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## TORTS—APPLICATION OF DISCRETIONARY FUNCTION EXCEPTION OF FEDERAL TORT CLAIMS ACT

The Federal Tort Claims Act<sup>1</sup> is a waiver of sovereign immunity to suit, making the United States liable for the torts of its employees committed within the scope of their 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."<sup>2</sup> This language is very broad, but the scope of the act is limited by several exceptions. The one with which this article is concerned is commonly known as the discretionary function exception, and reads as follows:

"The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused."<sup>3</sup>

The language used in this section seems to be clear and unequivocal, but nevertheless a certain amount of confusion has arisen concerning its application. The section seems to mean, simply, that the United States will not be liable for the torts of its employees when such torts are committed in the exercise of a discretionary function or duty. Obviously, however, to apply the exception to every act or omission of a government employee which in any sense of the word might be termed discretionary would defeat the very purpose of the act. An example of the confusion existing appears in the case of *Olson v. United States*,<sup>4</sup> in which the court said:

"When flood waters are to be released and how much water is to be released certainly calls for the exercise of judgment; in other words, the performance of a discretionary function."

The apparent meaning of this sentence is that the terms 'exercise of judgment' and 'discretionary function' are synonymous. If this were true the waiver of sovereign immunity would be extremely limited in scope. It is seldom that an employee is not to some degree exercising his judgment. Fortunately, the courts have not interpreted the discretionary function exception so liberally.<sup>5</sup>

<sup>1</sup> 28 U.S.C.A. secs. 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671, 2674-2680. (1948).

<sup>2</sup> 28 U.S.C.A. § 346(b) (1948).

<sup>3</sup> 28 U.S.C.A. § 2680 (1948).

<sup>4</sup> *Olson v. United States*, 93 F.Supp. 150 (D.C. N.Dak., 1950).

<sup>5</sup> The Supreme Court in *United States v. Yellow Cab Co.*, 17 S.Ct. 399 (1951) indicated that the FTCA should be liberally construed. It would seem to follow that if the act itself is to be liberally construed the exceptions to it should be strictly construed.

The problem lies in attempting to determine the exact scope of the term 'discretionary function.' The term is not such as to be capable of a definition which would fit every fact situation which may arise, and the courts have not attempted to give it such a definition. The definitions given are generally to the effect that a person possessing a discretionary power is not under compulsion, but cannot act capriciously or arbitrarily.<sup>6</sup> Nevertheless, in view of the congressional intent in enacting the exception and in view of the judicial application of the exception to date, it should be possible to arrive at a somewhat clearer idea of how the exception has been applied and how it will be applied in the future. For the purposes of clarity and simplicity in presentation the problem will be treated as consisting of two questions: First; how far does the discretion extend when it does exist? Second; when does a discretionary function exist, or when are functions discretionary?

How far the discretion extends where it has been found that discretion exists can best be shown by a comparison between two cases decided by the Fifth Circuit Court of Appeals. The first action was based on the alleged negligence of the United States Army in failing to provide prompt medical service for the wife of an army officer.<sup>7</sup> The court held there that under the controlling regulations, which provided for medical services for servicemen's families whenever practicable, there was no absolute duty to provide prompt medical service. Consequently the decision as to whether or not to provide medical services was a discretionary function, and the action was dismissed under the discretionary function exception. The second action, however, was based on the negligence of the employees of an army hospital in administering a harmful substance instead of a spinal anesthetic to a soldier's wife, after she had been admitted for treatment.<sup>8</sup> This time the court held that whatever discretion was involved was exercised in admitting the patient to the hospital, and having once admitted her there was a duty to give her proper attendance and treatment. A similar ruling resulted from an action for damages suffered when the plaintiff received treatment for an ear infection in a veterans hospital, but by mistake carbolic acid was poured in his ear.<sup>9</sup> Here again it was held that whatever discretion was involved was exercised in deciding to give plaintiff treatment, and that there was no discretion involved in the actual giving of the treatment.

These cases indicate that the discretion mentioned in the exception is only a discretion in making certain decisions or determinations, and that there is no discretion in acting upon them and carrying them out.

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<sup>6</sup> See WORDS AND PHRASES for judicial interpretations of the term 'discretion'.

<sup>7</sup> *Denny v. United States*, 171 F. 2d 365 (5th Cir., 1948).

<sup>8</sup> *Costley v. United States*, 181 F. 2d 723 (5th Cir., 1950).

<sup>9</sup> *Dishman v. United States*, 93 F.Supp. 567 (D.C. Md., 1950).

In other words, negligence in making a decision which is a discretionary function is only an abuse of discretion, but once that decision has been made, any further negligence in acting upon it is an actionable tort giving rise to a cause of action against the United States. The exception does not extend to the mere details of carrying out the decision since those are not discretionary functions.

This conclusion is supported by the case of *Coates v. United States*.<sup>10</sup> That was an action to recover for damages to plaintiff's land caused by flooding, which in turn was caused by the changing of the course of the Missouri River in connection with a federal flood control project. The action was dismissed under the discretionary function exception, but the court noted in the last paragraph of the decision that the negligence charged in the complaint referred to the exercise of legislative and executive functions which sanctioned the river project and discretionary functions which controlled it. The complaint did not charge negligence in some mere job of work involved in carrying on the river project. It appears to be necessary to plead specific acts of negligence.

In the *Olson case*<sup>11</sup> the plaintiff attempted to plead specific acts of negligence but lost the action anyway. The United States Fish and Wildlife Service had opened dam gates and released water at a time when the river channel was blocked by ice and snow. As a result plaintiff's farm and personalty were damaged. The complaint contained allegations that the United States, through its agents, did willfully and intentionally open the gates, that such agents were negligent, and that there was a lack of ordinary care and diligence. The court held that pleading negligence in specific acts would not defeat the application of the exception where it clearly appeared that the acts complained of were based on the exercise or performance or failure to exercise or perform a discretionary-function or duty. The court does seem to have adopted the rule, however, that there is no discretion to be negligent in carrying out the decisions or determinations in which the discretion was exercised, by holding that the employees did not open the dam gates negligently; they only abused their discretion as to when to open them. The distinction is not easy to express, but it seems to be important when pleading a cause of action under the FTCA if the action is not to be dismissed under the discretionary function exception.

After actually pleading specific acts of negligence the plaintiff still has the burden of proving them. In *Boyce v. United States*<sup>12</sup> the action was for the recovery of damages to property resulting from dynamite blasting by the United States in deepening the Mississippi River channel in aid of navigation. The action was dismissed as to the count alleging

<sup>10</sup> *Coates v. United States*, 181 F. 2d 816, 19 A.L.R. 2d 840 (8th Cir., 1950).

<sup>11</sup> *Supra*, note 4.

<sup>12</sup> *Boyce v. United States*, 93 F.Supp. 866 (D.C. Iowa, 1950).

specific acts of negligence because the plaintiff failed to sustain the burden of proving them, and as to the general count because the discretionary function exception applied.

An interesting point brought out in this case is that liability did not necessarily depend on proof of negligence, since under the applicable Iowa law there was absolute liability for damage caused by blasting. Only damages and causation had to be proved. However, the court held that the Chief of Engineers exercised his discretion in approving all the details of the plans for blasting, and therefore the discretion extended to all those details. Since the fact of blasting was the only proved cause of the damages, the claim was based on the exercise of a discretionary function. The court held that the result might have been different if the agents and employees actually discharging or detonating the dynamite had deviated in so doing from the discretionary plan approved by the Chief of Engineers.

The answer to the first question as to how far the discretion extends can now be stated. The discretion is limited to the principal decision or determination; it does not extend to negligence in the minor details and determinations made as incidents thereto. The original or principal decision is a discretionary function, but the minor ones generally are not. Negligence in making the discretionary decision is merely an abuse of discretion, but negligence thereafter is an actionable tort. In the *Boyce* case the discretion did extend to the minor details, but only because they were decided upon by the person having the discretion. Also, it does not appear in that case that there was any negligence involved in either deciding upon or carrying out the minor details of the plan.

Although the discretion, when discretion exists, is limited to the principal decision or determination, not all principal decisions are discretionary. In other words, discretion does not always exist even in the decision or determination. The next question then is, when are the principal decisions or determinations discretionary, or as stated earlier, when does a discretionary function exist? The answer to this question will depend upon the congressional intent. House Report Number 1287, 79th Congress is quite enlightening on that intent, and states:

"This is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suits for damages against the government growing out of an authorized activity, such as a flood control or irrigation project, where no negligence on the part of any government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious . . . ."<sup>13</sup>

This portion of the report indicates that the exception was not

<sup>13</sup> H.Rept. No. 1287, 79th Cong., 1st Sess., (1945) p. 5.

intended to be used to defeat suits based on negligence, at least in some cases. The courts have taken the view, however, as has been seen by the cases previously cited, that if the negligence involved is merely a negligent exercise of the discretionary function it is just an abuse of discretion and the exception still applies. On the other hand, if the negligent act is committed after the discretion has been exhausted the exception will not apply.

The report is more important for its indication that the exception was intended to apply where the government is engaged in an authorized activity, specifically mentioning flood control and irrigation projects. This indicates that not all government activities were intended to be included within the discretionary function exception, but is of little help in determining just which ones are to be included since it does not say what is meant by an authorized activity. The report gives a few more examples of the type of claims which were intended to be barred by the exception. Those are claims against regulatory agencies, including specifically the Federal Trade Commission, the Securities and Exchange Commission and the Treasury Department. Claims against the regulatory agencies were to be barred by the exception whether or not negligence is alleged to have been involved.

"However, the common law torts of *employees* of regulatory agencies would be included within the scope of the bill (the FTCA) to the same extent as torts of nonregulatory agencies."<sup>14</sup>

Upon reading this report two distinctions become apparent. First, certain authorized activities were to be excepted from the waiver of sovereign immunity provided that no negligence is shown, but claims arising from the activities of regulatory agencies were intended to be excepted whether or not negligence is alleged or shown. The second distinction is that although the torts of regulatory agencies are excluded from the FTCA by the discretionary function exception, the torts of employees of regulatory agencies are not excluded, but are to be included to the same extent as torts of nonregulatory agencies. The implication is that torts of nonregulatory agencies are not excluded from the FTCA unless they are authorized activities, and then only if no negligence is involved.

To date it has not been necessary for the courts to make these distinctions, since in none of the reported cases wherein the discretionary function exception has been applied or sought to be applied has the claim been based upon the activities of a regulatory agency. The only question which has had to be answered was whether or not the claim was based upon the exercise of a discretionary function. In order to determine which decisions or determinations the courts consider to be

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<sup>14</sup> *Ibid.*

discretionary functions it will be necessary to examine the cases in which the application of the discretionary function exception was an issue.

Generally, in the cases in which it was found that the claim was based on the exercise of a discretionary function the discretion involved decisions of major interest to the public, and several of them fall within the class of flood control or irrigation projects which, as shown by the House Report quoted earlier herein, were intended to be excluded from the FTCA by the exception. Thus, in the *Coates* case<sup>15</sup> the act of the government in changing the course of the Missouri River, and in the *Boyce* case<sup>16</sup> the act of the government in deepening the channel of the Mississippi River, were held to be discretionary functions. In several other cases arising out of government flood control projects the actions were also dismissed under the discretionary function exception.<sup>17</sup>

In other actions it was held that the claim was based on the exercise of a discretionary function because the damages resulted from the determinations of some important government official, such as the Secretary of the Interior. One example is an action arising when geese from a federal refuge damaged and destroyed plaintiff's crops.<sup>18</sup> The complaint alleged that the cause of the damage was negligence on the part of the United States in prohibiting the hunting of migratory waterfowl. The court held that in determining whether migratory waterfowl might be hunted and killed in any particular year, the Secretary of the Interior performs a discretionary function, and dismissed the action.

In still other actions a discretionary function was found to exist due to the regulations or orders under which an official was acting. Thus, in the *Denny* case<sup>19</sup> the hospital officials were found to be exercising a discretionary function because the regulations provided for medical services for servicemen's families whenever practicable. The term 'whenever practicable' was held to create a discretionary function. Similarly, in a suit for losses suffered by reason of plaintiff's coal mine not being operated after it had been taken over by the Secretary of the Interior under an executive order of the President, it was held that the executive order gave the Secretary the discretion to operate or not operate the mines.<sup>20</sup>

However, in *Oman v. United States*<sup>21</sup> it was held that the Federal

<sup>15</sup> *Supra*, note 10.

<sup>16</sup> *Supra*, note 12.

<sup>17</sup> *Thomas v. United States*, 81 F.Supp. 881 (D.C. Mo., 1949); *North v. United States*, 94 F.Supp. 824 (D.C. Utah, 1950); *Lauterbach v. United States*, 95 F.Supp. 479 (D.C. Wash., 1951).

<sup>18</sup> *Sickman v. United States*, 184 F.2d 616 (7th Cir., 1950).

<sup>19</sup> *Supra*, note 7.

<sup>20</sup> *Old King Coal Co. v. United States*, 88 F.Supp. 124 (D.C. Iowa, 1949).

<sup>21</sup> *Oman v. United States*, 179 F.2d 738 (10th Cir., 1949).

Range Code did not grant the government employees any discretion to refuse to cancel the grazing permits of plaintiff's predecessors. The court also said:

"No government employee is granted the discretion whether or not he shall induce or incite third persons to interfere with exclusive rights or privileges granted by the United States."

The actions there complained of were intentional, not merely negligence.<sup>22</sup> Whether or not this ruling will be extended to apply to all other intentional torts which are not excluded by the other exceptions to the FTCA remains to be seen.<sup>23</sup>

An attempt was made in the case of *Toledo v. United States*<sup>24</sup> to lay down a rule limiting the scope of the term 'discretionary function'. The facts of that case were that due to internal rot a large tree fell upon and crushed plaintiff's automobile while it was parked on the grounds of the United States Experimental Station at Mayaguez, Puerto Rico, in an area used for automobile parking and within the control of the experimental station. The tree was the subject of certain experiments being carried on by the experimental station. It was held that the course to be pursued in experimenting with the tree and whether or not to continue experimentation was a discretionary function.

In the decision the court laid down the rule that the discretionary function exception was to be limited to acts which are governmental in their nature. This rule may be of some help if expanded somewhat, but simply as stated by the court it just creates the secondary problem of which acts of employees or activities of the government are governmental in their nature. The activities of states and municipalities have been quite frequently classified, for the purpose of determining their liability for the torts of their agents, into two categories; those which are governmental functions and those which are proprietary functions.<sup>25</sup> That classification has seldom been made, however, in the case of activities of the federal government, since prior to the enactment of the FTCA and its predecessors the federal government was not liable for the torts of its employees regardless of the type of activity in which it was engaged. The rule may be of some help, however, if the courts will consider the classifications heretofore applied to state and municipal activities as applicable also to activities of the United States. If that was done there would then be judicial precedents for classifying nearly

<sup>22</sup> The problem arises whether intentional torts are within the scope of employment. This problem was not solved in this case but the court indicated that the mere fact that the acts were unauthorized would not remove them from the scope of employment.

<sup>23</sup> 28 U.S.C.A. § 2680(h) lists eleven intentional torts which are excepted from the waiver of sovereign immunity.

<sup>24</sup> *Toledo v. United States*, 95 F.Supp. 838 (D.C. Puerto Rico, 1951).

<sup>25</sup> WORDS AND PHRASES gives a comprehensive classification of activities into the two categories.



any type of activity in which the federal government may engage.<sup>26</sup> Even applying the very broad but general rule of classification, that those activities are governmental if for the benefit of the public as a whole and that all the others are proprietary, would be of some help and would serve to restrict the discretionary function exception within reasonable limits.

Although the courts prior to the *Toledo* case did not expressly limit the discretionary function exception to activities of the United States of a governmental nature, they seem to have quite uniformly applied the exception only to activities which were intended for the benefit of the public in general and thus could be said to be of a governmental nature. Examples of this are the cases arising out of flood control projects, improvement of navigable rivers under the commerce clause, the emergency operations of coal mines, and the protection of migratory waterfowl. An apparent exception to this is the case of *Ure v. United States*.<sup>27</sup> In that case the court held that the operation by the United States of an irrigation system was not a discretionary function, without giving much reasoning for the holding. The decision is in conformance, however, with the governmental function principle, since the court held that the United States was acting as a common carrier of water, and state agencies and municipalities acting as common carriers of water have been held to be acting in proprietary capacities.<sup>28</sup> Consequently, it could be said by analogy that the United States was acting in a proprietary capacity in the *Ure* case, and therefore liable under the FTCA as would be an individual in the same circumstances. That, at least, is the effect of the ruling.

Although the court in the *Toledo* case laid down a rule which may be helpful in the future in applying the discretionary function exception, its decision on the facts is not entirely satisfactory, probably because the facts themselves are not very clear. Apparently the cause of action was based on negligence but the decision does not show where the negligence lay. If the negligence was involved in deciding to continue experimentation with the tree, then it seems to be more logical. It hardly seems that such a decision would be a governmental function as being intended for the benefit of the public as a whole, but states have been held to be acting in a governmental capacity when operating agricultural experimental stations.<sup>29</sup> On the other hand, if the negligence lay in the lack of ordinary care after having decided to continue the experiments, it would seem that following the precedent of the *Costley* case the court should

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ure v. United States*, 93 F.Supp. 779 (D.C. Oregon, 1950).

<sup>28</sup> *Home Owner's Loan Corporation v. Logan City*, 97 Utah 235, 92 P. 2d 346 (1939); accord, *Newman v. Bitter Root Irrigation District*, 95 Mont. 521, 28 P. 2d 195 (1933).

<sup>29</sup> *Morgan v. State*, 170 S.W. 2d 648 (1942).

have ruled that the discretion was exercised and exhausted in deciding to continue experimentation with the tree, and that there was no discretion to be negligent in carrying on such experimentation.

The recent case of *Ellison v. United States*<sup>30</sup> is perhaps the best example of limiting the discretionary function exception to activities of the United States in its governmental nature. The complaint alleged that the United States, acting in its proprietary capacity and as successor in interest to certain ranch lands, unlawfully diverted part of the water supply of a stream in violation of a court order. The United States attempted to have the action dismissed under the discretionary function exception, but the court held that there was no discretionary function involved since the United States was acting in a proprietary capacity. The diversion was not part of a public work and not in the public interest. This distinguished the action from the Coates case and similar cases in that they generally were concerned with acts or omissions involving the exercise of judgment or discretion having to do with great projects and matters of public interest.

The answer to the second question presented, as to when functions are discretionary, appears to be that functions are discretionary when carried on for the public interest, or where the discretion is more or less expressly given by a regulation or order, or when the function is part of the duties of a high government official. As has been seen, the two most recent cases have shown a tendency to limit the exception to acts which are governmental in their nature, or in the public interest. This tendency should be approved as it will enable attorneys to more clearly understand when the exception will be applied, and will be more in consonance with the congressional intent to waive sovereign immunity to suit for tort.

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<sup>30</sup> *Ellison v. United States*, 98 F.Supp. 20 (D.C. Nev., 1951).