

Torts--Federal Tort Claims Act--Government Held Liable for Negligent Operation of a Lighthouse (Indian Towing Co. v. United States, 350 U.S. 61 (1955))

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current with the operation. The shield of immunity before and during operations is nearly complete, leaving possible room for recovery only where objectively administrative acts are: 1) incidental and 2) not concurrent with the operation. Thus, a person receiving a blood transfusion in New York today must be prepared to assume most of the risk of injury.²⁸

Even if public policy did at one time warrant the doctrine of immunity for charitable organizations, conditions have changed radically and the trend reveals a gravitation towards the just imposition of liability.²⁹ "With today's ready availability of liability insurance it is difficult to believe that the satisfactory functioning of charitable institutions requires a gratuitous license to kill or maim."³⁰ However, as the law stands in New York today, we are forcing the victim of a negligent medical act to make an unreasonable contribution³¹ to the tortious charitable organization by a denial of a cause of action. In addition to the consideration that immunity fosters carelessness,³² charities should be required to be *just* before they are *generous*.³³ The aberrational concept of granting immunity even when a charity "does good in the wrong way,"³⁴ is the creation of the courts. Recently, opportunities have been presented to the New York Court of Appeals in which it could have eliminated immunity. However, the Court chose only to reaffirm its prior position.³⁵ It then appears that if we are to find any relief from this inequitable situation, it must come from the legislature.



TORTS — FEDERAL TORT CLAIMS ACT — GOVERNMENT HELD
LIABLE FOR NEGLIGENT OPERATION OF A LIGHTHOUSE. — Plaintiff
brought an action under Section 1346(b) of the Federal Tort Claims

²⁸ A blood transfusion meets all the requirements of either the lay or legal definition of an "operation." See WEBSTER'S NEW INTERNATIONAL DICTIONARY 1707 (2d ed. 1946); BLACK, LAW DICTIONARY 1243 (4th ed. 1951).

²⁹ See *Georgetown College v. Hughes*, 130 F.2d 810, 827 (D.C. Cir. 1942). This may be illustrated by the fact that both the Federal Government and New York State have waived their exemption. See Federal Tort Claims Act, 28 U.S.C. § 1346 (1952); N.Y. Ct. Cl. Act § 8.

³⁰ Thornton & McNiece, *Torts, 1955 Survey of N.Y. Law*, 31 N.Y.U.L. REV. 344, 363 (1956).

³¹ See *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P.2d 220, 226 (1951).

³² See *Georgetown College v. Hughes*, *supra* note 29 at 824.

³³ See 3 SCOTT, TRUSTS § 402, at 2150 (1939).

³⁴ *Georgetown College v. Hughes*, 130 F.2d 810, 828 (D.C. Cir. 1942).

³⁵ See *Mrachek v. Sunshine Biscuit, Inc.*, 308 N.Y. 116, 123 N.E.2d 801 (1954); *Bakal v. University Heights Sanitarium, Inc.*, 302 N.Y. 870, 100 N.E.2d 51 (1951) (no opinion), *affirming*, 277 App. Div. 572, 101 N.Y.S.2d 385 (1st Dept 1950).

Act which provides for governmental liability ". . . under circumstances where the United States, if a *private person*, would be liable . . . in accordance with the law of the place where the act . . . occurred."¹ Plaintiff's tugboat was damaged as a result of the negligent operation of a lighthouse. It was contended that the operation of a lighthouse is a *uniquely governmental act*, and under Louisiana law there is governmental immunity for analogous activity. The Supreme Court, in denying defendant's contention, *held* that once the Coast Guard personnel undertook to maintain a lighthouse, they were acting as private persons within the meaning of Section 1346(b), and as such are liable for their torts irrespective of the fact that no private persons operate lighthouses. *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

In 1946 the Federal Tort Claims Act² was passed whereby the United States waived its immunity from tort liability.³ This waiver was substantially limited by thirteen exceptions.⁴ The most significant of these is embodied in Section 2680(a) of the act, which excludes from its provisions any claim which results from an injury caused by a federal agency in performing its *discretionary* functions.

The probable intent of Congress in enacting this clause was to prevent judicial "second-guessing" of high level policy decisions.⁵ The courts, however, in construing this section have extended it to cover situations far removed from such executive determinations.⁶ For example, they have held that decisions to uproot a dead tree,⁷ or as to how much water to let over a dam,⁸ or whether to spray herbicide⁹ are *discretionary* within the meaning of the act. *Dalehite v. United States*¹⁰ is the most recent case illustrative of this tendency. There the Court held that a decision of a *subordinate* to bag fertilizer at 200° F., instead of at a lower figure, involved the exercise of discretion. It was reasoned that, where there is room for policy judgment and decision, there is discretion. More germane to the instant case, however, is the fact that the Court there decided that a Coast Guard

¹ 28 U.S.C. § 1346(b) (1952) (emphasis added).

² *Ibid.*

³ Mr. Justice Holmes in a famous statement explained, "a sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

⁴ See 28 U.S.C. § 2680 (1952).

⁵ See Note, 66 HARV. L. REV. 488, 497 (1953).

⁶ See, e.g., *Schmidt v. United States*, 198 F.2d 32 (7th Cir.), *cert. denied*, 344 U.S. 896 (1952); see Note, 23 GEO. WASH. L. REV. 716 (1955); 22 GEO. WASH. L. REV. 496 (1954).

⁷ *Toledo v. United States*, 95 F. Supp. 838 (D.P.R. 1951).

⁸ *Olson v. United States*, 93 F. Supp. 150 (D.N.D. 1950).

⁹ *Harris v. United States*, 106 F. Supp. 298 (E.D. Okla. 1952), *aff'd*, 205 F.2d 765 (10th Cir. 1953).

¹⁰ 346 U.S. 15 (1953).

"Fire Fighting Brigade" was absolved from liability in that they were engaging in an act for which there was no analogous liability in the law of torts.

In the instant case, the entire Court agreed that failing to check the light and neglecting to warn vessels that the light was out, fell outside the realm of the discretionary exception. Neither the majority nor the dissent gave the rationale behind this conclusion, notwithstanding the fact that the Court had previously affirmed the Court of Appeals' decision which placed this case within the scope of the discretionary clause.¹¹

The disagreement in the instant case revolves about the interpretation given the statutory language which makes the government liable under the law of the state where the act occurred¹² and in the same manner as a "*private individual under like circumstances.*"¹³ The majority interpreted *like* circumstances to mean similar acts which, if performed by private individuals, would give rise to liability.¹⁴ The dissent contended that since private individuals do not operate lighthouses there can be no *like* circumstances. Lighthouse keeping, they continued, is a "uniquely governmental" activity and since the law of Louisiana does not provide for governmental liability in analogous situations, the federal government should not be liable.¹⁵ The majority impliedly concluded, however, that while the law of the state where the acts occurred will determine whether such acts are tortious, the liability of the federal government is determined by *federal law*, and the fact that Louisiana provides for governmental immunity is immaterial. Although the majority distinguishes the *Dalehite* decision, it is submitted that the instant case has overruled that portion of the opinion which immunizes the Government where there is no analogous liability for a private individual.¹⁶

¹¹ In *Indian Towing Co. v. United States*, 349 U.S. 902 (1955), the Court by a 4-4 vote affirmed, per curiam, the Court of Appeals' determination in the instant case (Mr. Justice Harlan not sitting). Subsequently a petition for rehearing was granted, and the case restored to the docket for reargument before the full Bench.

¹² 28 U.S.C. § 1346(b) (1952).

¹³ 28 U.S.C. § 2674 (1952) (emphasis added).

¹⁴ For cases where the courts, having once decided that the acts complained of fell outside the specified exceptions of the Federal Tort Claims Act, looked to the local law to judge whether the acts are negligent, see *McGill v. United States*, 200 F.2d 873 (3d Cir. 1952) (An abandoned Coast Guard tower was used as a playground by small children. It was held that the Government should have known of the dangers that caused injuries to one 7 year old.); *Somerset Seafood Co. v. United States*, 193 F.2d 631 (4th Cir. 1951) (Government held liable for sinking plaintiff's ship because of negligent marking of wrecked vessel); *Hernandez v. United States*, 112 F. Supp. 369 (D. Hawaii 1953) (Once the Government set out to build a road, failure to set warning signals was actionable by those injured.).

¹⁵ See *Edwards v. Shreveport*, 66 So. 2d 373 (La. 1953); cf. *Howard v. New Orleans*, 159 La. 443, 105 So. 443 (1925).

¹⁶ This apparently was the opinion of Mr. Justice Reed in *Indian Towing Co. v. United States*, 350 U.S. 61, 76 (1955) (dissenting opinion).

The Court, by utilizing federal law to establish liability, relieves federal judges of the task of wading through the quagmire of innumerable state approaches to the problem of distinguishing between what is "governmental" and what is "proprietary."¹⁷ The abandonment of this tenuous distinction serves to broaden federal liability to a considerable extent, approaching the liberal attitude of the New York courts.¹⁸ But perhaps a more important result of this case is that the Court, without defining discretion, has at last limited its application,¹⁹ something they refused to do in the *Dalehite* case.²⁰ That the limitation imposed by the instant case will destroy much of the importance of the broad definition of the discretionary clause as propounded in that decision—a construction which has hitherto thwarted the legislative intent²¹—seems to be quite evident. Thus, after a lapse of ten years marked by judicially superimposed legislation, the Court has finally agreed to admit that Congress had waived governmental tort immunity.



TORTS — MANUFACTURERS' LIABILITY FOR DAMAGE TO DEFECTIVE PRODUCT — SCOPE OF *MacPherson* DOCTRINE. — Plaintiff purchased airplanes equipped with latently defective engines. These

¹⁷ For examples of the disharmony among the states, see *Haley v. Boston*, 191 Mass. 291, 77 N.E. 888 (1906). While defendant's employees were collecting ashes from dwelling houses, they ran their cart over the plaintiff's leg. It was held that the city was not liable since the service performed by the city was without charge. But the court intimated that the decision would probably be different if the plaintiff could show that the cart in question had at some time also carted away steam engine ashes for which the city charged 10 cents a barrel. See also *Williams v. City of New York*, 57 N.Y.S.2d 39 (Sup. Ct. 1945); *Irvine v. Greenwood*, 89 S.C. 511, 72 S.E. 228 (1911); *Borchard, Government Liability In Tort*, 34 YALE L.J. 129 (1924).

¹⁸ See *Foley v. New York*, 294 N.Y. 275, 62 N.E.2d 69 (1945) (state liable when negligent failure to replace burned-out bulb in traffic light caused accident); *Bernardine v. City of New York*, 294 N.Y. 361, 62 N.E.2d 604 (1945) (city held liable in negligence action for damages caused by runaway police horse).

¹⁹ This conclusion is borne out by the recent Supreme Court case of *United States v. Union Trust Co.*, 350 U.S. 907, affirming *per curiam sub nom.* *Eastern Air Lines, Inc. v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir. 1955). There, the Court affirmed a lower court determination that the discretionary exemption does not shield the Government from liability for the wrongful death of airline passengers killed in a plane collision caused by the negligent operation of a Government control tower. In reaching its decision, the Court relied solely on the instant case. See also *Dahlstrom v. United States*, 24 U.S.L. WEEK 2312 (8th Cir. Jan. 10, 1956).

²⁰ "It is unnecessary to define, apart from this case, precisely where discretion ends." *Dalehite v. United States*, 346 U.S. 15, 35 (1953).

²¹ See *Leflar, Torts*, 1954 ANN. SURVEY AM. L. 549, 573, 30 N.Y.U.L. REV. 645, 669 (1955); *Notes*, 23 GEO. WASH. L. REV. 716, 717 (1955), 66 HARV. L. REV. 488 (1953).