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Strict Liability and the Federal Tort Claims Act

Robert C. Cetrulo

University of Kentucky

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Recovery under the Federal Tort Claims Act (FTCA) upon that basis of liability loosely designated in the law of torts as "liability without fault" has been denied by most of the cases which have considered the problem. The pertinent section of the Act states that the government shall be liable 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. (Emphasis supplied)

Before discussing the cases in which it has been contended that the government is subject to strict liability and the legislative history behind the Act, it is first necessary to examine the nature and scope of the doctrine of strict liability at common law.

The basic notion behind the doctrine is that one may, under certain circumstances, be legally responsible for consequences of his acts regardless of his intent or the degree of care he exercises. Tort theory has evolved from an early common law position of liability without fault in all cases through a subsequent period where it was stated there was no liability without fault in any case, to the present day position of liability without fault in some cases.

Although strict liability is solidly entrenched in the law today, the types of cases which will invoke its application cannot be stated with mathematical nicety, as there are various ways of grouping the somewhat overlapping categories which have traditionally warranted application of the rule. The various courts which have dealt with the question of strict liability under the Act have been faced, in the main, with four situations, each of which usually called for application of liability without fault at common law: (1) trespass, (2) fire, (3) abnormal things and activities, and (4) aircraft. These historic categories will serve as the framework for this discussion.

A tracing of the history of the rule of strict liability under the FTCA reveals two distinct states of development—one before the celebrated
case of Dalehite v. United States, and the other after it. Three of the four cases discussing the question in the first stage of its development accepted the theory of strict liability under the Act; the fourth rejected it.

The first case, Boyce v. United States, presented the most accepted of all strict liability categories, blasting. This “extrahazardous activity” falls within category three above and usually results in strict liability, even in those jurisdictions which reject the broader implications of the rule of “abnormal things and activities.” The court stated that the plaintiffs established causation and that

in the absence, therefore, of the application of ... (the discretionary function section of the Act) a recovery in some amount would of necessity have followed in each case, since it is fundamental that under the substantive law of Iowa dynamite is a dangerous instrumentality, the use of which, so as to damage the property of another, constitutes a ‘wrongful act’ for which recovery may be had, even without a specific charge of negligence or the proof thereof.

The Court ruled for the defendant on the discretionary function exception.

Another illustration of the judicial thinking on this question prior to the Dalehite case is Parcel v. United States. The plaintiff sued for damages to his property resulting from the crash thereon of two United States Air Force planes. The court rendered judgment for the plaintiff, saying that the government had not rebutted the inference of negligence raised by the doctrine of res ipsa loquitur, and even if it had, there would be absolute liability without fault for such an activity at common law. In answering the defendant’s contention that the rule of strict liability was not applicable under the Act, the court said:

The words ‘wrongful act’ in that portion of the statute must be given some meaning. To say that ‘wrongful act’ is a tautological phrase meaning negligence is inconsistent with the general rule of statutory interpretation, namely, that no portion of a statute susceptible of meaning is to be treated as superfluous. In 45 Words and Phrases 627, many cases are cited in which the phrase ‘wrongful act’ has been

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0 346 U.S. 15 (1953).
7 93 F. Supp. 866 (SD Iowa 1950).
8 The “discretionary function” exception of the Act relieves the government of any liability when the negligence complained of is committed on the “planning” in contradistinction to the “operational” level.
9 Supra note 7 at 868.
11 For the reader who is wondering why the court is deciding whether the presumption of negligence raised by the doctrine of res ipsa loquitur has been rebutted, usually a question of fact within the province of the jury, it is pointed out that suits under the FTCA are tried without a jury. 28 U.S.C. 2402 (1946).
12 Supra note 10 at 116, citing Hurley & Comi v. United States, 192 F. 2d 297 (CA4 1951).
interpreted to mean any act which in the ordinary course of events infringes on the rights of another to his damage. To say that a tort giving rise to absolute liability is not a ‘wrongful act’ would be a technical refinement of language incompatible with that liberal interpretation of the sovereign’s waiver of immunity which the highest court in the land has admonished us to employ.\(^1\)

Whether aviation is treated as an “extrahazardous activity” or classified as a “trespass”, there is ample authority that strict liability ensues for ground damage caused by airplanes.\(^1\)\(^4\)

The third case litigating the question of whether the government can be subjected to strict liability under the FTCA arose, again, out of the crash of a government airplane on private property.\(^1\)\(^5\) The appellate court affirmed the judgment of the lower court for the plaintiff and on the point of absolute liability said:

> The flying of an airplane below safe altitude immediately adjacent to the property of the plaintiffs, ensuing crash and resultant injuries sustained by the plaintiffs would entitle the plaintiffs to damages under the law of Colorado, and where the airplane involved was piloted by an officer of the United States Air Force acting within the scope of his employment, there was a redressible wrong in the nature of trespass for which the United States would be similarly liable under the FTCA.\(^1\)\(^6\) (Emphasis supplied)

The only dissenting note was interjected by the opinion in United States v. Hull where it was said, by way of dictum:

> [I]n certain cases, under local law a private person may be liable without fault for injuries deemed ‘ultra-hazardous’, but the United States would not be subject to suit on such a liability for under 28 U.S.C. 1346 (b), the United States has consented to be sued only where the injury was ‘caused by the negligent or wrongful act or omission’ of some government employee acting within the scope of his office.\(^1\)\(^7\)

In evaluating the opinion of this court on the question of strict liability, it is suggested that two facts should be taken into account: (1) the court never actually came to grips with the real problem, i.e., what is the meaning of the “wrongful act” phrase of the Act, and (2) the case does not present an orthodox strict liability situation since plaintiff was suing for injuries she sustained when a United States Post Office counter window fell on her hand as she was sliding money under it.

The turning point in the judicial trend toward the acceptance of


\(^{14}\) Restatement of Torts, sec. 520, Comment b (1939), (extra hazardous activity). United States v. Gaidys, 194 F. 2d 762 (CA10 1952), (trespass).

\(^{16}\) U.S. v. Gaidys, supra 14.

\(^{17}\) 195 F. 2d 64 (CA1 1952).
strict liability under the Act came in the famous case of *Dalehite v. United States.*\(^{18}\) This suit was the consolidation of many causes of action brought against the United States under the FTCA to recover damages for injuries to persons and property resulting from the disastrous explosion at Texas City, Texas, of ammonium nitrate fertilizer produced according to specifications and under the control of the United States for export to increase food supply in areas under military occupation following World War II. The trial court found the government negligent and entered judgment for the plaintiff. The United States Court of Appeals for the Fifth Circuit reversed and the Supreme Court granted certiorari. A four to three Court held the government not liable, basing its decision on the “discretionary function exception” to the Act, but then went on to make a statement, not essential to the decision of the case, that Congress didn’t intend to make the United States liable without fault in those situations where a private person would be so liable. It is submitted that the same criticism leveled against the court in the *Hull* case might validly be aimed at the Supreme Court’s dictum on absolute liability here. The conclusion of the court seems to be a mere begging of the question of legislative intent behind the liability section of the Act, contrary to a reasonable, objective interpretation of the section and without any reference to a source wherein such an intention can be seen.\(^ {19}\)

Of the nine cases discussing strict liability after *Dalehite*, four are of the *Rylands v. Fletcher* type, two involve fire, and three are airplane accidents. Only one of the nine accepts a theory of strict liability.

Less than a month after *Dalehite*, a court which earlier had committed itself to the position that absolute liability exists for damage caused by government airplanes\(^ {20}\) stated, again by way of dictum,\(^ {21}\) that the government was not absolutely liable without fault for the destruction of crops of private landowners caused by government spraying of its own property, adjacent to that of plaintiffs', with a destructive herbicide.\(^ {22}\)

The spraying of a destructive herbicide near crops should, it would

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\(^{18}\) Supra note 6.

\(^{19}\) Another curious fact about this litigation is that after this judgment, Congress took it upon itself to pass special relief bills to reimburse fully the claimants in this action in an amount in excess of two hundred million dollars, a chore, the avoidance of which was the admitted purpose of Congress in drafting the FTCA. Most interesting is the language used by both legislative chambers in awarding compensation to the claimants, characterizing the fertilizer as “an inherently dangerous and hazardous explosive. . . .” H.R. Rep. 2024, 83rd Cong. 2d Sess. 9 (1954); S. Rep. 684, 84th Cong. 1st Sess. 19 (1955).

\(^{20}\) Gaidys case, supra note 15.

\(^{21}\) This case turned on the “discretionary function” exception.

\(^{22}\) Harris et al. v. United States, 205 F. 2d 765 (CA10 1953).
seem, be classified as an “abnormal activity”, category three of the strict liability analysis above. That type of strict liability may be traced to the controversial English case of *Rylands v. Fletcher*, where the defendant was subjected to strict liability for damage caused by the escape of water collected on his land which was deemed to be “abnormal and inappropriate” in light of the locale. The doctrine has subsequently been applied either where the doing of an act or the possession of a thing involves a high degree of risk to others, unreasonable in light of the surroundings. Whether this court would, in the future, reject all types of absolute liability under the Act or only the *Rylands v. Fletcher* type is not made clear by the opinion.

The case of *Danner v. United States* was an action by landowners against the government for damage to realty caused by floodwaters of the Missouri river and allegedly due to the defendant’s negligent failure to maintain the approach fill. The problem was resolved once again with reference to the “discretionary function” section of the Act, but the court echoed the antipathy to strict liability seen in the *Dalehite* case.

A decision unquestionably attributable to the *Dalehite* dictum is *Ure v. United States*. The plaintiffs sued the government to recover for the flooding of land following a break in an irrigation supply canal operated by the United States Reclamation Service. The district court decided for the plaintiffs, stating that the doctrine of *Rylands v. Fletcher* applied. The appellate court reversed the judgment, pointing out that the case was decided below on grounds of strict liability before the *Dalehite* case rendered that basis of recovery inapplicable under the Act.

*Porter v. United States* applied the *Dalehite* rule that the government cannot be subjected to strict liability in a case involving explosives. A father and his minor son sued for personal injuries sustained by the son due to the explosion of a military fuse which the youth found in a field between his home and the United States Army post.

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23 L.R. 1 Exch. 265 (1866). One author notes that although many American jurisdictions purportedly reject *Rylands v. Fletcher*, “there is in fact no case applying *Rylands v. Fletcher* which is not duplicated in all essential respects by some American decision which proceeds on the theory of nuisance; and it is quite evident that under that name the principle is in reality universally accepted.” Supra note 2 at 337, 338.


25 It is not certain whether the fact situation of this case would give rise to strict liability against a private person at common law. The “unnatural” state of the river due to the improvements thereon for control might bring the case within the rule of *Rylands v. Fletcher*.

26 225 F. 2d 709 (CA9 1955).


28 228 F. 2d 389 (CA4 1955).
of Ft. Jackson. The appellate court affirmed the judgment for the defendant handed down in the lower court:

Since the decision by the Supreme Court in the case of Dalehite v. United States, there can be no assumption that the government is liable under the FTCA merely because it may be the owner of an 'inherently dangerous commodity' or engaged in an 'extra-hazardous activity'.

The Dalehite dictum was extended to another type of activity in Strangi v. United States. The United States was having land cleared for a dam and reservoir by burning the timber thereon when the flames spread to and damaged adjacent tracts of privately-owned land. The court held for the defendant by concluding that the actor was an independent contractor, but also reiterated Dalehite on strict liability. At a very early date, the common law appreciated the dangerous potentialities of fire and imposed, with some limitations, strict liability for its consequences. Although the extent of these limitations has been and still is disputed, it is well settled that strict liability ensued when the fire was intentionally set, as it was here.

A forest fire which spread from United States forest lands and damaged private property in the state of Washington gave rise to the case of Rayonier, Inc. v. United States. The plaintiff predicated his action upon two theories of recovery: (1) the government is liable under a state statute imposing liability without fault on a private landowner for failing to take steps to remedy substandard conditions on his property, and (2) the government is liable for damages sustained by reason of the United States Forest Service's negligence in fighting a forest fire since, under Washington law, a private person or a corporation would be liable for negligence under similar circumstances. The court disposed of both contentions with reference to the familiar Dalehite case. The Supreme Court granted certiorari, and although the

20 Although this decision against strict liability was rendered by the same court (CA4) that decided in favor of strict liability in the Praylou case, infra note 41, several factors point to the conclusion that this court has not totally rejected strict liability under the Act: (1) the type of strict liability urged upon the court here is not as well accepted generally as some other types, (2) the Supreme Court had already spoken out against this type (Dalehite) and (3) the element of strong state policy evidenced by a statute imposing strict liability on the particular activity, present in the Praylou case, was lacking here.

30211 F. 2d 305 (CA5 1954).

31 The requisite master-servant relationship lacking, the government cannot be liable since the whole Act is premised on the theory of 'respondeat superior'. Hubsch v. United States, Schweitzer v. United States, 174 F. 2d 7 (1949).

32 Supra note 4 at 327. In those jurisdictions which accept Rylands v. Fletcher, there is also the possibility of absolute liability on the theory that fire is an "extrahazardous activity" when set near timber and if it escapes, the actor is strictly liable for resultant damages.

33 225 F. 2d 642 (CA9 1955).
decision did not turn on strict liability, the opinion appears to mark a distinctively different philosophic approach to the Act from that seen in, and generally since, Dalehite.34 There have been three cases involving government aircraft since Dalehite. The trial court in Dahlstrom v. United States35 stated that there is persuasive authority to the effect that where the law of the state where the accident occurred makes the injurious flight of aircraft a trespass and therefore imposes liability even in the absence of negligence, then that flight is 'wrongful' within the meaning of the FTCA. . . .36 (Emphasis supplied) but held for the government on the "discretionary function" exception. The appellate court reversed both findings, said this wasn't a "discretionary function", and remanded the cause to the District Court to be dismissed unless there was a showing of negligence.37 Probably the most arresting aspect of this litigation is the lower court's concept of "misfeasance":

Although there [in Dalehite] the Supreme Court held that the Act would not impose liability upon the United States merely by virtue of the fact that the manufacturing and packing of fertilizer made with ammonius nitrate was an 'extra-hazardous' activity, it did not limit the operation of the Act to cases involving negligence.38

United States v. Taylor,39 although it resulted in a judgment for the defendant, cannot be said to reject strict liability under the Act. The cause of the action was, once again, the crash of a government airplane on private property. The court held that the government was not liable under a state statute imposing liability without fault on the owners of aircraft for all damages resulting from their operation, since the agents here were not "acting within the scope of their employment."40

34 77 S. Ct. 374 (1957). Particularly interesting is one bit of language used by the Court here: "... the very purpose of the Tort Claims Act was to waive the government's traditional all-encompassing immunity from tort actions and to establish 'novel and unprecedented governmental liability.'" Cf. Dalehite v. United States, supra, for diametrically opposed language.
36 Citing Gaidys, Fraylou, and Parcell cases, supra.
37 228 F. 2d 819 (CA8 1956).
38 129 F. Supp. 772, at 774 (1955). For other non-restrictive interpretations of "misfeasance" see 27 Words & Phrases 339: "misfeasance" is the improper performance of some act which might lawfully be done." See also Ballentine's Law Dictionary to the same effect. It is submitted that the word is, in reality, a non-restrictive, legal conclusion of liability, not attempting to establish when an act is "improper", but rather, reserving that task for the orthodox principles of the law of torts, which does not limit the use of the word to negligence.
39 236 F. 2d 649 (CA6 1956).
40 28 U.S.C. 1946 (b) (1946): "... negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment...." At the time of the crash, the pilot was about two hundred miles from his prescribed training area, engaged in prankish maneuvers over his home town.
The only case after Dalehite that can be cited with certainty in support of the position that strict liability is not excluded by the Act is United States v. Praylou. In holding that the government was strictly liable to the plaintiffs, the court pointed out that South Carolina, the state in which the accident occurred, had adopted the Uniform Aeronautics Act which, inter alia, imposes absolute liability without fault on the operators of aircraft for all damages resulting from such operation:

To hold that in those states [which have adopted the Uniform Aeronautics Act] the government would be liable on a showing of negligence whereas private individuals are held to absolute liability by the statute would be contrary to the requirement of the FTCA.

It is submitted that this court determined the true rule to be that if the particular local law to be applied imposes absolute liability on private individuals for a certain activity, then the United States is subject to a like imposition. The Supreme Court denied certiorari.

It is immediately apparent from an examination of the leading cases dealing with strict liability under the Act, that the problem has not been adequately probed, either from a policy standpoint or from the standpoint of orthodox statutory interpretation. An investigation of the legislative materials bearing on the Act might shed some light on the question of whether the national legislature "intended" the government to be subject to strict liability in the same manner as a private individual.

A reading of the debate on the floor of the seventy-ninth Congress regarding the adoption of the Congressional Reorganization Act of 1946, of which the FTCA was a part, reveals no hint of legislative intent on the point in question.

The author of a critical note on the Praylou case refers to a report of the House of Representatives wherein is seen, he maintains, legislative intent to preclude the operation of strict liability under the Act.

The report states:

Section 402 specifies the claims which wouldn't be covered by the bill. The first subsection of section 402 exempts from the bill claims

41 208 F. 2d 291 (CA4 1953).
42 Id. at 295. See 28 U.S.C. 1346 (1946); "... 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."
43 347 U.S. 934 (1954); see note, 24 Tenn. L.R. 301 at 320 (1956) where it is said: "Despite the apparently unmistakable pronouncement of the Supreme Court in Dalehite that the Act does not extend to liability without fault the Fourth Circuit Court of Appeals narrowed the implications of the high court's opinion by affirming government liability based upon a state statute imposing absolute liability on the owner of aircraft for injuries caused by their operation."
44 Congressional Record, 79th Cong. (1945).
based upon the performance or nonperformance of discretionary functions or duties on the part of a Federal agency or government employee, whether or not the discretion involved be abused, and claims based upon the act or omission of a government employee exercising due care in the execution of a statute or regulation, whether or not valid.  

Does this report wholly exclude strict liability under the Act? Or does it do so only in those instances when the actor is executing a statute or regulation?  

In the absence of a direct expression of Congressional intention the search must be extended to indirect sources. The proceedings of the Committee on the Judiciary of the United States Senate show that the committee, in handling the tremendous volume of private relief bills referred to it annually, has attempted to establish something of a legislative stare decisis system by indexing the cases according to kind for purposes of future reference. Interesting for present purposes are two claims for private relief which the committee catalogued as "liability without fault" situations. Both of these petitions for redress were given Congressional consideration subsequent to the enactment of the FTCA, but in the reports of the bills the committee attributed the right to Congressional consideration to the fact that "these claimants have no remedy under the FTCA . . . for the reason that the accidents out of which their claims arose occurred prior to January 1, 1945, the effective date of the FTCA."  

In light of the facts: (1) that both of these accidents were caused by government airplanes; (2) that there were no allegations of negligence in either instance; and (3) Congress was of the opinion that if the mishaps had occurred after the effective date of the Act, the claimants would have been afforded a judicial remedy, it might well be contended that the existence of strict liability as a basis of recovery under the Act was contemplated by its enactors.  

The question did not break upon the judicial scene totally unforeseen. In an article published only a few months after the passage of the Act, the potential difficulty centering around the "negligent or wrongful" correlative was detected:

Does the fact that the state statute or state decisional law gives the injured party a legal cause of action against a private person engaged in such activities (i.e., extrahazardous) mean that there has been such a legal wrong as is within the scope of the 'wrongful act or omission' language of the Federal Tort Claims Act. If it was the

47 In which case the government is already immune since such an action is clearly a "discretionary function."  
intention of Congress to give the injured person a remedy against the
government when he would have a remedy against a private person,
may well be argued that recovery should be allowed under the Act
especially since such cases are not specifically mentioned in Section
421 which excepts certain torts. . . .

Can it be seriously contended that the actual language of the Act
excludes the notion of strict liability? Is it not significant that previous
piecemeal governmental liability legislation covering particular agen-
cies like the Armed Forces, and the Coast and Geodetic Survey spoke
only in terms of “negligence” and avoided the “wrongful act” type of
language seen in the broad waiver of immunity under the FTCA?

If it was the intention of Congress to exclude strict liability from
the coverage of the Act, why was it not included in the host of specific
exemptions seen in Section 421? Can it safely be said that the position
of the Dalehite case on liability without fault under the Act is “unchal-
lenged”, or “solidly based upon the statute”? Fair, objective answers
to these questions would seem to suggest that none of the orthodox
legal indicia militate against the adoption, under the Act, of the rule
of strict liability, in the proper case.

Fundamentally, however, the problem is one of a social, rather
than a strictly legal, nature. Is society best subserved in using the
common law concept of “fault” as a measuring rod of governmental
responsibility, or should the test be predicated upon the economic fact
that a government is the best of all possible risk spreaders and that
perhaps the taxpaying public should ordinarily bear the losses resulting
from governmental activity?

Conclusion

The applicability of strict liability as a basis of recovery under the
FTCA today involves, as does any question of law, a prediction based
upon past indications of judicial thought. The author is of the opinion
that this particular prediction depends mainly on the Dalehite case—
its interpretation and its vitality. Although Dalehite purports to reject
all strict liability, and admittedly has had a substantial effect on sub-
sequent cases, it is doubtful whether it was ever precedent for any-
thing beyond the proposition that the government is not absolutely

49 Baer, Suing Uncle Sam in Tort, 26 N.C.L.R. 119, at 123 (1947).
50 Supra note 46.
51 Davis, Tort-Liability of Governmental Units, 40 Minn. L.R. 751 (1956) at
791, fn. 194: “The Court’s holding to this effect in Dalehite is unchallenged and
seems solidly based on the statute.”
52 This premise is the foundation of the systems of sovereign responsibility in
some of the continental countries. Schwartz, Public Tort Liability in France, 29
liable for damages resulting from "possession of an inherently dangerous commodity"—and was only dictum even as to that!

Even more questionable is its vitality in light of the recent Rayonier case.\textsuperscript{53} It is believed that the substantial change in personnel on the Supreme Court in the short period separating Dalehite and Rayonier may be responsible for the pronounced difference in basic approach to the Act seen in the latter case.

It is hoped that the Supreme Court will, in a properly presented case, consider the problem de novo, bearing in mind the manifest Congressional purpose in passing the Act.\textsuperscript{54} As Mr. Justice Jackson said, the Act surely was intended to embrace more serious controversies than traffic accidents; if we continue to construe it with such rigidity, we will only have changed the ancient maxim that "the King can do no wrong" to "the King can do only little wrongs."\textsuperscript{55}

\textit{Robert C. Cetrulo}

\textsuperscript{53} Supra note 34.
\textsuperscript{54} Supra note 19.
\textsuperscript{55} Supra note 6 at 60.