



Immunities and Tort Liability of the Government

Torts
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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)
 - 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)







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

**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.

CHART NO. 1
PERMANENT PARTIAL DISABILITY SCHEDULE

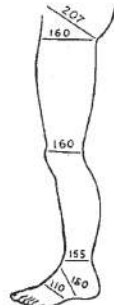
Visual Chart Showing Number of Weeks of Compensation Payable for Permanent Partial Disabilities under the MISSOURI WORKERS' COMPENSATION LAW. When there is complete loss of a member - either by severance or loss of use - the number of weeks indicated on this chart for such member(s) is increased by ten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

Complete Loss of Sight
in One Eye - 140

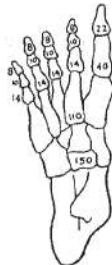
Complete Deafness

Both Ears - 180
(Occupational) - 180

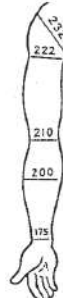
One Ear - 49
(Occupational) - 49



LEG



FOOT



ARM



HAND



ENTIRE PERSON

WC-110 (06-10) M

**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





The FTCA gives the federal government many huge exclusions/exemptions from liability, including

- Only compensatory damages allowed (no punitives, no injunctions)
- Excluded causes of action include defamation, various fraud claims, interference with contract rights, strict liability. That mostly leaves negligence.
- Conduct excluded includes combatant actions of the military, claims arising in a foreign country, and discretionary function.

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Discretionary function is the exception the government likes to drive a truck through ...



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.

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)

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Held: Discretionary function

Is it a
discretionary
function?

The superintendent of the San Juan National Historic Site disregards safety committee's recommendation to put up fencing. A tour guide falls as a result.

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

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

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

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

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

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A modified elevator mechanism of a USAF aircraft was negligently designed. A flight was undertaken to test the modified elevator mechanism – it failed, and the crew died.

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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.



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