TORT LIABILITY REGARDING CERTAIN MORALE, RECREATION AND WELFARE ACTIVITIES

A Thesis

Presented To

The Judge Advocate General's School, U. S. Army

The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either the Judge Advocate General's School, U. S. Army, or any other governmental agency. References to this study should include the foregoing statement.

by

Major Richard K. Dahlinger, 097381

April 1969

SCOPE

The thesis will analyse the following problem areas; U.S. Government liability for torts of employees and members of nonappropriated funds and private associations; liability of the nonappropriated fund and the private association for torts of employees and members of the activity; individual liability of the member or employee of a nonappropriated fund or private association for their torts; liability of the U.S. Government, the fund, association , or a guest when torts are committed by a guest of an activity. The paper will also discuss some of the remedies and defenses available to the respective defendants.

TABLE OF CONTENTS

CHAPTER I

INTRODUCTION

One sunny Sunday morning, Baker was teeing-off on the first hole of the Fort Blank golf course. The ball took off like a shot; screaming down the fairway about five feet off the ground. Abruptly, it sliced to the right, sailed over the out-of-bounds fence and struck Abbot directly on the temple, killing him instantly. Abbot, not a member of the military forces, had been strolling along the left shoulder of an adjacent State highway. This thesis will examine the legal aspects of tort liability which can arise as a result of incidents just such as this.

The following perplexing problem areas are presented in question form as a means of introduction to the subject matter:

> Must Abbot's next of kin rely solely on the assets or insurance coverage, if any, of Baker?
>
> Can the United States Government be joined as a party defendant?
>
> If the golf course was operated as a nonappropriated fund, is the fund subject to suit or payment of a claim?

What difference would it make if Baker were the military golf professional for the club and was giving a playing lesson at the time of the incident?

What tort liability results if the golf course was being utilized for a tournament by an authorized private association?

When it appears that a government employee or a government agency is involved in an incident, an injured party has three possible avenues of approach toward recovery for his damages. As will be seen some remedies are exclusive; some remedies are dependent upon strict compliance with administrative prerequisites; some remedies work to the advantage of the claimant whereas others are to the benefit of the tortfeasor; and in some cases the claimant loses completely if he chooses the wrong remedy. The first available remedy is a civil suit against the individual tortfeasor. However, in many cases a plaintiff will find this remedy unavailable or extremely cumbersome. A second possible remedy is to file an administrative claim against the United States Government. It will be seen that the agency for which an employee-tortfeasor worked, or the agency which a tortfeasor was even a member or guest thereof, will affect the recovery. A third avenue toward recovery is a civil suit against

the United States Government under the Federal Tort Claims Act. In general, the Federal Tort Claims Act permits payment by the United States Government for injuries caused by the wrongful or negligent acts of government employees while acting within the scope of their employment. A great number of books and articles discuss the liability of the government for the torts of military personnel and civilian employees paid from appropriated funds, however there is a paucity of materials related to liability for torts of employees, members and guests of nonappropriated funds and private associations. The thrust of this thesis is directed toward this latter area.

The subject matter has been divided into three general areas:

Chapter II defines and identifies the various types of morale, recreation and welfare activities which are generally associated with the military departments. The importance of this identification process is to assure that the morale, recreation or welfare activity involved is a "federal agency" within the meaning of the Federal Tort Claims Act thereby permitting the submission of a claim or a suit against the government. If the activity is not such a "federal agency" the claimant will be limited to seeking relief against the agency itself or the

individual tortfeasor.

Chapter III discusses nonappropriated funds, to determine when tortious conduct by employees, members or guests can subject the United States Government or the nonappropriated fund itself to payment of damages. Analysis includes liability under the Federal Tort Claims Act and/or relevant military claims regulations. The discussion also encompasses individual liability for torts.

Chapter IV is devoted to private associations, discussing any responsibility they might incur for injuries caused by the negligence of their employees, members or guests. Discussion will also touch on possible liability of the United States Government and the liability of the individual tortfeasor.

Finally, a summary is presented which includes recommendations to improve the system and to clarify certain areas of confusion.[1]

---

1. This paper will not delve into the complicated area of whether a claimant is barred from recovery by the "incident to service" rule because he is a member of the military or a civilian employee. However, on occasion some reference to this situation will be made since the nature of the cases examined required consideration of the matter. Legal analysis of this subject is well covered in Chapter 5, Jayson, Handling Federal Tort Claims, 1967.

CHAPTER II

IDENTIFICATION AND CLASSIFICATION OF ACTIVITIES

Prior to examining possible tort liability of the United States Government, a nonappropriated fund, a private association, or an employee, member or guest of one of these activities, it is appropriate to define just what these organizations and activities are. There are four types of morale, recreation and welfare activities. It will be observed that the claims and judicial procedures, as well as ultimate responsibility, is greatly affected by the type of activity which is involved.

A. STATUTORY ORGANIZATIONS

Certain organizations which perform morale, recreation or welfare activities on and around military installations are established and operated pursuant to United States or State statutes. These organizations perform an important function for the military, are almost always found existing on an installation, and are most frequently considered as part of the military establishment. However, although many of these organizations are authorized a place to meet or office space on

the installation,[2] and certain other logistic support,[3] it will be seen that they are not military organizations nor even agencies or instrumentalities of the United States Government so as to permit a suit against the government under the Federal Tort Claims Act. A few of these organizations will be identified and discussed for purposes of clarification and edification.

Title 36 of the United States Code lists patriotic societies authorized and recognized by the United States Government.[4] The Boy Scouts of America, for example, operates at virtually every U.S. military post in the world, yet few people understand its status. The Boy Scouts of America is a charitable institution. Its existence is authorized by federal statute and it is not liable for negligence of its agents unless negligent in selecting those agents.[5] Other similar organizations

---

2. Army Reg. No. 210-55, Para. 7g (26 Jul.1956), and Army Reg. No. 230-5, para. 2(18 Jul. 1956) /hereafter cited as AR 230-5/.

3. Army Reg. No. 930-5 (28 Jun. 1968)-Red Cross/hereafter cited as AR 930-5/, and Army Reg. No. 950-1 (2 Feb. 1961)-USO /hereafter cited as AR 950-1/.

4. 36 U.S.C. 21-29

5. Young v. Boy Scouts of America, 51 P. 2d 191, 9 Cal. App. 2d 760 (1935).

are: The American National Red Cross,[6] The American Legion,[7] Big Brothers of America,[8] and the Civil Air Patrol,[9] to name a few.

In Pearl v. United States,[10] the court held that the Civil Air Patrol was not a corporation primarily acting as an instrumentality of the United States. The court stated: "The control of Congress over this corporation is only such as is common to virtually all private corporations granted federal charters-merely requiring the transmittal to Congress each year of a report of its proceedings and activities for the preceding calendar year."[11] A suit will therefore not lie against the U.S. Government for torts of the Civil Air Patrol or its employees. The claimant must seek redress against the agency or the individual employee-tortfeasor.

A similarly situated organization is the American National Red Cross. The Red Cross provides many general welfare and recreation services to military personnel

---

6. 36 U.S.C. 1-17.

7. 36 U.S.C. 41-51.

8. 36 U.S.C. 881-898.

9. 36 U.S.C. 201-208.

10. 230 F.2d 243 (10 C.C.A. 1955).

11. Id. at 244.

and their families. They are also entitled to many benefits of the military department,e.g. office space, supplies and equipment, communications facilities, transportation, subsistence, quarters, medical care, commissary, exchange and APO privileges.[12] In spite of the foregoing, Red Cross personnel are salaried by the Red Cross, are subject to the control and immediate reassignment by the Red Cross and are in all other respects independent contractors not in the employ of the United States Government. Accordingly, torts committed by Red Cross personnel cannot be considered as a tort committed by an employee of the United States Government within the purview of the Federal Tort Claims Act.[13]

Another statutory organization which serves the religious, spiritual, social, welfare, and educational needs of the armed forces is the United Service Organizations (USO).[14] The USO is a private association chartered under the laws of the State of New York and primarily serves members of the armed forces and their dependents outside

---

12. AR 930-5, Chapter 3.

13. United States ex rel. Salzman v. Salent and Salent, 41 F.Supp. 196 (D.C.N.Y. 1938). "The Red Cross is not part of the Government, nor a department or officer thereof, and its funds are not property of the government." cf. 10 U.S.C. 2602(e) (1964).

14. AR 950-1.

of military reservations when such personnel are off duty or on leave. This organization is also recognized as the principal civilian agency for the procurement of live entertainment for showing to the armed forces. However, even though the USO performs services at the request of the military, and USO personnel are authorized certain logistical support, such as commissary and exchange privileges,[15] this does not alter the fact that the USO is a private statutory organization similar to the Red Cross and its services to the government are as a private contractor for which the United States assumes no liability.[16]

Based on the foregoing discussion, it is important to remember that torts committed by employees of these types of organizations do not subject the United States to suit under the Federal Tort Claims Act and are without the Army Claims System. An injured party should be

---

15. AR 950-1, para. 10.

16. Gradall v. United States, 329 F.2d 960(Ct. Cl. 1963), and Pulaski Cab Co. v. United States, 157 F. Supp. 955(Ct.Cl. 1958). See also, Scott v. U.S.O. Camp Shows Inc., 82 N.Y.S. 2d. 118, 274 App. Div. 862(1948), and Polsky v.U.S.O. Camp Shows Inc., 74 N.Y.S. 2d. 667, 272 App. Div. 1094(1947), holding entertainers of USO performing overseas at request of military to be in scope of employment of USO when injured. It can be assumed such employees would likewise be held to be USO employees and not U.S. Government employees should such individual injure a third party.

advised to seek recovery of his damages against the organization itself, or the individual tortfeasor.

The only exception to the aforementioned conclusion that the United States Government is not liable for the negligent acts of employees of private corporations or agencies authorized existence by federal or state statute is the American Battle Monuments Commission.[17] The acts of incorporation for this organization provide that claims for loss or destruction of real or personal property, personal injury or death of any person caused by the negligent or wrongful act or omission of any officer or civilian employee of the commission while acting within the scope of his office or employment may be considered and settled under the Foreign Claims Act.[18] This Act limits recovery to incidents arising in a foreign country and concerning non U.S.-resident claimants.

B. SPECIAL SERVICES

Another type of activity which performs and provides morale, recreation, and welfare services to the military command is Special Services.

---

17. 36 U.S.C. 121-138.

18. 10 U.S.C. 2734, 2735, as implemented by Army Reg. No. 27-28(20 May 1966).

> Special services embraces those personnel services established and controlled by military authorities and designed to contribute to the physical and mental effectiveness of military personnel and authorized dependents and civilian employees. [19]

The regulation further enunciates that the mission of Special Services is to stimulate, develop, and maintain the mental and physical well-being of military personnel through their participitation in planned recreation and morale activities.[20] United States Government appropriated funds are used for employment and utilization of civilian personnel at all echelons, procurement of necessary supplies, equipment, furniture, furnishings and fixtures, and construction, modification, and maintenance of facilities.[21] Nonappropriated funds may be used to supplement appropriated funds to support Special Services.[22]

Major programs of Special Services are Army Library program, Army Sports program, Army Service Clubs and Army Dependent Youth Activities program. In addition, Special Services can establish and operate rest and

---

19. Army Reg. No. 28-1, para. 2a (15 Sep. 1964) [hereafter cited as AR 28-1].

20. AR 28-1, para. 3.

21. AR 28-1, para. 9a.

22. AR 28-1, para. 9b.

recouperation areas, as well as constructing golf courses, swimming pools and bowling alleys.[23]

Special Services activities and facilities are therefore appropriated fund activites of the United States Government. All employees are either full-time military personnel or civilian employees paid from appropriated funds. Accordingly, torts committed by any of these employees while acting within scope of employment are processed as normally required under the Federal Tort Claims Act and implementing army regulations.[24]

C. NONAPPROPRIATED FUNDS

A nonappropriated fund is an entity established by authority of the Secretary of the Army for the purpose of administering moneys not appropriated by the Congress for the benefit of military personnel or civilian employees of the Army.[25] Nonappropriated funds are instrumentalities of the Federal Government and as such are entitled to all the immunities and privileges which are available under the Federal Constitution and statutes of

---

23. AR 28-1, para. 17,18.

24. Army Reg. No. 27-22(18 Jan. 1967) [hereafter cited as AR 27-22].

25. AR 230-5, para. 3a.

the departments and agencies of the Federal Government.[26] Further, such funds are established and supervised as a command function by officers or employees of the Government acting within the scope of their official capacity.[27] Individuals, installations, organizations, and units have no proprietary interest in the funds, and profits, if any, do not accrue to any individual.[28]

Three general types or categories of nonappropriated funds are authorized by regulations. Revenue-producing funds are self-sustaining funds established to sell merchandise and services.[29] Examples are exchanges, motion picture theaters and post restaurants. Welfare funds are established and maintained by income derived primarily from dividends from revenue-producing activities.[30] Examples are Central Welfare funds, Unit funds, Central Post funds, and Commandants' Welfare funds. Sundry funds pertain to self-sustaining funds and to associations whose active membership, composed of limited groups of military

---

26. AR 230-5, para. 4d.

27. AR 230-5, para. 4d(1).

28. AR 230-5, para. 4d(2).

29. AR 230-5, para. 3b.

30. AR 230-5, para. 3c.

members and eligible civilian employees, support the fund.[31] Examples are the Central Mess funds, Officers', Non-commissioned Officers' and Warrant Officers' open messes, and other association funds considered essential for the morale, recreation and welfare of the command and organized pursuant to the nonappropriated fund regulations, such as golf courses, hunting and fishing clubs and flying clubs.[32]

D. PRIVATE ASSOCIATIONS

Private associations are organized, established, and operated by individuals acting not within the scope of their official capacity as officers, employees, or agents of the Government, are not established to provide essential morale and recreational facilities and services, and are not subject to the requirements of the nonappropriated fund regulations.[33] These organizations exist on a military installation only with the written consent of the installation commander, which consent can be withdrawn at any time if deemed necessary in the interest of

---

31. AR 230-5, para. 3d.

32. The historical background and legal aspects of nonappropriated funds are discussed at length in Kovar, Nonappropriated Funds, 1 Mil. L. Rev. 95 (1958).

33. AR 230-5, para. 2b.

the Government.[34] Some of the other requirements of private associations, in order to be permitted to operate on an installation, are that the nature and authorized functions of the organization be established in a constitution and by-laws, charter, or articles of agreement, that neither the Army, nor a nonappropriated fund assert claim to the assets of the organization, that neither the Army nor any nonappropriated fund assume any of the obligations of the association,[35] and that such association not engage in activities which are in conflict with authorized activities of nonappropriated funds.[36] Examples of private associations are wives clubs, hunting and fishing clubs, skeet shooting clubs, flying clubs, and parachute clubs. It should be noted that in some instances a particular form of morale, recreation or welfare activity is conducted as a nonappropriated fund, and in other instances as a private association. It will be seen that whether an activity is organized as a nonappropriated fund or a private association will have a significant bearing upon the remedies available to an injured claimant.

---

34. AR 230-5, para. 2b(7).

35. See JAGA 1961/5437, 24 Oct. 1961, expressing no legal objection to establishing a private association to support an existing sundry fund.

36. AR 230-5, para. 2b.

CHAPTER III

TORT LIABILITY RELATING TO NONAPPROPRIATED FUND ACTIVITIES

To return to the example incident which was related in the Introduction, let us assume that the golf course at Fort Blank was operated as a nonappropriated fund and that a claim has been presented by Abbot's next-of-kin. Assuming further that the next-of-kin is a proper claimant and that negligence is provable, whether the United States Government is subject to payment of damages depends upon three important considerations:[37] whether a nonappropriated fund is an instrumentality of the United States; whether the individual tortfeasor was an employee, member or guest of the nonappropriated fund; and whether his tortious act was committed within the scope of his employment or within the scope of the authorized activities of the nonappropriated fund.

There are two avenues toward recovery against the United States Government for the tortious acts of an employee of a nonappropriated fund. First, is an admin-

---

37. These considerations are the initial basic requirements for a claim or suit, but are not meant to preclude consideration of defenses which could bar recovery such as the "indident to service" rule, an intentional tort, contributory negligence, or the statute of limitations, to mention a few.

istrative claim against the nonappropriated fund itself.[38] For many years prior to 1958, the Secretary of the Army provided that nonappropriated funds would carry public liability insurance to protect the assets of such activities from possible loss through civil suit. Since 1958 nonappropriated funds no longer carry liability insurance, but they are protected by a self-insurance system.[39] The extent of protection remains the same under either system; employees of nonappropriated fund activities are protected from civil liability for torts committed while acting within the scope of their employment.[40] Pursuant to this self-insurance system meritorious claims against the nonappropriated fund are paid from nonappropriated funds.

In 1946, the Federal Tort Claims Act provided another avenue of recovery. This waiver of sovereign immunity permitted a claimant to file a claim against the government or file suit directly. This right of election was subsequently precluded by an amendment to the Act.[41]

---

38. AR 230-8, para. 14(27 Aug. 1958).

39. AR 230-8, para. 13.

40. See, Infra Sections B and C, this chapter, discussing that this protection is not absolute except when the employee was operating a vehicle in the scope of his duties, or when the claimant accepts an administrative settlement from the Government.

41. A request for administrative settlement (claim) must be made prior to institution of suit. 80 Stat. 306 (1966), amending 28 U.S.C. 2675(1964).

Under the present law, if a claim is filed and denied, or the settlement offered is considered insufficient by the claimant, suit can be filed in the federal courts against the Government. Although in most instances the basis for recovery under an administrative claim is exactly the same as that which would prevail in litigation pursuant to the Federal Tort Claims Act, due to the special nature of nonappropriated fund claims and the expanded coverage which is offered in regard to members and guests of such funds, the discussion of tort liability will be divided into two sections within this chapter: first, the basis of recovery under the Federal Tort Claims Act; and second, the requirements and basis for recovery under military claims regulations.

A. LIABILITY OF THE UNITED STATES UNDER FEDERAL TORT CLAIMS ACT.

In 1946, the Federal Tort Claims Act was enacted into law.[42] The importance of this legislation was its sweeping waiver of the Government's sovereign immunity from suit. Under the provisions of the Act, money damages can be paid by the United States for injuries to

---

42. 60 Stat. 842, 28 U.S.C. 1346, 2671-2680.

property or persons 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.[43] The Act defines an employee of the government to include officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.[44] A federal agency is defined as follows:

> 'Federal agency' includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.[45]

In order to determine whether a nonappropriated fund and its employees come within these definitions, thereby subjecting the government to payment of damages for their negligent acts, the discussion will be divided into

---

43. 28 U.S.C. 1346(b) (1964).

44. 28 U.S.C. 2671 (1964).

45. Id.

three areas: whether a nonappropriated fund employee is a government employee; whether he is employed by or acting on behalf of a federal agency; and whether he was acting in the scope of his employment at the time of the incident.

1. Government Employees

All nonappropriated fund activities are created and governed by carefully detailed regulations prescribed by the Secretary of the Army.[46] Nonappropriated funds have been recognized as governmental activities by Congress,[47] the courts and the Comptroller General,[48] and they are controlled and directed in their day-to-day operations by members of the military services in the course of their military duties. Despite these elements of control and the obvious principal-agent relationship between the Secretary of the Army and the activities which these elements represent, there has been a division of opinion in the federal courts and the military departments as to the legal rights and liabilities of the United States for the torts of employees of these activities. Some courts have adopted the view that nonappropriated fund

---

46. Army Regs. No. 230-5 to 230-117.

47. 5 U.S.C. 8171-8173 (1966), formerly 5 U.S.C. 150k (1952).

48. 24 Comp. Gen. 771 (1945), and cases cited therein.

activities are arms of the federal government, so as to make the United States liable for claims sounding in tort arising out of their activities, to the same extent that the United States has consented generally to be sued in such matters.[49] Other courts have held that even though nonappropriated fund activities are instrumentalities of the United States, the general waivers of sovereign immunity by the Congress do not extend to them.[50] Some courts have even held that nonappropriated fund activities are not agencies or instrumentalities of the federal government.[51] A closer examination of the more recent court decisions and Army Regulations will shed some light in this area.

The leading case in defining the status of nonappropriated funds is Standard Oil of California v. Johnson[52] (hereafter cited as the Johnson case). This case in-

---

49. Daniels v. Chanute Air Force Base Exchange, 127 F. Supp. 920 (E.D. Ill. 1955).

50. Pulaski Cab Co. v. United States, 157 F. Supp. 955 (Ct. Cl. 1958); Borden v. United States, 126 Ct. Cl. 902, 116 F. Supp. 873 (1953); Edelstein v. South Post Officers' Club, 118 F. Supp. 40 (E.D. Va. 1951). In each of these cases the court granted the Governments motion to dismiss, which was grounded on sovereign immunity and the consequent lack of jurisdiction of the court.

51. Faleni v. United States, 125 F. Supp. 630(E.D.N.Y.1949).

52. 316 U.S. 481 (1942), 62 S.Ct. 1168.

volved an appeal from the decision of the Supreme Court of California upholding a license tax which had been levied by California tax authorities on a distributor who sold gasoline to the United States Army post exchanges in California. Section 10 of the California Motor Vehicle Fuel License Tax Act stated that the Act was inapplicable to any motor vehicle fuel sold to the Government of the United States or any department thereof for official use of said Government. The California Supreme Court had decided that a post exchange was not a part of the Government of the United States for this purpose.

The Supreme Court of the United States reversed, holding that the question of whether post exchanges were "the Government of the United States or department thereof" was a matter controlled by federal law, and that as a matter of federal law post exchanges were integral parts of the War Department. The court stated:

> From all of this, we conclude that post exchanges as now operated are arms of the Government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the Constitution and federal statutes. In concluding otherwise the Supreme Court of California was in error. [53]

---

53. 316 U.S. 481 at 485.

The next revision of Army Regulations concerned with fund activities contained for the first time the following provision: "Activities and funds authorized by these regulations are government instrumentalities and are entitled to the immunities and privileges of such instrumentalities."[54]

In spite of the Johnson case, deciding that nonappropriated funds are agencies of the United States Government, the fact that the Secretary of the Army recognized this fact by so stating in his regulation immediately after the Johnson case, and the obvious principal-agent relationship which exists between the Secretary and the nonappropriated fund activities concerned, a great deal of controversy over this point was generated after the passage of the Federal Tort Claims Act.

The first case of major importance to reach the federal courts on this matter was Faleni v. United States.[55] This case involved a suit under the Federal Tort Claims Act to recover damages for personal injuries sustained by the plaintiff as the result of the negligence of an employee of the United States Government. Faleni was

---

54. Army Reg. No. 210-50, para. 5h (1 Jun. 1944).

55. 125 F. Supp. 630 (E.D. N.Y. 1949).

employed by the Ship's Service Department of the Floyd Bennett Field Naval Air Station in New York City(The Ship's Service Department was a nonappropriated fund). Faleni was returning home after work on a Navy bus owned and controlled by the United States, and operated by one of its employees in the regular course of employment.The complaint alleged that the operator managed the bus in such a reckless and careless manner as to cause the plaintiff's injuries. The Government defended on the ground that the Ship's Service Department was an agency of the United States and hence, the plaintiff was an employee of the United States; that the plaintiff was injured in the course of her employment; and that the plaintiff was covered by Workman's Compensation and had filed a claim thereunder and, hence was barred from recovery. The Government cited the Johnson case in support of its position that the plaintiff was an employee of the United States. In denying the Government's motion for summary judgment to dismiss the complaint the court stated:

> Granting that /post exchanges are arms or instrumentalities of the government as stated in the Johnson case/, it does not necessarily follow that the plaintiff was an employee of the defendant. That is too nebulous a basis on which to establish a relationship of employer and employee. The plaintiff's salary was not paid from funds appropriated by the Congress. The defendant made no grant or appropriation from the merchandise or

> services sold at the Ship's Service Department or the recreational facilities furnished by it. All of its income is derived from purchases made by naval personnel and its own civilian employees. It pays its own obligations for maintenance and upkeep, including heat, light, power and other services....
> ....The foregoing facts,...satisfy me that the Ship's Service Department is merely an adjunct of and a convenience furnished by the Navy Department, and that an employee thereof is not an employee of the United States of America. [56]

Based on this expressed reasoning the court reached the conclusion that the plaintiff was not an employee of the United States, the Ship's Service not being a "federal agency", and that the Johnson case was interpreted as standing only for the proposition that instrumentalities of the government cannot be taxed by the States.[57]

In 1952, the Judge Advocate General of the Army, adopting the theory of the Faleni case, concluded that a nonappropriated fund was not a "federal agency" within the meaning of the Federal Tort Claims Act, and that an employee, paid from nonappropriated funds, could not be an employee of the United States Government as that term is defined in the Federal Tort Claims Act. The

---

56. Id. at 632.

57. There was no question of the status of the tortfeasor as an employee of the government and that liability would lie under the Tort Claims Act if the plaintiff was a proper party. The case is cited for the proposition that the government argued that an employee of a nonappropriated fund, regardless of whether he be claimant or tortfeasor, is a government employee.

opinion states: "...,nonappropriated fund instrumentalities being mere adjuncts of the Department of the Army are not federal agencies within the meaning of the Act."; and, "Persons working for nonappropriated fund instrumentalities are not employees of any federal agency within the meaning of the Act.".[58] The effect of this opinion was to convey the position of the Department of the Army to the Justice Department, which is responsible for defending suits against the United States, that nonappropriated fund activities are not "federal agencies" and employees of such activities are not "federal employees". Thereafter, the Justice Department began defending suits against the government on the grounds that liability under the Federal Tort Claims Act should not lie for negligent acts of employees of nonappropriated funds.

Late in 1952, the District Court in Georgia had little difficulty in deciding that the Government was liable for negligently causing death at a nonappropriated fund activity.[59] In this case, an umbrella had been negligently fastened to a lifeguard stand at a civilian

---

58. JAGL 1952/1906, 2 Feb. 1952, 1 Dig. Ops. Claims #33.1.

59. Brewer v. United States, 108 F. Supp. 889 (D.C. MD Ga. 1952).

swimming pool operated by the Air Force. The umbrella fell off during a small whirlwind, killing a boy who was standing nearby. The Government asserted that the civilian swimming pool was not a governmental agency. No authorities were cited to support this conclusion. Likewise, without citing authority, the court stated:

> I have no serious difficulty in reaching the conclusion that the civilian pool was a governmental agency, for the reason that the same was constructed, maintained and operated by Government agents and was under their direct supervision and control; that Government agents, and particularly Major McWaters, was directly in charge of the pool, visited it daily, superintended its activities, promulgated rules and regulations for the operation of the pool, and that if any injury was suffered by the negligent operation thereof, the defendant /United States/ would be liable.[60]

In 1954, an action for damages was brought under the Tort Claims Act to recover for personal injuries and property damage sustained in a collision between the plaintiff's automobile and a truck which was negligently driven by an Air Force enlisted man who was assigned to the Air Force Base Exchange on permanent duty status.[61] The government defended on the ground that the enlisted man was an employee of the Base Exchange, a nonappropriated fund instrumentality, and so was not an employee of the Government within the meaning of the Federal Tort Claims Act.

---

60. Id. at 891.

61. Roger v. Elrod, 125 F. Supp. 62 (D.C. Alaska 1954).

The government cited Faleni in support of its assertion. The court distinguished the Faleni case from the one at bar basically because in Faleni the employee was a civilian employee paid from nonappropriated funds and no more, whereas in this case the enlisted man wore a uniform of the Air Force, was on call twenty-four hours a day, and his pay was drawn from the United States Government. The court relied heavily on the Johnson case and stated:

> ...the fact that the maintenance of a Post Exchange has been held to be an integral part of the War Department by the Supreme Court and that, in this case, military personnel have been utilized in its operation, would certainly seem to indicate that the operation of the Post Exchange is the business of the Air Force and that it had the right to supervise and control the duties of servicemen assigned to it.[62]

The court cited the Brewer case in support of its holding.

In 1955, in Daniels v. Chanute Air Force Base Exchange and the United States,[63] this matter was again litigated. The plaintiff, a civilian employee of the Chanute Air Force Base Exchange, brought his action under the Federal Tort Claims Act to recover for personal injuries received in the course of employment as the result of negligence of the United States. The court dismissed the complaint as

---

62. Id. at 65.

63. 127 F. Supp. 920 (E.D. Ill. 1955).

to the Exchange itself, on grounds not here relevant. As to the suit against the United States, the Government maintained that a post exchange was not an agency of the United States and the suit therefore should not come within the Federal Tort Claims Act. The Government relied upon two cases; Faleni v. United States, and Keane v. United States.[64] The court cited the Johnson case as clearly showing that an exchange is an instrumentality of the United States and that the United States is therefore subject to suit under the Federal Tort Claims Act. In support of this position the court cited several other cases which held that nonappropriated fund activities were agencies of the Federal Government.[65] The court also took particular note of the fact that in the Faleni case the Government took exactly the opposite position;

---

64. 272 F. 577 (4th Cir.,1921) holding a conspiracy to defraud a post exchange not a conspiracy to defraud the United States.

65. United States v. Query, 37 F. Supp. 972, aff'd, 121 F.2d. 631 (4th Cir. 1941)(exchange was "federal instrumentality"); Borden v. United States, 116 F. Supp. 873, 126 Ct. Cl. 902 (1953)(Army Exchange Service was an agency of the U.S. and couldn't be sued on a contract of employment without its consent); and Edelstein v. South Post Officers' Club, 118 F. Supp. 40 (E.D. Va. 1951)(Army officers' club was an agency of the United States and couldn't be sued for breach of contract without its consent). Note-These cases involved contracts, which are not the subject of suit under the Federal Tort Claims Act.

that the nonappropriated fund employee was an employee of an agency of the United States and could not recover for the negligence of a fellow employee. The court refused to accept the Faleni case, holding that the Johnson case clearly refutes the arguments and decision of the Faleni case. In throwing aside the Keane case, cited as authority by the Government for its position, the court said: "This case was decided prior to the Johnson case, and there is a strong dissenting opinion with which this court is in accord.".[66]

In Aubrey v. United States,[67] the plaintiff was the assistant manager of the Officers' Mess at the Naval Gun Factory in Washington D.C. The Officers' Mess was a nonappropriated fund activity and Aubrey's salary as an employee of the Mess was paid from the proceeds of the sale of food and beverages. On the day in question the club's hall was being waxed by Navy enlisted men acting within the scope of their employment, when Aubrey, in the course of his duties as assistant manager, slipped on the newly-waxed floor, fell and broke his ankle. The

---

66. 127 F. Supp. at 924.

67. 254 F.2d. 768, 103 U.S. App. D.C. 65 (1958).

Mess, as required by statute,[68] had provided workmen's compensation insurance and Aubrey had collected under it. He then sued under the Federal Tort Claims Act. His wife joined in the complaint as a plaintiff for loss of consortium. The interesting point in this case was the fact that the plaintiff and the Government stipulated that the plaintiff was not a Government employee on the night of the accident. No explanation was provided as the basis for this stipulation, however, based on the stipulation the plaintiff urged that even though he had received compensation benefits, since he was not a government employee he was not barred from bringing suit under the Federal Tort Claims Act. The court rejected this argument, holding that the compensation provided by the Officers' Mess was Aubrey's exclusive remedy.

> ...By enacting a statutory system of remedies for injuries in the course of employment by these government instrumentalities, Congress has limited the remedy available against the United States by civilian employees of such instrumentalities to workmen's compensation, the cost of which is borne by the self-supporting instrumentalities themselves.[69]

The court indicated there was little doubt that nonappropriated funds are instrumentalities of the government, citing the Johnson case, and based on the close relation-

---

68. 72 Stat. 397 (1968), 5 U.S.C. 8171 (1966), formerly 66 Stat. 138 (1952), 5 U.S.C. 150k, 150 k-1.

69. 254 F.2d. at 770.

ship between such nonappropriated fund instrumentalities as officers' messes and the military establishment of which they form an arm Congress was justified in its legislative control over such instrumentalities. By such legislation Congress had directly regulated the conduct of these activities to the extent of requiring them to provide workmen's compensation protection for their civilian employees. Based on this, the court dismissed Aubrey's complaint. Since Aubrey was an employee of an agency which was required by statute to provide compensation benefits, and he had recovered thereunder, he had no other remedy. However, because the parties stipulated that Aubrey was not an employee of the Government, a cause of action was created for the wife's damages for loss of consortium.[70] Immediately thereafter legislation closed this loop-hole by providing that the liability of the United States or of a nonappropriated fund regarding the disability or death of an employee would be exclusive, where insurance protection is provided, as to the employee or any other person entitled to recover.[71]

---

70. The husband's recovery under District of Columbia Workmen's Compensation Act was exclusive and bars claim by wife against that employer(33 U.S.C. 9050, but since wife is suing a third party, U.S. Government, she is not barred and is a proper party-plaintiff since Aubrey was not employed by the Government.

71. 5 U.S.C. 150k-1(c)(1958), now codified in 5 U.S.C. 8173(1966).

The final two cases to be considered in this area are United States v. Forfari,[72] and Holcombe v. United States.[73]

In the Forfari case, the plaintiff was a civilian chef in the Commissioned Officers' Mess at Mare Island Naval Shipyard, Vallejo, California. While so employed, he slipped and fell down a flight of stairs which led from the kitchen to the employees' washroom. The lower court found that the injuries were proximately caused by the negligence of the United States and entered judgment for the plaintiff. The Government appealed, asserting that Forfari was an employee of the United States and was therefore barred from bringing an action under the Federal Tort Claims Act, and/or that as he is an employee of a nonappropriated fund instrumentality of the United States, he is precluded from bringing this action because of his recovery under the California Workmen's Compensation Act. The plaintiff countered these arguments on the ground that even though a nonappropriated fund is a federal instrumentality, as decided in the Johnson case, this does not make him a federal employee, citing the

---

72. 268 F.2d. 29 (9th Cir. 1959), cert. den. 361 U.S. 902, 80 S.Ct. 211, 4 L.Ed.2d. 157.

73. 176 F. Supp. 297 (E.D.Va. 1959), aff'd., 277 F2d. 143 (4th Cir. 1960).

Faleni case.[74] The court rejected this assertion, stating that the rationale of the Faleni case appeared to be wholly inconsistent with the reasoning and decision of Standard Oil of California v. Johnson.[75] The court was quite emphatic in its decision that Forfari was at the time of his injury a federal employee. He was precluded from bringing an action under the Federal Tort Claims Act since a system of simple, certain, and uniform compensation for injury or death was provided for through workmen's compensation, citing Aubrey v. United States.[76] This case can therefore be cited as authority for the proposition that nonappropriated fund employees will be recognized as federal employees, but that they are not proper plaintiffs under the Federal Tort Claims Act when they are themselves injured incident to their employment since they are covered by workmen's compensation insurance. However, will their torts cause government liability?

In the Holcombe case, the plaintiff, a civilian employee manager of an officers' mess, instructed another employee to proceed in the plaintiff's personal automobile to the post commissary to pick up some salad

---

74. Supra, note 55 and accompanying text

75. Supra, note 52 and accompanying text.

76. Supra, note 67.

dressing. His car was destroyed in an accident. In the District Court, the complaint was dismissed, holding that the employee, Miss Roller, was not within the scope of her employment. On appeal the judgment was vacated as under Maryland law she was acting within the scope of her employment. The case was remanded to the District Court which awarded for the plaintiff, $1,325., the value of his automobile and its destroyed contents. The Government appealed and stood on the sole contention that the United States had not waived immunity for torts of civilian employees of "nonappropriated instrumentalities" as such instrumentalities are not "federal agencies" within the meaning of the Federal Tort Claims Act and the fund is not supported by appropriations out of the national treasury, but is financed by its own operations. The court rejected this argument and in affirming for the plaintiff relied on the Johnson case. The court stated:

> ....An Officers' Mess being an integral part of the military establishment, and an agency of the Government according to the usual meaning of the word, and having been held to be such in other contexts, it is difficult to escape the conclusion that the Federal Tort Claims Act encompasses it. The policy of the Act is to fix Government liability under the doctrine of respondeat superior just as if the United States were a private employer. In the absence of any restriction in the statute, a court cannot read into it the exception contended for. [77]

Thus a nonappropriated fund employee can subject the

---

77. 277 F.2d. at 146.

United States Government to liability for negligent or wrongful acts committed in the scope of their employment, as such employees are considered "federal employees".

As can be seen from the examined cases, the Government asserted every possible defense to avoid subjecting the Government to responsibility for injuries to or caused by nonappropriated fund employees. For the most part, the courts refused to adopt any of them. This dispute over the status of nonappropriated funds having continued for over ten years as of the date of the Holcombe decision, stimulated a letter, dated 14 July 1960, from the Assistant Attorney General of the United States to the Judge Advocate General of the Army.[78] The gist of this letter was that through the years the three Military Departments have urged the Department of Justice to dispute liability in cases relating to nonappropriated fund activities on the ground that nonappropriated fund employees are not "employees of the government" and that a nonappropriated fund instrumentality is not a "federal agency" within the definition of these terms in the Federal Tort Claims Act. The Justice Department had consistently advanced the views of the

---

78. This letter is filed in the Tort Claims Branch, Litigation Division, Office of the Judge Advocate General of the Army.

military departments before the courts, but without success. The Holcombe case, which was the first appellate court decision on point, as well as the other cases which rejected the Justice Department's contentions (e.g. Daniels v. Chanute Air Force Base Exchange, Roger v. Elrod, Brewer v. United States) demonstrate the futility of pressing the point any further. The letter continued that based upon full consideration of the matter the Solicitor General had decided not to seek Supreme Court review of the Holcombe decision, and that the Justice Department would no longer contend that nonappropriated fund instrumentalities are not federal agencies within the meaning of the Federal Tort Claims Act.

Based upon the examined line of cases, and the aforementioned decision by the Justice Department, it appears well settled that the United States is liable under the Federal Tort Claims Act for the negligent or wrongful conduct of nonappropriated fund employees whether paid from appropriated or nonappropriated funds[79] assuming all

---

79. The courts make no distinction in regard to the class of tortfeasor, although present Army Regulations do. For example, Army Reg. No. 27-20, paras. 26-27 (20 May 1966) provide that acts or omissions of military personnel while performing assigned military duties, and acts or omissions of civilian employees paid from appropriated funds, will be paid from appropriated funds, whereas claims resulting from acts or omissions of civilian employees of nonappropriated

other elements of liability under the Federal Tort Claims Act are present. Later court decisions have consistently followed this view.[80]

The administrative regulations of the Department of the Army have likewise been amended to accept this conclusion. For example, until 1964, Army Regulations provided:

> The United States is not responsible for contract, tort and compensation claims against the Army and Air Force Exchange Systems and has not waived its immunity from suit on those claims. Any claim arising out of the activities of A & AFES shall be payable solely from nonappropriated funds.[81]

In 1964, this regulation was amended to conform to the case law interpretation of the relationship between nonappropriated funds as "federal agencies" and the Federal

---

funds paid from nonsppropriated funds will be paid from nonappropriated funds. The Federal Tort Claims Act offers no basis for this distinction and the courts have likewise failed to make any differentiation. Accordingly, although a distinction is present as to the accounting principles by which a claim may be paid because of the class of tortfeasor, a suit may be instituted under the Federal Tort Claims Act regardless of the type of nonappropriated fund employee.

80. Tempest v. United States, 277 F. Supp. 59 (E.D.Va. 1967)(vessel owned and operated for recreational purposes by NAF is public vessel and subjects United States to liability for negligent operation); Fraley v. United States, 232 F. Supp. 491 (D.C. Mass. 1964) (ownership of vehicle by NAF is ownership by government); Fournier v. United States, 220 F. Supp. 752 (S.D. Miss. 1963)(United States liable for negligence of officers' club in serving drinks to intoxicated person who then fell down stairs).

81. Army Reg. No. 60-10, Air Force Reg. No. 147-7A, para. 1(7) (Change No. 2, 2 Aug. 1960).

Tort Claims Act. The regulation now reads as follows:

> The A and AFES is an instrumentality of the United States....Suits by or against the A and AFES or individual exchanges are in legal effect suits by or against the United States. However, claims and judgments, including compromise settlements of court actions, against the United States arising out of exchange activities are payable solely out of A and AFES funds. [82]

The effect of this change is to clarify the fact that the Exchange Service is liable for the torts of its employees, but that the Exchange itself may not be sued in its own name.[83]

2. Employee of a Federal Agency

The question of whether the tortfeasor was an employee of a federal agency is of crucial significance in all cases under the Federal Tort Claims Act, for the liability assumed by the United States under the Act is a respondeat superior type of liability. If there is no master-servant relationship between the United States and the tortfeasor, there can be no liability. The Federal Tort Claims Act provides that the term "employee of the Government" includes "officers or employees of any

---

82. Army Reg. No. 60-10, Air Force Reg. No. 147-7, para. 7 (30 Jan. 1964).

83. Goddard v. District of Columbia Redevelopment Land Agency, 287 F.2d. 343 (C.A. D.C. 1961), cert. den. 366 U.S. 910.

federal agency", "members of the military or naval forces of the United States", and "persons acting on behalf of any federal agency in an official capacity".[84] It is apparent that the Act's definition of "employee" contemplates a much broader category than those who comprise our federal civil service or members of the military. The use of the word "includes" suggests that persons who do no clearly fall within one of the three categories mentioned in the definition may nevertheless be covered by the term. In this connection, the primary consideration would seem to be the extent of control,,or the right of control, which the Government exercised over the tortfeasor in the performance of the activities giving rise to the claim or suit. Thus, the employees of a private firm under contract with the United States to act as a managing agent of a public housing project may be held to be employees of the Government for liability purposes under the Federal Tort Claims Act,[85] although such employees are not federal civil service employees in the popular conception of that phrase. An extension of this interpretation is possible from

---

84. 28 U.S.C. 2671

85. State of Maryland v. Manor Real Estate & Trust Co. 176 F.2d. 414 (4th Cir. 1949), and Shetter v. Housing Authority of the City of Erie, 132 F. Supp. 149 (W.D. Pa. 1955).

cases such as Messig v. United States,[86] in that although a bystander who was directed by government fire fighters to assist in fighting the fire did not thereby become a federal employee so as to become eligible for compensation under the Federal Employees Compensation Act for his own injuries, it is likely that if such a bystander, while assisting government employees, were negligently to injure a third person, the courts would hold the United States liable.

In short, the presence of those characteristics which traditionally determine the existence of the common-law relationship of master and servant will generally determine whether the wrongdoer is an employee of a federal agency for whose torts the United States must respond.

However, the employment relationship is only one of several elements which must be established by the claimant in order to recover under the Federal Tort Claims Act. Scope of employment must also be shown.

3. Scope of Employment

It is not intended to provide a comprehensive study of all the factors which are entailed in determining

---

86. 129 F. Supp. 571 (D.Minn. 1955). See also, Jayson, Handling Federal Tort Claims, 1967, Sec. 203.01.

whether a nonappropriated fund employee was acting within the scope of his employment at the time of a tortious incident, but to point out the basic considerations relevant to such determination.[87]

The Federal Tort Claims Act provides that the Government is liable for negligence when the employee of the Government is acting within the scope of his office or employment.[88]

Acting within scope of office or employment, in the case of members of the military or naval forces of the United States, means acting in line of duty.[89] It is now firmly established that insofar as the Federal Tort Claims Act is concerned, the phrase "line of duty" when applied to military personnel, has no broader significance than "scope of employment" as used in master and servant cases.[90] Liability for the wrongful acts of

---

87. For an analysis of "scope of employment" see, Seibert, when is Operation of Motor Vehicles Activity "Within Scope of Employment" under the Federal Tort Claims Act?, 20 Fed. B. J. 416 (1960).

88. 28 U.S.C. 1346(b).

89. 28 U.S.C. 2671.

90. Williams v. United States, 350 U.S. 857, 76 S.Ct. 100, 100 L.Ed. 761 (1955); Bissell v. Mc Elligott, 369 F.2d. 115 (8th Cir. 1966); Cobb. Kunn 367 F.2d. 132 (7th Cir. 1966); Farmer v. United States, 261 F. Supp. 750 (S.D. Iowa 1966).

servicemen, in other words, is determined by reference to the liability of a private employer under the doctrine of respondeat superior in like circumstances.

Scope of employment is essentially a factual issue involving a great many elements. Thus, in determining whether an act was within the scope of employment, the following are among the factors that may be relevant; the time, place and purpose of the act, and its similarity to what is authorized; whether it is one commonly done by such servants; the extent of departure from normal methods; the previous relations between the parties; whether the master had reason to expect that such an act would be done; as well as other considerations dependent on the particular circumstances on the relationship and the incident. "In general, the servant's conduct is within the scope of his employment if it is of the kind which he is authorized to perform, occurs substantially within the authorized limits of time and space, and is actuated, at least in part, by a desire to serve the master."[91] For example, servicemen assigned to full-time duty at a post exchange are within their scope of employment as members of the armed forces while per-

---

91. Prosser, Torts (2d Ed.), 1958 at 352. See Also Restatement of Agency (1958), Sec. 228,229.

forming such duties,[92] and federal employees charged with the maintenance of a swimming pool located at a naval station for the benefit of servicemen and their families and guests were acting within the scope of their employment when they failed to warn of a dangerous condition in the pool.[93]

It is therefore important to realize that the question of federal employment is entirely different from that of scope of employment. An individual can be a federal employee because he is employed by a nonappropriated fund, but his tortious acts will not subject the United States to liability under the Federal Tort Claims Act if he has acted outside the scope of his authorized duties.[94] Likewise, an individual could subject the Government to liability under the Federal Tort Claims Act even though he was not a regularly salaried employee of the Government or one of its instrumentalities. This result would follow if he were directed to perform a function which would ordinarily be performed by an employee, or if the scope of the activity performed was authorized and of such benefit to the government as to

---

92. Roger v. Elrod, 125 F. Supp. 62 (D. Alaska 1954).

93. Brown v. United States, 99 F.Supp. 685 (S.D.W.Va. 1951).

94. Further, the Tort Claims Act retains immunity from suit for certain intentional torts regardless of the tortfeasors scope of employment (28 U.S.C. 2680(h)).

be considered as having been performed by an employee. Under this framework, there would appear to be little doubt that the actions of members of a board of governors of an officers' mess, or individuals who they designate to perform certain tasks, would subject the Government to liability under the Federal Tort Claims Act should such performance be negligent, even though the tortfeasor would not be an employee within the specified terms of the Act.

4. Torts of Members and Guests

Although case law interpreting the relevant provisions of the Federal Tort Claims Act has determined that nonappropriated funds are "federal agencies" and employees of nonappropriated funds are "government employees" whether paid from appropriated or nonappropriated funds, the courts have not gone so far as to include members and guests of such funds as subjecting the Government to liability for their actions even though directly connected with military activities. Only two cases are directly in point.

The first case is United States v. Hainline.[95] The plaintiff sued under the Federal Tort Claims Act when

95. 315 F.2d. 153 (10th Cir. 1963).

her car was struck by an airplane which was approaching an airfield to land. The plane was being piloted by an Air Force officer who was a member of the Aero Club at McConnell Air Force Base, Kansas (a nonappropriated fund). The trial court concluded:

> A 'member' [of the Aero Club] is to be considered as an 'employee' within the meaning of the Federal Tort Claims Act when such member is engaged in the activities and pursuits provided for in the constitution of the club, and that when a member of the club is engaged in activities and pursuits provided for in the constitution of the club, he is acting within the scope of his employment, thus subjecting the United States to liability under the Act. [96]

Judgment was thereafter rendered for the plaintiff. In reversing, the appellate court pointed out that the pilot rented the plane from the club; he was off-duty and could utilize this time as he saw fit; and that he was not accountable to the Air Force or anyone else as to the flying of the plane. The court found no basis to establish an employer-employee relationship as the Government had no right to direct and control the pilot's activities and derived no benefit from his activities. Therefore, he was not within the scope of his employment as an Air Force officer. The trial court had erroneously relied upon an Air Force regulation which stated that for purposes of the regulation "employees" is interpreted to

---

96. Id. at 154

include members and/or authorized "participants" or "users" of nonappropriated fund airplanes. The appellate court stated that this regulation only deals with the administrative investigation, settlement and payment of claims, and does not purport to, nor could it, enlarge the liability of the United States under the Federal Tort Claims Act, or create any new or different definition of the word "employee" as used in the Act. The court concluded: "...there is no federal rule to the effect that a club member is an 'employee' under the Federal Tort Claims Act."[97]

In Brucker v. United States,[98] the plaintiff was a member of the Castle Air Force Base Aero Club (a nonappropriated fund) and was injured in a plane crash which was being piloted by a Lieutenant, another club member. The plaintiff alleged that the Lieutenant should be considered a servant or employee of the Club since he was a "check pilot" and "flight instructor", that regulations required that members complete a "check flight" with a "check pilot," and that the plaintiff had paid the normal three dollars an hour for such services. However, the facts

---

97. Id. at 156.

98. 338 F.2d. 427 (9th Cir. 1965), cert. den. 381 U.S. 937 (1965), 85 S.Ct. 1769, 14 L. Ed. 701.

disclosed that no contractual arrangement existed between the Club and the Lieutenant for such services. He was not paid by the Club, and the Club neither possessed nor exercised any power to control the conduct of the flights. The court held that the pilot had not been acting as an agent of the Club and hence not as an agent of the government. The court also stated: "...liability could not be imposed upon the United States for acts of persons not its servants simply because the government encouraged the activity and derived benefit from it."[99]

Although no other cases have reached the courts on this matter, the cases cited are considered sufficiently recent and succinct to merit the conclusion that the actions of a member or guest or a nonappropriated fund can not subject the United States to liability under the Federal Tort Claims Act. However, classification as a member of a nonappropriated fund, in itself, will not preclude a suit under the Federal Tort Claims Act if his actions were directed and controlled in such a manner as to be considered the actions of an employee. For instance, the actions of the president of a flying club who directs a member to move an airplane from one end

---

99. Id. at 430

of a runway to the hangar, a job which normally is performed by an employee, could subject the Government to liability when another plane is negligently struck during the course of that movement. The basis for such liability is that the member is acting as an employee of the government, at the direction of a supervisor of a federal agency and for the sole benefit of the Club, a government instrumentality.

However, even if a member of a nonappropriated fund is not acting in the capacity of an employee so as to subject the United States to liability under the Federal Tort Claims Act, the injured party might still recover under military claims regulations. This matter will be discussed in the next section.

B. CLAIMS AGAINST NONAPPROPRIATED FUNDS

Tort liability of nonappropriated funds is determined generally by the same substantive rules and procedures as applicable to claims and suits under the Federal Tort Claims Act.[100] Hence, reference must be made to the provisions of the Federal Tort Claims Act,[101] and the implementing regulations,[102] to determine if liability exists.

---

100. AR 230-8, para. 14a.

101. 28 U.S.C. 1346, 2671-2680.

102. Army Reg. No. 27-22 (18 Jan. 1967)-Claims Based on Negligence of Military Personnel or Civilian Employees Under the Federal Tort Claims Act.

However, Army Regulation 27-20[103] reveals that the scope of administrative settlement in regard to torts of nonappropriated funds goes beyond the coverage of the Federal Tort Claims Act. The principal area of expansion is that the nonappropriated fund will be liable administratively for the torts of members and guests of such fund activities,[104] as well as for the torts of its employees. The history of this expanded protection was obviously to encourage military personnel and civilian employees and dependents to make full use of such facilities without fear of subjecting themselves to personal liability in the event they injure an innocent third party.

Prior to 1958, nonappropriated funds were required to procure public liability insurance adequate to indemnify nonappropriated fund assets and the United States against tort claims for personal injury, death, or property damages arising from acts or omissions of employees of such nonappropriated funds.[105]

---

103. 20 May 1966 [hereafter cited as AR 27-20].

104. AR 27-20, para. 26c.

105. AR 230-8, para. 14 (2 Aug. 1957).

In 1958, the requirement that nonappropriated fund activities maintain liability insurance was terminated,[106] and provision was made for the payment of tort claims arising out of their activities from nonappropriated funds themselves,[107] except as provided otherwise in Army Regulations.[108]

Although the aforementioned regulations referred only to liability for acts or omissions of employees of nonappropriated funds, Department of the Army Circular 230-10[109] explained the scope of the self-insurance provisions of AR 230-8 in these words:

> 1. . . .While it is the policy of the Department of the Army to provide adequate liability protection for all nonappropriated fund employees through means of self-insurance, it is also recognized that the same measure of protection must be provided to authorized members of those nonappropriated fund activities whose operations are conducted on a membership basis. The provisions of DA Circular 230-7 and Section IV, AR 230-8 are, therefore,

---

106. Department of the Army Circular 230-7 (26 Aug. 1958).

107. AR 230-8, para. 13 (27 Aug. 1958).

108. Army Reg. No. 25-20 (1 Oct. 1959) [superceded] was amended to provide that claims arising from acts or omissions of military personnel in the performance of assigned military duties for the fund would be paid from appropriated funds.

109. 22 Jan. 1959 [expired].

> interpreted as being equally applicable to both, employees and authorized members of nonappropriated activities.[110]

Hence, the self-insurance plan was intended to cover members of nonappropriated funds as well as its employees. This interpretation can be reached through an extension of the definition of the coverage provided. AR 230-8 provides that it is the policy of Department of the Army to settle all tort claims arising "out of the operations of nonappropriated fund activities."[111] By this language, the scope of potential tort liability is not defined exclusively by whether or not the tortfeasor is an "employee", a "member" or otherwise related to a nonappropriated fund activity, but is determined in regard to whether or not the tortious act or omission is incident to the operation of the activity. Accordingly, members and guests can be furnished the same protection under administrative procedures as "employees." Further, this interpretation is not changed by the courts decision in United States v. Hainline.[112] The Hainline case was decided under the Federal Tort Claims Act and specifically

---

110. Id.

111. AR 230-8, para. 13.

112. 315 F.2d. 153 (10th Cir. 1963). Also, Infra, Chap. IV

ruled that members of nonappropriated funds cannot be considered "employees" for Tort Claims Act purposes even though military regulations define them as such. However, there is no requirement that that scope of the Government's liability under administrative procedures be coextensive with that under the Federal Tort Claims Act. Accordingly, the interpretation provided by DA Circular 230-10 of the word "employee" as used in AR 230-8 is not changed by the courts interpretation of that term in Hainline.

The foregoing discussion of the basis for permitting compensation to claimants who were injured by the negligent acts of members and guests of nonappropriated funds only afforded protection to the tortfeasor when the injured party filed an administrative claim. Members were not furnished the same protection in those cases where the injured party elected to file suit against the member individually in a civilian court, because there was no authorization for using nonappropriated funds for the defense of such suits or for the payment of compromises or judgments arising from such suits. To remedy this situation, AR 230-8 was amended in 1963 to provide as follows:

> b. If a member, employee, or other authorized user of nonappropriated fund property is sued individually,

> as the result of an alleged act or omission committed by him while he was using nonappropriated fund property, and it appears that the property was being used in the manner and for the purpose authorized, nonappropriated funds may be used to pay expenses incident to the suit, judgments, and compromise settlements.[113]

The intent of this change was to provide the same protection for members and guests of nonappropriated funds when the injured party elects to bring suit in a civilian court as they have when the party files an administrative claim. However, only "employees" have full judicial protection under most circumstances, since if a suit is filed against a civilian employee while operating a vehicle while in the scope of his duty he may have the case removed to a federal court and defended by the Department of Justice,[114] or if a plaintiff desires to join the Government as a party defendant the employee-tortfeasor cannot later be sued individually. If a member or guest of a nonappropriated fund is sued, not having any of these protections, and a judgment is rendered against him, it is possible that he alone would bear the financial risk where it was determined not to afford him the relief authorized under AR 230-8 of

---

113. AR 230-8, para. 14.3b (Ch. 7, 14 Jan. 1963).

114. 28 U.S.C. 2679 (Government Drivers' Act).

paying the judgment.[115]

Based upon this latter possibility, individual members of nonappropriated funds would be wise to consider the advisability of covering their personal liability with private insurance.

C. INDIVIDUAL TORT LIABILITY

Since the dawn of our Republic the courts have consistently held that government employment is no cloak of immunity from suit.[116] With the passage of the Federal Tort Claims Act in 1946, a great deal of the Government's sovereign immunity from civil suit was abandoned. However, this waiver of immunity did not act to bar suits against individual employees for their own acts of negligence even though committed in the course of their employment.

In general, an injured plaintiff may proceed against the individual, or the United States, or both at the same

---

115. The Judge Advocate General or his designee certifies when payment of attorneys fees, litigation expenses, compromises, and judgments is proper. AR 230-8, para. 14.3b(4) (Ch.7, 14 Jan. 1963).

116. Little v. Barreme, 2 Cranch 170, 6 US 170, 2 L.Ed. 243 (1804); Mitchell v. Harmony, 13 How. 115, 54 US 115, 14 L.Ed. 75 (1851); Bates v. Clark, 95 US 204, 24 L.Ed. 471 (1877); 6 C.J.S. Army & Navy, Sec. 37, page 419; 36 Am. Jur. 265; Wright, The Federal Tort Claims Act, 1957, page 77.

time,[117] although he would be entitled to but one satisfaction.[118]

The Federal Tort Claims Act did, however, limit the scope of certain actions and remedies.

In 1961, Congress provided that for personal injury or death resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of employment, the exclusive remedy is against the Government, and the individual employee or his estate may not be sued. Further, when an injured plaintiff sues a government employee in a State court, and the Attorney General certifies that the employee was acting within the scope of his employment at the time of the incident, the action will be removed to the Federal District Court and deemed an action against the United States under the Federal Tort Claims Act.[119] However, this judicial protection for employees is limited to tort claims arising out of the operation of motor vehicles.[120]

---

117. Munson v. United States, 380 F.2d. 976(6th Cir. 1967).

118. Moon v. Price, 213 F.2d. 794 (5th Cir. 1954).

119. 28 U.S.C. 2679 (Government Drivers' Act).

120. Gurzo v. Gregory Park, Inc.,240 A 2d. 25, 99 N.J. Super. 355 (1968); Ray v. Harris, 275 F. Supp. 110 (D.C.Md. 1967); Whealton v. United States 271 F. Supp. 770 (D.C.Va. 1967).

Congress also specifically provided that a judgment against the Government constitutes a complete bar to any later action against the employee of the Government.[121] When the judgment has been paid by the Government, no recourse is permitted against the employee.[122]

Further, Congress provided that the acceptance by a claimant of any award, compromise, or settlement of an administrative claim is final and conclusive on such claimant and is a complete release of any claim against the United States and the employee.[123]

As can be visualized, in spite of these limitations, there still exists numerous areas where individual tort liability can result. For instance, when an employee is sued individually in a State court and the action is then removed to a Federal Court upon certification by the United States Attorney General that the employee was operating a vehicle in the scope of his employment, and upon hearing the facts it is determined that the United States could not be liable under the Federal Tort Claims Act as

---

121. 28 U.S.C. 2676. Satterwhite v. Bocelato, 130 F. Supp. 825 (E.D. NC 1955).

122. United States v. Gilman, 347 U.S. 507, 74 S.Ct. 695, 98 L.Ed. 898 (1954); Adams v. Jackel, 220 F. Supp. 764 (D.C. NY. 1963).

123. 28 U.S.C. 2672.

the employee was not within the scope of his employment as that term is defined under the controlling state law, the case would be remanded to the State court for trial against the individual.[124] On the other hand, should the United States have the case removed to a Federal court and defend the action solely on the ground that the action is barred against the United States as it was not filed within the two year Statute of Limitations,[125] the issue of non-scope of employment not being raised, and the motion is granted, no action can then be initiated against the individual employee in the State courts even though the State Statute of Limitations has not expired.[126] The reasoning behind this result is that the remedy provided in Title 28, United States Code, Section 2679 is exclusive as against the United States; that the United States has admitted responsibility for the actions of the driver-employee by certifying that he was in scope of employment; and since the action was not brought

---

124. 28 U.S.C. 2679(d). Bissell v. McElligott and the United States, 248 F. Supp. 219(D.C.W.D.Mo. 1965); Tavolieri v. Allain and the United States, 222 F. Supp. 756 (D.C.D.Mass. 1963).

125. 28 U.S.C. 2401.

126. Reynaud v. United States, 259 F.Supp. 945(D.C.Mo. 1966); Hoch v. Carter, 242 F.Supp. 863(D.C.NY 1965); Fancher v. Baker, 240 Ark. 288, 399 S.W. 2d. 280, 16 A.L.R.3d. 1383(1966), with a strong dissent that court should have heard issue of scope of employment as Statute of Limitations shouldn't apply if the employee was outside scope of his employment.

within the two year statute of limitations, the Government is entitled to a summary motion to dismiss.

Another interesting variation of this remedy is that if the action was initially brought against the United States in a Federal District Court under Section 1346(b) of Title 28, United States Code,[127] instead of against the employee in a state court, and the court renders a judgment in favor of the defendant-United States because the employee was found not to have been driving the vehicle in scope of employment,[128] such judgment would act as a bar to any subsequent action against the employee individually as he would be protected by Section 2676 of Title 28, United States Code.[129]

For this reason, it would appear better to sue the employee or officer than the United States and find, after suit against the United States has been dismissed, that

---

127. Supra, note 43, and accompanying text.

128. Sievers v. United States, 194 F.Supp. 608(D.C.Or.1961), (vehicle accident caused by Airman driving to next PCS).

129. 28 U.S.C. 2676 provides: "The judgment in an action under 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."

it is too late to sue the employee. Such was the result in United States v. Eleazer,[130] where the plaintiff won a $20,000 verdict against the United States in the trial court, but was reversed on appeal because it was not proven that the officer was acting within the course of his employment at the time of the injury. Judgment was for the defendant-United States, and no action could thereafter be brought against the employee individually.

In summary, an individual can be personally sued for his own acts of negligence when an injured plaintiff decides not to file a claim or sue the Government under the Federal Tort Claims Act. If such individual suit is initiated, the officer-employee is responsible for defending himself whether the employee was acting within or outside the scope of his employment; the only exception is under the Government Drivers' Act where the Government is required to defend and pay the judgment if the employee was driving a vehicle in the scope of his employment. Although an officer sued individually in a State court for a negligent act when he was acting under "color of office" may have the action removed to a Federal

---

130. 177 F.2d. 914 (4th Cir. 1949).

Court,[131] this is only for the convenience of military personnel as they are generally unfamiliar with State procedures, and there is no authority or reason for the Government to defend the suit or pay any judgment rendered against the officer.

However, if a civilian employee or military member is sued individually in a State court and it is found that he was acting within the scope of his office or employment, and the acts are considered as within his discretionary powers or are ministerial in nature, the courts have adopted a doctrine of immunity from liability.[132] The scope of this doctrine of protection for government employees is far too broad to be discussed any further in this paper, but it is mentioned for purposes of continuity and completeness of discussion. It should be mentioned that this doctrine would likewise be available as a defense by employees of nonappropriated funds who were acting within their scope of employment.

---

131. 28 U.S.C. 1442a.(1964).

132. Barr v. Matteo, 360 U.S. 564 (1959); Garner v. Rathburn, 346 F.2d. 55 (10th Cir. 1965); Bailey v. Van Buskirk, 345 F.2d. 928 (9th Cir. 1965); Eggenberger v. Jurek, 253 F. Supp. 630(D. Minn. 1966). See also, McKay, The Serviceman and the Law: Personal Liability for Acts and Omissions While Acting in Performance of Official Duties, 1964, a thesis presented to the Judge Advocate General's School.

CHAPTER IV

LIABILITY OF PRIVATE ASSOCIATIONS

To return to the example incident cited in the Introduction, it should be assumed for purposes of this Chapter that the golf course was being utilized by an authorized private association, such as the wives club, and that the torfeasor was an employee, member or invited guest of the association.

As will be recalled from the explanation and discussion of the various types of morale, recreation and welfare activities, private associations are not subject to nonappropriated fund regulations, and in general, are authorized to function as they desire, so long as the Post Commander approves of their general operating procedures and they refrain from violating other prescribed post regulations and applicable civil and criminal laws. However, command approval does not in any manner indicate approval of a particular action or function so as to subject the United States to liability under the Federal Tort Claims Act.

Private associations, their employees, members and guests subject themselves to personal liability for negligence in the same manner as any other private group or individual. The fact that they operate on

federal reservations with the approval of the commander does not transform these associations into government instrumentalities. Accordingly, suit can be instituted against the private association in its own name,[133] or against the individual tortfeasor. However, a claim cannot be submitted through military channels against the association or any individual employee, member, or guest thereof,[134]

The essential problem is to be able to identify the activity as either a nonappropriated fund or a private association since ultimate responsibility depends upon this very distinction. The leading case in this area is Scott v. United States,[135] and arose because of this very problem of mis-identification. In Scott, the Fort Benning Hunt Club was an association composed of military personnel and their families who owned horses and were interested in the equestrian art and the activities associated therewith. The Post

---

133. United States v. Fort Benning Rifle and Pistol Club, 387 F.2d. 884 (1966).

134. JAGA 1960/4870, 18 Oct. 1960, 60 JALS 57/15, (Claims against private associations cannot be paid from either appropriated or nonappropriated funds).

135. 226 F. Supp. 864 (M.D.Ga. 1963), aff'd 337 F.2d. 471 (5th Cir. 1964), cert. den. 380 U.S. 933 (1965), 13 L.Ed. 2d. 471, 85 S.Ct. 939.

Commander had approved the existence of the club and allowed it to use some land in a remote area of the Fort Benning military reservation. The dependent wife and daughter of a member of the Club were injured when a hitching post which had been erected and maintained by the club fell on the plaintiffs. The plaintiffs alleged that the Club was a nonappropriated fund activity, an instrumentality of the Government, and therefore the United States Government is liable for the torts of the activity and its employees. The plaintiffs cited United States v. Hainline[136] (involving an Aero Club which was held to be a nonappropriated fund), to support their position. The court distinguished the Hainline case as being one where military regulations specifically authorized such activities to operate as nonappropriated funds, and stated that this case presented a horse of a different color since the Club began its operation as a private association and there was no directive of any nature issued which changed that status. Since no direct supervision or control over the Club was exercised by the Government, no liability could be assumed for acts of negligence of the Club or any of its members. The Club was not a non-

---

136. 315 F.2d. 153 (10th Cir. 1963).

appropriated fund and therefore not a federal agency. In affirming the judgment in favor of the Government, the appellate court pointed out that although the Hunt Club was located on the Fort Benning Military Reservation, its membership consisted primarily of military personnel and their dependents, and permission to establish the Club had been granted by Fort Benning's Commanding General, the Club was a self supporting organization receiving no appropriations from the United States Treasury, it maintained a small civilian staff paid entirely out of funds collected from the members, its normal activities were overseen by a board of governors elected from its membership, and its constitution provided that it was a private association which was not operating as an instrumentality of the federal government. Analysis of the court's reasoning reveals that only the last statement actually differentiates a private association from a nonappropriated fund; that its constitution provided it was a private association. The other points of apparant distinction, can be attributed to both types of activities: both are self supporting; both maintain civilian staffs paid from fund monies; both are overseen by a board of governors; and neither are directly supported by appropriated funds.

Accordingly, the only valid distinction between a non-appropriated fund and a private association is that the post commander has authorized the activity to operate in one form or another. An examination of the constitution or by-laws of the organization will normally immediately identify the status of the activity.

No other cases with a similar fact situation as the Scott case could be found. Neither could any cases be found where a military private association had been sued.by an injured individual.[137] However, there are many cases where private associations, including womens' clubs, have been sued.[138]

It is noteworthy that in spite of the numerous private associations in existence and the wide scope of their authorized activities, to the author's knowledge virtually none carry liability insurance. This appears to be a gross error on the part of the association and its members, for neither has any protection.

---

137. However, see note 133, where a private association was sued by the Government to recover for medicare.

138. Gaddis v. Ladies Literary Club, 4 Utah 2d. 121, 288 P.2d. 785(1955); Fishman v. Brooklyn Jewish Center, 234 App. Div. 319, 255 NYS 124(1932), app. dis. 263 NY 685, 189 N.E. 757; Kitchen v. Women's City Club, 267 Mass. 229, 166 N.E. 554(1929). See in general, 14 A.L.R. 2d. 473; 15 A.L.R.3d. 1013.

CHAPTER V

CONCLUSIONS

The preceding chapters of this paper discussed the legal aspects of tort liability of certain morale, recreation and welfare activities. As will be recalled, the initial step is to identify and classify the organization as one of the four types of morale, recreation or welfare activities; a statutory organization, special services, a nonappropriated fund, or a private association. Thereafter, an in depth analysis was presented regarding two of these activities; nonappropriated funds and private associations. The thrust of this analysis was to determine under what circumstances the United States Government, an activity, or the individual tortfeasor can be held pecuniarily responsible for tortious conduct.

Nonappropriated funds comprise the largest group of morale, recreation and welfare activities, and perhaps because of this fact, are the least understood and the most difficult to handle regarding tort liability. There is little doubt that the present state of the law is that Federal Tort Claims Act liability does exist when a negligent act is committed by a nonappropriated fund employee acting in the scope of his

employment, whether he is paid from appropriated or nonappropriated funds. This result is based on the court's conclusions that nonappropriated funds are "federal agencies" and that their employees are "government employees" for purposes of the Federal Tort Claims Act. The only distinction is that the military departments, through its nonappropriated fund reserves, will reimburse the government for any claims or judgments which result from an act of an employee paid from nonappropriated funds. This reimbursement is not legally necessary, however it maintains the self-supporting aspect of nonappropriated funds.

Negligent acts of members and guests of nonappropriated funds do not subject the government to suit under the Federal Tort Claims Act, as such individuals are not "federal employees" as that term is defined in the Federal Tort Claims Act. However, claims and judgments can be paid for the torts of such individuals from the self-insurance reserves of such nonappropriated funds because the military regulations have so authorized. This permits freer participation by all members and guests, be they military, civilian employees, or dependents, in the excellent and extensive programs which these organizations provide to the entire military community.

It was also learned that an individual tortfeasor, military and civilian, can be subjected to suit and personal liability for their negligent acts, except for certain statutory and judicial protections. In general, an individual can be held personally responsible for his own acts of negligence if he was an employee of the government but was acting outside the scope of his employment, or if he was a member or guest of a nonappropriated fund and the fund or the Judge Advocate General declines to pay the claim or judgment.

To return once again to the incident related in the Introduction, the facts as described are similar to those in Gleason v. Hillcrest Golf Course[139]. In that case, the plaintiff was injured when a golf ball driven from a course adjacent and parallel to the road hit the windshield of the car in which the plaintiff was a passenger. The owner of the golf course and the player who struck the ball were found jointly and severally liable to the plaintiff on the theory that if there was a possibility of danger, and if the doing of a lawful act would naturally and probably result in harm, though unintended, there was an actionable wrong. This accident could have been prevented, in all likelihood, if a fence had been

---

139. 148 Misc. 246, 265 N.Y.S. 886 (1933).

installed along the course boundaries by the owner, and his failure to do so was negligent.

Relating the Gleason case to the example incident, the following results are apparent:

A. Baker, the player, is negligent and subject to civil suit no matter who owns or operates the golf course, and regardless of whether Baker is an employee of the government or a member or guest of a nonappropriated fund or private association.

B. If the golf course were run as a nonappropriated fund, the government could be sued under the Federal Tort Claims Act for the negligence of its employees (nonappropriated fund employees) in failing to construct a fence. The fund could avoid the suit by paying a claim from its self-insurance reserves, provided the claimant was willing to accept the amount offered.

1. If Baker was the golf professional under the control of the nonappropriated fund and was giving a playing lesson at the time, the government could be sued under the Federal Tort Claims Act for his act of negligence in the scope of his employment. The fund could avoid suit by paying the claim.

2. If Baker was a member or guest of the fund,

he could be sued individually, but a submitted claim could be paid from nonappropriated funds. If Baker is sued, the judgment could be paid from nonappropriated funds upon certification by the Judge Advocate General. However, even if a claim were paid this would not bar a suit against Baker individually under the present wording of the federal statutes.

C. If the golf course was being utilized by a private association, the government could still be sued under the Federal Tort Claims Act for failure to put up the fence, unless the private association actually owned or operated the golf course so as to subject itself to liability.

1. If Baker was an employee of the association, the association and Baker could be sued as joint tortfeasors. The employer would be held liable in this instance on the basis of respondeat superior as the employee would be under the direct control and supervision of the employer-association and Baker was acting within the scope of his employment.

2. If Baker was only a member or guest of the association, he would be subject to in-

dividual suit and personal liability. The association would probably not be liable for Baker's acts under these circumstances as there would be insufficient nexus between Baker as a member or guest and the association.

Based upon the material discussed in the preceding chapters, it sppears that several changes could be make in the law and military regulations to clarify certain areas and rectify certain inadequacies.

First, Section 2672 of Title 28, United States Code, which bars suits against employees if a settlement or compromise of a claim is reached with the government, should be amended to include any claim settled or compromised with any federal agency, including nonappropriated funds. As the statute now reads, only claims paid in behalf of employees bars a later suit against the employee. If a claim is paid by a nonappropriated fund for the negligence of a member or guest of such fund, a civil suit can still be instituted against the individual.

Second, Section 2679 of Title 28, United States Code, which provides an exclusive remedy against the United States Government for the negligence of an employee while driving any vehicle in the scope of his employment, and provides that the Attorney General will

defend the suit, should be amended to provide this procedure for the exclusiveness of the remedy and defense by the Attorney General for any federal employee when he acts within the scope of his employment, whether he is driving a vehicle or not. As the law now reads, if the employee was not driving a vehicle, he must defend the suit himself, prove he was acting within the scope of his employment and was performing a discretionary or ministerial act to invoke the court's doctrine of immunity for governmental functions. At the present time he receives no federal assistance in this matter. It is interesting to note however, that an employee, member or guest of a nonappropriated fund may be provided a defense counsel at the expense of the fund if the Judge Advocate General certifies this payment,[140] whereas no similar provision protects appropriated fund employees.

Third, and considered the most important by the author, is that members of nonappropriated funds and private associations be required, or at least strongly encouraged, to purchase public liability insurance for their own protection. In fact, such insurance is highly desireable even for civilian employees and military

---

140. AR 230-8, para. 14.3b.

personnel, because if a court should determine that scope of employment is not proven, or is disproven, personal liability could result. Since scope of employment is determined by state law, and since such state laws vary to such a great extent from state to state, it is virtually impossible for an employee or military member to be sure of whether his actions are within a particular state's statutory definition or judicial interpretation of scope of employment. To insure protection from an adverse ruling in this regard, personal liability insurance should be purchased either by the individual, or by the government or association for the individual.

TABLE OF CASES AND STATUTES

United States Court of Claims

State Courts

Miscellaneous

BIBLIOGRAPHY

Texts

Cooley, On Torts (3d. Ed. 1897).

Jayson, Handling Federal Tort Claims (1967).

Prosser, Law of Torts (2d. Ed. 1955).

Restatement of Agency (1958).

Wiener, A Practical Manual of Military Law (1940).

Winthrop, Military Law and Precedents (2d. Ed. 1920).

Wright, The Federal Tort Claims Act (1957).

Articles

Ehrenzweig, Soldiers' Liability for Wrongs Committed on Duty, 30 Cornell L.Q. 179 (1944).

Gerwig, Federal Tort Liability for Nonappropriated Fund Activities, 10 Mil. L. Rev. 204 (1960).

Government Liability for the Torts of Military Personnel Under the Federal Tort Claims Act, 45 Minn. L. Rev. 275 (1960).

Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209 (1963).

James, Tort Liability of Governmental Units and Their Officers, 22 U. Chi. L. Rev. 610 (1955).

Jennings, Tort Liability of Administrative Officers, 21 Minn. L. Rev. 263 (1937).

Kovar, Legal Aspects of Nonappropriated Fund Activities, 1 Mil. L. Rev. 95 (1958).

Liability for Torts of Military Personnel, 55 Harv. L. Rev. 651 (1942).

Liability of Individuals in Armed Forces to Civilians for Infractions of Local Laws in Pursuance of Military Activity, 36 Ill. L. Rev. 361 (1941).

Seibert, When is the Operation of Motor Vehicles Activity "within the scope of employment" Under the Federal Tort Claims Act, Fed. B. J. 20:416 (1960).

Vestal, Extent of Claim Preclusion, 54 Iowa L. Rev. 1,(1968).