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Torts—Federal Tort Claims Act—Government Liable for Negligence of Federal Forest Service in Fighting Fire

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Petitioners brought an action against the United States under the Federal Tort Claims Act,[1] alleging as the proximate cause of their property loss the negligence of the federal forest service in allowing a forest fire to spread and burn the petitioners' land. The district court dismissed the complaint for failure to state a claim, and the court of appeals affirmed.[2] The Supreme Court, in vacating the prior judgments, held that under the tort claims act the United States would be liable for the negligent acts of the forest service if the law of the place where the act occurred would impose liability on a private individual under similar circumstances. *Rayonier Inc. v. United States, 77 Sup. Ct. 374 (1957).*

Traditionally, a sovereign, in the absence of its consent, has been immune from suit.[3] Under the Federal Tort Claims Act, the United States, subject to certain exceptions, is liable for the negligence of its employees "in the same manner and to the same extent as a private individual *under like circumstances.*"[4] The scope and meaning of this section have confused the courts for more than a decade. Cases where the government has performed a uniquely governmental function which has no private counterpart have been especially difficult. Such a case is *Rayonier.*

Prior to 1955, the courts generally denied recovery in these cases, holding that the act contemplates analogous private activity[5] and does not create new causes of action where none existed before.[6] Thus, in *Feres v. United States,*[7] it was held that a serviceman on active duty, who was injured by the negligence of others in the armed forces, could not recover under the act. The Court reasoned that there could be no analogous private liability because no private person has power to conscript or mobilize a private army.[8] The opinion did state that except for the status of the parties the Government would have been liable.[9] Three years later the *Dalehite* case[10]

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[1] 28 U.S.C. § 1346 (1952). "[T]he district court shall have exclusive jurisdiction of civil actions on claims against the United States for money damages . . . caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, 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." *Id.* § 1346 (b).

[2] Rayonier, Inc. v. United States, 225 F.2d 642 (9th Cir. 1955).

[3] See, e.g., Kawananakoa v. Polybank, 205 U.S. 349 (1907).

[4] 28 U.S.C. § 2674 (1952) (emphasis supplied).

[5] *E.g.,* National Mfg. Co. v. United States, 210 F.2d 263 (8th Cir.), *cert. denied,* 347 U.S. 967 (1954)(recovery denied for injuries due to erroneous weather reports because there was no private counterpart). However, a few pre-1955 cases allowed recovery, apparently on the ground that the act was intended to impose liability in this type of case. See, e.g., Somerset Seafood Co. v. United States, 193 F.2d 631 (4th Cir. 1951)(negligence of Government in marking the spot of a sunken ship); Cerri v. United States, 80 F. Supp. 831 (N.D. Cal. 1948)(plaintiff injured by a military policeman).

[6] *E.g.,* Kendrick v. United States, 82 F. Supp. 430 (N.D. Ala. 1949)(suit against Government for negligence in discharging a mental patient from an army hospital).

[7] 340 U.S. 135 (1950).

[8] But cf., Brooks v. United States, 337 U.S. 49 (1949)(soldier on furlough hit by an army truck recovered damages).

[9] 340 U.S. at 142.

[10] Dalehite v. United States, 346 U.S. 15 (1953).

considered Government liability for the Texas City disaster. Two boat loads of fertilizer manufactured under the direction and control of the United States exploded as a result of a fire which started on one of the ships and spread to the other. Many deaths and a great loss of property ensued. The Court, relying mainly on the act's "discretionary function" exception,[11] denied recovery.[12] But, regarding the negligence of the coast guard in fighting fire, the Court followed the reasoning in *Feres* stating, "there is no analogous liability; in fact, if anything is doctrinally sanctioned in the law of torts it is the immunity of communities and other public bodies for injuries due to fire fighting."[13]

[11] 28 U.S.C. §. 2680 (a) (1952) provides that the provisions of the act shall not apply to "Any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or 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." A good case showing the application of this exception is Coates v. United States, 181 F.2d 816 (8th Cir. 1950)(changing course of Missouri River). For a discussion of the limitations of this exception see Eastern Air Lines v. Union Trust Co., 221 F.2d 62 (D.C. Cir.); *aff'd per curiam sub nom.* United States v. Union Trust Co., 350 U.S. 907 (1955)(negligence of airport tower operator during landing procedure).

[12] The Dalehite case was the test case representing the claims of others totaling more than $200,000,000. It should be mentioned that Congress subsequently expressed its disapproval of the decision by assuming the responsibility of the United States for the losses. 69 Stat. c. 864 (1955).

1955 marked a change in the Court's attitude. In *Indian Towing Co. v. United States*,[14] the petitioners sought recovery for negligence of the coast guard in allowing a lighthouse light to become extinguished. It was held that the Government's liability does not depend upon the presence or absence of identical private activity[15] nor upon whether a state or municipality would have been immune had it been engaged in the function. Liability depends, rather, on whether a private individual engaged in the same activity would be liable under the substantive law of the place where the act occurred. Moreover the Court rejected a contention frequently raised by the Government in other cases—that the United States should be treated as a state or municipality within the "governmental-proprietary" distinction.[16] The Court did not expressly overrule *Feres* or *Dalehite*, but rather distinguished them on their facts. It is notable that in the instant case the lower court based its decision entirely upon the reasoning in *Dalehite*, but the Supreme Court took the position that *Dalehite* had been overruled by *Indian Towing*.

The *Rayonier* case represents an application and extension of the test set forth in *Indian Towing*. It may appear to be a radical departure; for traditionally a sovereign, in the absence of a statute to the contrary, has been relieved of liability for injuries resulting from the maintenance and operation of its fire departments.[17] Obviously the Court did not intend this new rule to apply to sovereigns generally, but only to the United States.

The principal case represents a liberal construction of the Federal Tort Claims Act, giving the act the effect intended by Congress.[18] It is a policy decision based upon the rationale that it is better to spread the loss among all the taxpayers than to place the entire burden upon the person wronged. In this sense the decision constitutes a true growth in the law governing federal tort claims. Nor is its significance merely doctrinal. Its practical effect may be felt by lumbermen, farmers, and ranchers throughout the country since the federal forest service controls and protects vast forest acreage, including more than seven million acres in Colorado.

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[13] See note 10 *supra* at 44.
[14] 350 U.S. 61 (1955).
[15] "[W]e would be attributing bizarre motives to Congress to hold that it was predicating liability on such a completely fortuitous circumstance—the presence or absence of identical private activity." *Id.* at 67. See also United States v. Lauter, 219 F.2d 559 (5th Cir. 1955)(plaintiff's wife fell out of a helicopter during rescue operations).
[16] Air Transport Associates v. United States, 221 F.2d 467 (9th Cir. 1955)(negligence of airport tower operator)(dictum).
[17] See Annots., 9 A.L.R. 143 (1920), 33 A.L.R. 688 (1924), 84 A.L.R. 514 (1933).
[18] O'Toole v. United States, 206 F.2d 912 (3d Cir. 1953)(plaintiff's automobile collided with an army tractor)(dictum).