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the weight of such a consideration, when cast upon the scales in a worthless check case, would line up with caveat emptor, both being opposed to the negotiability of goods, and operate to deprive the innocent purchaser of the goods. The result is an anomalous situation wherein the security of acquisitions, rather than security of transactions, lends its support to the free movement of trade.

WILLIS C. BUMGARNER.

Torts—Federal Tort Claims Act—Servicemens' Suits

In 1946 Congress enacted the Federal Tort Claims Act.¹ This legislation is a sweeping waiver of governmental immunity from suits sounding in tort.² The Act makes the United States liable on "claims for injury or loss of property or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable. . . ."³ The Government is not to be liable in twelve enumerated instances. Among these specific "exceptions" is a provision that the Act is to have no application to "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."⁴ The Act makes no mention of veterans' or servicemens' claims except for the indirect reference implicit in the language of this exception.

What is the status then of the serviceman-claimant under the Act? The Supreme Court was faced with this question in *Brooks v. U. S.*⁵ Two soldiers, Welker and Arthur Brooks, were riding in an automobile when they were hit at a highway intersection by an Army truck. At the time of the accident the men were on leave and about their own private affairs. It was held that the fact that plaintiffs were servicemen would not preclude the maintenance of a suit under the Tort Claims Act.⁶ "The statute's terms are clear," wrote Mr. Justice Murphy.

¹ 28 U. S. C. §§1291, 1346, 1402, 1504, 2110, 2401, 2411, 2412, 2671-2680 (1948).

² This legislation seems to have been passed with two main purposes in mind: (1) to relieve an over-burdened Congress from the necessity of considering hundreds of private bills yearly (the only remedy available to the private citizen before passage of the Act), and (2) to remove the previous barrier to suit against the Government in tort, a reform which had been sought by statesmen and jurists for more than a century. See generally, Baer, *Suing Uncle Sam in Tort*, 26 N. C. L. REV. 119 (1948); Gellhorn and Schenck, *Tort Actions Against the Federal Government*, 47 COL. L. REV. 722 (1947); Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L. J. 1 (1946); Note, 20 MISS. L. J. 354 (1949).

³ 28 U. S. C. §1346(b) (1948).

⁴ 28 U. S. C. §2680 (1948). The exceptions fall loosely into two categories: (1) claims which relate to certain governmental activities which should be free from the threat of damage suit, or (2) claims for which adequate remedies are already available. SEN. REP. No. 1400, 79th Cong., 2d Sess. 33 (1946).

⁵ 69 S. Ct. 918 (1949).

⁶ *Accord*, *Alansky v. Northwest Airlines*, 77 F. Supp. 556 (D. Mont. 1948) (death of officer in the military forces killed in plane crash while being trans-

"They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.'"⁷ All but two of the tort claims bills introduced in Congress between 1925 and 1935⁸ had contained a clause excepting claims cognizable under either the Federal Employees' Compensation Act⁹ or the World War Veterans' Act of 1924.¹⁰ The Act of 1946 contained such an exception when introduced;¹¹ but the provision, without ascertainable explanation, was dropped from the Act as adopted.¹² It seems apparent from both the language and the legislative history of the Act that Congress did not intend to place such claims beyond the Act's coverage.¹³

It had been argued by the Government that since there already existed an elaborate and adequate system of pensions and benefits for servicemen,¹⁴ it had not been intended to include such claims within the framework of the Act. But the Court said that there is nothing in the Act or the veterans' laws which provides for exclusiveness of remedy.¹⁵ The Government then objected to recovery on the ground that it would put the United States in the position of having to pay twice for the same injury—the plaintiff Welker Brooks having been awarded a disability allowance of \$27.60 per month, and the mother of the deceased Arthur Brooks having been paid a death benefit of \$468 under the Veterans' Act. The Court made it plain, however, that it would not permit a double recovery, and the case was remanded to the Court of Appeals for its consideration of the problem of reducing the damages *pro tanto*. In other words, the substantial recovery obtained by the plaintiffs in the District Court¹⁶ might be diminished by the modest amounts already paid out in the form of benefits under the Veterans'

ported to Seattle where he was to be discharged); *Samson v. U. S.*, 79 F. Supp. 406 (S. D. N. Y. 1947) (death of Army private whose injuries, not incident to military service, were sustained when he was a passenger on a bus operated by the War Dep't.).

⁷ *Brooks v. U. S.*, 69 S. Ct. 918, 919 (1949).

⁸ For citation of these bills, see *Brooks v. U. S.*, 69 S. Ct. 918 n. 2 (1949).

⁹ 39 STAT. 742 (1916), 5 U. S. C. §751 *et seq.* (1946).

¹⁰ 43 STAT. 607 (1924), 38 U. S. C. §§421-576 (1946).

¹¹ H. R. 181, 79th Cong., 1st Sess. (1945).

¹² The exceptions became §421 of the Legislative Reorganization Act, 28 U. S. C. §2680 (1948).

¹³ See Judge John J. Parker, dissenting in *U. S. v. Brooks*, 169 F. 2d 840, 846 (4th Cir. 1948).

¹⁴ These laws are too numerous to be cited individually. See generally, KIMBROUGH AND GLEN, *AMERICAN LAW OF VETERANS* (1946).

¹⁵ *Contra*, *Perucki v. U. S.*, 80 F. Supp. 959 (M. D. Pa. 1948); *Wham v. U. S.*, 81 F. Supp. 126 (D. D. C. 1948), where it is said: "When the United States consents to be sued in tort, as it has by the Tort Claims Act, those members of a class for which a comprehensive system of compensation has otherwise been provided may not seek benefits under the Act."

¹⁶ Welker was awarded \$4,000; Arthur's estate \$25,000.

Act.¹⁷ It had also been argued that where a claimant has received compensation under either the Federal Employees' Compensation Act or the Veterans' Act, this would constitute an election of remedies and that recovery under the Tort Claims Act would therefore be barred.¹⁸ But the Court said, "We will not call either remedy exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so."¹⁹ And so the serviceman may accept compensation under the Veterans' Act and then proceed under the Tort Claims Act. Thus the more generous award is made available to the claimant.

The *Brooks* case is controlling only in cases in which the injuries are not incident to military service. The Court stated: "Were the accident incident to the Brooks' service, a wholly different case would be presented."²⁰ We can only speculate as to the result the Court will reach when it is squarely faced with a case in which the plaintiff's injuries are incident to his service. The literal language of the Act could easily embrace such injuries. The only section which feasibly could apply to claims of the serviceman is Section 2680(j) which excepts all claims "arising from combatant activities . . . during time of war."²¹ Certainly there remains between the decision in the *Brooks* case and the literal language of Section 2680(j) a wide area of possible claims.

Some of the lower courts have already probed into this twilight zone. The District Court for the District of Maryland dealt with the problem of a service-connected injury in *Jefferson v. U. S.*²² There an ex-soldier sued the United States for injuries sustained in an operation performed on him by an Army surgeon. A towel 2½ feet long by 1½ feet wide was negligently left in the plaintiff's abdomen and was

¹⁷ Just before press time the two Brooks cases were considered on remand. *U. S. v. Brooks*, 176 F. 2d 482 (1949). The case of the deceased Arthur was disposed of, the Court deducting the \$468 death benefit payment but refusing to deduct payments made through National Service Life Insurance. The case of the injured Welker was remanded to the District Court for further findings of fact since it did not appear to what extent, in making the award of damages, the District Judge took into account hospital and medical expenses and disability benefits.

¹⁸ This argument is developed in Gottlieb, *The Federal Tort Claims Act*, 35 GEO. L. J. 1, 57 (1946). In *Parr v. U. S.*, 78 F. Supp. 693 (D. Kan. 1948), a Government employee who had accepted compensation under the Federal Employees' Compensation Act later brought action under the Tort Claims Act. *Held*: acceptance of compensation under the former Act constituted an "election," and the present action was therefore barred. *Cf. White v. U. S.*, 77 F. Supp. 316 (D. N. J. 1948), where employees of the War Dep't. recovered under the Federal Employees' Compensation Act before the effective date of the Tort Claims Act. *Held*: this did not constitute a waiver or an "election."

¹⁹ *Brooks v. U. S.*, 69 S. Ct. 918, 920 (1949).

²⁰ *Ibid.*

²¹ In *Skeels v. U. S.*, 72 F. Supp. 372 (W. D. La. 1947), "combatant activities" was defined as actual conflict, not mere training activities, and plaintiff was permitted to recover for death of his intestate (a civilian) who was killed when an iron object fell from an Army plane engaged in tow target practice over the Gulf of Mexico.

²² 77 F. Supp. 706 (D. Md. 1948).

discovered nine months later when a similar operation was performed at Johns Hopkins. The complaint was dismissed. Relying on House and Senate Committee Reports²³ and after a consideration of the probable consequences of allowing such suits, the court reasoned that Congress had not contemplated the inclusion of claims for service-connected injury. In a more recent case, *Santana v. U. S.*,²⁴ the Court of Appeals for the First Circuit held, on the basis of the decision in the *Brooks* case, that the district court had jurisdiction, under the Tort Claims Act, of an action for wrongful death of a discharged serviceman whose death was allegedly caused by the negligence of Government employees at a Veterans Administration Hospital. Here the deceased was not in service at the time of the negligence complained of, and the court felt that inclusion of the claim could involve no problem of the "subversion of military discipline."²⁵ The Court further said, "With respect to the argument, that Congress presumably did not intend to include discharged veterans within the coverage of the Tort Claims Act, in so far as they already are covered by a 'comprehensive system of special statutory benefits,' the Supreme Court in its decision in the *Brooks* case . . . expressly discredited that argument, even as applied to servicemen."²⁶

In *Perucki v. U. S.*²⁷ a United States district court sitting in Pennsylvania denied recovery to a veteran seeking damages for an injury allegedly received when he was undergoing examination in connection with an appeal from a decision reducing his rate of disability. Plaintiff said he had received painful burns when a Veterans Administration doctor tested his reflexes by applying lighted matches to both knees. The court held the claim to be within the "combatant activities" exception because "the basis of the claim could not have arisen if it had not been for the injury which the plaintiff sustained while engaged in the combatant activities of the military forces."²⁸ Since the negligence complained of occurred *after* discharge, it seems that the court came up with a very strained construction of the exception in order to disallow the plaintiff's claim.²⁹

²³ SEN. REP. No. 1400, 79th Cong., 2d Sess. 33 (1946); H. R. REP. No. 1287, 79th Cong., 1st Sess. 6 (1946).

²⁴ 175 F. 2d 320 (1st Cir. 1949).

²⁵ In *U. S. v. Brooks*, 169 F. 2d 840 (4th Cir. 1948), the majority says at 845: "If soldiers could sue for such injuries as illness based on the alleged negligence of the company cook or mess sergeant, or if soldiers who contract sickness on wintry sentry duty had a right of action against the Government on the allegation of a negligent order given by the company commander, then the traditional grouching of the American soldier would result in the devastation of military discipline and morale."

²⁶ *Santana v. U. S.*, 175 F. 2d 320, 322 (1st Cir. 1949).

²⁷ 80 F. Supp. 959 (M. D. Pa. 1948).

²⁸ *Id.* at 961.

²⁹ The District Court in the *Santana* case did not file an opinion for publication. The facts set out in the opinion of the Court of Appeals are meager, and so it is not possible to determine whether the deceased veteran in the *Santana*

Whatever the approach, whether by a narrowing of the literal language of the Act as was done in the *Jefferson* case, or by a strained interpretation of the "combatant activities" exception as in the *Perucki* case, the courts have shown little disposition to push the Government's liability as far as the literal language of the Act will admit. Undoubtedly the courts are concerned with the spectre of the floods of litigation that will almost surely result if they do not adopt some limitative criterion. Whether by accident or by design, the decisions to date indicate a trend toward a criterion akin to that adopted in the Crown Proceedings Act of 1947,³⁰ the British Act waiving sovereign immunity. The British Act exempts the Crown from liability when the serviceman is injured while on duty or when the injury is incurred on military premises.³¹ This criterion, if incorporated directly into our Act, would hardly be open to the often-voiced objection that allowance of servicemen's claims will result in the subversion of military discipline, and at the same time it would quiet the courts' fears as to the possibility of floods of litigation.

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case was hospitalized in connection with a former combat injury or for some other reason. It may be, then, that the *Santana* and *Perucki* cases are distinguishable on the facts. Since the negligence complained of occurred after discharge in both cases, the original basis for hospitalization or treatment would seem immaterial.

³⁰ 10 & 11 GEORGE VI, c. 44, §10 (1947).

³¹ Barnes, *The Crown Proceedings Act, 1947*, CAN. B. REV. 387, 393 (1948).