North Dakota Law Review

Volume 42 | Number 3 Article 8

1966

National Guardsmen and Tort Liability

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NATIONAL GUARDSMEN AND TORT LIABILITY

From the standpoint of tort liability, the National Guardsman occupies a unique position with respect to members of the other military services. The United States Government accepts liability for torts committed by all military personnel in the performance of their duty, except for personnel of the National Guard. This situation exists because of the persistent notion that the National Guard is still basically a state organization and therefore the federal government can not be held liable for torts committed by Guard personnel. This classification of the Guard as a state rather than a federal entity stems from the original concept of its purpose and organization.

The National Guard of the United States is a direct descendant of what was formerly called the militia, which consisted of troops formed and maintained by the individual states.[1] The Constitution of the United States authorizes the existence of the state militia and also gives Congress the power of "calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions."[2] However, the National Guard of today bears little resemblance to the "minutemen" and volunteer citizen-soldier forces which comprised the original militia. Federal legislation[3] which authorized appropriations for the support of the National Guard required the units to meet certain standards for "federal recognition" before they were eligible for the federal funds. A uniformly well trained reserve military force of approximately a half million men[4] is eloquent testimony to the effectiveness of the present system. Nevertheless, it has resulted in virtually complete federal control of the National Guard.

REMEDY OF THE INJURED PARTY

The problem can best be described in terms of a hypothetical situation; *A* is injured by *B*'s negligence in connection with *B*'s

1. 13 COLLIERS ENCYCLOPEDIA 585 (1955).
2. U.S. CONST. art. I, § 8.
3. The Dick Act of 1903 (32 Stat. 775), provided for the organization of the National Guard and the National Defense Act of 1916 (39 Stat. 166), exercised the congressional power of regulation of the militia. Subsequent acts of 1920, (41 Stat. 759), 1933 (48 Stat. 153), and 1956 (70A Stat. 1) amended and codified the laws but the basic framework remains the same as that provided by the 1916 and 1920 legislation.
4. 1965 COLLIERS ENCYCLOPEDIA YEARBOOK 589. In 1964, the Army National Guard had 395,000 men on drill pay status and the Air National Guard had 75,000. These figures are undoubtedly higher at the present time due to the military reserve reorganization.

duties as an employee of a company or corporation. *A*'s remedy in this situation is an action for damages against *B*'s employer under the doctrine of respondeat superior. If *B* happens to be an employee of a federal agency or a soldier in the United States Army, *A* may then bring his action against the United States in accordance with the Federal Tort Claims Act.[5] However, if *B* is a National Guardsman, *A*'s remedy must be either recovery under an administrative remedy[6] or an action for damages against the guardsman personally because *B* is not considered a federal employee within the meaning of the Federal Tort Claims Act. The injustice, with respect to both the guardsman and the injured party, of such a situation is obvious. The victim of the tort is, for all practical purposes, without a legal remedy and the guardsman is subjected to tort liability arising from his military service.

The basis of the problem, the well established doctrine of governmental immunity, has its roots in the English common law doctrine of sovereign immunity. The United States Supreme Court, in 1896 said that "the United States, however, like all sovereigns, cannot be impleaded in a judicial tribunal, except so far as they have consented to be sued."[7] The United States has, of course, given such consent by the enactment of the Federal Tort Claims Act.[8] This Act imposes liability upon the United States for death or injury caused by the negligence 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."[9] The term, "employee of the government", as defined by statute, "includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation."[10] The term "employee" has also been held to have the same general meaning as the term "servant" has in the body of rules relating to the doctrine of respondeat superior.[11] The result is that liability for a particular tort will not fall upon the United States unless the tortfeasor can be classed as a federal employee acting within the scope of his employment.

Former decisions concerning National Guard personnel and the

5. 28 U.S.C. §§ 1346; 1402; 1504; 2110; 2401; 2402; 2671-2680 (1964).
6. 32 U.S.C. § 715.
7. Belknap v. Schild, 161 U.S. 10, 16 (1896).
8. *Supra* note 5.
9. 28 U.S.C. § 1346 (b) (1964).
10. 28 U.S.C. § 2671 (1964). This section also states: " 'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in the line of duty."
11. Brucker v. United States, 338 F.2d 427 (9th Cir. 1964).

Federal Tort Claims Act, divided guardsmen into two classes: the regular guardsman on "drill" status and the National Guard employee hired pursuant to the "caretaker" statute.[12] With one exception,[13] the decisions have been uniform in holding that a regular member of the National Guard is not a federal employee within the meaning of the Act.[14] It is worthy of note that in all of the cases so holding, no significance was attached to the following factors:[15] (1) that the guardsman was federally recognized, (2) that he was compensated directly from federal funds, and (3) that he was in possession and control of federally owned equipment which was involved in the accident giving rise to the claim for damages.

The cases deciding whether a National Guard employee or caretaker is a federal employee are divided.[16] In those cases holding that a caretaker is a federal employee, the following factors were regarded as significant:[17] (1) that the caretaker or maintenance technician qualified for employment under federal regulations, (2) that they were paid directly from federal funds and (3) that they were responsible for repairs and maintenance of federally owned equipment in accordance with prescribed regulations. These are practically the same factors which were deemed immaterial in deciding whether or not a non-employee National Guard member is a federal employee under the Federal Tort Claims Act.

A 1965 United States Supreme Court decision, *State of Maryland for the use of Levin v. United States*,[18] has now settled the issue. This case arose out of a 1958 collision between a commercial airliner and an Air National Guard jet trainer. The only survivor was the pilot of the Guard trainer. Suits filed against the United States under the Federal Tort Claims Act were appealed and and eventually resulted in two United States Circuit Courts of Appeal

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12. 32 U.S.C. § 709 (1964) authorizes National Guard units to employ persons meeting federal standards as caretakers of the federal equipment entrusted to the Guard units.

13. O'Toole v. United States, 206 F.2d 912 (3rd Cir. 1953). This case involved a motor vehicle accident between a member of the District of Columbia National Guard and the plaintiff. The court reasoned that there was a direct chain of command from the President on down to the enlisted man and, therefore, the guardsman was a federal employee within the Federal Tort Claims Act.

14. Pattno v. United States, 311 F.2d 604 (10th Cir. 1962) *cert. denied* 373 U.S. 911 (1963); McCranie v. United States, 199 F.2d 581 (5th Cir. 1952), *cert. denied* 345 U.S. 922 (1953); Dover v. United States, 192 F.2d 431 (5th Cir. 1951); Williams v. United States, 189 F.2d 607 (10th Cir. 1951); Storer Broadcasing Co. v. United States, 251 F.2d 268 (5th Cir. 1958), *cert. denied* 356 U.S. 951 (1958); Slagle v. United States, 243 F.2d 404 (5th Cir. 1957); Leary v. United States, 186 F. Supp. 953 (N.H.D. 1960); Gross v. United States, 177 F. Supp. 766 (E.D.N.Y. 1959); Larkin v. United States, 118 F. Supp. 435 (N.D.N.Y. 1952).

15. State of Maryland for the use of Levin v. United States, 329 F.2d 722 (3rd Cir. 1964) (dictum).

16. Holding that caretaker is federal employee: United States v. State of Maryland for the use of Meyer, 322 F.2d 1009 (DC Cir. 1963), *cert. denied* 375 U.S. 954 (1963); Courtney v. United States, 230 F.2d 112 (2d Cir. 1956); United States v. Duncan, 197 F.2d 233 (5th Cir. 1952); Elmo v. United States, 197 F.2d 230 (5th Cir. 1952); United States v. Holly, 172 F.2d 221 (10th Cir. 1951). Holding that caretaker is not a federal employee: Robin Construction Co. v. United States, 345 F.2d 610 (3rd Cir. 1965); State of Maryland for the ues of Meyer, 322 F.2d 1009 (D.C. Cir. 1963), *cert. denied* 375 U.S. 954 (1963), Pattno v. United States, 311 F.2d 604 (10th Cir. 1962).

17. State of Maryland for the use of Levin v. United States, 329 F.2d 722 (3rd Cir. 1964).

18. 381 U.S. 41 (1965).

reaching conflicting decisions[19] on the issue of whether or not a National Guard employee, hired pursuant to federal requirements,[20] is a federal employee within the meaning of the Federal Tort Claims Act. The controversy was settled by the ruling that the Guard pilot was a state and not a federal employee whether he was acting in his capacity as a regular guardsman or as an employee of the National Guard.

A proposal to extend the coverage of the Federal Tort Claims Act to National Guard members and employees was rejected by Congress in 1960.[21] As an alternative, a bill was passed which gives the secretary of the Army or Air Force, whichever is appropriate, authority to pay meritorious claims up to $5,000.00 for personal injury or property damage caused by National Guard personnel. The statute also stipulates that claims exceeding $5,000.00 which the secretary of the military department concerned considers meritorious may be paid to the extent of $5,000.00 and the excess reported to Congress for its consideration.[22] Civilian employees or caretakers are also included in the provision despite the fact that the majority of decisions on this issue prior to 1960 held that they were included under the Tort Claims Act. This fact was pointed out to Congress by the Justice Department,[23] but the committee reports of both houses of Congress indicate acceptance of the position of the Department of the Army that employees, as well as regular member, should be included in the bill.[24] Since this provision was passed in 1960 and the disaster involved in the *Maryland* cases occurred in 1958, it is not applicable in this situation and the only possibility for relief, as the Supreme Court stated, is for those aggrieved to appeal to the benevolence of Congress.[25]

A few states have remedied the situation by enacting statutes[26] waiving their immunity from suit for tort claims. *Goldstein v. State of New York*[27] is an example of an action brought under such a statute. In this case, a guardsman was fatally injured due to the negligence of a fellow guardsman. The court said that the decedent was not a state employee so as to be covered by workmen's compensation. It then followed that the negligent person was not a state employee either, for the same reason that the decedent was not, and therefore the state could not be held liable. It would appear, by the reasoning of this case and the ruling of

19. State of Maryland for the use of Levin v. United States, *supra* note 17, held that National Guard employees are not federal employees. United States v. State of Maryland for the use of Meyer, 322 F.2d 1009 (D.C. Cir. 1963), *cert. denied* 375 U.S. 954 (1963), held that they are.
20. *Supra* note 12.
21. S. 1764, 86th Cong., 2d Sess. (1959); H.R. 5435, 86th Cong. 2d Sess. (1959).
22. 32 U.S.C. § 715 (1964).
23. See S. REP. No. 1502, 86th Cong. 2d Sess. p. 11 (1959).
24. *Supra* note 23. See H.R. REP. No. 1928, 86th Cong. 2d Sess. (1960).
25. *Supra* note 18.
26. *E.g.* N.Y. CT. CL. ACT. §§ 8, 8-a; CAL. GOV'T CODE § 945.
27. 281 N.Y. 396, 24 N.E.2d 97 (1939).

the United States Supreme Court in the *Maryland* case, that the guardsmen involved must be in the anomalous position of being neither state nor federal employees. However, the deciding factor here was the fact that both the tortfeasor and the victim were guardsmen. The case indicates that the opposite result would have been reached if the victim had not been a National Guardsman.

PERSONAL LIABILITY OF GUARDSMEN

Examination of the problem from the guardsman-tortfeasors point of view also reveals a situation which is somewhat less than desirable. A hypothetical will again be useful to illustrate: Consider the same situation as that posed previously in this discussion with the added facts that *A*'s damages are $12,000.00 and that *B* has savings which total approximately $12,000.00. In the first two situations, the best remedy for *A* would remain the same, however, if *B* is a guardsman, it might be advantageous for *A* to sue *B* personally for the entire $12,000.00 rather than attempt to recover $5,000.00 from the secretary of the Army or Air Force and have the remaining $7,000.00 certified to Congress by the secretary of the Army as provided in the administrative provision.[28] A legal remedy is in many instances preferable to an administrative procedure, particularly if, as in this case, it is necessary to resort to Congress to obtain full compensation.

There is considerable authority for the proposition that a governmental employee can be held personally liable for torts committed by him during the course of his employment.[29] The United States Supreme Court in *Belknap v. Schild*[30] stated: "But the exemption of the United States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person whose rights of property have been wrongfully invaded or injured, even by authority of the United States."[31]

Bates v. Clark[32] also involved a military officer. Bates was an Army captain in command of Fort Seward near Jamestown, Dakota Territory. The action was brought by Clark, a merchant, for damages because Bates had seized whiskey belonging to him under the mistaken belief by Bates that he had authority to do so. The officer was held personally liable in spite of his defense that he was a subordinate acting under orders of a superior officer. The court said that "military officers can no more protect them-

28. *Supra* note 18.
29. Belknap v. Schild, 161 U.S. 10 (1896); Bates v. Clark, 95 U.S. 204 (1877); Mitchell v. Harmony, 54 U.S. 115 (1851); Little v. Barreme, 6 U.S. 170 (1804); Burks v. United States, 116 F.Supp. 337 (S.D.Tex. 1953); Devore v. Schaffer, 245 Iowa 1017, 65 N.W.2d 553 (1954); Rising v. Dickinson, 18 N.D. 478, 121 N.W. 616 (1909).
30. 161 U.S. 10 (1896).
31. *Id.* at 18.
32. 95 U.S. 204 (1877).

selves than civilians in time of peace by orders emanating from a source which is itself without authority. . . ."[33]

It should be noted that even though a person is employed by the government, which has waived its immunity from tort liability, that person may still be held personally liable for torts committed by him in the course of his employment. The initial liability may be imposed on the United States by virtue of its waiver of immunity, but the federal government may invoke the common law principle that an employer who, without personal fault, is held liable to third persons solely because of the doctrine of respondeat superior, may recover indemnification from the responsible employee and therefore the government could recover from its employee.[34]

It seems to follow then, that it makes no difference so far as the guardsman is concerned whether he is included within the coverage of the Federal Tort Claims Act or not because it does not affect personal liability. However, the practical truth is that the government rarely seeks indemnification from an employee in cases of ordinary negligence and the injured party would, more than likely, seek damages from the government rather than try to recover from the individual.

The requirement that the employee committing the tort must have been "acting within the scope of his office or employment"[35] may also remove the person from the coverage of the Act. In *Brucker v. United States*,[36] a member of an Air Force base flying club was injured in a crash of one of the club's planes. Another member of the club was piloting the plane. The court held that the pilot was not acting as an agent of the club at the time and hence was not an agent of the United States so as to make him a federal employee within the meaning of the Act.[37] The District of Columbia Circuit Court in *State of Maryland for the use of Meyer*,[38] in contrast to the Third Circuit Courts determination in *State of Maryland for the use of Levin*,[39] found that the military officer was acting within the scope of his employment as a civilian caretaker and thus was a United States employee. The Third Circuit Courts interpretation of the "scope of office or employment" requirement seems to be unduly narrow and strict,[40] although it is not without precedent.[41]

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33. *Id.* at 209.
34. Burks v. United States, *supra* note 29. The Court states at 339: "There can be no doubt that the governmental employee here would be liable to the claimant under the present facts had that claim been asserted. It has long been established that governmental employees are personally liable for their own torts to third persons, committed in the course of employment. Such employees are still citizens and their employment by the Government is no cloak of immunity. The same rule of personal liability prevails as to members of the Armed Forces.
35. 28 U.S.C. § 1346 (b) (1964).
36. 338 F.2d 427 (9th Cir. 1964).
37. *Accord*: United States v. Hainline, 315 F.2d 153 (10th Cir. 1963).
38. 322 F.2d 1009 (D.C. Cir. 1963).
39. 329 F.2d 722 (3rd Cir. 1964).
40. See 329 F.2d 722 (3rd Cir. 1964) (dissenting opinion.)
41. In Watt v. United States, 123 F.Supp. 906 (E.D.Ark. 1954) an administrative as-

It does not appear that the passage of the Act of 1960[42] has rectified the ill effects of the exclusion of guardsmen from the coverage of the Tort Claims Act. Undoubtedly, the plight of an individual who suffers personal injury or property damage because of the negligence of a guardsman is not as hopeless as it was prior to the Act. Nevertheless, as previously pointed out, the administrative procedure may not always be satisfactory to an injured claimant and he still has no action at law against the United States for his damages.

The United States Supreme Court in the *Maryland* case recognized the unfortunate consequences of this decision in stating:

> In so holding we are not unmindful that this doubtless leaves those who suffered from this accident without effective legal redress for their losses. It is nevertheless our duty to take the law as we find it, remitting those aggrieved to whatever requitement may be deemed appropriate by Congress, which in affording the administrative remedies, unfortunately not available here, has shown itself not impervious to the moral demands of such distressing situations.[43]

This expression of regret is also applicable to incidents occurring subsequent to 1960 because the victim must still depend upon Congress for any relief exceeding $5,000.00.

GUARDSMEN—STATE OR FEDERAL EMPLOYEES

The obvious solution, once rejected by Congress,[44] is to include members and employees of the National Guard within the scope of the Federal Tort Claims Act by legislative enactment. The argument that the Guard and the regular armed forces and reserves should be treated differently has certain historical support, but the present day status of the National Guard indicates that the distinction is without merit.

The legislative Act of June 15, 1933[45] established the National Guard as a "reserve component of the Army of the United States." The United States Code states that the "Army National Guard of the United States means the reserve component of the Army all of whose members are members of the Army National Guard."[46]

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sistant of the Arkansas National Guard was held to be a federal employee within the meaning of the Federal Tort Claims Act but the court held that he was not acting within the scope of his employment because he was driving a truck and his duties were supposed to be clerical in nature. This result was reached in spite of the fact that he was driving the truck on an errand for the Guard unit. In United States v. Taylor, 236 F.2d 649 (6th Cir. 1956) plaintiffs were denied recovery for injuries from falling debris and gasoline from an Air Force plane which exploded in midair. The pilot had departed from his scheduled route and was making low altitude, high speed passes over his home town when the mishap occurred. The court held that he was not acting within the scope of his employment. But see the dissenting opinion.

42. 32 U.S.C. § 715 (1964).
43. 381 U.S. 41, 53 (1965).
44. S. 1764, 86th Cong., 2d Sess. (1959); H.R. 5435, 86th Cong., 2d Sess. (1959).
45. 48 Stat. 153.
46. 32 U.S.C. § 101(5) (1964). The provision applicable to the Air National Guard is 32 U.S.C. § 101(7) (1964).

Many other sections of the Code[47] also refer to the National Guard of the United States as a reserve component of the United States Army or Air Force. These provisions clearly point out that the guardsman is also a reservist. That being the case, he should be entitled to the same treatment under the Federal Tort Claims Act as other reservists.

The legislative enactments concerning the National Guard and the degree of control presently exercised by the federal government give strong support to the contention that the Guard is a state organization in name only. Even though the Guard is supposedly under the control of the adjutant general of the state, the Dick Act of 1903[48] stated that the President could call up the militia for a period up to nine months to repel invasions. Refusal by a guardsman to present himself for such muster resulted in his trial by court-martial. It also provided that arms and equipment were to be issued to the states at no cost and that the equipment was to remain the property of the United States. The 1916 Act[49] provided that the organization of the National Guard shall be the same as the regular Army, forbid states to maintain troops other than the National Guard, and provided for appropriations to support the Guard. These are only a few illustrations of the exercise of federal control over the Guard. The list could be extended much further.[50]

The degree of financial support of the National Guard provided by the federal government provides further evidence that it is a federal organization. For example, the North Dakota Air National Guard during 1965 received over $2¼ million in federal funds as compared to $20,900 in state funds. This is less than one per cent of the total and the comparison does not take into account the fact that all of the equipment is owned by the United States.[51] It has been suggested that the Guard is merely another example of a federal aid program[52] and that the federal government only exercises sufficient control to prevent reckless and excessive expenditures. The degree of federal financial support given and the control exercised in other federally subsidized activities, however, does not even approach that involved in the National Guard, particularly in the matter of payment of salaries of personnel. Federal "aid" and complete federal control and support are not the same.

Because the evidence seems to support the contention that a

47. *E.g.*, 32 *U.S.C.* § § 102; 8062; 8077; 8261; 8351 (1964).
48. 32 Stat. 775.
49. 39 Stat. 166.
50. *E.g.* 10 U.S.C. § 332 (1964). This section was used to federalize the National Guard in Alabama to enforce school integration in accordance with federal law and contrary to the wishes of the state. Exec. Order No. 11111, 28 Fed. Reg. 5709 (1963); Exec. Order No. 11118, 28 Fed. Reg. 9863 (1963).
51. Figures obtained from Major James Buzick, North Dakota Air National Guard Comptroller. Most of the state funds received by the unit are used to pay the salaries of four groundskeeper-maintenance type personnel who receive their paychecks directly from the state. These men are actually state employees.
52. See State of Maryland for the use of Levin v. United States, 329 F.2d 722 (3rd Cir. 1964) (citing the Federal Highway Act of 1958, 23 U.S.C. § 101 (1964).

guardsman is a federal employee within the meaning of the Federal Tort Claims Act, a more liberal interpretation of its coverage than was given in *State of Maryland for the use of Levin* would have been proper. The Act should be liberally construed to avoid a deluge of persons seeking relief for claims from Congress. This is the purpose of the Act.[53] Mr. Justice Jackson, regarding the Federal Tort Claims Act, stated:

> This Act, however, should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole. The Tort Claims Act was not an isolated and spontaneous flash of congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit. While the political theory that the King could do no wrong was repudiated in America, a legal doctrine derived from it that the Crown is immune from any suit to which it has not consented was invoked on behalf of the Republic and applied by our courts as vigorously as it had been on behalf of the Crown. As the Federal Government expanded it's activities, its agents caused a multiplying number of remediless wrongs—wrongs which would have been actionable if inflicted by an individual or a corporation but remediless solely because their perpetrator was an officer or employee of the Government. . . . At last, in connection with the Reorganization Act, it waived immunity and transferred the burden of examining tort claims to the courts. The primary purpose of the Act was to extend a remedy to those who had been without; . . .[54]

CONCLUSION

The statutory provision, allowing payment of claims for damages caused by guardsmen, is inadequate as protection for the individual members of the National Guard. The only remaining course open to the guardsman is to purchase personal liability insurance. However, there is very little to recommend such a solution. A person in any military service should not be required to purchase insurance with his own funds in order to protect himself from liability which might arise out of that service.

It is respectfully submitted that the administrative remedy provided in the 1960 legislation is not adequate nor does it give the guardsman the measure of protection to which he is entitled as a member of the United States military forces. Furthermore, the Act has destroyed any possibility for courts to construe the Federal

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53. *E.g.* United States v. Praylou, 208 F.2d 291 (4th Cir. 1953) *cert. denied* 347 U.S. 934 (1954); Somerset Seafood Co. v. United States, 193 F.2d 631 (4th Cir. 1951); State Farm Mutual Liability Insurance Co. v. United States, 172 F.2d 737 (1st Cir. 1949).

54. Feres v. United States, 340 U.S. 135, 139 (1950).

Tort Claims Act in favor of a National Guard member or employee. Congress has decided the issue by legislatively declaring that a guardsman is not a federal employee under the Federal Tort Claims Act. Therefore, only Congress can reverse this position.

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