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Impleader of the United States for Contribution under the Federal Tort Claims Act

Henry Rose

NOTES AND COMMENTS

IMPLEADER OF THE UNITED STATES FOR CONTRIBUTION UNDER THE FEDERAL TORT CLAIMS ACT

It is not an uncommon situation nowadays for a plaintiff, while riding as a passenger in one vehicle, to be injured in a collision with another vehicle due to the concurrent negligence of both drivers. Assuming that the vehicles were being operated by employees acting within the scope of their employment, the plaintiff may ordinarily sue either or both of the owners of the vehicles. And if plaintiff chooses to sue only one of them, the defendant may implead the other owner for the purpose of obtaining contribution, or he may bring a separate action for that purpose later, if there is a substantive right to contribution in the jurisdiction. If one of the vehicles involved in the collision happened to be owned by the United States, do the private litigants have the same choice of remedies? Of the lower federal courts passing on some phase of the problem, some answered in the affirmative;[1] most in the negative.[2]

The Supreme Court of the United States has definitely settled these questions in the recent decision of *United States* v. *Yellow Cab Company*, argued and decided together with *Capital Transit Company* v. *United States*.[3] The problem of impleader[4] as regards the United States has vexed the lower federal courts since passage of the Federal Tort Claims Act in 1946. In the *Yellow Cab* case, the Supreme Court, in an opinion by Mr. Justice Burton, has settled this problem and also nipped in the bud any question as to the liability of the United States under the Tort Claims Act for contribution, where local law allows it. Specifically, the Court held that the United States is liable for contribution and may be impleaded for that purpose under the Tort Claims Act.[5] Mr. Justice Black and Mr. Justice Douglas dissented without opinion.

THE FEDERAL TORT CLAIMS ACT

The Federal Tort Claims Act[6] waived the immunity of the United States from actions for damages resulting from the torts of its employees while acting

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1. *Englehardt* v. *United States*, 69 F Supp. 451 (D. Md. 1947); *State of Md.* v. *Manor Real Estate & Trust Co.*, 83 F. Supp. 91 (D. Md. 1949); see *Bullock* v. *United States*, 72 F. Supp. 445 (D. N. J. 1947).

2. *Donovan* v. *McKenna*, 80 F. Supp. 691 (D. Mass. 1948); *Uarte* v. *United States*, 7 F. R. D. 705 (D. S. D. Cal. 1948); *Drummond* v. *United States*, 78 F. Supp. 730 (D. E. D. Va. 1948); see *Prechtl* v. *United States*, 84 F. Supp. 889 (D. W. D. N. Y. 1949); see also 3 MOORE, FEDERAL PRACTICE 516 (2d ed. 1948).

3. — U. S. —, 71 S. Ct. 399 (Feb. 26, 1951).

4. Fed. R. Civ. P. 14 (a). Substantially the same problems arise as to the joinder (see Fed. R. Civ. P. 20) of the United States with another as defendants. See Brief for United States in the *Yellow Cab* case, *supra*, p. 11 n. 2.

5. Presumably, joinder of the United States with other defendants is allowable also. See n. 4, *supra*.

6. 28 U. S. C. §§ 1346 (b), 1402 (b), 1504, 2110, 2401 (b), 2402, 2311 (b), 2412 (c), 2671-2680. The *Yellow Cab* case was decided under the Act as originally passed, but the 1948 revisors made only "minor changes ... in phraseology."

within the scope of their employment. Its liability is stated to be "in accordance with the law of the place where the act or omission occurred."[7] Thus, the United States cannot be impleaded for contribution as a joint tortfeasor, when the law governing the tort action is such as that in New York, since contribution is allowed in that state only where the plaintiff has chosen to sue the tortfeasors jointly.[8] *A fortiori,* the United States cannot be impleaded for contribution in states which do not recognize contribution at all.[9]

The Tort Claims Act provides that "the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States for money damages . . . for injury or loss of property, or personal injury . . . under circumstances where the United States, if a private person, would be liable to the claimant . . ."[10] "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. . . ."[11] It can readily be seen from the language quoted that the Tort Claims Act is a waiver of sovereign immunity in the broadest terms.[12]

LIABILITY OF THE UNITED STATES FOR CONTRIBUTION

The liability of the United States for contribution would seem to have been clear from the sweeping language of the Act and its purpose. More than magnanimity and a sense of justice prompted this legislation; it was also an attempt by Congress to rid itself of the burden of legislating large numbers of private settlements.[13] However, many judges were reluctant to liberally construe a statute which drastically changes the prior law. Those judges were able to find comfort by pointing out that contribution is a claim "rooting from

7. 28 U. S. C. § 1346 (b).

8. *Brown* v. *Cranston,* 132 F. 2d 631 (2d Cir. 1942), holding the New York rule to be a matter of substance under *Erie R. R.* v. *Tompkins.*

9. E.g. Ohio; see *Royal Indemnity Co.* v. *Becker,* 122 Ohio St. 582, 173 N. E. 194 (1930); *Fidelity & Casualty Co.* v. *Federal Express, Inc.,* 136 F. 2d 35 (6th Cir. 1943).

10. 28 U. S. C. §1346 (b).

11. *Ibid.*

12. The presence of the United States as a party in a suit involving private litigants does not eliminate the necessity of diversity of citizenship between the individual parties needed to sustain jurisdiction in the federal courts. *Wasserman* v. *Perugini,* 173 F. 2d 305 (2d Cir. 1949); *Dickens* v. *Jackson,* 71 F. Supp. 753 (D. E. D. N. Y. 1947); *Prechtl* v. *United States,* 84 F. Supp. 889 (D. W. D. N. Y. 1949). But actions under the Tort Claims Act against the United States are not subject to the usual minimum jurisdictional amount of $3,000. *Bates* v. *United States,* 76 F. Supp. 57 (D. Neb. 1948). It would seem that at least a $3,000 claim is necessary between the individual parties where plaintiff has joined an individual defendant with the United States. See *Englehardt* v. *United States,* 69 F. Supp. 451 (D. Md. 1947); see also Hulen, *Suits on Tort Claims against the United States,* 7 F. R. D. 689, 700 (1948).

13. See *United States* v. *Yellow Cab Co., supra,* 71 S. Ct. at 404.

principles of equity, not from principles of tort-liability."[14] They reasoned that since statutes waiving sovereign immunity are to be strictly construed and contribution does not sound in tort, such a claim is not within "the letter" of the statute.[15]

The attitude of the Supreme Court in the *Yellow Cab* case in rejecting the obsolescent reasoning outlined above was foreshadowed in *United States* v. *Aetna Surety Co.*[16] There the Court said that the fact that a subrogee's claim rested on "substantive equitable rights" did not preclude him from recovery under the Tort Claims Act. And in answer to the Government's reliance, in that case as in the *Yellow Cab* case, on "the doctrine that statutes waiving sovereign immunity must be strictly construed," Chief Justice Vinson said: "We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statment in Anderson v. Hayes Construction Co., 243 N. Y. 140: 'The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced.' "[17] The Court's conclusion in the *Yellow Cab* case that liability for contribution falls within the scope of the Tort Claims Act appears cogent.

IMPLEADER OF UNITED STATES FOR CONTRIBUTION

Whether the Tort Claims Act permitted the United States to be impleaded in an action between private litigants involves greater difficulties, largely procedural. It may be true that "such difficulties are not insurmountable,"[18] as the Supreme Court put it, but they are more formidable than a casual reading of the *Yellow Cab* opinion will disclose. No doubt, it was in tacit recognition of such problems that the Court suggested that "if the Act develops unanticipated complications, Congress can meet them."[19]

In contending that impleader of the United States should not be allowed, the Government attempted to find an analogy between the Tort Claims Act and the Tucker Act[20] (the counterpart of the Tort Claims Act for contract

14. *Drummond* v. *United States,* 78 F. Supp. 730, 731 (D. E. D. Va. 1948); *Stradley* v. *Capital Transit Co.,* 87 F. Supp. 94, 95 (D. D. C. 1949).

15. *Stradley* v. *Capital Transit Co., supra* n. 14. *Accord, Drummond* v. *United States, supra* n. 14; *Uarte* v. *United States,* 7 F. R. D. 705 (D. S. D. Cal. 1948); *Donovan* v. *McKenna,* 80 F. Supp. 691 (D. Mass. 1948); see *Prechtl* v. *United States, supra* n. 12. at 8; see also the discussion of Judge Connally in *Brown & Root* v. *United States,* 92, F. Supp. 257 (D. S. D. Texas 1950).

16. 338 U. S. 366 (1949).

17. *Ibid.* at 383.

18. *United States* v. *Yellow Cab Co., supra,* 71 S. Ct. at 407.

19. *Ibid.*

20. 28 U. S. C. § 1346 (a), 491 *et seq.*

claims) under which it has been held that the United States must be the sole defendant.[21] Questionable legislative history reinforced this analogy.[22] But the analogy is weak. The Tucker Act gave the district courts only concurrent jurisdiction with the Court of Claims,[23] and therefore implicity carried over the limitations of the latter court. The Tort Claims Act is more closely analogous to the Suits in Admiralty Act[24] under which the United States may be impleaded or joined as a joint tortfeasor.[25]

Actions under the Tort Claims Act against the United States must be tried without a jury.[26] In view of the fact that the Seventh Amendment to the Constitution guarantees the right to trial by jury to individuals, the Government argued that Congress contemplated suits against the United States alone.

But denial of a jury trial as to the claim against the United States is reconcilable with the right to trial by jury as to the action between the private litigants.[27] Under the Federal Rules of Civil Procedure, separate verdicts can be used,[28] and if problems of admissibility of evidence require, separate trials may be ordered by the court.[29]

However, some knotty problems can be foreseen when two triers of fact adjudicate the same issues. For example, the jury may find that the plaintiff was free from contributory negligence, while the court finds to the contrary. The individual defendant thus suffers an adverse judgment and if he is allowed to recover contribution from the United States, such recovery would rest, at least in part, on the jury verdict. If contribution is denied, then the United States is absolved of liability for contribution on the ground that the third party plaintiff is not liable, when he has already been held liable to the original plaintiff. In effect, recovery against the United States as a third party defendant requires findings by the court as well as the jury that the individual defendant is liable.

Although no cases have been found on the point, it is submitted that the jury's determination of damages should control in computing the amount of

21. *United States* v. *Sherwood*, 312 U. S. 584 (1941).

22. H. R. Rep. No. 1287, 79th Cong. 1st Sess., p. 5 (report on a prior similar bill which did not pass).

23. See n. 20, *supra*.

24. 41 Stat. 525 as amended; see 46 U. S. C. § 741 *et seq*.

25. *Hidalgo Steel Co.* v. *Moore & McCormack Co.*, 287 Fed. 331 (D. S. D. N. Y. 1923).

26. 28 U. S. C. § 2402.

27. It should be noted that trial by jury was not demanded by any of the private litigants in the *Yellow Cab* case or in the *Capital Transit* case, *supra*.

28. Fed. R. Civ. P. 54 (b).

29. Fed. R. Civ. P. 42 (b).

contribution to be recovered against the United States,[30] once the court finds liability of the United States to the original plaintiff.[31] With this exception, it appears that discrepancies in fact-finding will be resolved against the individual defendant.[32]

CONCLUSION

Where one party's liability is derivative from another's, and the asserted liability of each is predicated on precisely the same fact situation, it might appear, at first blush, to be anomalous that one should be held liable and the other not, or both held liable but for different amounts. However, this happens in other legal situations.[33] Indeed it follows unavoidably from the nature of fact-finding process that different fact-finders are not always consistent with each other.[34]

The suggestion of the Supreme Court that complications can be met by the Congress leads one to speculate about possible legislative solutions.[35] The number of situations in which divergent findings of fact may occur could be minimized by restricting the availability of the jury. It might be provided that impleader of the United States by an individual defendant constitutes a waiver by him of any right to trial by jury in the action. But the right of a plaintiff to a jury trial seemingly could not be constitutionally affected by the impleader

30. This should be so, at least in the absence of fraud, lack of good faith or excessive verdict in the action against the individual tortfeasor, even where the United States is sued for contribution in a separate action. See *Consolidated Coach Corp.* v. *Burge,* 245 Ky. 631, 54 S. W. 2d 16 (1932); see also *Pinnix* v. *Griffin,* 221 N. C. 348, 20 S. E. 2d 366 (1942). This would not offend the statutory prohibition of trial by jury in actions against the United States because the evil at which the statute is aimed, namely the fear that juries might be too generous with the Government's money, is largely absent.

See Gregory, *Procedural Aspects of Securing Tort Contribution in the Injured Plaintiff's Action,* 47 HARV. L. REV. 209 (1933), especially at 214.

31. If this were not so, and the court and jury were to make findings of damages in different amounts, the result would be that the third party plaintiff would receive less than half of the amount which he was compelled to pay to the plaintiff. The nature of contribution precludes him from ever receiving more than half. See Gregory, *op. cit.* n. 30.

32. Of course, such difficulties will arise also where contribution is sought against the United States in a separate action.

33. *Elder* v. *N. Y. & Pa. Motor Express, Inc.,* 284 N. Y. 350, 31 N. E. 2d 188, 133 A. L. R. 176 (1940); *Laskowski* v. *People's Ice Co.,* 203 Mich. 186, 168 N. W. 940, 2 A. L. R. 586 (1918); *May Coal Co.* v. *Robinette,* 120 Ohio St. 110, 165 N. E. 576, 64 A. L. R. 441 (1929).

34. "The power to weigh and determine facts carries with it a freedom of action and decision inherent in itself." *McSweeney* v. *Hammerlund Mfg. Co.,* 275 App. Div. 447, 450, 90 N. Y. S. 2d 347, 350 (3d Dept. 1949). See Judge Jerome Frank's excellent article, *Say It With Music,* 61 HARV. L. REV. 921 (1948).

35. It is not inconceivable that the judiciary could accomplish the same result without legislative aid.

of the United States by the individual defendant. However, if plaintiff then amended his complaint to assert a claim against the United States, a waiver of his right to a jury trial as against the individual defendant might be provided for.[36]

Further legislation would have been necessary to avoid injustices regardless of how the Supreme Court decided the issues in the *Yellow Cab* case. But the alternative evils were not equal, and it is submitted that the approach of Mr. Justice Burton for the Court is sound and the result has the greater justness to commend it.

The questions of contribution and impleader for that purpose having now been decided, the difficulties arising therefrom cannot long escape more definite consideration by the courts, in view of the ever increasing volume of litigation arising under the Federal Tort Claims Act.[37] Pending further action by the Congress, private parties to such litigation must themselves examine with care the problems suggested herein in order to avoid possible pitfalls and to aid the courts in making judicial adjustments.

Henry Rose

FORUM NON CONVENIENS AND THE FEDERAL EMPLOYERS LIABILITY ACT

In recent years there has been much speculation as to the power of a state court to invoke the doctrine of forum non conveniens[1] in order to dismiss suits based on foreign operative facts when the suit is brought under the Federal Employers Liability Act.[2] The problem has been greatly clarified by the recent decision of the United States Supreme Court in *Missouri ex rel. Southern Ry.* v. *Mayfield.*[3] In order to understand the import and effect of the *Mayfield* decision, it is important to review the problem prior to that case.

It is not within the scope of this comment to discuss the doctrine of forum non conveniens as such, or the reasons for its application, but only to treat the restrictions of the Federal Constitution and statutes on state courts in applying the doctrine in actions properly brought under the FELA.

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36. And in the joinder situation: Joinder of the United States with an individual as defendants might be deemed a waiver of trial by jury on the part of the plaintiff who joined them. Assertion of a cross-claim for contribution by an individual defendant against the United States, where they were joined by the plaintiff, could be given the same effect.

37. See Collet, *Federal Tort Claims Act,* 8 F. R. D. 2 (1948).

1. The doctrine of forum non conveniens deals "with the discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before ti may be more appropriately tried elsewhere." Blair, *The Doctine of Forum Non Conveniens In Anglo-American Law,* 29 COL. L. REV. 1 (1929).

2. 45 U. S. C. § 56 (1908).

3. 339 U. S. 918, 71 S. Ct. 1 (1950).