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Government Contractor'S Liability For Consequential Damages

Difficulties in this area of the law would be minimized if the courts would confine discussion of the liability of the husband for goods and services furnished to his wife by a third party to the theories of true agency and restitution, drawing clear-cut distinctions between the two theories. It is only when these theories are confused through the use of terms as *agency implied in law* and *presumption of agency from the fact of cohabitation* that unnecessary difficulties arise. This confusion is in semantics rather than in law.

E. MICHAEL MASINTER

GOVERNMENT CONTRACTOR'S LIABILITY FOR CONSEQUENTIAL DAMAGES

The federal government, to a considerable extent, waived its sovereign immunity from suit by passage of the Federal Tort Claims Act.[1] Under the Act the liability of the United States as an employer[2] is determined in accordance with the law of the state in which the negligent tortious act occurred, as it would be in a case involving a private employer.[3] Using the Federal Tort Claims Act as a model, some states have also partially waived their sovereign immunity from suit.[4] When the plaintiff's claim against the sovereign is based upon "liability without fault," recovery has generally been denied, regardless of whether the sovereign is the United States or a state and regardless of whether the sovereign is sued in a federal or a state court.[5] In the

[1]28 U.S.C. §§ 1346(b), 2671-80 (1958). See also 28 U.S.C. §§ 1291, 1402(b), 1504, 2312(c), 2401(b), 2402, 2411(b) (1958).

[2]The Act sets out numerous exceptions to its general rule of government liability for the tortious acts of its employees or agents. The more important exceptions are those concerning discretionary functions, intentional torts, combat activities of the military during wartime, and those arising in a foreign country. These and the remaining exceptions are set forth in 28 U.S.C. § 2680(a)-(m) (1958).

[3]The United States will be liable in 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 laws of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (1958).

[4]For a summary of state tort claims acts, see Leflar and Kantrowitz, Tort Liability of the States, 29 N.Y.U.L. Rev. 1363 (1954).

[5]Dalehite v. United States, 346 U.S. 15 (1953); Voytas v. United States, 256 F.2d 786 (7th Cir. 1958); United States v. Taylor, 236 F.2d 649 (6th Cir. 1956); United States v. Hull, 195 F.2d 64 (1st Cir. 1952); Edwards v. United States, 164 F. Supp. 885 (M.D. Ga. 1958); Bulloch v. United States, 133 F. Supp. 885 (D. Utah 1955); Danner

leading case of *Dalehite v. United States*[6] the United States Supreme Court held that recovery under the federal Act must be based upon misfeasance or nonfeasance since the legislative history of the Act showed no intention to include absolute liability as a basis for recovery. Though criticized,[7] the *Dalehite* decision has not been overruled.

Pumpherey v. J. A. Jones Constr. Co.[8] presents the problem of whether a government contractor is entitled to share the immunity of the sovereign when, without negligence, he carries out his operations in accordance with the terms of the agreement, and the procedures required by the contract and approved by the government result in consequential damage[9] to third parties. Defendant was engaged in blasting operations in connection with building a lock upon the Mississippi River. Plaintiff alleged that in the course of the work the defendant negligently used high explosives, the concussions therefrom injuring the plaintiff's property. Plaintiff subsequently dropped the allegation of negligence and sought to recover solely on the basis of strict liability.[10] The Iowa trial court entered judgment for the plaintiff,[11] but the Supreme Court of Iowa reversed, holding that the Federal Tort Claims Act does not extend to cases in which liability without fault is the only basis of recovery, and that the defendant was entitled to share this immunity.[12]

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v. United States, 114 F. Supp. 477 (W.D. Mo. 1953). A search of state statutes has revealed no state which has waived its immunity from suit in the area of strict liability.

[6]346 U.S. 15 (1953).

[7]Angoff, The Federal Tort Claims Act: A General View, 37 B.U.L. Rev. 387 (1957); Peck, Absolute Liability and the Federal Tort Claims Act, 9 Stan. L. Rev. 433 (1957); Note, 45 Ky. L.J. 518 (1957).

[8]94 N.W.2d 737 (Iowa 1959).

[9]The term is applied to damage to or destruction of property not actually taken. "Consequential damages arise when property is not actually taken or entered but an injury to it occurs as the natural result of an act lawfully done by another." Puloka v. Commonwealth, 323 Pa. 36, 185 Atl. 801, 803 (1936). For this and other meanings of the term "consequential damages" see 8A Words and Phrases, Consequential Damages 222 (1951).

[10]The Iowa courts are committed to the rule of absolute liability for injuries resulting from the use of explosives, regardless of whether the injury was caused by a direct trespass or by mere vibrations or concussions. Watson v. Mississippi River Power Co., 174 Iowa 23, 156 N.W. 188 (1916).

[11]In the Lee County District Court the case was argued solely upon the liability without fault theory.

[12]"We may at the outset eliminate the Federal Tort Claims Act . . . from consideration. The question is referred to considerably in the arguments, but the ultimate conclusion of both parties seems to be that it is not important here. If the government could be sued under the Act, perhaps the defendants-contractors could

In deciding the question of whether a government contractor is entitled to share the sovereign's immunity, most courts have held that a contractor who is guilty of neither negligence nor a willful tort and who performs his work in accordance with the plans and specifications set forth in the contract is not liable for any incidental injuries necessarily involved in the performance of the contract, and is entitled to share the immunity of the sovereign with whom he contracts.[13] Thus, it has been held that a government contractor is not liable for injuries resulting from the construction of sewers,[14] highways,[15] drains,[16] levees,[17] bridges,[18] harbor improvements,[19] and the changing of a river's course.[20] In denying liability a majority of courts call him an independent contractor, though they generally treat him as an agent, the basis of his nonliability being that he has done the work under the complete control of the sovereign and thus is in the some position the sovereign would have been in had it performed the work itself.[21] Others hold the contractor to be an authorized agent of the state, and as such immune unless he has exceeded his authority, or unless such authority was invalidly conferred.[22]

However, little appears to turn on this distinction, for those courts

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also be held to answer. But the Act, as its title indicates, is concerned with torts, and does not extend to cases where the rule of 'liability without fault' is the only basis of recovery." 94 N.W.2d at 739.

[13]Yearsley v. W. A. Ross Constr. Co., 309 U.S. 18 (1940); Engler v. Aldridge, 147 Kan. 43, 75 P.2d 290 (1938); Nelson v. McKenzie-Hague Co., 192 Minn. 180, 256 N.W. 96 (1934); Ference v. Booth & Flinn Co., 370 Pa. 400, 88 A.2d 413 (1952); Glade v. Dietert, 156 Tex. 382, 295 S.W.2d 642 (1956); Tidewater Constr. Corp. v. Manly, 194 Va. 836, 75 S.E.2d 500 (1953). See Annot., 97 A.L.R. 205 (1935), and Annot., 69 A.L.R. 489 (1930), for general discussions of a contractor's nonliability when under government contract.

[14]Hanrahan v. Baltimore, 114 Md. 517, 80 Atl. 312 (1911).

[15]Ernst v. General Refractories Co., 202 F.2d 485 (6th Cir. 1953).

[16]Victor A. Harder Realty & Constr. Co. v. City of New York, 64 N.Y.S.2d 310 (Sup. Ct. 1946).

[17]De Baker v. Southern California Ry., 106 Cal. 257, 39 Pac. 610 (1895).

[18]Williams v. Stillwell, 88 Ala. 332, 6 So. 914 (1889).

[19]Benner v. Atlantic Dredging Co., 134 N.Y. 156, 31 N.E. 328 (1892).

[20]Salliotte v. King Bridge Co., 122 Fed. 378 (6th Cir. 1903).

[21]Maezes v. City of Chicago, 316 Ill. App. 464, 45 N.E.2d 521 (1942); Engler v. Aldridge, 147 Kan. 43, 75 P.2d 290 (1938); Adkins v. Harlan County, 259 Ky. 400, 82 S.W.2d 425 (1935); Daly v. Earl W. Baker & Co., 271 P.2d 1114 (Okla. 1954); Valley Forge Gardens Inc. v. James D. Morrissey Inc., 385 Pa. 477, 123 A.2d 888 (1956); Wood v. Foster & Creighton Co., 191 Tenn. 478, 235 S.W.2d 1 (1950).

[22]Yearsley v. W. A. Ross Constr. Co., 309 U.S. 18 (1940); Evans v. Massman Constr. Co., 115 S.W.2d 163 (Kan. Ct. App. 1938); Tidewater Constr. Corp. v. Manly, 194 Va. 836, 75 S.E.2d 500 (1953); Muskatell v. Queen City Constr. Co., 3 Wash. 2d 200, 100 P.2d 380 (1940); Kaler v. Puget Sound Bridge & Dredging Co., 72 Wash. 497, 130 Pac. 894 (1913).

that treat the contractor as either an independent contractor under state control or as an authorized agent of the state generally allow him to share the sovereign's immunity.[23] To support this position, most courts follow two lines of reasoning. The first is concerned with the contractor's freedom from fault,[24] and the second points out that the sovereign has or should have provided a suitable remedy.[25] In *Nelson v. McKenzie-Hague Co.*[26] the Minnesota Supreme Court, in holding for nonliability, pointed out the contractor's freedom from fault, stating that once he had contracted he had more than mere authorization to proceed. The contract "puts upon him the legal duty to do so.... Upon what basis, then, can we hold him liable in damages for an obligation which neither legally nor morally is his, but is solely that of the sovereign state?"[27] Furthermore, the court said, "Having committed no wrong, defendant should not be subjected to liability. [He] is not saved by the state's immunity from suit, but by [his] own innocence of wrongful acts resulting in liability as for tort."[28] The second reason for granting immunity to the contractor was well stated by the Court of Appeals of New York in *Benner v. Atlantic Dredging Co.*,[29] an oft-quoted case in this field. The New York court said that since it was lawful for the sovereign to exercise its "lawful power, it must follow that whatever results from its proper exercise is not unlawful, and if any injury, direct or consequential, results to the individual, he is remediless, except so far as the sovereign gives him a remedy."[30] Both of these arguments were used in *Yearsley v. W. A.*

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[23]Courts that have held the contractor liable, other than on the basis of his use of explosives, have usually done so on the ground that defendant was neither an independent contractor under state control, nor an agent of the state. Grennell v. Cass County, 193 Iowa 697, 187 N.W. 504 (1922); Baird v. Thibodo, 197 La. 688, 7 So. 2d 388 (Ct. App. 1942); Wade v. Gray, 104 Miss. 151, 61 So. 168 (1913); Louden v. City of Cincinnati, 90 Ohio St. 144, 106 N.E. 970 (1914).

[24]Yearsley v. W. A. Ross Constr. Co., 309 U.S. 18 (1940); Nelson v. McKenzie-Hague Co., 192 Minn. 180, 256 N.W. 96 (1934); Ference v. Booth & Flinn Co., 370 Pa. 400, 88 A.2d 413 (1952); Wood v. Foster & Creighton Co., 191 Tenn. 478, 235 S.W.2d 1 (1950); Glade v. Dietert, 156 Tex. 382, 295 S.W.2d 642 (1956); Kaler v. Puget Sound Bridge & Dredging Co., 72 Wash. 497, 130 Pac. 894 (1913).

[25]Yearsley v. W. A. Ross Constr. Co., 309 U.S. 18 (1940); Maezes v. City of Chicago, 316 Ill. App. 464, 45 N.E.2d 521 (1942); Engler v. Aldridge, 147 Kan. 43, 75 P.2d 290 (1938); Benner v. Atlantic Dredging Co., 134 N.Y. 156, 31 N.E. 328 (1892); Garrett v. Jones, 200 Okla. 696, 200 P.2d 402 (1948); Tidewater Constr. Corp. v. Manly, 194 Va. 836, 75 S.E.2d 500 (1953).

[26]192 Minn. 80, 256 N.W. 96 (1934).

[27]Id. at 98.

[28]Id. at 100.

[29]134 N.Y. 156, 31 N.E. 328 (1892).

[30]Id. at 329.

Ross Constr. Co.,[31] in which Mr. Chief Justice Hughes, speaking for a unanimous court, said that "in the case of taking by the Government of private property for public use . . . it cannot be doubted that the remedy to obtain compensation from the Government is as comprehensive as the requirements of the Constitution, and hence it excludes liability of the Government's representatives lawfully acting on its behalf in relation to the taking."[32] In light of these two arguments, the plaintiff is in effect told that he has brought suit against the wrong party and that his only chance for recovery is to bring the proper action against the sovereign itself.

In *Pumpherey* plaintiff attempted to distinguish the case at bar from those cases which grant immunity to the contractor by asserting that there must be a difference in theory when explosives are used. However, the Iowa Supreme Court refused to accept this distinction, stating that it saw "no reason for applying a different rule in explosive cases than in others."[33]

When explosives are the cause of injury in a case involving private parties, there are three general views as to liability. The old view, now rejected in most jurisdictions, was that negligence was a necessary element for recovery of damages resulting from blasting operations.[34] A second view, followed in a minority of jurisdictions, is that no right exists to recover for damages to adjoining property resulting from concussions alone.[35] Under this view, a defendant is liable only for a direct trespass and not for injury caused merely by vibrations resulting from the use of explosives. The third view, which is now the majority rule and is increasing in favor, is that one who uses explosives is absolutely liable for all injuries resulting from their use regardless of whether the injury is caused by a direct trespass or by concussions or vibrations.[36]

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[31]309 U.S. 18 (1940).

[32]Id. at 22.

[33]94 N.W.2d at 743.

[34]Bennet v. Texas-Illinois Pipeline Co., 113 F. Supp. 788 (E.D. Ark. 1953).

[35]Aldridge-Poage Inc. v. Parks, 297 S.W.2d 632 (Ky. 1956); O'Regan v. Verrochi, 325 Mass. 391, 90 N.E.2d 671 (1950); Whitmore v. Fago, 93 N.Y.S.2d 672 (Sup. Ct. 1949). The Supreme Court of Maine held that fault is a necessary requisite for recovery for damages caused by concussion or vibrations from explosives and that in the majority of cases the rule of reasonable care will afford ample protection under all circumstances. Reynolds v. W. H. Hinman Co., 75 A.2d 802 (Me. 1950). For further cases discussing strict liability for explosives see Annot., 92 A.L.R. 741 (1934), and Annot., 20 A.L.R.2d 1372 (1951).

[36]Britton v. Harrison Constr. Co., 87 F. Supp. 405 (S.D. W. Va. 1948); Scranton v. L. G. De Felice & Son, Inc., 137 Conn. 580, 79 A.2d 600 (1951); Watson v. Mississippi River Power Co., 174 Iowa 23, 156 N.W. 188 (1916); Wendt v. Yant Constr. Co., 125

A majority of courts, unlike the Iowa court, hold that these rules for explosives also apply to a government contractor, even though in most cases he would be immune from suit.[37] Thus, when the contractor's use of explosives, though authorized, is the cause of plaintiff's injury, he is placed in the same position as any other private party, and his liability is determined by the particular jurisdiction's rule for explosives. *Scranton v. L. G. De Felice & Sons, Inc.*[38] is a good example of this departure by the majority of courts from the general rule granting the government contractor immunity in cases not involving explosives. Plaintiff's greenhouse and garage were damaged in connection with a state improvement project in which no negligence was alleged. The court, in holding for the plaintiff, stated that "under the law of this jurisdiction one who explodes the intrinsically dangerous substance of dynamite under such conditions that it necessarily or obviously exposes the property of another to the damage of probable injury is absolutely liable, irrespective of negligence on his part, even though the damage caused is due only to vibrations of the earth or concussions of the atmosphere.... The defendants were not immune from liability for damages which resulted directly from these acts when done in pursuance of a contract with the state." The state cannot be sued, "but the defendants are not the state and we can see no reason why they should be immune."[39]

In a jurisdiction which accepts the concussion-direct trespass distinction in regard to blasting done by private parties, the contractor will be held liable only for injury caused by a direct trespass resulting

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Neb. 277, 249 N.W. 599 (1933). "This rule rests on the principle that the explosion of dynamite is an intrinsically dangerous operation and that, therefore, one who engages in it acts at his peril." Whitman Hotel Corp. v. Elliot & Watrous Eng'r Co., 137 Conn. 562, 79 A.2d 591, 593 (1951). See Restatement, Torts §§ 519, 520, comment e (1938).

[37]Asheville Constr. Co. v. Southern Ry., 19 F.2d 32 (4th Cir. 1927); Ledbetter-Johnson Co. v. Hawkins, 103 So. 2d 748 (Ala. 1958); Scranton v. L. G. De Felice & Son, Inc., 137 Conn. 580, 79 A.2d 600 (1951); Whitman Hotel Corp. v. Elliot & Watrous Eng'r Co., 137 Conn. 562, 79 A.2d 591 (1951); Baker v. S. A. Healey Co., 302 Ill. App. 634, 24 N.E.2d 228 (1939); Bluhm v. Blanck & Cargaro, Inc., 62 Ohio App. 451, 24 N.E.2d 615 (1939); City of Knoxville v. Peebles, 19 Tenn. App. 340, 87 S.W.2d 1022 (1935).

[38]137 Conn. 580, 79 A.2d 600 (1951).

[39]Id. at 601, 602. For examples of other cases following the rule of liability without fault for damages from blasting, see Asheville Constr. Co. v. Southern Ry., 19 F.2d 32 (4th Cir. 1927); Ledbetter-Johnson Co. v. Hawkins, 103 So.2d 748 (Ala. 1958); Baker v. S. A. Healy Co., 302 Ill. App. 634, 24 N.E.2d 228 (1939); Bluhm v. Blanck & Gargaro, Inc., 62 Ohio App. 451, 24 N.E.2d 615 (1939); City of Knoxville v. Peebles, 19 Tenn. App. 340, 87 S.W.2d 1022 (1935).

from the use of explosives.[40] *Whitmore v. Fago*[41] held that the factors freeing the contractor from liability for concussion damages rest on the jurisdiction's rule for explosives. However, if injury is caused by a direct trespass, the contractor will be held liable regardless of whether he would be entitled to share the sovereign's immunity in other cases. Two Kentucky decisions clearly illustrate this distinction.[42] In *Adkins v. Harlan County*[43] the plaintiff sued to recover damages for the taking of and injury to property resulting from the construction of a highway by the state. In holding for the defendant, the Kentucky Court of Appeals stated that in order to recover against a contractor the injured party must prove that the damage occurred as a result of the negligence of or a trespass by the contractor, and it is not sufficient to show that injury resulted from the contractor's doing the work in conformity with the plans of the highway commission. In a later case, *Aldridge-Poage Inc. v. Parks*,[44] in which plaintiff's land was damaged by the construction of a water line for the city by a public contractor, the Kentucky Court of Appeals spoke only of the rule of explosives and entirely disregarded the fact that defendant was a public contractor. The state rule allowing the contractor to share the immunity of its sovereign was not even considered.

Thus it can be said that two rules prevail in deciding the liability of public contractors. First, a contractor hired to do work under a state contract cannot be held liable to one who suffers consequential damage as a result of non-negligent performance of this contract. Secondly, in the majority of cases in which explosives are the cause of injury, the rule granting immunity to the contractor is superseded by the prevailing rule in the jurisdiction with regard to explosives. Though directly in conflict with the majority rule regarding explosive cases, the *Pumpherey* case appears to set forth a more equitable rule. It is

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[40]Aldridge-Poage Inc. v. Parks, 297 S.W.2d 632 (Ky. 1956); Flynn v. Gull Constr. Co., 183 N.Y.S.2d 806 (Sup. Ct. 1959); Whitmore v. Fago, 93 N.Y.S.2d 672 (Sup. Ct. 1949); Del Pizzo v. Middle West Constr. Co., 146 Pa. Super. 345, 22 A.2d 79 (1941).

[41]93 N.Y.S.2d 672 (Sup. Ct. 1949).

[42]Other jurisdictions making this distinction are: (1) Ala., cf. Williams v. Stillwell, 88 Ala. 332, 6 So. 914 (1889), with Ledbetter-Johnson Co. v. Hawkins, 103 So.2d 748 (Ala. 1958); (2) Ill., cf. Maezes v. City of Chicago, 316 Ill. App. 464, 45 N.E.2d 521 (1942), with Baker v. S. A. Healy Co., 302 Ill. App. 634, 24 N.E.2d 228 (1939); (3) N.Y., cf. Benner v. Atlantic Dredging Co., 134 N.Y. 156, 31 N.E. 328 (Sup. Ct. 1892), with Whitmore v. Fago, 93 N.Y.S.2d 672 (Sup. Ct. 1949); (4) Pa., cf. Valley Forge Gardens Inc. v. James D. Morrissey Inc., 385 Pa. 477, 123 A.2d 888 (1956), with Del Pizzo v. Middle West Constr. Co., 146 Pa. Super. 345, 22 A.2d 79 (1941); (5) Tenn., cf. Wood v. Foster & Creighton Co., 191 Tenn. 478, 235 S.W.2d 1 (1950), with City of Knoxville v. Peebles, 19 Tenn. App. 340, 87 S.W.2d 1022 (1935).

[43]82 S.W.2d 425 (1935).

[44]297 S.W.2d 632 (Ky. 1956).