

Torts--Assault by Fellow Inmate Not Within Federal Torts Claims Act (Panella v. United States, Civil No. 69-16, S.D.N.Y., Dec. 9, 1953)

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followed where there was a contingent remainder,²¹ but not when the remainder was already vested and a termination could only accelerate the power of enjoyment.²²

In the principal case the tax was imposed pursuant to Section 811(d)(2) since the trust was established in 1929. The Court, in including the trust corpora within the gross estate, relied entirely upon the *Holmes* case, and refused to draw any distinction based upon the dissimilar factual situations. In the *Holmes* case, unlike the instant case, the settlor retained the power to accumulate the income indefinitely,²³ and, depending on the date of termination, the trust corpora might have gone to his sons, their issue, his wife or her heirs. In the present case, only the beneficiaries (or their heirs by operation of law) could take. It is respectfully suggested that such a distinction could and should have altered the result.



TORTS — ASSAULT BY FELLOW INMATE NOT WITHIN FEDERAL TORT CLAIMS ACT.—After being convicted as a user of narcotics, plaintiff chose treatment in a federal hospital in lieu of a prison term. While in the hospital he was stabbed by another inmate. In an action against the Government under the Federal Tort Claims Act,¹ plaintiff alleged a negligent omission to provide sufficient guards against such a contingency. The Government defended on the ground that the federal act expressly excepted from the purview of the Government's waiver of immunity provision, "any claim arising out of assault, or battery. . . ." ² The Court, in rejecting the plaintiff's contention that the exception precludes recovery only when the assault or battery is inflicted by an employee of the United States Government, granted the defendant's motion for summary judgment, *holding* that the exception is not restricted to Government employees, and that *any* claim based on an injury resulting from an assault or battery is barred under the Act. *Panella v. United States*, Civil No. 69-16, S.D.N.Y., Dec. 9, 1953.

Through the Tort Claims Act the Federal Government has waived its immunity from suit for the torts of its employees, in situations where a private person would be liable pursuant to the *lex loci*

²¹ See *Comm'r of Internal Revenue v. Newbold's Estate*, 158 F.2d 694 (2d Cir. 1946).

²² See *Hays' Estate v. Comm'r of Internal Revenue*, 181 F.2d 169 (5th Cir. 1950).

²³ See *Comm'r of Internal Revenue v. Estate of Holmes*, 326 U.S. 480, 484 (1946).

¹ 28 U.S.C. §§ 1346(b), 2674 (Supp. 1950).

² 28 U.S.C. § 2680(h) (Supp. 1950).

delicti.³ There are, however, several enumerated exceptions to this waiver,⁴ one of which is any claim arising out of assault or battery. In respect to this latter provision, courts have interpreted similar fact situations differently. In *Lewis v. United States*,⁵ the shooting of the plaintiff upon refusal to halt when ordered, by an over-zealous sentry, was found to have been an assault, while in *Cerri v. United States*⁶ the wounding of an *innocent bystander* by a sentry was interpreted as a mere failure to exercise due care. The apparent willingness of the court in the *Cerri* case to find negligence rather than an intentional tort was perhaps stimulated in part by a desire to bring this particular plaintiff within the protection of the Tort Claims Act.

In the instant case, the plaintiff's status—whether prisoner or voluntary patient—was left undetermined by the Court. Such a determination would have been immaterial since the fact that the claim arose out of a battery precluded relief on any theory. However, in another context—a pure negligence situation—the position of the plaintiff would have been pertinent. If he were a patient he might have a remedy.⁷ If, on the other hand, he were a prisoner, he would be barred from recovery under the rule of *Sigmon v. United States*,⁸ where it was held that prisoners may not avail themselves of the Act. A basis for this decision was the rationale in *Feres v. United States*,⁹ where recovery was denied to a serviceman injured while on duty. In the latter case, the Court reasoned that the actions of servicemen based on service-incurred injuries should not be dependent on the differing negligence law of the states in which they happened to be stationed—especially since they have no choice as to their geographical location.¹⁰ The limited tort relief available against the Federal Government contrasts with the liberal attitude manifested by the State of New York, where prisoners on parole have a tort remedy against the state for injuries incurred in prison.¹¹

³ 28 U.S.C. § 2674 (Supp. 1950).

⁴ 28 U.S.C. § 2680 (Supp. 1950).

⁵ 194 F.2d 689 (3d Cir. 1952).

⁶ 80 F. Supp. 831 (N.D. Cal. 1948).

⁷ See *Costley v. United States*, 181 F.2d 723 (5th Cir. 1950); *Grigalaukas v. United States*, 103 F. Supp. 543 (D. Mass. 1951), *aff'd*, 195 F.2d 494 (5th Cir. 1952); *Dishman v. United States*, 93 F. Supp. 567 (D. Md. 1950).

⁸ 110 F. Supp. 906 (W.D. Va. 1953); see *Van Zuch v. United States*, 118 F. Supp. 468 (E.D.N.Y. 1954); *Shew v. United States*, 116 F. Supp. 1 (M.D.N.C. 1953). For a critical appraisal of the *Sigmon* case, see Note, 63 *YALE L. J.* 418 (1954).

⁹ 340 U.S. 135 (1950). However, servicemen may recover against the Government for the negligent conduct of its agents which causes injuries not incident to service. *Brooks v. United States*, 337 U.S. 49 (1949). In addition, discharged veterans may recover for negligent treatment in veterans' hospitals subsequent to their discharge. *Santana v. United States*, 175 F.2d 320 (1st Cir. 1949); *Brown v. United States*, No. 22826, 2d Cir., Jan. 5, 1954.

¹⁰ See *Feres v. United States*, 340 U.S. 135, 143 (1950).

¹¹ *N.Y. PENAL LAW* § 510, *Duffy v. State*, 197 Misc. 569, 94 *N.Y.S.2d* 757 (Ct. Cl. 1950). However, even where the prisoner is released from prison,

As a policy consideration, courts may be reluctant to extend the protection of the Tort Claims Act to a malefactor such as the plaintiff, though not a prisoner in the narrow sense. If given the right to sue while incarcerated, the prisoner may disrupt prison routine and discipline by seizing upon every opportunity to leave the prison confines for trips to the courthouse.¹² Moreover, servicemen¹³ and many federal prison inmates¹⁴ are protected by some form of injury compensation benefits. Hence, cases denying tort relief to servicemen and prisoners have rested, at least in part, upon the premise that Congress did not intend to afford them more than one remedy.¹⁵

Therefore, where servicemen and prisoners are concerned, the decision in the instant case achieved a commendable result. However, the case highlights a possible inequity in the provision of the Tort Claims Act which excludes suits arising out of assault and battery. The plaintiff's complaint was based on an alleged negligent omission of Government employees, and not on an assault and battery of an inmate. Nevertheless, the Court, in construing the provision, stated that it does not refer to claims of assault and battery, since Congress could have, but did not, so word it. Consequently, in cases where an assault or battery results in injury to a person *other than a serviceman or prisoner*, due to the negligence of Government employees, there could be no relief under the Act. An enlightened republic ought not to suffer its citizens to receive such injuries without recourse. "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."¹⁶



TORTS—LIABILITY FOR SOLICITATION OF FORMER EMPLOYER'S CUSTOMERS.—Plaintiff advertising agency sought damages from its former account executives alleged to have been sustained as the result of a conspiracy by the latter to deprive plaintiff of its principal cus-

his suit against the Federal Government for injuries incurred during his confinement are barred. See *Van Zuch v. United States*, *supra* note 8.

¹² See *Duffy v. State*, *supra* note 11.

¹³ See *Feres v. United States*, *supra* note 10 at 144 (statutes collected therein).

¹⁴ 48 STAT. 1211-1212 (1934), 18 U.S.C. § 4126 (Supp. 1952).

¹⁵ See *Feres v. United States*, 340 U.S. 135, 144 (1950) (serviceman); *Sigmon v. United States*, 110 F. Supp. 906, 911 (W.D. Va. 1953) (prisoner).

¹⁶ *Anderson v. John L. Hayes Construction Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926) [quoted with approval in reference to the Tort Claims Act in *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 383 (1949)].