Act simply adds an additional and concurrent remedy, but the United States would not be liable to pay for those items of damages satisfied by pensions and gratuities. There is, therefore, no election of remedies here and the lawyer is not faced with the problem of making the determination as to whether it would be more profitable to take the benefits provided by the pension laws, etc. or to pursue the remedy of the Act. In several cases discussed later this will be his somewhat delicate job.

The serviceman who has been discharged and subsequently is injured through the negligence of a doctor in a Veteran's Hospital, in which he is entitled to be treated by virtue of his prior service, would not fall within the ban of the Jefferson case, and he would be entitled to maintain his action. The rationale of this decision can be predicated on the thought that a state cause of action exists in this situation, and there is no federal "status" which is interfered with, although the veteran is enjoying a federally created right.

Parties in the Action—Joinder and Impleader

Up to now this paper has considered the parties in the action from the standpoint of the position opposite to that of the United States. Turning to the party or parties who are aligned with the United States in the question of liability to the plaintiff, and some of whom may have rights against the United States by way of contribution or indemnity, it is found that the Supreme Court has recently considered and settled in its opinion in the U. S. v. Yellow Cab Co. and Capital Transit Co. v. U. S. cases many of the prior conflicts. First, the court stated that a claim for contribution comes within the terms of the Act. Thus, a joint tort-feasor with the United States where the local law gives such a right can assert that right against the United States. Once the right was recognized by the court the procedural method to be used in enforcing it became of importance. Would the United States have to be sued in another and separate action, or would Federal Rule 14(a) be applicable? More simply stated, had the United

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57 However, in some states the fact that the hospital is considered a charitable institution may operate as a bar to the application of the doctrine of respondeat superior, e.g. Pennsylvania. See Perucki v. U. S., 76 F. Supp. 34 (D. C. Pa. 1948) and 80 F. Supp. 959 (D. C. Pa. 1948).
58 71 S. Ct. 599 (1951).
59 "Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person who is not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him."
States consented to an action by the original defendant in the same suit by way of a third-party action? The court, wisely it seems, held that the United States had consented not only to the contribution claim, but also to the impleader procedure of Federal Rule 14(a). The procedural impediments advanced in argument by the counsel for the government were not considered as difficult of solution. The fact that the original individual defendant would be entitled to a jury trial and there would be none in the third-party action against the United States creates no problem because Federal Rule 42(b) providing for separate trials would be applicable.  

Should there be compelling reasons in an individual factual situation whereby it would be prejudicial to the rights of the Government to be impleaded, the judge may, in the exercise of the discretion granted by Federal Rule 14(a), deny the motion of the defendant as a third-party plaintiff to add the United States as a third-party defendant. This decision also sanctions by indirection the joinder of the United States with an individual plaintiff on a theory of joint tort liability. In Sappington v. Barrett, 61 which the court mentions seemingly in disapproval of the ruling of the Court of Appeals therein, the original plaintiff, as contrasted with the third-party plaintiff involved in the Yellow Cab case, had moved to add the United States as a party defendant under Federal Rule 19(a), mentioned previously. The Court of Appeals had held that leave to add the United States should not be granted, based on a lack of power rather than the exercise of discretion. This analysis indicates that the Supreme Court would approve the addition of the United States as a joint defendant should it be called upon to rule on the matter. 

It will be noted from a perusal of the opinions of the lower courts in these actions 62 that jurisdiction existed in the suits originally brought against the individual defendants, one by virtue of diversity and the requisite jurisdictional amount, and the other because the accident on which the claim was based occurred in the District of Columbia. The implication of this fact will be of considerable importance when the United States is joined as a defendant with an individual based on a theory of joint tort liability. Should the civil action against the individual joint tort-feasor be considered as merely ancillary to the claim against the United States so that if the claim against the United States fails for other than jurisdictional reasons the court can proceed to an adjudication on the merits on the individual claim in the absence of independent jurisdictional grounds? 63

Apparently this question should be answered in the negative. Wasserman v. Perugini 64 is to that effect and states that a right of contribution against the

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60 "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim * * *".


United States would not aid the jurisdiction. Certainly, however, if the United States is dismissed as a party defendant, the court may proceed to adjudicate the claim between the individual parties if diversity jurisdiction does exist. Somewhat different considerations are present when the government employee has been sued originally and the plaintiff moves to join the United States. The Act provides that a judgment against the United States shall act as a complete bar to any action by the claimant against the government employee whose conduct provides the basis for the claim. In the one case involving this problem the court ruled that the United States had not consented to be joined along with its employees. This would seem to be correct because of the policy indicated in the immunity provided by the government to an employee in the event a judgment is obtained against the United States.

A related question is whether a counterclaim can be interposed against the United States when it has originated the suit against the individual. A broad application of the doctrine of the *Yellow Cab* case would allow such a counterclaim on the ground of consent, as it must be apparent that consent has been given to more than separate suits against the government. There are no procedural problems which differ from those in the main case. However, the only authority is to the contrary, but the decision antedated the one above. On the other hand, where the United States is the original defendant, the Act clearly states that the court has "jurisdiction of any set-off, counterclaim, or other claims or demand on the part of the United States against any plaintiff commencing an action. * * *" This would be true even where the plaintiff is a sovereign state, for the state has consented to be sued where the United States is involved by the very nature of the federal plan. One final observation on parties plaintiff before turning to indemnity. State law will govern the capacity of any person who sues in a representative capacity and the requisites provided therein must be shown in the federal court.

Indemnity claims against the government have caused no little difficulty, part of which was discussed previously in connection with the statute of limitations. Otherwise, the claim for indemnity is one to which the government has consented in much the same manner as in the suit for contribution among joint tort-feasors, although admittedly there may be conceptual differences.

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71 Olson v. U. S., 175 F.2d 510 (1949) and Federal Rule 17(b).
Exclusions—General

The Tort Claims Act did not completely abrogate the doctrine of sovereign immunity for it provided for certain specified exclusions. Section 2680(k) of 28 U.S.C.A. excludes any claim for "interference with contract rights." However, the torts of those agents of the United States performing duties under a contractual arrangement are not considered within the language of exclusion. Furthermore, where a contract raises certain implied obligations, the breach of these latter is within the purview of the liability provision, while an action for breach of the contract would be excluded. If the real theory of the civil action of the plaintiff is contractual though cast in an ex delictu manner, there is no jurisdiction in the court, such as a suit for damages for use of a bomb sight indicator chart allegedly originated and owned by the plaintiff, the alleged illegal use of a secret process, or loss on a contract caused by the dissolution of the O.P.A. The Act cannot be used to test the discharge of a civilian employee of the government since this is contractual.

Claims based on the intentional torts are excluded, for example, false imprisonment and false arrest. Where the state law allows a recovery for mental suffering inflicted by a wilful trespass, there can be no recovery under the Act, even though plaintiff is not given a cause of action by state law for negligent conduct which results in such mental pain. A suit against a collector of customs is specifically excluded, as are those covered by the Suits in Admiralty Act or the Public Vessels Act, and claims arising from activities of the Panama Railroad Co. The fact that the Congress governs the District of Columbia does not indicate that the Act waived the bar of sovereign immunity in negligence case against the District.

Exclusions—Combatant Activities

The Act specifically excludes "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." There are two conditions in this exclusion: (1) The activities must be "combatant," and (2) these combatant activities must be "during time of war." In Johnson v.
the plaintiff alleged pollution of his clam farm by naval vessels during the period from December, 1945 to sometime in 1946. The vessels were ammunition ships which had been on their way to the Pacific war front when the actual fighting ceased and which had thereupon been recalled to the West Coast. One cannot but recognize that the United States was and still is in a technical state of war with Japan. The acceptance of this definition would eliminate many claims. However, the court took a more practical view of the language of the statute and interpreted it to mean "during actual hostilities." This would cover the conflict in Korea wherein the Congress has not actually declared war.

As to the other condition, the court, in defining "combatant activities" was well aware of the logistics of modern warfare as is apparent from the following excerpt:

"Aiding others to swing the sword of battle is certainly a 'combatant activity,' but the art of returning it to a place of safekeeping after the fighting is over cannot logically be catalogued as a 'combatant activity.'" 88

This is a difficult line to draw, and it is associated with the directness of the connection of the alleged negligent act to the prosecution of hostilities. Thus, a soldier on guard at a wharf during the period of actual hostilities, who negligently shoots a civilian, has at most an indirect connection with the fighting, though he be guarding material which is being transshipped to the war zone. 89 The obvious purpose of the exclusion was to prevent claims from actual hostilities, but the modern concept of war and total mobilization tends to cause practically every governmental as well as civilian activity to be engaged in the war. The extension of combatant activities from the actual area of battle to those matters having a direct connection is warranted under modern conditions of which the Congress certainly had an awareness.

The case of the discharged serviceman who goes to a Veteran's Administration hospital for treatment of a wound received in combat and subsequently is injured by the negligence of a doctor in treating this wound requires a determination as to whether this is "combatant." Perucki v. U. S. 90 discussed in the previous article, took the viewpoint that this was within the exclusion. However, a more enlightened view is expressed in Santana v. U. S., 91 where the court ruled that there was jurisdiction to determine the merits of the claim of the plaintiff. Although the main contention of the United States was on the "status" theory, developed previously herein, it is apparent that any jurisdictional matter would have been considered.

87 170 F.2d 767 (C. A. 9th 1948).
88 Id. at 770.
Exclusions—Foreign Countries

U. S. v. Spelar 92 considered the exclusion relating to "any claim arising in a foreign country." 93 There a Newfoundland air base which had been leased to the United States in the destroyer deal with Great Britain was held to be a "foreign country." The basic point was that the laws of a foreign country would have to be used to determine the liability of the United States. The Vermilya-Brown case 94 extending coverage of the Fair Labor Standards Act to a similar base in Bermuda was distinguished because there a law of the United States was involved and the application of foreign law was not necessary. An administrative determination by the Secretary of State that certain territory conquered or occupied is not part of or possession of the United States would control. 95

Exclusions—Discretionary Duties

The exclusion as to discretionary functions or duties 96 has been before the courts so many times in the past two years that the subject warrants a somewhat detailed treatment here. Three aspects will be considered: (1) those duties which have been denominated discretionary; (2) the duties which have been labelled non-discretionary; and (3) those duties which are discretionary but after the exercise of the discretion some negligence occurs which results in injury. The dividing line between the policy formulating function in the government, which is discretionary, and the ministerial function, which is non-discretionary, is sometimes difficult to ascertain. One category, however, is well-established. Officials of the United States acting in connection with the development of navigable streams are generally in a discretionary position. Thus, the planning of dikes in the Missouri River, 97 changing the course of a navigable stream, 98 the opening of flood gates, 99 raising the water of a stream by the construction of a dam, 100 and blasting in order to deepen a channel of the Mississippi River 101 all have been within the exclusion when civil actions have been brought for the injuries resulting from alleged negligence in performing these duties. Of course, the plaintiff is not entirely without a remedy for his case may fall within the provisions of the Fifth Amendment. 102 Similarly, the dissolution of the O.P.A. which resulted in a loss on a contract, 103 a failure on the part of the

96 28 U. S. C. A. § 2680(a) "Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused."
government to operate a mine after it had been taken over by the Secretary of the Interior under an Executive order of the President and a determination under the Migratory Bird Treaty Act as to whether migratory birds could be hunted and killed in any particular year have been denominated as discretionary functions. An examination of the statute involved is used as a guide in this determination, and where the action of the official has been circumscribed by statute or where the effect of the exercise of his discretion has been previously settled, then the duty is ministerial or he is foreclosed from a further exercise of his discretion. Thus, an official could not affect by a subsequent contract a previous contract for grazing privileges, an agreement by an agency to abide by certain governmental rules would remove the discretion of the agency, and the operation of an irrigation system is non-discretionary.

The third aspect mentioned above has arisen usually in connection with the medical services. While a doctor may have a discretion in discharging a patient from a hospital, or a hospital may have a discretion in admitting patients, such as in the case of dependents of servicemen, or employees for minor ailments when they would not otherwise be eligible, nevertheless once this discretion has been exercised there exists no discretion as to the treatment accorded and the hospital is under a duty to attend and treat and if there is negligence then the United States will be held liable.

"Within the Scope of his Office or Employment"

There are two points to be determined here. The first is whether or not the alleged agent is an employee of the federal government. If he is found to be an employee it must then be determined whether or not at the time of the injury he was acting within the scope of such employment. A trustee in bankruptcy, though an officer of the court appointing him, is not an employee of the United States. A local committee which by the terms of a federal statute assigns certain inspectors for administrative duties are not employees and neither are the inspectors so appointed. Neither is a member of the National Guard when it is still in state service, though equipment of the United States is used in carrying out its functions.

The application of local law largely determines whether the employee is acting within the scope of his employment. An exception is made in the event the local law has a statute or rule which holds the owner liable for automobile accidents regardless of whether or not the driver is in and about the business of the owner. This simply means that although state law will be used to determine the question of scope of employment it will not be used to expand the liability of the government outside the provisions of the Act. Where the United States does not have control of its employee, or where a doctor operates on a person not authorized to receive treatment there is no liability.

Where the employee who is negligent is a member of the armed forces "acting within the scope of his office or employment . . . means acting in line of duty." As is known to anyone familiar with the services, the term "in line of duty" has been defined many times in connection with certain gratuities which are dependent on whether a death or injury occurred therein, and for this purpose the term has an exceedingly broad meaning. A man on leave is considered "in line of duty" for this purpose. However, the courts have consistently failed to apply this broad meaning and have held that where a soldier on leave injures someone the United States is not liable. Hence, the definition of "line of duty" is restricted to "circumstances where a private individual would be liable." A serviceman off on a lark of his own, doing something contrary to regulations such as transporting a colonel's private gear, or who has deviated from his instructions, or is not in and about the business of the United States, is not within the scope of his employment or "in line of duty." The service definition of "in line of duty" has been limited quite properly to intra-service matters and as to third person the concepts of state law as to scope of employment serve as a guide.

Administrative Claims and Causes of Action

The Tort Claims Act provides, as mentioned previously in the consideration of the statute of limitation problems, that federal agencies have jurisdiction to determine claims for $1,000 or less, and that a determination or award is final

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124 U. S. v. Campbell, 172 F.2d 500 (C. A. 5th 1949) (Sailor running to catch a train).
and conclusive on all officers of the government, except when procured by fraud. As has been shown there are provisions for extending the statute of limitations when a claim has been presented to an agency. Furthermore, no civil action can be "instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence or intervening facts." The first situation to be considered will be where a claim has been filed for less than $1,000, and a subsequent suit is brought for an amount in excess of $1,000. Does the court have jurisdiction over the cause of action? One court said that "no suit can be instituted in excess of the claim filed," and hence an action claiming in excess would be dismissed for lack of jurisdiction. Since the court had no jurisdiction then an amendment, to reduce the amount sued for, filed after the expiration of the six month's period from withdrawal or final disposition could not be entertained. Others, however, have treated the amount in the action which is in excess as a nullity and simply limited recovery to the claim amount, and an amendment was allowed merely to set the record straight, though it was not thought necessary. This would be true even though the claim was filed with a statement that it was without prejudice to file in a larger amount in a civil action in the courts, since the plaintiff cannot vary the terms of the statute. Consider now the effect of the filing of an administrative claim in excess of $1,000 which is not reduced subsequently to $1,000.00. It would seem that the agency has no jurisdiction and the claim is a legal nullity so that any amount could be sued for though in excess of the claim which was presented to the agency. This result is intimated in one case.

Other Aspects

The facets of the Act mentioned in this portion are given a brief presentation. This does not mean that they are not of importance, because they are important in the administration of the Act. However, the number of cases and the treatment received in the courts during the past two years have not brought them into sharp enough focus to warrant a detailed survey.

A lawyer whose client may have benefits under another statute and who may at the same time have a cause of action under the Tort Claims Act will have to consider carefully whether pension or similar rights may not be more beneficial than a recovery under the Act. Furthermore, the pursuit of one remedy may constitute an election and foreclose pursuit of the other. A pension plan which benefits an injured person or one entitled to recover and which does not originate

with the federal government simply is a concurrent or cumulative remedy. However, where the event which caused the injury gives rise to rights for compensation from the government, e.g., under the Federal Employee's Compensation Act and also to rights under the Tort Claims Act then the remedies afforded are in the alternative and the choice of one constitutes an election. Where the remedies from the government are concurrent then the court has to reduce the damages under the Act pro tanto. A six months pay gratuity given for the death of a serviceman will be deducted, but amounts received from National Service Life Insurance will not.

Where an attorney has filed an action and a recovery results the court may award up to 20% as attorney's fees. One court approved an agreement between attorney and client which provided for a fee equal to 10% of the recovery except in the event of an appeal being perfected in which case the fee would be 20%, on the ground that there was implied authority in the Act though not express authority. This allowance of fees is within the discretion of the court and it can consider the fact that there is a state statute which allows the attorney a portion of the recovery to cover expenses.

The Act provides that "the Attorney General, with the approval of the court may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon." The court contemplated is the district court, and this is true even though the compromise is reached after the court of appeals has affirmed a lower court decision for the defendant and the case is in the Supreme Court. The appellate courts have been occupied also with considerations involving the evidence below. The judge of the district court hears and determines the facts and the examination in the higher court goes only to the sufficiency.

State law, of course, is the basis for the federal cause of action and state

183 5 U. S. C. A. § 751 et seq.
rules as to last clear chance,\textsuperscript{142} contributory negligence,\textsuperscript{143} res ipsa loquitur\textsuperscript{144} have been applied. As a matter of administration when the lower court finds contributory negligence judgment should be entered for the defendant rather than a dismissal of the action.\textsuperscript{145} Every facet of state law, even as to the burden on the plaintiff of showing freedom from contributory negligence has been applied.\textsuperscript{146}

Conclusion

This survey has highlighted the past two years under the Tort Claims Act. Undoubtedly the future will bring additional problems in the administration of the Act, and the Supreme Court will resolve the existing ones which have been pointed out. The liberal spirit of the Act has been captured by practically all the courts, and this is typified by the Supreme Court in the \textit{Brooks} and \textit{Aetna Casualty} decisions. A definitive rule on the statute of limitation problems is most needed at the present time and it is hoped the Court will have the opportunity to formulate one in the near future.

The impact of state law makes for a lack of uniformity. Notice the difference which will occur in the same factual situation when the plaintiff is required to sustain the burden of the ultimate risk of non-persuasion as to his freedom from contributory negligence; and when this burden of pleading and proving the plaintiff's contributory negligence is on the defendant. While this state approach may be desirable in the pure diversity cases where rights created by the respective states are being enforced, nevertheless it is considered that this is a federal cause of action, and there should be uniformity, at least in these matters, if not in the question of the standards of conduct required. The federal courts have not hesitated to say that substantive statutes of limitation of the states do not apply, and in the example used, the employment of the Federal Rules of Civil Procedure as to pleading contributory negligence would approach the uniformity which it is felt is desirable. Other examples will be apparent to the reader on an examination of the cases.

Aside from those matters which involve policy, it is hoped that the lawyer who has a claim will be more aware of the pitfalls he will have to avoid such as those in the election of remedies. Some of his problems have been solved, and he can better advise his client now than two years ago as to the probability of recovery. The amount of fee allowed the attorney is out of line with that prevailing in tort


cases in most jurisdictions. It is hoped, however, that this will not serve as a deterrent in accepting worthy claims. From the volume of business under the Act any fear on this score is apparently not well-founded.

One final observation is fitting. This is a splendid act from many viewpoints. The general excellence of the decisions under the Act, both from the standpoint of the results achieved and the careful analysis given to the points of interpretation involved, speaks volumes for the merits of our federal judiciary.