

Torts--Federal Tort Claims Act--Application to Members of the Armed Forces (Feres v. United States, 71 Sup. Ct. 153 (1950))

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TORTS—FEDERAL TORT CLAIMS ACT—APPLICATION TO MEMBERS OF THE ARMED FORCES.—Three actions were brought against the United States under the Federal Tort Claims Act.¹ The common fact underlying the three cases was that each claimant, a member of the armed forces, while on active duty and not on furlough, sustained injury due to the negligence of other members of the armed forces. The Supreme Court considered the three cases in one opinion. *Held*, judgment for the United States. The government is not liable under the Act for injuries to servicemen arising out of or in the course of activity incident to military service. *Feres v. United States*, 71 Sup. Ct. 153 (1950).

Twenty months earlier the Court decided an analogous case.² There the claimants were soldiers on furlough when the negligence occurred. It was held that a serviceman is not precluded from recovery under the Act for death or injury incurred not incident to his service in the armed forces. The Court remained silent, however, as to whether the Act would afford relief for death or injury incident to military service. Nevertheless, cognizance was taken of this type of claim when reference was made to it as "a wholly different case". The principal case was the adjudication of the "wholly different case".

The Court in the instant case interpreted Section 2674 of Title 28 of the United States Code³ not as a creation of new causes of action but merely as the transposition of the sovereign to the status of a private individual. Thus, in the first instance, it must be determined whether private liability would arise in the fact situation being considered. If so, the government would assume that liability. An analogy must be drawn, therefore, between the activities of a private person or business and the activities of the government. That this presents a formidable problem when the comparison is to be made between private enterprise and the armed forces is clear.⁴

Applying this construction to the instant cases it was found that no private liability would arise in a fact situation of this nature.⁵

¹28 U. S. C. A. §§ 1291, 1346(b), 1402(b), 1504, 2110, 2401, 2402, 2411(b), 2412(a) (c), 2671-2680 (1948).

²*Brooks v. United States*, 337 U. S. 49 (1949).

³"The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. . . ."

⁴As was stated by one writer in reference to this element in the Crown Proceedings Act, 1947, 10 & 11 GEO. 6, c. 44, § 10 (the English equivalent of the Federal Tort Claims Act), "The maintenance of Armed Forces is another example which defies analogy with private enterprise. In the training and maintenance of the Armed Forces the Crown and its officers have to undertake duties which, if done by a private individual, would not only be unlawful but might also be criminal. . . ." Barnes, *The Crown Proceedings Act, 1947*, 26 CAN. B. REV. 387, 393 (1948).

⁵The Court stated, "Nor is there any [private] liability 'under like circumstances,' for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command." *Feres v. United States*, 71 Sup. Ct. 153, 157 (1950).

In arriving at this interpretation the Court considered Section 1346 (b) ⁶ which makes the law of the place where the operative facts occurred govern any consequent liability. It concluded that it was doubtful that Congress desired that the law of a state should determine the liability for an act arising from a relationship so completely federal in its nature.⁷ Furthermore, it is questionable that Congress should intend the creation of a situation observed by Judge Soper of the Fourth Federal Circuit; namely, an inquiry by the judiciary into military orders, commands, and actions, a procedure which could very well lead to a serious impairment of military discipline.⁸

None of the listed exceptions ⁹ of the Federal Tort Claims Act expressly excludes the claims presented in the instant litigation. Moreover, it would seem that the Act has language sufficiently broad to include them. At least it was so thought by a majority of the judges in the Federal Court of Appeals, Tenth Circuit, when determining one of these cases.¹⁰

A fact which buttresses this construction is that when the Act was introduced to Congress it contained several exceptions, one of which ¹¹ would have excluded practically all claims by servicemen. This exception was omitted when the Act was approved. On the other hand, the literal meaning of the Act may be narrowed by construction where it is apparent that the literal meaning is contrary to established governmental policy.¹² Too, the language of discarded measures of a statute should not be given undue weight.¹³

As a practical matter the decision is sound. It avoids the possibility of a multitude of litigation with its attendant inquiry into routine military matters to which reference has been previously made

⁶ 28 U. S. C. A. § 1346(b) (1948).

⁷ Cf. *United States v. Standard Oil Co.*, 332 U. S. 301, 305 (1947).

⁸ *Jefferson v. United States*, 178 F. 2d 518, 520 (4th Cir. 1949). The Court in the principal case also considered existing statutes providing disability benefits to servicemen and gratuity payments to their survivors (most of these are in Titles 10 and 38 and in the Appendix to Title 50 of the U. S. C. A.). It is interesting to note statements made with respect to these statutes in the instant case and the *Brooks* case. In the former it was written, "This Court . . . cannot escape attributing some bearing upon it [the deciding of the claims] to enactments . . . which provide . . . uniform compensation for injuries or death of those in armed services," *Feres v. United States*, 71 Sup. Ct. 153, 158 (1950), and in the *Brooks* case it was stated that "Provisions in other statutes . . . indicate no purpose to forbid actions under the Tort Claims Act." *Brooks v. United States*, 337 U. S. 49, 53 (1949).

⁹ 28 U. S. C. A. § 2680 (1948).

¹⁰ *Griggs v. United States*, 178 F. 2d 1 (10th Cir. 1949).

¹¹ "Any claim for which compensation is provided by the Federal Employees Compensation Act, as amended, or by the World War Veterans Act of 1924, as amended." H. R. 181, 79th Cong., 1st Sess. § 402(8) (1945).

¹² *Jefferson v. United States*, 77 F. Supp. 706, 711-712 (D. C. Md. 1948), *aff'd*, 178 F. 2d 518 (4th Cir. 1949).

¹³ *Jefferson v. United States*, 178 F. 2d 518, 520 (4th Cir. 1949).

in this article. There are factors,¹⁴ however, which possibly might have diminished the number of these claims to the extent that it would have presented no problem. They are: the short time within which the action must be commenced;¹⁵ the common law defenses¹⁶ available to the government; the settlement or compromise of certain valid claims;¹⁷ and finally, the hesitancy of servicemen to wade through tedious court procedure with its attendant court costs and attorney's fees in an effort to supplement substantial compensation to which they are already entitled.

Whether these factors would eliminate the problem is conjectural. If, however, in the words of the Court, ". . . we misinterpret the Act, at least Congress possesses a ready remedy."¹⁸



TORTS—LIABILITY OF OWNER AND LESSOR FOR INJURIES SUFFERED BY LESSEE'S EMPLOYEE.—Plaintiff, a shipyard employee, sustained injuries when a link of chain on a tractor crane broke as he was assisting those who were operating the crane. The crane was the property of the defendant Turner who had rented it to the defendant Farrington, who, within two days of receipt, had sublet it to plaintiff's employer. The evidence showed that the link had been defectively manufactured, and that the defect (but not its extent) had been detectable for more than two years before the accident. Further, there existed several well-known methods of testing the link. *Held*, where the nature and use of a chattel are such that it is reasonably certain to place life and limb in peril when defectively made or repaired, and it is probable that it will be used without inspection by persons other than those who could claim the benefit of implied warranty, the supplier thereof has a duty to use reasonable care to see that the chattel is reasonably safe for use, even when there is no actual knowledge of a defect or of facts which indicate a defect. The fact that plaintiff's employer, as lessee of the crane, had an equal opportunity to discover the defect does not serve to relieve the owner of liability. *La Rocca v. Farrington*, 301 N. Y. 247, 93 N. E. 2d 829 (1950).

The conclusion reached by the court finds its genesis in the holding of *Thomas v. Winchester*.¹ The essence of that case was that the finished article must be imminently dangerous to human life

¹⁴ Note, 58 YALE L. J. 615, 625, n. 44 (1949). These factors were forwarded in reference to the *Brooks* case but they are applicable here.

¹⁵ 28 U. S. C. A. § 2401(b) (1948).

¹⁶ Contributory negligence, assumption of risk and fellow servant theory.

¹⁷ 28 U. S. C. A. § 2677 (1948).

¹⁸ *Feres v. United States*, 71 Sup. Ct. 153, 155 (1950).

¹ 6 N. Y. 381 (1852).