



Immunities and Tort Liability of the Government

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Konomark
Most rights sharable

Immunities

Immunities

- **Family**
 - Spousal (mostly abolished)
 - Parent-child (mostly abolished)
- **Charitable** (mostly abolished)
- **Sovereign governments** (still very strong)
- **Individual government employees**
 - Legislators, judges, high-level executive officials
 - Typically absolute for official acts
 - Westfall Act
 - Immunizes all federal employees from personal liability for torts committed on the job
 - U.S. is substituted as defendant

**Suing the
Sovereign**

Federal Tort Claims Act

FTCA

Overview

- Sovereign immunity prevents suits against the U.S. government.
- The FTCA is a limited waiver of sovereign immunity.
- The FTCA is a comprehensive scheme of procedural and substantive law.
- Tort suits against the U.S. must be prosecuted under the terms of the FTCA.

Procedure

- Plaintiffs must first file an administrative claim with the appropriate agency specifying a sum certain of damages.
- The agency has six months to allow or deny the claim.
- If denied, a plaintiff may sue in federal district court under the FTCA.

Substance

- The tort liability of the the U.S. is judged with reference to the tort law of the relevant state.
- If, under state law, a private actor would have a duty in negligence, then the U.S. has such a duty for negligence purposes.
 - This is true even if the action performed by the U.S. would be highly unusual or unlikely for a private person.
- The tortious action must have been committed by a federal employee acting within the scope of her or his employment.
 - Contractors' actions cannot create federal liability, except in rare circumstances where they were so closely controlled, they were functionally employees.
- The FTCA provides many liability exemptions that trump state tort law.

28 U.S.C. § 1346(b)(1)

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 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.

Many exclusions/exemptions from liability

including ...

- based on remedies
- based on the cause of action
- based on the nature of the conduct

Exclusion

Based on the remedy

- Only compensatory damages are allowed as remedies
- No punitive damages
- No injunctions

Exemptions

Based on the cause of action

- Assault*, battery*
- False imprisonment*, false arrest*
- Malicious prosecution*, abuse of process*
- Defamation
- Misrepresentation, deceit
- Interference with contract rights
- No suit can proceed under strict liability.
 - Negligence must be proved.

* These exemption does not apply to federal law enforcement officers, whom you can sue for these things.

Exemptions

Based on the nature of the conduct

- Discretionary function or duty
- Combatant actions of the military
- Claims arising in a foreign country

28 U.S.C. § 2680(a)

[These waivers, including § 1346(b) shall not apply to—]

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. § 2680 (j) & (k)

[These waivers, including § 1346(b) shall not apply to—]

- (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.
- (k) Any claim arising in a foreign country.

28 U.S.C. § 1346(b)(2)

No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

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Remember, in practice, if you are using a statute, read the whole statute.

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Kohl v. U.S.

From the district court:

“The plaintiff testified in her deposition that, while riding home from the project, her “head was painful” and she felt lethargic. Docket Entry No. 43-5, at 23. She sought medical care the next day and was later referred to a neurologist, who ultimately diagnosed her with “post-concussive syndrome with persistent headaches and cognitive changes,” Docket Entry No. 43-7, at 8, which she opined were caused during the incident, resulting in [permanent brain damage](#). *Id* at 13. The plaintiff has not been employed since that time. Docket Entry No. 43-5, at 26”

.Kohl v. U.S., 3-09-1190, 2011 WL 4537969, at *2 (M.D. Tenn. Sept. 29, 2011)

Kohl v. U.S.

- Have a hard-to-forget example of government conduct that injures and requires discretionary-function analysis.
- Appreciate how elastic and indeterminate discretionary function doctrine can be.
- Understand that the discretionary function determination cannot be collapsed into the question of whether the government was negligent.
- See and understand the two-step test used to determine discretionary function.
- Appreciate how law evolves over time and precedent can be eroded without being overruled.
- Consider the policy choices inherent in the judge's job in these case.
- Consider the policy choices in waiving sovereign immunity.

Diplomatic Immunity

- Diplomats are immune from the courts and police
 - Not the laws themselves.
 - Although this is often a distinction without a difference.
- International organizations are often immune as well.
- Example: UN and Haiti cholera outbreak

The Firefighter Rule

Firefighter Rule

- Essentially, a kind of reverse immunity.
 - Instead of a defendant being immune based on who the defendant is (standard immunity, the firefighter rule has the defendant being immune based on who the *plaintiff* is.
- Can be thought of as a kind of assumption of the risk implied by law.
- The rule is that persons who are hired to help people in distress, and who are hurt in the process, cannot sue the person in negligence for putting her or himself in distress.
- Has been applied to firefighters, police officers, veterinarians, and others.

Fireman Filbert misreads the dials on this awesome panel of stuff and, because of his error, a house burns down.

- A. The application of the firefighter rule will prevent Filbert from being sued by the homeowner.
- B. The firefighter rule allows Filbert to be liable.
- C. Honestly speaking, the firefighter rule has nothing to do with any of this.



From the casebook ... p, 436-437

Problem: Museum Gala

Who among the following defendants, on the basis of immunity or a related doctrine, can escape liability in a lawsuit brought by Carl for personal injuries?

And, separately, who among the following can assert immunity or some related doctrine to block a personal injury suit brought by Fiona?

- A. The City of Metropolis
- B. The Metropolis Museum Trust
- C. Fiona Freeman
- D. Harold Heltenmayer
- E. The National Park Service
- F. Superintendent Stu Strinden