Torts -- Limitations and Exceptions to Recovery Under the Federal Tort Claims Act

Follow this and additional works at: http://repository.law.miami.edu/umlr

Recommended Citation

Torts -- Limitations and Exceptions to Recovery Under the Federal Tort Claims Act, 5 U. Miami L. Rev. 634 (1951)
Available at: http://repository.law.miami.edu/umlr/vol5/iss4/18

This Case Noted is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.
through the negligence of one charity is apt to place the burden of aid upon another charity or cause the injured to become a public charge. 25

The court in the instant case overruled two Iowa cases which approved of immunity 26 thereby alloying itself with the courts favoring liability and furthering this trend. With the reasons for allowing immunity no longer existent, it is not for the court but for the legislature, if they are of the opinion that public policy still demands a limitation of the liability of charitable institutions, to grant immunity. 27 It is submitted that the decision in the instant case, in the absence of declaratory legislation, will permit holdings by the Iowa courts in favor of the person for whom the charity of a charitable hospital is in reality intended—the non-paying patient.

TORTS—LIMITATIONS AND EXCEPTIONS TO RECOVERY UNDER THE FEDERAL TORT CLAIMS ACT

Plaintiffs sought to recover under the Federal Tort Claims Act 1 for damage to property resulting from dynamite blasting operations of the United States in deepening a channel of the Mississippi River for navigational purposes. Held, in sustaining defendant’s motion to dismiss, that dynamiting was part of a discretionary plan of the army engineers and within an exception 2 to the Federal Tort Claims Act. Boyce v. United States, 93 F. Supp. 866 (S.D. Iowa 1950).

Substantially, the Federal Tort Claims Act is a waiver of governmental immunity in tort 3 restricted only by enumerated exceptions including that exception, herein disputed, which precludes recovery against the government for discretionary acts. 4 Liability can never be predicated upon the abuse of such discretion, 5 but only upon a breach of those ministerial duties wherein no room for speculation or judgment is permitted. 6 The apparent difficulty is that no yardstick has ever been presented for establishing a criterion which would clearly determine at what point it may be said that a particular part of a discretionary plan becomes so insignificant or elementary as to be classified “ministerial.” 7

25. See Nicholson v. Good Samaritan Hospital, supra note 7, at 373; 2 BOSSERT, TRUSTS AND TRUSTEES, § 401.
27. Glavin v. Rhode Island Hospital, 12 R.I. 411, 435 (1879); Rickbeil v. Grafton Deaconess Hospital, 74 N.D. 525, 23 N.W.2d 247, 260 rehearing denied (1946).
1. 28 U.S.C. § 1346(b) (1946).
4. See note 2 supra; 35 GEORGETOWN L.J. 1 (1946).
6. 56 YALE L.J. 534, 543-545 (1947).
In *Coates v. United States*, the course of the Missouri River was altered, in accordance with an approved plan, whereby plaintiff's lands were damaged and, notwithstanding the continuing trespass which ensued, the plan as carried out was held *discretionary*. Dicta in the case made the distinction that if the act complained of was based upon negligence in the carrying out of the approved plan, it would in all probability be a breach of a ministerial function; but not so if the plan so approved was negligently formulated. Cases factually similar to the instant case and the *Coates* case form a uniform pattern in precluding liability despite an abuse of this discretion in accord with the remaining portion of the exception in question.

Further investigation reveals a novel convolution in personal injury actions in contradistinction to those cases similar in facts and results to the instant case wherein a *discretionary* act is given primary consideration. Lip service is paid in some cases to that portion of the exception which deals with an abuse thereof. Failure of an army hospital to provide medical care for an officer's wife has been held *discretionary* in character, but, where, after admission, where the injury occurred through the negligence of an employee, failure to exercise reasonable care resulted in liability.

Similarly, discharging of a veteran from a government hospital was held purely discretionary and there was no liability for death of one killed by the veteran so released. However, where an employee of a veterans hospital was injured through the negligence of an agent in administering medication, liability attached albeit violation of regulations to treat chronic cases.

The rationale employed by the court in the instant case was that though the blasting was the proximate cause of damage to plaintiff's property, liability was not incurred since the use of dynamite was an integral part of the proposed plan. Under the interstate commerce power of the government, a decision to deepen the navigable waters of a river, in conformity with the plan of the army chief of engineers, was purely a discretionary function.

Thus, from these decisions, we observe a series of acts committed in the performance of a *discretionary* function, wherein either gross negligence is substantiated or the wisdom which motivates the particular plan to be followed is without rhyme or reason. Yet the courts, by some mystically formulated slide rule and through nebulous reasoning, have calculated a distinction between *discretionary* and ministerial acts. In interpolating the

8. 181 F.2d 816 (8th Cir. 1950).
9. Id. at 820.
11. Denny v. United States, 171 F.2d 365 (5th Cir. 1948).
12. Costley v. United States, 181 F.2d 723 (5th Cir. 1950).
facts and decisions it appears that the index presents a finding based upon public policy,\textsuperscript{17} or a liberal construction in favor of the United States in return for its waiver of sovereign immunity,\textsuperscript{18} or upon some caliginous precept clothed in “Fabian policy,” resulting in nothing more than a double entendre.\textsuperscript{19}

It is submitted that the Federal Tort Claims Act is a new highway leading to redress for wrongs of the Government but signposts leading to this highway are labelled in the vague and variable terms “No entering if the wrong committed against you resulted from a discretionary act.” This ambiguity encourages terminological confusion which could be remedied by erecting an infallible guide rather than a signpost showing a vague direction.

\textsuperscript{17} Ure v. United States, 93 F. Supp. 779 (D. Ore. 1950).
\textsuperscript{18} United States v. Sherwood, 312 U.S. 584 (1941).