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Torts -- Federal Tort Claims Act -- Indemnity

Hillard Chapnick

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indirectly on the promise, but on the fraudulent inducement, and therefore
the Statute of Frauds is no bar.\textsuperscript{16}

Although Florida courts recognize that promises made without intention
to perform constitute fraud,\textsuperscript{17} they are reluctant to apply this rule to
promises made within the Statute of Frauds, contending it would negate
the purpose of the statute.\textsuperscript{18} In the instant case, the court applied this
reasoning in dismissing the action as an indirect attempt to recover on
the contract. They will not allow void contracts to be admitted either
directly or indirectly for measure of damages.\textsuperscript{19}

In the writer's opinion, a refusal by courts to allow any recovery
in tort on a barred contract, under the premise that the Statue of Frauds
is designed to prevent fraud and should be strictly applied, will in many
cases actually shield fraud. Strict, "to the letter" application of the
statute in cases of proved fraud affords a good defense to the perpetrators.
Would any other construction of the statute cloud the distinction between
contract and tort remedies? Considering the injustice wrought by denying
any recovery, it would seem that clear thinking could dispel any possible
clouds on the distinction, and strict application of the statute could be
relaxed to the extent that it would fulfill its purpose, to prevent fraud, in
more cases.

Alan H. Dombrowsky

\textbf{TORTS—FEDERAL TORT CLAIMS ACT—INDEMNITY}

Plaintiff brought an action against the United States for injuries
sustained when his automobile collided with a negligently driven govern-
ment vehicle. The government, after suffering an adverse judgment under
the Federal Tort Claims Act, sought to recover, by way of indemnity,
the amount of the judgment from the employee involved in the collision.
\textit{Held}, Section 2676 of the United States Code\textsuperscript{1} bars any legal basis for

\begin{itemize}
  \item 16. Nanos v. Harrison, 97 Conn. 529, 117 Atl. 803 (1922); Texas Co. v. Sloan,
        171 Kan. 182, 231 P.2d 255 (1951); Papanikolas v. Sampson, 73 Utah 404, 274 Pac.
        856 (1929).
  \item 17. O'Melia v. Adkins, 73 Cal. App.2d 143, 166 P.2d 298 (1946); Day v.
        Wependod, 101 Fla. 333, 134 So. 525 (1931); Feldman v. Witmark, 254 Mass.
        480, 150 N.E. 329 (1926); Rutan v. Straehly, 289 Mich. 341, 286 N.W. 639 (1939);
        Brittingham v. Huylers, 120 N.J. Eq. 198, 184 Atl. 529 (Ct. Err. & App. 1936);
        Zora Realty Co. v. Green, 186 Misc. 1044, 60 N.Y.S.2d 440 (Sup. Ct. 1946); Harris
        v. Sanderson, 178 S.W.2d 315 (Texas 1944); Kritzer v. Moffat, 136 Wash. 410, 240
        Pac. 355 (1925); Davis v. Alford, 113 W. Va. 30, 166 S.E. 701 (1932).
        v. Keyton, 63 So.2d 906 (Fla. 1953)(easement for a park, designated on plat, held
        satisfying the statute).
\end{itemize}

\textsuperscript{1} 28 U.S.C. § 2676 (Supp. 1948). "The judgment in an action . . . shall
constitute a complete bar to any action by the claimant . . . against the employee
whose act or omission gave rise to the claim."
indemnity, precluding the government from recovery. *Gilman v. United States*, 206 F.2d 846 (9th Cir. 1953).

Indemnity stems from the common law principle that everyone is responsible for his own torts.² It is universally recognized today that an employer who is liable to a third person solely under the doctrine of respondeat superior may be indemnified by his erring servant.³ This view is based on the equitable principle that the person actually at fault should bear the loss resulting from his wrong, and would be unjustly enriched by the master's being compelled to satisfy the servant's obligation.⁴

Prior to the passage of the Federal Tort Claims Act, the government had no right of indemnity against a negligent employee because Congress had never made provision for the assertion of such claims.⁵ Under the common law principle of governmental immunity, a citizen negligently injured by a governmental employee had no right of action in any court unless he obtained the government's consent to be sued.⁶ His only other possible relief was to appeal to Congress for private legislation.⁷ Prayers for private legislation became so numerous and burdensome, that the Federal Tort Claims Act was passed to relieve the situation.⁸ Therefore, the primary purpose of this act was to make changes of procedure which would enable Congress to devote more time to major public issues.⁹

The act is silent on the question whether the government has a right of indemnity against a negligent employee. Two cases have arisen which dealt with this problem,¹⁰ and although the basic facts in both cases are similar, the decisions are diametrically opposite. In *Burks v. United States*, the court based its decision upon the common law rule of indemnity and held that the government does have such a right against a negligent employee.¹¹ The court reasoned that by statute the government is held to the liability of a private employer, and therefore should enjoy one of the concomitant rights which flow from such a liability.¹² (Section 1346 (b) U.S. Code:¹³ "... under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the place where the act or omission took place ... "). This view is shared

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2. Prosser, Torts 1114 (1941).
3. Hunter v. DeLuxe Drive-In Theaters, 257 S.W.2d 255 (Mo. 1953).
by eminent text authorities, and by the author of the Federal Tort Claims Act.

Opposed is the viewpoint which examines the purpose of the act—merely to eliminate the necessity for passage of private acts. The Congress did not intend to place the government in the exact position of a private employer since there is no complete waiver of immunity. The act requires some misfeasance or nonfeasance for its application. This view takes into consideration the fact that the government had no right of indemnity before the passage of the act, and therefore it is consistent to say that after the passage of the act the government still had no right of indemnity.

The decision in the instant case concurred with the latter theory. The court ruled that any legal basis for indemnity was lacking, since there was no unjust enrichment present. The decision was based upon the ground that the employee was not answerable to the original claimant once the judgment was rendered against the government under Section 2672 of the United States Code.

In this writer's opinion, the reasoning in the instant case is fallacious. Section 2676 of the United States Code bars the original claimant from subsequent proceedings against the negligent employee, but nowhere does it say, or imply that the government is also barred from an action against the negligent employee. The court seems to ignore the fact that the liability of the government is not the claimant's exclusive remedy, since he has an election to sue either the negligent employee or the government. If he chooses to bring an action against the government, it should definitely have the right of indemnity. To hold otherwise would be creating a special society that is not responsible for its torts, and may very well lead to collusion between the employee and claimant.

Hillard Chapnick

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15. 56 Yale L.J. 534, 560 (1947). The author of the Federal Tort Claims Act, without citation of pertinent authority, rather boldly states: "The Government clearly would have a valid claim against the employee." 
18. See note 5 supra.
20. See note 12 supra.