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Torts - Federal Procedure - Impleading the United States under the Federal Tort Claim Act

Frederick E. Martin

TORTS—FEDERAL PROCEDURE—IMPLEADING THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT. The United States Supreme Court, two justices dissenting, recently decided that under the Federal Tort Claims Act[1] individual defendants, charged with negligence, can implead the United States as a third-party defendant and can join the United States for purposes of contribution among joint tort-feasors under circumstances in which plaintiff's injury was caused by the negligence of individual defendants and that of an employee of the United States government then acting within the scope of his employment. The FTCA, in its original form, authorized suit by an injured party for "*any claim* against the United States . . . on account of personal injury".[2] The decision here considered resolves two cases from different circuits, *U. S. v. Yellow Cab Co.* from the Third Circuit and *Capital Transit Co. v. U. S.* from the District of Columbia Circuit; this decision will be referred to hereafter as the *Yellow Cab* decision.[3] The former case, *U. S. v. Yellow Cab Co.*, arose in Pennsylvania and resulted from the initial action of *Howey v. Yellow Cab Co.*,[4] in which the United States District Court, by adopting a broad interpretation of the FTCA, allowed impleading of the United States as a third-party defendant and denied the government motion to dismiss the suit against it. The government, having been unsuccessful in appealing the adverse ruling to the Third Circuit[5] on the ground that under the FTCA it had not consented to be sued through joinder and impleader, the United States Supreme Court, likewise, refused the argument of the government and upheld the Third Circuit by affirming the ruling authorizing joinder and impleader. The latter case, *Capital Transit Co. v. U. S.*, arose in the District of Columbia and resulted from the initial action of *Stradley v. Capital Transit Co.*[6] Acting under the FTCA, Capital Transit moved to implead the United States as a third-party defendant, but the United States District Court denied the motion by interpreting the Act strictly in order to protect the government's

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[1] 60 Stat. 842, 28 U. S. C. (1946 ed.) §§921-946. Hereafter cited in the text as FTCA. As amended, 28 U.S.C. (1946 ed. Supp. III) §§1291, 1346(b), 1402(b), 1504, 2110, 2401(b), 2402, 2411, 2412, 2671-2680. With the revision of the Judicial Code under the Act of June 25, 1948, the FTCA of 1946 was repealed (see Schedule of Laws Repealed, 62 Stat. 1008), but the subject matter was reenacted into law, with slight change, under Title 28 of the U. S. Code, Judiciary and Judicial Procedure, effective Sept. 1, 1948, 62 Stat. 869, and all sections of the original act were renumbered. See Gottlieb, *The Federal Tort Claims Act — A Statutory Interpretation*, 35 Geo. L. J. 1 (1946); Yankwich, *Problems Under the Federal Tort Claims Act*, 9 F.R.D. 143 (1950); Note, *The Federal Tort Claims Act*, 56 Yale L. J. 534 (1947).

[2] 60 Stat. 844, 28 U. S. C. (1946 ed.) §931(a) (emphasis added). See 28 U. S. C. (1946 ed. Supp. III)§1346(b) for revised wording, which reads, in part, "The district courts . . . shall have exclusive jurisdiction of civil actions on *claims against the United States* for . . . personal injury or death 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." (Emphasis added).

[3] U. S. v. Yellow Cab Co. and Capital Transit Co. v. U. S. 71 Sup. Ct. 399 (1951).

[4] No report of opinion of United States District, E.D.Pa., was published.

[5] Howey v. Yellow Cab Co., 181 F.2d 967 (3d Cir. 1950), *cert. granted* 71 Sup. Ct. 63 (1950); Note, 50 Col. L. Rev. 1137 (1950) 59 Yale L. J. 1515 (1950).

[6] Stradley v. Capital Transit Co., 87 F. Supp. 94, 95 (D.C. 1949); Note, 35 Va. L. Rev. 925 (1949).

sovereign right to immunity from suit in tort without its consent. Though the District of Columbia Circuit upheld the decision,[7] the United States Supreme Court reversed the holding, stating that the FTCA must be applied on a broad, liberal basis.

In the *Stradley* case[8] plaintiff was injured while a passenger on a streetcar which collided with a United States Army truck operated by a soldier acting within the scope of his employment. Alleging that his injury resulted from the negligence of defendant's conductor, plaintiff sued the Transit company, which, in turn moved to make the United States a third-party defendant on the ground that the negligent operation of the Army truck by the soldier-driver was the sole or contributing cause of the collision. Upon the granting of the Transit's company motion, the United States was joined as a third-party defendant. The United States moved for dismissal of suit against it on the ground that the United States cannot be sued without its consent and that the FTCA does not expressly authorize joinder or impleader of the United States for purposes of contribution among joint tort-feasors. The court granted this motion and the suit against the United States was dismissed. The Transit company, having been found guilty of negligence, prosecuted an unsuccessful appeal in the District of Columbia Circuit to hold the United States for contribution as a joint tort-feasor, but the United States Supreme Court reversed the circuit court and by the *Yellow Cab* decision said, in effect, that under the FTCA Capital Transit had a right to join and implead the United States as a third-party defendant. In the *Howey* case[9] defendant Yellow Cab Company was permitted to implead the United States, and when both defendants were found guilty of negligence under the applicable Pennsylvania law,[10] the United States District Court ordered the United States to pay half the damages by way of contribution.[11]

In the *Yellow Cab* decision the United States Supreme Court, mindful of Judge Cardozo's caveat against "refinement of construction",[12] refused to construe the FTCA strictly, as has been its custom heretofore with other statutes and cases where the government's interests were in question.[13] The United States has long recognized its obligation to grant relief in tort claims arising out of the negligent conduct of its employees but has granted this relief only

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[7] Capital Transit Co. v. U. S., 183 F.2d 825 (D.C.Cir. 1950), *cert. granted* 71 Sup. Ct. 61 (1950); Note, 59 Yale L. J. 1515 (1950); 26 Notre Dame Law. 349 (1951); 99 U. of Pa. L. Rev. 714 (1951).

[8] Stradley v. Capital Transit Co., 87 F. Supp. 94 (D.C. 1949).

[9] See *supra* n. 4 and n. 5.

[10] 12 Purdon's Penna. Stats., §2081.

[11] Howey v. Yellow Cab Co., 181 F.2d 967, 973 (3d Cir. 1950).

[12] Anderson v. Hayes Construction Co., 243 N.Y. 140, 147, 153 N.E. 28, 29 (1926), quoted in U. S. v. Yellow Cab Co., 71 Sup. Ct. 399, 403 (1951).

[13] U. S. v. Sherwood, 312 U. S. 584 (1941) (non-joinder in contract suit); U. S. v. Michel, 282 U. S. 656 (1931) (tax recovery suit); Price v. U. S., 174 U. S. 373 (1899) (damage by ward of government); Schillinger v. U. S., 155 U. S. 163 (1894) (patent appropriated by U. S.). *Contra*, Reconstruction Finance Corporation v. J. G. Menihan Corp., 312 U. S. 81, 84 (1941), wherein it reads, "Waivers by Congress of governmental immunity from suit should be liberally construed in the case of federal instrumentalities—that being in line with the current disfavor of the doctrine of governmental immunity"; South Carolina Highway Department v. U. S., 78 F. Supp. 594, 596 (E.D.S.C. 1948).

through private bills.[14] With the passage of the FTCA in 1946 Congress sought to relieve itself of this legislative burden of numerous private relief bills.[15] and it clearly declared the government's liability for the negligent conduct of its employees "under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, or injury, or death in accordance with the law of the place where the act or omission occurred".[16] Twelve specifically enumerated exceptions were not to be covered by the Act[17] and nothing therein prohibits joinder or impleader of the United States for purposes of contribution among joint tortfeasors. There was a definite split of opinion in the cases under the FTCA on this subject of joinder[18] and the courts which granted joinder applied the doctrine of *expressio unius est exclusio alterius* and thus gave a broad, literal interpretation to the statute.[19] It was provided, further, that the Federal Rules of Civil Procedure should govern the practice and procedure under the Act.[20] These rules permit third-party practice,[21] necessary[22] and permissive[23] joinder of parties. No one will deny the government's right to implead others for purposes of contribution; yet if the statute were construed strictly as proposed by government counsel, the United States would be

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[14] Borchard, *Governmental Responsibility in Tort*, 36 Yale L. J. 757, 799 (1927); Borchard, *The Federal Tort Claims Bill*, 1 U. of Chi. L. Rev. 1 (1933); Holtzoff, *Tort Claims Against the United States*, 25 A.B.A.J. 828 (1939); Buford, *The Federal Tort Claims Act*, 20 Miss. L. J. 354 (1949); Yankwich, *Problems Under the Federal Tort Claims Act*, 9 F.R.D. 143 (1950).

[15] Moore, *Federal Tort Claims Act*, 33 A.B.A.J. 857, 858 (1947), writes, "The magnitude of private claim bills introduced in Congress has been prodigious. The Seventy-fourth and Seventy-fifth Congresses each considered more than 2,300 private claim bills asking for a total of over $106,000,000. Approximately 2,000 private bills were introduced in the Seventy-sixth Congress, which approved 315 of them for a total of $826,000". See Hulen, *Suits on Tort Claims Against the United States*, 7 F.R.D. 689, 690 (1948).

[16] 28 U. S. C. §1346(b).

[17] 28 U. S. C. §2680.

[18] For over fifty years, in suits under the Tucker Act of 1887, the United States Supreme Court has not permitted joinder of individuals with the United States as co-defendants. See 2 Barron and Holtzoff, Federal Practice and Procedure 113 (1950).
Cases granting joinder: Howey v. Yellow Cab Co., 187 F. 2d 967 (3d Cir. 1950); State of Maryland v. Manor Real Estate & Trust Co., 83 F. Supp. 91 (D.Md. 1949); Englehardt v. U. S., 69 F. Supp. 451 (D. Md. 1947); Bullock v. U. S., 72 F. Supp. 445 (D.N.J. 1947).
Cases denying joinder: Capital Transit Co. v. U. S., 183 F.2d 825 (D.C. Cir. 1950); Sappington v. Barrett, 182 F.2d 102 (D.C.Cir. 1950); Prechtl v. U. S., 84 F. Supp. 889 (W.D.N.Y. 1949); Donovan v. McKenna, 80 F. Supp. 690 (D.Mass. 1948); Uarte v. U. S., 7 F.R.D. 705 (S.D.Calif. 1948); Drummond v. U. S., 78 F. Supp. 730 (E.D.Va. 1948).

[19] Wojciuk v. U. S., 74 F. Supp. 914, 916 (D.Wis. 1947). But see U. S. v. Brooks, 169 F.2d 840 (4th Cir. 1948), at 844, "The maxim expressio unius est exclusio alterius is by no means a rule of statutory interpretation to be universally applied". See also Cascade County, Montana v. U. S., 75 F. Supp. 850, 853 (D.Mont. 1948).

[20] 60 Stat. §411 (1946).

[21] Fed. R. Civ. P., 14(a).

[22] Fed. R. Civ. P., 19(a).

[23] Fed. R. Civ. P., 20(a).

granted immunity not only from being impleaded by another defendant but also from having to pay contribution for negligence of its own employees. Favoring the broad, literal interpretation, authorizing both joinder and impleader of the United States for contribution, the United States Supreme Court says, "It is fair that this should work both ways".[24]

Contribution is "the right of one who has discharged a common liability or burden to recover of another also liable the aliquot portion which he ought to pay or bear".[25] Historically, the rule is that contribution among joint tort-feasors is not recognized[26] for the reason that "no man can make his own misconduct the ground for an action in his own favor".[27] Contribution is not founded on contract,[28] nor does it sound in tort;[29] it originated in equity[30] and is now enforced at law.[31] Therefore, the courts denying joinder and contribution in cases under the FTCA[32] had the support of tradition, but there appear to be sound reasons why this rule should be discarded. Bohlen has suggested[33] three such reasons: (1) denial of contribution cannot be an effective deterrent to wrongdoing; (2) because the forum of the court is granted to a negligent plaintiff seeking damages, it should be granted also to one seeking contribution from a co-delinquent; and (3) though it is said that the law has no scales to determine relative guilt, still by analogy with the provisions of the Federal Employers' Liability Act,[34] it is believed a proper and satisfactory determination of degree of guilt could be made. "The denial of contribution and the concept of tort liability upon which that denial is itself founded have greatly handicapped the intelligent development of the law of torts, and particularly of the law of negligence."[35] Prosser says, "There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the plaintiff's whim or malevolence, or his collusion with the other wrongdoer, while the latter goes scot free".[36] The

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[24] U. S. v. Yellow Cab Co., 71 Sup. Ct. 399, 405 (1951).

[25] 18 C.J.S. §1 (1939).

[26] Merryweather v. Nixan, 8 T.R. 186 (K.B. 1799) (plaintiff who had responded in damages to a third person sued on implied assumpsit but was refused damages from a defendant with whom plaintiff was *in pari delicto*). See Restatement, Restitution §102 (1937); Prosser, Handbook of the Law of Torts, 1111 (1941); Reath, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan*, 12 Harv. L. Rev. 176 (1898). Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. of Pa. L. Rev. 130 (1932), at 139, states, "There has been a great deal of criticism of the common law rule denying contribution between tort-feasors, but practically all of it has been against the rule as applied in negligence cases." See also James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 Harv. L. Rev. 1156 (1941).

[27] 1 Cooley, Torts, 291 (4th ed. 1932).

[28] 2 Williston, Contracts, §345 (Rev. ed. 1936).

[29] Brown & Root v. U. S., 92 F. Supp. 257, 261 (S.D.Texas 1950).

[30] 5 Pomeroy, Equity Jurisprudence, §§2334, 2338 (4th ed. 1919).

[31] Goldman v. Mitchell-Fletcher Co., 292 Pa. 54, 141 Atl. 231 (1928); Note, 76 U. of Pa. L. Rev. 979 (1928).

[32] See cases cited *supra*, n. 18.

[33] Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 Corn. L. Q. 552, 557 *et seq.* (1936).

[34] 45 U. S. C. A. §53 (1928).

[35] Bohlen, *op. cit.*, 553.

[36] Prosser, *Torts*, 1114 (1941).

Yellow Cab decision to permit impleading of the United States as a third-party for purposes of contribution is a decisive and progressive step in contributing materially to what Bohlen called "the intelligent development of the law of torts".

Formerly, waiver of sovereign immunity in tort liability was consistently upheld and courts construed statutes strictly on all points where the government's position was being subjected to direct attack. Under the FTCA those courts which denied joinder and impleader zealously maintained this precedent of strict interpretation of waiver of immunity with respect to the United States, in spite of the undoubted clarity and directness of the language of the Act. By the very wording of the FTCA Congress manifestly intended a change from this historic position of sovereign immunity; thus the *Yellow Cab* decision is correct in its interpretation of the Act, even though such an interpretation marks a complete break from the former rule of strict construction of a statute pertaining to the tort liability of the United States. In fact, the words "any claim" indicate clearly the intent of Congress to be as the United States Supreme Court has here decided.

There are admitted procedural problems under the FTCA, but these do not appear insuperable. For example, exclusive original jurisdiction for a civil action on a tort claim, having been given to federal district courts,[37] the Act provides that the courts shall try without a jury any case in which the United States is a defendant.[38] If joinder be permitted, the one party-defendant, a private person, is entitled under the Seventh Amendment to the Constitution to a trial by jury. The situation then is one in which the case of the United States is tried to the court, while that of the other party-defendant is tried to the jury. Indeed, the case of *Englehardt v. U. S.*,[39] one of the leading cases under the FTCA, was tried in this manner. If after proceeding with a trial both to the court and to the jury it appears that separate trials for the parties-defendant be deemed advisable, the court under Rule 42 (b) of the Federal Rules of Civil Procedure is empowered to order same. The problem of variance in verdicts in respect to parties-defendant under joinder is not obviated by separate trials. Another procedural problem is that of appellate review. The FTCA provides for appeal to be taken either to the Court of Appeals or to the Court of Claims.[40] Appeal to the latter can be accomplished only with "the written consent on behalf of all the appellees".[41] The arguments advanced against joinder and impleader based on procedural points are, for the most part, cogent and compelling, theoretically, at least, but the United States Supreme Court boldly and realistically decided that under the FTCA Congress unquestionably intended that the United States waive its sovereign immunity broadly in tort claims and that therefore the FTCA does authorize third-party procedure and does carry the government's consent to be sued because the Act was "intended to facilitate, not to preclude, the trial of multiple claims which otherwise would be triable only in separate proceedings".[42]

Even with the protection which the *Yellow Cab* holding gives to all interested parties, there are still some inequities for litigants

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[37] 28 U. S. C. §1346(a).
[38] 28 U. S. C. §2402.
[39] 69 F. Supp. 451 (D.Md. 1947).
[40] 28 U. S. C. §§1291, 1504.
[41] 28 U. S. C. §1504.
[42] U. S. v. Yellow Cab Co., 71 Sup. Ct. 399, 407 (1951).

in a suit brought under the FTCA. An injured plaintiff may bring suit in one of two jurisdictions, either where he resides or where the accident occurred.[43] The FTCA is administered in accordance with "the law of the place where the act or omission occurred".[44] Thus, litigants denied joinder and impleader in one jurisdiction, because the local law did not permit such rights, could have been granted these procedural rights, had their case been prosecuted in another jurisdiction in which the local law did permit such procedure. The Uniform Contribution Among Tortfeasors Act[45] has been adopted by six states, Arkansas, Delaware, Maryland, New Mexico, Rhode Island, and South Dakota, and by Hawaii,[46] and twelve other states and Puerto Rico have statutes permitting contribution.[47] An additional twelve states permit contribution by judicial decision.[48] The Maryland statute of 1941[49] controlled the *Englehardt* case, while Pennsylvania law, authorizing contribution,[50] applied in the *Howey* case.

One need not fear that a broad, literal interpretation of the FTCA will lead to harmful or undesirable results. Three states, for example, Illinois, Michigan, and New York, having waived sovereign immunity in tort liability in varying degrees, have provided for judicial administration of tort claims before a Court of Claims.[51] The New York act, the most liberal, allowing unlimited recovery, constitutes a broad waiver of immunity, and in operation has proved most successful.[52] There is every reason to believe that waiver of sovereign immunity by the United States may be equally successful and really prove a new, vital force for justice and equity. The *Yellow Cab* decision represents an interpretation of the FTCA according to its "broad language" and is a decided advance in the field of torts. The age-old doctrine of sovereign immunity, that "the king can do no wrong", has rightly become a veritable museum-piece in our legal thinking.

Frederick E. Martin

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[43] 28 U. S. C. §1402(b).
[44] 28 U. S. C. §§2672, 2674.
[45] 9 U. L. A. 159 (1942).
[46] 9 U. L. A. Supp. 32 (1950).
[47] Gottlieb, *Some Aspects of Contribution and Indemnity in Tort Actions Against the United States*, 9 Federal Bar Journal 391, 397 (1948).
[48] *Id.* at 398 *et seq.*
[49] Maryland Code (Flack, 1943, Supp.) Art. 50 §§21-30.
[50] See *supra*, n. 8.
[51] Borchard, *Tort Claims Against Government: Municipal, State and Federal Liability*, 33 A.B.A.J. 221, 225 (1947).
[52] *Ibid.*