August 2015


Daniel Wallen

Please take a moment to share how this work helps you through this survey. Your feedback will be important as we plan further development of our repository.
Follow this and additional works at: http://ideaexchange.uakron.edu/akronlawreview

Part of the Air and Space Law Commons, Government Contracts Commons, and the Torts Commons

Recommended Citation
Available at: http://ideaexchange.uakron.edu/akronlawreview/vol6/iss1/7

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.

Jim Nelms, a resident of a rural community near Nashville, North Carolina, brought suit in the United States District Court for the Eastern District of North Carolina, under the Federal Tort Claims Act. Mr. Nelms claimed that his house was damaged beyond repair by a sonic boom caused by military planes on a training mission. The District Court granted the Government's motion for summary judgment on the ground that the training mission was embraced by the discretionary function exception of the FTCA. The United States Court of Appeals for the Fourth Circuit reversed and remanded for trial holding that the discretionary function exception could not be used as a defense by the Government, and that Nelms could proceed on the theory of absolute liability.

Relying on its decision in Somerset Seafood Co. v. United States, the Fourth Circuit held the discretionary function exception cannot serve as a valid defense when Government employees are under a duty imposed by law to perform a mandatory act. The Court of Appeals in Nelms construed an Air Force Regulation as restricting the discretion of the Commander-in-Chief who authorized the training program, as well as his subordinates. Although the court considered the decision to fly at supersonic speeds discretionary, the degree of protection to be given civilians within the reach of the sonic boom was not.

3 See 28 U.S.C. § 2680(a) (1970). The FTCA shall not apply to "Any claim based upon an act or omission of an employee of the Government, ... 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."
4 Nelms v. Laird, 442 F.2d 1163, 1165 (4th Cir. 1971).
5 Id. at 1168.
7 U.S. Air Force Reg., No. 55-34 (1960), providing in part for maximum protection to be afforded civilian communities and for the Air Force to "accept responsibility for restitution and payment of just claims." (Emphasis added.)
8 442 F.2d at 1166.
Having determined that the Government's defense could not be asserted, the plaintiff had only to show the damage to his property was caused by the negligent or wrongful act or omission of a Government employee "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." Being unable to prove negligence, the plaintiff relied on the doctrine of strict liability for ultrahazardous activities. The Government asserted as controlling Dalehite v. United States, where the Supreme Court held that the FTCA did not extend to cases of absolute liability. Responding to the Government's contention, the Fourth Circuit reaffirmed the position it took in United States v. Praylou, decided shortly after Dalehite.

The Supreme Court granted certiorari, and reversed, holding that the FTCA precludes the imposition of liability if there has been no negligence or other form of "misfeasance or nonfeasance" on the part of the Government, regardless of state law characterization.

The Supreme Court relied on Dalehite v. United States, a case which arose out of the Texas City disaster of 1947. In Dalehite, the Federal Government loaded ships with ammonium nitrate fertilizer which exploded and resulted in about 300 separate personal and property claims. After the Dalehite court concluded that the alleged negligence did not subject the Government to liability they dealt with the contention that the Government was strictly liable because of the ultrahazardous activity in which they were engaged. The four-man majority concluded that the FTCA was to be invoked only on a "negligent or wrongful act or omission" of an employee. The court construed the phrase "negligent or wrongful act or omission" to preclude recovery based on the theory of absolute liability, because the tortfeasor may be held liable, under this theory, regardless of how he conducts himself.

---

10 RESTATEMENT OF TORTS § 520 (1938).
12 Id. at 45. "... the Act does require some brand of misfeasance or nonfeasance, and so could not extend to liability without fault."
13 208 F.2d 291 (4th Cir. 1953), cert. denied, 347 U.S. 934 (1954). The Government was held strictly liable under State law. The basis of liability was a statute imposing absolute liability on private persons engaged in ultrahazardous activities which resulted in damage.
15 Dalehite, 346 U.S. 15, 45.
17 Id. at 42.
18 Id. at 44.
19 Id.
Mr. Justice Rehnquist, speaking for the majority in *Nelms*, concluded that the "necessary consequence" of *Dalehite* is that the United States has consented to be sued only where there has been a "negligent or wrongful act or omission of any employee of the government," and thus a "uniform federal limitation" exists under the FTCA.\(^{20}\) (Emphasis added.) The court concluded that the decision in *Dalehite* was controlling by reason of *stare decisis* and by Congress' indifference to the decision.\(^{21}\) Once the court determined that absolute liability could not serve as a basis of recovery under the FTCA the court found it unnecessary to examine the scope of the discretionary function exception.\(^{22}\)

The dissent considered the majority's conclusion not justified by the language, history, or purpose of the FTCA.\(^{23}\) They felt the doctrine of absolute liability should be applicable if the conduct of Government employees would be actionable under the law of the State where the conduct occurred.\(^{24}\) It would appear that once this determination has been made it would then become necessary to examine the scope of the discretionary function exception of the FTCA to determine if the act falls within the class of those where the Government has not waived its immunity. Despite this fact, Mr. Justice Stewart concluded that once it is determined that the doctrine of absolute liability is applicable to sonic booms, the discretionary function exception is irrelevant and the court need only consider questions of causation and damages.\(^{25}\)

There are three reasons why the majority opinion in *Nelms* is questionable. First, it has been suggested that the portion of the *Dalehite* decision which dealt with the doctrine of absolute liability was *dicta*, and that the case was decided entirely on the discretionary function exception.\(^{26}\)

Second, whether or not this theory is correct, later Supreme Court opinions interpreting the FTCA have limited *Dalehite*.\(^{27}\) *Rayonier v. United

---

\(^{20}\) 92 S. Ct. at 1900.
\(^{21}\) Id. at 1903.
\(^{22}\) Id.
\(^{23}\) Id.
\(^{24}\) Id. at 1906; see 28 U.S.C. 1346(b) (1970), "...if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred."
\(^{25}\) 92 S. Ct. at 1907.
\(^{27}\) See *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). The court held the Government was not immune from liability on the basis that private persons do not perform similar functions. It is significant to note that the majority in *Indian Towing* were the dissenters in *Dalehite* and vice versa. *Accord*, Rayonier Inc. v. United States, 352 U.S. 315 (1957).
States is of particular significance because of a footnote contained therein which cited Praylou, the principal case relied on by the Fourth Circuit in Nelms. Praylou was cited as one of four cases, all standing for the proposition that if there was anything contrary in the Dalehite decision it was necessarily rejected by Indian Towing Co. v. United States. Thus, the four cases were cited to show that the Dalehite decision had been limited.

The footnote in Rayonier had been generally understood to mean that the rejection of absolute liability in Dalehite had been “implicitly abandoned.” It was thought that the Government would be subject to absolute liability under those statutes which would subject a private person to similar liability. It is difficult to comprehend how the majority in Nelms could claim that one of the bases of their decision was stare decisis and not even mention the Rayonier decision.

The third factor weakening the majority opinion is the legislative history of the FTCA as interpreted by Dalehite and reiterated by the majority in Nelms. The legislative history relied upon by the majority deals only with the discretionary function exception, an area which the majority refused to consider.

The major issue which must be examined, to properly analyze the legislative history of the FTCA, is what the legislature meant by the phrase “negligent or wrongful act or omission.” Perhaps, the most effective way to interpret this phrase is to specifically analyze its development. A tort claims bill passed the Senate in 1942 which only provided for liability for “negligence.” This bill was amended by the House Judiciary Committee and the phrase “negligent or wrongful act or omission” was used. The committee indicated that, “the committee prefers its language as it would afford relief for certain acts or omissions which may be wrongful but not necessarily negligent.” Although this bill did not become law, the same phrase was used in the bill enacted in 1946.

Persuasive arguments can be set forth to support the contention that

---

28 352 U.S. 315, 319 n.2 (1957). “To the extent that there was anything to the contrary in the Dalehite case it was necessarily rejected by Indian Towing.”
30 92 S. Ct. at 1905.

31 Peck, Absolute Liability and the Federal Tort Claims Act, 9 Stan. L. Rev. 433, 435 (1957). This interpretation appears perfectly consistent with 28 U.S.C. § 1346(b) (1970). In addition, 28 U.S.C. § 2674 (1970), providing that the United States shall be liable “in the same manner and to the same extent as a private individual under like circumstances,” would also serve to reinforce this belief, especially after Indian Towing.
32 92 S. Ct. at 1903.
33 S. 2221, 77th Cong., 2d Sess. § 301 (1942).
35 Id. at 11.
the word "wrongful" was intended to include absolute liability, rather than
the narrow interpretation given to the phrase in Dalehite. As the dissent
in Nelms indicated, the doctrine of absolute liability was well established
at the time the FTCA was enacted and there is nothing appearing in the
history of the Act to indicate that this basis of liability was to be excluded.36
As Judge Parker emphasized in Praylou, the phrase "negligent or wrongful
act or omission" could be equated with the word "tortious."37 To support
his conclusion, Judge Parker relied upon the Restatement of Torts:

The word "tortious," therefore, is appropriate to describe not only an
act which is intended to cause an invasion of interest legally protected
against intentional invasion or conduct which is negligent as creating
an unreasonable risk of invasion of such an interest, but also conduct
which is carried on at the risk that the actor shall be subject to
liability for harm caused thereby, although no such harm is intended
and the harm cannot be prevented by any precautions or care which
it is practicable to require.38

Absolute liability is both tortious and wrongful and thus should subject
the Government to liability, barring any legislative exceptions. (Emphasis
added.)

It is a well established principle of tort law that a statute may
prescribe a standard of conduct required of a reasonable man from which
it is deemed negligent to deviate.39 Often, absolute liability is imposed
upon one who violates these statutes, but under the name of negligence
per se. A strong argument has been made, based upon these statutes, that
it is a fiction to distinguish between liability for engaging in an
extra-hazardous activity and liability for negligence.40

It has been determined that the FTCA is to be liberally construed, not
only because it is remedial legislation, but also to lessen the burden on
Congress to deal with special legislation. The Supreme Court has also
decided that there is no justification for exemptions to be read into the
FTCA beyond those provided by Congress.41 It should logically follow
that the theory of absolute liability should not be rejected as a basis of
recovery until Congress decides to specifically exempt it.

If the majority in Nelms was willing to accept the doctrine of absolute
liability as an acceptable theory to rely upon, this would not automatically

36 92 S. Ct. at 1903.
37 208 F.2d at 293.
38 RESTATEMENT OF TORTS § 6, comment a (1934).
39 Osborne v. McMasters, 40 Minn. 103, 41 N.W. 543 (1889); RESTATEMENT (SECOND)
of Torts §§ 285, 286 (1965); see W. PROSSER, LAW OF TORTS § 36 (4th ed. 1971).
40 Leflar, Negligence in Name Only, 27 N.Y.U. L. REV. 564 (1952); see Wildwood
be outcome determinative. Congress has provided express exceptions where the Government will not be liable, and a great deal of controversy has involved the discretionary function exception of section 2680(a).42

It has been suggested that the discretionary function exception was adopted primarily to prevent the judiciary from substituting its view for that of the legislature, thus, fostering the policy of separation of powers.43 In the field of negligence the purpose of the exception is brought into play because the danger exists that in weighing the factors to determine whether conduct is negligent the court may substitute their views for that of the legislature.44 Notwithstanding this danger, Professor Peck submits that because there is "no element of disapproval or condemnation" in the field of absolute liability, applying this theory under the FTCA would not conflict with the purpose of the discretionary function exception, and therefore the exception is inapplicable.45 His view was apparently adopted by the dissent in Neims.46 Although it may be true that to allow a claimant to proceed on the theory of strict liability would not conflict with the primary purpose of the discretionary function exception, the fact still remains that if the activity is considered discretionary the exception is applicable, even if the discretion is abused.47 However, neither the majority nor the dissent in Neims faced the crucial issue as to the scope of the discretionary function exception.48 The Supreme Court has chosen to leave the extent of the discretionary function exception in a state of turmoil rather than to judicially define it.

The Fourth Circuit's interpretation of the discretionary function exception derives no support from the legislative history of the FTCA.49 If

[End of text]
the order to conduct the mission in *Nelms* is deemed to have been made at the planning level, any finding of Governmental liability would clearly be contrary to the express provisions of the FTCA. The Supreme Court’s unwillingness to decide this issue has further complicated the ability to recover damages caused by sonic booms.

The *Nelms* decision can be interpreted as awarding the members of the Air Force a license to conduct sonic booms and not have to face the consequences if they possess the requisite “discretion.” As Mr. Justice Black stated in *Rayonier*:

> When the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees.

In summary, although the legislative history of the FTCA lends great support for the argument that the doctrine of absolute liability is an acceptable theory to employ to seek recovery under the FTCA, the Supreme Court has chosen to rely on the *Dalehite* decision and completely overlook later Supreme Court interpretations. The legislative history of the FTCA also indicates that the discretionary function exception must always be confronted, regardless of the theory one proceeds under to seek recovery.

It appears that the only solution lies in legislative action in two areas. Congress must first, clearly indicate that the Government shall be liable under the FTCA if a private person would be liable to the claimant in accordance with the law of the place where the act occurred, even if liability in that state is based upon the doctrine of absolute liability. Furthermore, the Government must assume liability for damages caused by sonic booms produced by military aircraft, regardless of the official who authorized the program, where a causal connection can be shown.

Daniel Wallen

51 The Military Claims Act makes provisions for the administrative settlement of claims not exceeding $5,000. 10 U.S.C. 2733 (1970). Sonic boom damage claims may be paid under this section. Air Force Manual 112-1, Ch. 7 § 1, providing in part that, “the Military Claims Act is an act of grace.” A claimant acquires no legal or equitable rights merely because injuries or damages are cognizable under it. The legislation confers no rights to judicial review if the Secretary of Defense refuses a claim. If administrative relief is denied the Air Force is usually relieved of liability under the discretionary function exception; see Maynard v. United States, 430 F.2d 1264 (9th Cir. 1970); McMurray v. United States, 286 F. Supp. 701 (W.D. Mo. 1968); Schwartz v. United States, 38 F.R.D. 164 (D.N.J. 1965); Huslander v. United States, 234 F. Supp. 1004 (W.D. N.Y. 1964). See also Neher v. United States, 265 F. Supp. 210 (D. Minn. 1967), where the discretionary function exception was found to be waived by stipulation.
52 352 U.S. 315.
53 Id. at 320.