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Clifford L. Ashton

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By CLIFFORD L. ASHTON*

Experience in claims offices of the Judge Advocate General's Department, of the United States Army, has convinced the writer that many lawyers do not have a full appreciation of the existing rights and remedies which are provided for the relief of those who have been damaged by government activity, particularly activity of military and civilian personnel of the War Department. Several cases have come to the writer's attention of individuals who have been advised by counsel that they had no legal remedy against the government for damage and injuries sustained because of the general rule of sovereign immunity from suit. While this is true, it does not follow that an injured party cannot make *claim* against the government, nor that such claims cannot be paid. Congress has made many inroads into the doctrine of sovereign immunity by providing claims statutes authorizing various departments of the government to settle certain claims.[1] This legislation has prob- the acts of government agents.

The purpose of this article is as follows: First, to outline briefly the remedy and procedure provided by the Act of 3 July 1943, as amended by the Act of 29 May 1945, commonly referred to as the Domestic Claims Act.[2] Second, to consider briefly the legislative relief available to damaged claimants through special relief bills presented at each session of the Congress. Third, to review the policy and legal procedure involved in processing and prosecuting claims which the government has against those whose negligent acts have caused damage to government property and personnel.

I. Domestic Claims Act

The Act of 3 July 1943, as amended, commonly referred to as the

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*Judge, City Court, Salt Lake City.

[1] Various bills making the Federal government generally responsible for the negligence of its officers or employees have been introduced in Congress since 1925. Separate bills passed both houses as early as the 69th Congress. The Federal Torts Bill, sponsored by the American Bar Association and indorsed in principle by President Roosevelt in his message to the 77th Congress passed the Senate but was not acted upon by the House. The bill was reintroduced in the 78th Congress but did not pass. It is apparent that the trend is away from sovereign immunity, and that in the near future the government will accept full responsibility for the torts of its officers and employees.

ably been enacted to relieve the Congress of the burden of a great number of special relief bills which have been requested by individuals damaged by

[2] 57 Stat. 372; 31 U.S.C. 223b as amended by Public Law 67—79th Cong.; sec. III, War Department Bulletin 9, 1945.

Domestic Claims Act, confers authority on the War Department [3] to process of the War Department acting within the scope of their employment.[4] Liability is limited to $1,000.00 in time of war and $500.00 in time of peace, and extends to damage to, or loss or destruction of both real and personal property.[5] [6] Liability for personal injury is restricted to reasonable medical, hospital, and burial expense actually incurred. It does not include liability for physical pain and suffering and loss of earning capacity recoverable in ordinary tort actions.

Under the provisions of the act, claims for damage to or loss or destruction of property, or for personal injury or death, proximately caused by willful, negligent, wrongful, or otherwise tortious acts or omissions of military personnel or civilian employees acting within the scope of their employment are payable. Acts or omissions involving a lack of reasonable care are the usual basis of claims so payable. However, the claimant must not be at fault himself. If his negligent or wrongful act in any way proximately contributed to his injury or damage his claim will be denied.

Claims for damage to or loss or destruction of property, or for personal injury or death, though not caused by acts or omissions of military personnel or civilian employees of the War Department or of the army, are payable under the provisions of the Act of 3 July 1943, as amended, if otherwise incident to the non-combat activities of the War Department or of the army. In general, the claims within the above category are those arising out of authorized activities which are peculiarly army activities having little parallel

[3] The War Department has implemented the Act of 3 July 1943 and 29 May 1945, supra, by Army Regulation 25-25, dated 3 July 1943 and 29 May 1945 and Army Regulations 25-20, dated 3 July 1943 and 29 May. Copies of these Army Regulations may be obtained by writing to the Office of the Adjutant General in Washington.
and pay for certain damages caused by military personnel or civilian empolyees

[4] Although officers and enlisted men are not strictly speaking, servants or employees of the government, they are so considered for the purpose of determining liability under the Domestic Claims Act.

[5] The exact hour which has been fixed upon for the outbreak of the war with Japan is 1:25 p.m., E.S.T., 7 Dec. 1941, Sec. III, Cir. 118, W.D., 23 April 1942. The Judge Advocate General has frequently held that a state of war continues until a formal peace treaty has been signed. Therefore, until such a peace treaty has been signed, the jurisdictional limit recoverable under the Domestic Claims Act is $1,000.00.

[6] While the Secretary of War does not have authority to settle claims over $1,000.00 the act does authorize him to report to Congress claims over the applicable limit. The Army Regulation which implements the act provides that such claims will be forwalded to the Judge General for appropriate action. The Judge Advocate General, if he considers the claim meritorious prepares a recommendation for the signature of the Undersecretary of War which is transmitted to the Bureau and thence to the Claims Committee of Congress. If Congress approves, which it usually does, the claim is included in the next annual or deficiency appropriation act. It is important to note that a claim made through the War Department, even though over the jurisdictional amount, will not include elements to conpensate for loss of wages, pain and suffering, permanent disability and death. (Army Regulation 25-25, 29 May 1945.) This limitation imposed by the Army Regulation does not apply to special relief bills, hereinafter considered, which are requested by direct means through the Congress.

in civilian pursuits and to situations which historically have been considered as furnishing a proper basis for the payment of claims. For example, included are claims for damage or injury arising out of, and which are natural or probable results or incidents of, maneuvers and special field exercises, practice firing of heavy guns, practice bombing, operation of aircraft and antiaircraft, use of barrage balloons, escape of horses, use of instrumentalities having latent mechanical defects not traceable to negligent acts or omissions, movement of combat vehicles or other vehicles designed especially for military use, and use and occupancy of real estate. Negligence or wrongful act of the claimant, in whole or in part the proximate cause, bars a claim.

The War Department rule which denies recovery to a claimant whose negligence contributes to his injury or damage is so firmly established that the Judge Advocate General has refused to accept any of the rules applied in some jurisdictions which relax the established policy. Thus the doctrines of comparative negligence and last clear chance are not applied under the Domestic Claims Act.

Frequently a conflict of law question will arise. By analogy to the reasoning applied in *Erie Railroad vs. Tompkins*, 304 U. S. 64, the Judge Advocate General has held that, in the absence of Federal law, the law of the situs controls. Thus the "family purpose doctrine" will be applied if the claim arose in a jurisdiction which follows that rule. So also, if the jurisdiction imputes the negligence of one driving to the owner, irrespective of a master servant relationship, the rule will be applied in passing on the contributory negligence of the claimant.

Claims for damage to or loss or destruction of property must be presented by the owner of the property or his duly authorized agent or legal representative. The word "owner", as so used, includes bailees, lessees, mortgagors and conditional vendees, but does not include mortgagees, conditional vendors and others, having title for purposes of security only. Claims for personal injury or death must be presented by the injured person or his duly authorized agent or legal representative. Claims for medical, hospital and burial expenses, not presented by the injured person, may, if it appears that no legal representative has been appointed, be presented by any person who, by reason of family relationship, has in fact incurred the expenses for which claim is made.

Under the 1943 act military personnel and employees of the War Department could not recover if their injury or damage occurred incident to their service. Thus, if a soldier's automobile were damaged by a government vehicle he could not, under the old act, recover from the government unless he could show that he was engaged in a private matter, not incident to his service in the army. This limitation has been removed by the present act so that now army and War Department personnel have the same rights as other claimants.

The act provides that claims must be presented in writing within one

year from the date of their accrual. However, if the incident giving rise to the claim occurs in time of war, or if war intervenes within one year, the claim, on good cause shown, may be presented until one year after peace is established. The burden is on claimant to show good cause why his claim was not presented within the year. Proof must be substantial, such as absence from the country or military service, or an honest and reasonable belief that all steps necessary have been taken.

Motor vehicle accidents are the greatest single source of claims under the Domestic Claims Act. Frequently the owner of the property involved in such an accident has a contract of insurance which provides subrogation rights to the insurance company. The question that therefore arises is: What are the rights of a subrogee insurance company under the Domestic Claims Act? The right of subrogation was never recognized in connection with army claims until 1932 when the Attorney General held that the right should be recognized with respect to claims under the old negligence act.[7] But under the present act, here considered, a subrogee has no rights in that capacity because the act specifically provides that only the insured *or his agent* will be recognized by the government. The purpose of this provision is to prevent splitting of claims with attendant administrative difficulties and possibility of duplicate payment. The full amount, therefore, is paid to the insured or his agent, regardless of whether a portion of the recovered sum may be recovered from the insured by his insurance company. The practical effect of this rule is that the insurance companies make claim for the insured in insured's name, as his agent, provided such agency is established by a written power of attorney or other writing evidencing an agency. This practice is common and the War Department has no rule or policy which opposes its continuance.

Lawyers who advise and represent clients who have claims against the government are, of course, interested in the procedure employed and the policy which guides the administrative handling of such matters. The procedure is as follows:

When an accident or incident occurs which results in damage to private property, regardless of amount, or death or personal injury to a civilian, except those covered by provisions of the United States Employees Compensation Act, an investigation is made. Every post, camp, or station has a claims officer who has the responsibility of making these investigations. The primary purpose is to develop information necessary to determine whether or not a claim will be allowed by the government, or to determine whether or not a claim exists in favor of the government. This information, which includes required diagrams and exhibits, is compiled into a report. During the investigation the officer will ordinarily advise the damaged party of his right to file a claim and will furnish the necessary forms and information required. This will be done even though the officer may feel that the claimant is not

[7] 36 Atty. General 553.

entitled to recover. The claims officer will forward his report, together with his recommendation and claimant's claim, if one has been filed, to the commanding officer who appointed him. This commanding officer either approves or disapproves the recommendation. If he does not have delegated authority to settle the claim, which is the usual case, he forwards the original and one copy of the report and claim to the commanding general of the service command or the commanding officer of the air service command, depending on which branch of the service is involved. At this point the evidence and recommendations are again reviewed by trained army officers in the commanding general's judge advocate office. They write a review in which an approval or disapproval is recommended. The review is placed on the commanding general's desk for his action. His action will usually follow the recommendation of his claims judge advocate.

If he orders approval and payment, the claim is sent to the appropriate disbursing officer for payment. If he disapproves the claim, in whole or in part, the claimant is notified in writing of his right to appeal within 30 days to the Secretary of War. If an appeal is filed within 30 days it is forwarded, together with the complete record, to the Office of The Judge Advocate General in Washington. There the appeal is transferred to the claims division where a recommendation is made. From there the file is sent to the Secretary of War for his final action. His action will generally follow the recommendation of the Judge Advocate General. After action on the appeal by the Secretary of War the claimant is notified. If the claim is finally approved in less than the full amount, consent of the claimant to accept the lesser amount approved must be obtained.

If no claim is filed with the investigating officer he forwards the original and one copy of his report, through the channels herein indicated, to the office of the claims judge advocate of the service command, or air service command, where it is kept on record pending the filing of a claim.

The policy developed by the War Department in the payment of claims under this act is an extremely liberal one. It is demonstrated in the opinions of The Attorney General, The Comptroller General, The Judge Advocate General, and other policy forming officials. It is also demonstrated in army regulations and in general procedural and administrative War Department practice.

Lawyers, accustomed to ordinary rules of causation and negligence, may find the government's willingness to pay claims by liberal causation interpretation and without primary negligence somewhat startling. They will also find that the ordinary "arms length" attitude developed by litigants in the usual tort case does not exist between the government and a claimant; in fact the claims officer is often so anxious to assist a damaged party in obtaining every benefit provided in the act that his conduct is more apt to resemble that of claimant's advocate than that of a government investigator. One reason

for this is the remote and impersonal responsibility which many army officers, like other public officials, sometimes feel toward the public treasury.

II. Legislative Relief

As herein indicated, one of the principle reasons for the enactment of claims statutes is to relieve the Congress of the burden placed on it by special bills for relief submitted by congressmen in behalf of constituents who have suffered damage by reason of government activity. But this means of redress is not removed by the enactment of claims statutes. It is a very effectual remedy that still exists, and one that is frequently overlooked.

In considering this remedy it is important to distinguish it from the remedy provided in the Domestic Claims Act itself, particularly the provision which enables the Secretary of War, acting through the Judge Advocate General, to report to Congress for approval claims filed under the act which are over $1,000.00. (See note 6.) Such claims, while not restricted in amount are restricted as to the nature of the damage which may be recovered. Thus, under a claim so filed damages occasioned by pain and suffering, loss of wages, and permanent disability or death, are not allowable and will not be presented to Congress by the War Department. This is because of the restriction in the army regulation which implements the statute and which also provides a legislative remedy.

If a claim is presented directly to Congress by means of a special relief bill initiated by claimant's senator or representative none of the restrictions contained in the army regulation apply. Damages payable by this method are unlimited in nature and amount.

Suppose two hypothetical situations: First, a claimant's $2,000.00 automobile has been demolished in a collision with an army vehicle without any fault on the part of claimant. Second, same facts, except that not only has his automobile been damaged, he has been severely and permanently injured. What is his remedy in each instance?

In the first case claimant has an adequate remedy provided by the Domestic Claims Act as implemented by Army Regulations 25-25. His claim is entirely for property damage. Even though the amount is in excess of that which the War Department may pay, The Judge Advocate General is authorized to prepare a recommendation for the signature of the Undersecretary of War which will eventually be approved by the Claims Committee of Congress. By this method claimant will receive the full amount of his damage in the next deficiency appropriation act.

In the second case claimant can recover no more than $2,000.00 from Congress if he initiates his claim with the War Department. Clearly this will not compensate him for the injury he has sustained by reason of pain and suffering, loss of wages, and permanent injury. Therefore claimant must look

elsewhere for a remedy. He can obtain adequate relief by proceeding as follows:

A letter is written to claimant's representative or senator requesting that a special relief bill be submitted to Congress. There is no limit to the amount which may be requested and no restriction on the nature of the damages which may be recovered. After the bill has been submitted it is referred to the Claims Committee of the Congress. This committee refers it to the government agency which allegedly caused the injury or damage. If the damage resulted from War Department activity it will be referred through the War Department to The Judge Advocate General's Office in Washington. From there it will be forwarded to the claims officer located in the area which the alleged accident or incident occurred. The claims officer will make the usual investigation and report, which report together with his recommendation, will be forwarded to the service command headquarters where it will be reviewed by the service command claims judge advocate. If necessary, additional investigation will be made.

After the completed file is returned to The Judge Advocate General's Office in Washington the claims division of that office will review the evidence and recommendations and request any further information which may be required. Finally the reviewing officer will recommend that the claim be approved in whole or in part, or that it be denied. This recommendation, together with the review, will be sent to the Claims Committee where, for all practical purposes, final action will be taken. In almost every case the recommendation of The Judge Advocate General's Office is approved. As a practical matter, therefore, it is important to understand the rules and policy which guide that office in determining government liability.

Officers in The Judge Advocate Department are lawyers. Most of them are well trained. Many have had considerable practical legal experience. It is these men who review the evidence and apply the law upon which the claim is determined. The law which they apply, under the reasoning of the Supreme Court in *Erie Railroad vs. Tompkins,* supra, is the law of the situs. This law, as every lawyer knows, consists of the ordinary rules evolved by the local courts and established by statutes and ordinances in effect in the jurisdiction. For this reason it is quite possible to advise a client who is seeking relief by means of a special relief bill that his claim will be determined by the same legal rules which would be applied by the local courts. The principle difference is that the method employed is legislative rather than judicial.

It will be noted that the limitation imposed in the Domestic Claims Act, specifically that which restricts damages in personal injury cases to actual medical, hospital, and burial expense, does not apply under the legislative remedy just considered.

It is important to point out that if a claimant has an adequate remedy under the Domestic Claims Act, legislative relief by means of a special relief

bill will be denied. The remedy will be considered adequate if the amount claimed is less than the maximum sum payable under the Act.

III. Claims by the Government

The government in exercising its inherent right to recover for damages to government property in the custody or control of the War Department or of the army, or for loss incurred by reason of the torts of third persons proceeds in accordance with Army Regulation 25-220, 29 May 1945.[8] This regulation provides the procedure and scope for War Department claims.

Included within the provisions of the regulation are claims in excess of $25.00, and claims in lesser amount when the assertion thereof is deemed in the interest of the government. Included are the following: Damage to or loss or destruction of government property; amount of pay and allowances paid or payable by the government to military personnel for any period of incapacitation incident to injury to such personnel caused by negligent third parties; cost of medical treatment, hospitalization, travel, or other expense or loss to the government, in the rehabilitation of military personnel incident to injury; cost of funeral, burial, transportation, or other expense or loss to the government, incident to death of military personnel; expense to the government incurred in other cases, arising from negligence or wrongful act, where the government's obligation is fixed by common law, federal or state statute, convention, treaty, or agreement.

Generally speaking, it will be observed that the regulation includes those elements of damage which could be collected by a private person for damage to his property and those which could be collected by an employer for injury to his employee. Claims resulting from personal injuries to civilian personnel in the War Department are not considered under the regulation. They are handled under the United States Employees Compensation Act.[9]

In asserting claims under the regulation the government, in recognition of *Erie Railroad vs. Tompkins*, supra, concedes, in the absence of federal law, that the law of the situs determines liability.[10] The government in applying the local law makes an important concession. Since in the allowance of claims against the government it has been firmly established that contributory negligence on the part of the claimant defeats his claims brought under the Domestic Claims Act, the army, as a matter of policy, refuses to assert any claim in which the negligence of military personnel was a contributing cause to the damage or injury, even though the jurisdiction is one that applies the doctrine of last clear chance or comparative negligence.

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[8] This regulation supersedes Army Regulation 25-220, dated 3 July 1943.

[9] 5 U.S.C. 751-798.

[10] In a case wherein certain town ordinances required the giving of notice to the municipality within thirty days from the date of damage caused by negligence of agents of the municipality, it was held that such ordinances were binding on the Government in a tort asserted by the Government against the municipality. Digest of Opinions of the Judge Advocate General: Dig. Op. JAG 1912-40, page 910.

In the event the government institutes suit for damages it does so in the capacity of any other private litigant and waives any immunity as a sovereign. The defendant may therefore interpose any defense, including a counterclaim. In such cases the question of contributory negligence, or any other question, is for the determination of the court.[11]

Suits or claims by the government are not barred by ordinary statutes of limitation or by laches, unless the Congress has clearly indicated an intent that the government be barred by enacting legislation so providing. No such legislation has been enacted applicable to claims under Army Regulations 25-220.

The laws in the different jurisdictions are fairly uniform as to the elements recoverable for damage to real or personal property. However, with respect to the provision of the regulation under which the government asserts a right to recover for loss of services of its military personnel, and for expenses incident to their injury or death, serious questions may arise. The only direct authority available on this troublesome question is a case decided in the District Court of the United States, Southern District of California, Central Division. The case considered by that court was *United States vs. Standard Oil Company of California.*[12] The question for determination was whether or not the United States has the right to recover for hospitalization and wages paid to a soldier during the time he was incapacitated, through the tortious act of the defendant. The court recognized that there were no precedents controlling, and in holding that the government could recover said:

"At the common law, the master could recover for loss of services resulting from a tort committed on the servant of a third person. By analogy, a parent was given the right to recover for the loss of the services of his child, and a husband for those of his wife. And these actions are entirely independent of the right of the servant, child, or wife to recover for the injuries themselves. When a man becomes a soldier, a status is created whether the soldier enlisted voluntarily or is selected under a Selective Service Law. A voluntary enlistment originates in a contract for a definite period. But any similarity between it and other contractual relationships, such as master and servant ceases. The essence of the relation of master and servant is the freedom of the servant to end it, subject, of course, to responsibility of wrongful termination. * * * So the upshot of the matter is this: A special relation has been created. Whether we call it a status, as some of the cases do, or whether we just call it Government and soldier relation, it is clear that both the soldier and the Government have certain rights and obligations arising from it and that a third party who, through his tortious act, interferes with it to the detriment of the Government, is responsible for the mischief he causes. And he

[11] U. S. vs. Moscow Seed Co., 14 Fed. Supp. 135; 92 Fed. (2d) 170.

[12] This case is not reported and is at present being appealed to the Circuit Court. It is Case No. 4204-Y Civil, District Court of the United States, Southern District of California, Central Division.

cannot avoid responsibility for his act by claiming that the relation is one for which the common law *did not have a name.*"

The settlement of any claim asserted by the government for injury to military personnel does not serve to discharge any cause of action existing in favor of the injured soldier. His right to recover for negligent or wrongful injury to himself is a separate and distinct right from the right of the government to recover for the loss of his services or the expense incident to his care and rehabilitation. The converse is likewise true.[13]

Claims in behalf of the government are investigated in the same manner and by the same personnel as those considered in Part I of this article. If it is determined that the defendant is liable the commanding officer who appointed the claims officer refers the file to his Claims Judge Advocate. If he concurs in the recommendation the commanding officer will make a written demand for payment unless payment or an acceptable offer of compromise has already been made. Payments in full are transmitted to the appropriate fiscal officer.

The commanding officer has no authority to accept an offer of compromise, or to abandon the claim by reason of noncollectability.

If the demand is not met within a reasonable time the file is forwarded to the commanding general of the service command, who in turn refers it to his claims judge advocate. This officer will probably renew the demand. If payment or an offer of compromise is not forthcoming within a reasonable time the file is forwarded to the Judge Advocate General in Washington. The commanding general of the service command may abandon the case by reason of the amount involved or for any other special circumstance. He also closes the case if the defendant is not liable.

All cases requiring suit, or settlement by reason of an offer of compromise, must be forwarded to the Judge Advocate General. There they are reviewed and sent to the Secretary of War for transmittal to the Attorney General. The Attorney General, by virtue of his office, prosecutes the suit in the event such action is necessary. He, and he alone, has authority to accept an offer of compromise. Of course, the practical work of the Attorney General is done by the various United States District Attorneys. Acting in behalf of the Attorney General they have full discretion in prosecuting or dismissing the case, or in effectuating a compromise.

The practical effect of the outlined procedure is that only a small percentage of the potential claims are actually tried. A considerable portion are compromised in Washington through the cooperation of insurance carriers, the Judge Advocate General and the Attorney General. Many are abandoned, particularly when the damage to the government is not substantial. Many

[13] "The Government is not concerned with any settlement between the soldier and a third person. . . . Any such settlement would not affect the Government's right to proceed against the third person for all the hospital costs and pay of the soldier injured." Bulletin Judge Advocate General, April 1943, page 155.

are discontinued because of practical difficulties. Often the necessary witnesses are military personnel who have been transferred from the scene of the damage or injury. They are either unobtainable, or the difficulty of returning them to the jurisdiction where the damage or injury occurred is disproportionate to the amount of the claim.

One source of annoyance to lawyers is the provision in the regulation which prohibits the giving of a release, even though the amount of the payment is the full amount of the government's claim. The reason for this is that under federal law the Attorney General is the only one who has authority to compromise or release any defendant, against whom the government has a claim, from further liability. Therefore, in the event a release is insisted upon it must be obtained, through military channels, from the Attorney General. This procedure is quite unnecessary in view of the provisions in the regulation which empowers the claims officer, or any reviewing authority, to give a receipt reciting that payment in full has been received by the government for the injury or damage specified. This has the same practical effect as a release.

In conclusion the writer desires to make it clear that this article is not all inclusive on the subject of government claims. Attention has been directed only to War Department claims. If a problem arises involving other government agencies an investigation should be made through those agencies to determine what remedies are provided, and to determine what rights and obligations have been incurred. Also, no attempt has been made to consider contractual claims which arise against the government and which are handled by the United States Court of Claims.

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Should We Change Our Legal Educational System?†

By LEONARD A. WORTHINGTON *

* Of the San Francisco Bar.

The noteworthy action by the State Bar of California in providing for the placement, re-establishment, and education of returning lawyer veterans is worthy of the highest commendation and brings to mind a parallel matter that requires immediate study and attention by the lawyers and legal educators of this state.

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