



Immunities and Tort Liability of the Government

Torts
Eric E. Johnson
ericejohnson.com



Konemark
Most rights sharable

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 (unless by statute)
- **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 (and can be immune)
- **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: They 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*.

Who counts as an employee?

- WC statutes provide their own definitions, but
- in general, an employee is distinguished from an independent contractor.
- An independent contractor tends to
 - Work with their own tools
 - Direct themselves in details of working
 - Choose their own hours
 - Do work outside the core competency of the hirer
 - Ex: Website designer for law firm or child day care
- 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
 - Ex: Website designer for Facebook or New York Times

Exclusivity/preclusion/immunity

- Although often called “exclusivity” or “preclusion,” this is a kind of immunity for employers from their employees for accidents.
- Some exceptions to exclusivity/preclusion/immunity:
 - Genuine intentional wrongs
 - Reckless or wanton acts (in some courts)
 - Federal cause of action
 - (State law can't preclude federal law.)
 - Fraudulent concealment
 - Ex: 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 the resulting worsening of the illness.

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/immunity applies.
 - Ex: A factory worker suffers disfiguring burns, merely aesthetic in nature, caused by employer's negligence. Since this doesn't affect the ability to work in a factory, the worker might not be entitled to any compensation yet might be barred from filing a tort action.

MISSOURI DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION

CHART NO. 1 PERMANENT PARTIAL DISABILITY SCHEDULE

Visual Chart Showing Number of Weeks of Compensation Payable for Permanent Partial Disabilities under the MISSOURI WORKERS' COMPENSATION LAW. When there is complete loss of a member - either by severance or loss of use - the number of weeks indicated on this chart for such member(s) is increased by ten (10) percent.

Complete Loss of Sight
in One Eye - 140

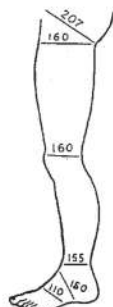
Complete Deafness

Both Ears - 180

(Occupational) - 180

One Ear - 49

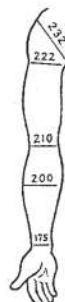
(Occupational) - 49



LEG



FOOT



ARM



HAND



ENTIRE PERSON

WC-110 (06-10) AI

To	SAWW	SAWW	SAWW		
6/30/2006	\$696.97	\$365.08	\$696.97	Gasconade County	Warrent
7/1/2006	105%	55%	105%	Jefferson City Docket	(curren
To	SAWW	SAWW	SAWW	Cole, Maries, Moniteau, Osage	Linco
6/30/2007	\$718.87	\$376.55	\$718.87	Counties	
7/1/2007	105%	55%	105%	Kirksville Docket	ST. JOS
to	SAWW	SAWW	SAWW	Adair, Knox, Putnam, Schuyler,	816-38
6/30/2008	\$742.72	\$389.04	\$742.72	Scotland, Sullivan Counties	Bethany
7/1/2008	105%	55%	105%	Macon Docket	Davi
To	SAWW	SAWW	SAWW	Linn, Macon, Shelby Counties	Chillico
6/30/2009	\$772.53	\$404.66	\$772.53	Marshall Docket	Cald
7/1/2009	105%	55%	105%	Saline County	Maryvil
To	SAWW	SAWW	SAWW	Mexico Docket	Atch
6/30/2010	\$807.48	\$422.97	\$807.48	Audrain, Montgomery Counties	Wort
7/1/2010	105%	55%	105%	Moberly Docket	Platte D
To	SAWW	SAWW	SAWW	Chariton, Monroe, Randolph	Platt
6/30/2011	\$799.11	\$418.58	\$799.11	Counties	St. Jose
				Rolla Docket	Andr
				Crawford, Dent, Phelps Counties	Cour
				Sedalia Docket	Trenton
				Benton, Pettis Counties	Grur
				<i>Names in bold are cities where dockets are held. Cases docketed at those locations are from the counties listed under the docket locations.</i>	ST. LOU
					314-344
					St. Loui
					City

Burial Benefit \$5,000.00
Minimum Rate \$40.00 per week
Disfigurement Max. 40 weeks
Mileage Reimbursement Rate 7/1/10 to 6/30/11 - 50.0 cents per mile

www.labor.mo.gov

Tort liability of the government

Ways to sue the government for torts

- **42 USC § 1983**
 - For violations of federal constitutional rights (and federal statutory rights) by
 - local/state agents/officials/employees acting under color of state law.
 - It's complicated in the details, but wide-ranging.
- **Bivens actions**
 - For violation of federal constitutional rights by federal agents/officers/employees
 - This is much, 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

- The FTCA is a limited waiver of federal government's sovereign immunity.
- Tort suits against the U.S. must be prosecuted under the terms of the FTCA.
- The FTCA covers both procedure and substance.

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.

in other words ...

- must be filed in federal court
- applies to negligent/wrongful acts of government employees on the job (within scope of office/employment)
- based on state tort law as would be applied to a private person





FTCA

Procedure

- Plaintiffs must first file an administrative claim and give the agency a chance to pay it.
- Maybe they will. (They're your government, after all, and hopefully they want to do the right thing.)
- If it's denied, the plaintiff can sue.

Substance

FTCA

- Generally must be on-the-job actions of federal employee (within scope of employment).
- 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!
 - Real example: Hostage negotiations with terrorists.
- The FTCA provides many liability exemptions that trump state tort law.

Many exclusions/exemptions from liability

FTCA

including based on ...

- remedies
- cause of action
- nature of the conduct

Exclusions based on the remedy

- No punitive damages
- No injunctions

(Only compensatory damages are allowed.)

Some exemptions based on the cause of action

- Defamation
- Various fraud claims
- Interference with contract rights
- No suit can proceed under strict liability.
 - Negligence must be proved.
- Assault, battery, and false imprisonment
 - Except federal law enforcement officers, whom you can sue for these intentional torts.

Some 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 ...*

Some 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 is the exception the government likes to drive a truck through ...



FTCA

Discretionary function

Put simplistically, discretionary functions are ones where the government is *governing*. The more the conduct in question is a matter of choice in terms of balancing policy interests, the more likely it is to be a discretionary function. Some extreme examples:

- Deciding to award a defense contract to Pratt & Whitney instead of GE is a discretionary function.
- Running a red light in a postal truck is not a discretionary function.

Scenarios that fall in between are harder to predict.

Is it a discretionary function?

Superintendent of San Juan National
Historic Site disregards safety committee's
recommendation to put up fencing. Tour
guide falls as a result.

- A. Discretionary function
- B. Not a discretionary function

Superintendent of San Juan National Historic Site disregards safety committee's recommendation to put up fencing. Tour guide falls as a result.

- A. **Discretionary function** ✓
- B. Not a discretionary function

NPS officials decide not to repair dangerous concrete culvert headwall. Motorist injured as a result.

- A. Discretionary function
- B. Not a discretionary function

NPS officials decide not to repair dangerous concrete culvert headwall. Motorist injured as a result.

- A. **Discretionary function** ✓
- B. Not a discretionary function

Dead tree in national park falls on passing car because of inadequate “windshield inspections” of hazards on roads in park.

- A. Discretionary function
- B. Not a discretionary function

Dead tree in national park falls on passing car because of inadequate “windshield inspections” of hazards on roads in park.

- A. **Discretionary function** ✓
- B. Not a discretionary function

Dead tree in national forest falls on contractor because of treatment from previous, failed deforestation effort. Contractor, not warned about dead trees, was hired to cut down trees in renewed effort.

- A. Discretionary function
- B. Not a discretionary function

Dead tree in national forest falls on contractor because of treatment from previous, failed deforestation effort. Contractor, not warned about dead trees, was hired to cut down trees in renewed effort.

- A. Discretionary function
- B. Not a discretionary function ✗

Negligent design of modified elevator mechanism of airplane. Flight was undertaken to test modified elevator mechanism – it failed, and the crew died.

- A. Discretionary function
- B. Not a discretionary function

Negligent design of modified elevator mechanism of airplane. Flight was undertaken to test modified elevator mechanism – it failed, and the crew died.

- A. Discretionary function
- B. Not a discretionary function ✘

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. Actually, the firefighter rule has nothing to do with any of this.



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. Actually, the firefighter rule has nothing to do with any of this. ✓

