Immunities and Tort Liability of the Government

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Immunities

Immunities

- Family
  - Spousal (mostly abolished)
  - Parent-child (mostly abolished)
- Charitable (mostly abolished)
- Sovereign governments (still very strong)
  - U.S., states, Indian tribes
  - But not cities
- 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
- Diplomatic immunity
- Employers (through workers comp)

Some detail about worker's comp

Workers Comp Basics

- Only alters obligations where there is an employee/employer relationship
- Creates a trade-off
  - Workers get compensated for more injuries
    - Because demonstrating negligence (breach of the duty of care) is not necessary
    - Workers get lower compensation than the tort system might provide
  - And vice versa for employers: Pay for more accidents, but get immunity from bigger judgments
- Compared to torts: Duty and causation are replaced with requirement of an *accident* happening *in the course of and arising out of employment*.

The Trade Off

- Workers:
  - Get compensated for more injuries
    - Because demonstrating negligence (breach of the duty of care) is not necessary
  - Get compensated more quickly
    - Because they get benefits right away, as opposed to going through the litigation process.
  - But they get lower compensation than the tort system might provide for a given accident
- And vice versa for employers. They:
  - Must pay for more accidents.
  - But get immunity from bigger judgments.
- Because of this trade off, in any given dispute, either the employer or the employee might be arguing for WC coverage.

Who counts as an employee?

- WC statutes provide their own definitions.
- Generally, an employee is distinguished from an independent contractor.
- An independent contractor tends to
  - Work with own tools
  - Direct her- or himself in details of working
  - Choose own hours
  - Do work outside the core competency of the hirer
- An employee tends to
  - Work with hirer's tools
  - Be controlled at work by boss
  - Work the exact hours hirer says
  - Work in the core competency of hirer

Exclusivity/preclusion/immunity

- Although often called "exclusivity" or "preclusion," this is really employer immunity from their employees for accidents.
- Exceptions to immunity:
  - Genuine intentional wrongs. (Substantial certainty counts as intent in many courts.)
  - Reckless or wanton acts (in some courts).
  - Federal cause of action
    - Where a federal statute allows a cause of action, that can't be precluded by state law
  - Fraudulent concealment
    - E.g., if company doctors know of a worker's illness but don't inform the worker, a fraudulent concealment theory can allow a tort action for worsening of the condition caused thereby.

Exclusivity/preclusion/immunity

- Preclusion without recovery:
  - It is possible, at least in some jurisdictions, for a worker to suffer an accident for which compensation will not be awarded, but where tort-preclusion applies.
  - For instance, if a factory worker suffers an accident that causes disfiguring burns which are aesthetic in nature, but which do not affect the worker's ability to work, the worker may have not be entitled to any compensation but may be barred from filing a tort action.

Tort Liability of the Government

Ways to sue the government for torts

- 42 USC §1983
  - Suit over local or state agents acting under color of state law
  - For violations of federal constitutional rights (and federal statutory rights)
  - Complicated in the details, but wide-ranging
- Bivens actions
  - Suit over federal action in violation of federal constitutional rights
  - Much narrower than §1983
- Federal Tort Claims Act
  - A limited waiver of federal sovereign immunity
  - The U.S. allows itself to be sued for certain things under certain circumstances.

Some detail about the 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.

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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 exemptions do 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
- *among other exemptions …*

Discretionary function

- Government actions are either ministerial or discretionary.
- Ministerial actions can incur negligence liability under FTCA
  - Ex.: postal truck running a red light
- Discretionary functions involve policy-making, governing-type decisions; they can't incur FTCA liability
  - Ex: changing Coast Guard rules on number of required lifeboat on a vessel
- In practice, the dividing line between discretionary and ministerial functions can be unpredictable.

The Firefighter Rule (a kind of reverse immunity)

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.