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Torts - Federal Tort Claims Act - Government Held to Strict Liability, Long v. U.S., 241 F.Supp. 286 (D. S.C. 1965)

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Torts—Federal Tort Claims Act—Government Held to Strict Liability. In *Long v. U.S.*,[1] the complainant, a South Carolina farmer, recovered $25,000 for injuries received from a mowing machine blade which he was adjusting when his mule, attached to the machine, lurched forward. It was alleged that the proximate cause of the injuries was the negligent operation of a U.S. Army helicopter which flew at low altitude over the field complainant was mowing, frightening the animal. The Government introduced evidence of written permission to use the field for Army maneuvers, but this was held to be no defense. In holding for the complainant, the District Court applied a South Carolina statute which assigns strict liability for all damages resulting from the flight of aircraft, regardless of negligence.[2]

Recovery under the FTCA on the basis of strict liability has been denied by virtually all of the courts confronted with the question in the last ten years[3] on the grounds that the Act, in requiring a "negligent or wrongful act or omission,"[4] excludes liability without fault. Ostensibly this view is supported by the Supreme Court's holding in *Dalehite v. U.S.*,[5] in which it was stated that the provisions of the FTCA did not extend to absolute liability so as to hold the Government for injuries and deaths resulting from its possession of dangerous chemical fertilizer.[6] The case has been judged controlling, the opinion of one authority being that further legislation probably will be required before strict liability is imposed upon the United States.[7]

1. 241 F.Supp. 286 (D. S.C. 1965). No appeal perfected.

2. The owner of every aircraft . . . is absolutely liable for injuries to persons or property . . . whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured or of the owner or bailee of the property injured. 36 Code of Laws of South Carolina 220, § 2-6 (1952). This act, known as the Uniform Aeronautics Act, codifies the former common-law status of aviation as an ultra-hazardous activity.

3. See, for example, Barroll v. U.S., 135 F.Supp. 441, 448 (D. Md. 1955); Voytas v. U.S., 256 F.2d 786, 790 (7th Cir. 1958); Stratton v. U.S., 213 F.Supp. 556, 560 (D. Tenn. 1962); U.S. v. Page, 350 F.2d 28, 33 (10th Cir. 1965).

4. Subject to the provisions of Chapter 171 . . . the district courts . . . shall have exclusive jurisdiction of civil actions or claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or 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, 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. 28 U.S.C.A. § 1346 (b) (1958).

5. 346 U.S. 15, 97 L.Ed. 1427, 73 S.Ct. 956 (1953). This is the sole case in which the Court has confronted directly the issue of strict liability under the FTCA.

6. *Id.* at 44.

7. Prosser, Torts, § 125, p. 1001, 3rd Ed. (1964).

Development of the law in this area, however, has been conflicting. Strict liability decisions against the Government were not uncommon during the period between passage of the FTCA in 1946 and *Dalehite* in 1953,[8] nor did that decision bring about their complete cessation. In the same year, in fact, the *Dalehite* doctrine was disregarded by the Fourth Circuit in *United States v. Praylou*,[9] in which it was held that a distinction must be made between strict liability of the Government for *deciding* to possess dangerous property, as in the former case, and liability under a strict liability statute[10] for damage *inflicted* by Government employees, as in the latter. Under this construction, the *Dalehite* prohibition of strict liability under the FTCA may be limited to injuries resulting from exercise of the planning or "discretionary" function of government (as opposed to the operational function), an area already expressly exempted from liability under the Act anyway.[11] In this connection it is significant that *Praylou* was cited with apparent approval by the Supreme Court in *Rayonier, Inc. v. U. S.*,[12] in which this distinction was critical. Another hint that the Court was ready to reconsider its previous decision came when certiorari was granted in *U.S. v. Taylor*,[13] a case following *Dalehite*, but settlement was reached prior to determination.

Despite indications of accord by the highest tribunal, *Praylou* has found no acceptance in the courts.[14] *Long v. U.S.* is the first case since 1957 to rely on it in holding the United States strictly liable. As a

8. Boyce v. U.S., 93 F.Supp. 866 (D. Ia. 1950); U.S. v. Glaidys, 194 F.2d 762 (10th Cir. 1952); Parcell v. U.S., 104 F.Supp. 110 (D. W.Va. 1952).

9. 208 F.2d 291 (4th Cir. 1953) *cert. denied*, 347 U.S. 934. (Government held strictly liable for its airplane crashing, inflicting injuries on persons and property.) "To say that the Tort Claims Act was not intended to cover a liability arising from the possession of dangerous property by the government is a very different thing from saying that it was not intended to apply to a liability for damage inflicted by government employees merely because the law of a state imposes absolute liability for such damage and not mere liability for negligence."

10. *Supra* note 2.

11. The provisions of this chapter and section 1346 (b) of this title shall not apply to (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or 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. 28 U.S.C.A. § 2680 (a) (1964).

12. 352 U.S. 315, 319 (1957). (Justices Reed and Clark dissented, citing Dalehite.)

13. 236 F.2d 649 (1956).

14. Accord: Hahn v. U.S. Airlines, 127 F.Supp. 951 (D. N.Y. 1954); Pendergast v. U.S. 241 F.2d 687 (4th Cir. 1957).

result of the decision, however, attention is again focused on the arguments in favor of the holding.

As contended by the petitioners in *Dalehite*, narrow interpretation of the words "negligent or wrongful act" in the FTCA[15] so as to exclude injuries for which local law imposes liability contravenes the intent of the Supreme Court that the Act be construed liberally,[16] and negates the logical meaning of Section 1346, which states that the United States will be liable to the same extent as a private person.[17] It was urged that it was a safe inference of legislative intent to read the words "negligent" and "wrongful," stated in the disjunctive, as not synonymous, the second word encompassing the concept of wrongfulness by dint of statute. Other *Dalehite* critics[18] believe that had exclusion of strict liability been the design, it could easily have been included in the FTCA's numerous express exemptions.[19]

The present case may be a preview if not a precedent. Should the Fourth Circuit, in which lies Virginia, again become a testing ground for this line of reasoning, a holding in accord therewith is not improbable.[20]

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Taxation—DEPRECIATION ALLOWANCE IN YEAR OF DISPOSITION ON ASSET SOLD AT A GAIN.

In *Fribourg Navigation Co. v. Commissioner of Internal Revenue*,[1] the taxpayer had purchased a used Liberty ship on December 21, 1955, for $469,000, and thereafter computed its depreciation thereon over a useful life of three years using the straight line method with an estimated salvage value of $54,000. The Internal Revenue Service had advised the taxpayer in a letter ruling prior to the acquisition that it would accept a three year life, subject to change if warranted by subsequent experience,

15. *Supra* note 4.

16. U.S. v. Yellow Cab, 340 U.S. 543 (1951); U.S. v. Aetna Casualty, 338 U.S. 366 (1949).

17. *Supra* note 4.

18. See Jacoby, *Absolute Liability Under the Federal Tort Claims Act*, 24 Fed. Bar J. 139 (1964).

19. 28 U.S.C.A. § 2680 (1964).

20. Note: Two of the three strict liability decisions between Dalehite and Long were in the Fourth Circuit. United States v. Praylou, *supra* note 9; Pendergast v. U.S., *supra* note 14. Cf. Medlin v. U.S., 244 F.Supp. 403, 406 (D. S.C. 1965).

1. 86 S.Ct. 862 (1966).