

FEDERAL LIABILITY FOR NEGLIGENT MAINTENANCE

OF WEATHER MODIFICATION EQUIPMENT

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Abstract. Governmental immunity, among other reasons, explains why the United States has not yet been held liable for claims based on its weather modification programs. Brown v. United States, a recent federal district court case involving negligent maintenance of a NOAA weather data buoy, indicates that in future cases, if there is proof of harm resulting from negligent maintenance of weather modification equipment, governmental immunity will not bar federal liability.

1. INTRODUCTION

Adaption in America of the legal proposition that the "King can do no wrong" is ironic in view of the assertions of his wrongdoing in the Declaration of Independence. Nevertheless, early in the nineteenth century, American courts decided that, like the British government, federal and state governments were immune from legal liability--they could do no wrong. It was not until the middle of the present century that congressional passage of the Federal Tort Claims Act (FTCA) allowed lawsuits against the United States for negligent harms done by its employees. That statutory waiver of immunity, however, was only partial. Among other exceptions also barring recovery against the federal government, the law retained federal immunity for wrongful performance of so-called "discretionary functions." (Jayson, 1984) The discretionary function exception, along with other reasons, helps explain federal success in avoiding liability for losses assertedly caused by its weather modification programs.

The discretionary function exception was written to preserve separation of powers in the federal government. The courts were not given authority to second-guess legislative or executive decisions. That would have allowed them ultimate control over the government through judicial review of policy decisions. The limitation on liability is broader, however, than just initiation of government programs. According to the 1984 decision of the Supreme Court in the Varig Airlines Case, regulatory conduct of government employees is immune from liability, and it is the nature of their conduct, not their status, that is the basis for determination of the immunity. Dalehite v. United States, the Texas City disaster case, laid down a basic distinction between government planning and managing for which the United States is immune and operational carelessness for which it is liable (Reynolds, 1968).

2. BROWN V. UNITED STATES

2.1 National Data Bouy Program

The National Data Buoy Program is administered by the National Oceanic and Atmospheric Administration (NOAA). NOAA supervises maintenance and repair of the buoys by contractors. Three of the data buoys in the program were located along the north-east coast, including Station 44003 on Georges Bank. The buoys had sensors for wind speed and direction, air temperature, barometric pressure, wave informa-

tion, and surface water temperature. When functioning properly, buoys provided forecasters with reliable hourly electronic "snapshots" of the weather picture within the buoy's vicinity. This data is used in conjunction with other information to forecast weather patterns and to track the course of storms (Hamilton, 1980).

NOAA knew of and encouraged small vessel fishermen's reliance on forecasts based in part on buoy data. The Georges Bank buoy's difficulties started in May 1980, and were compounded that summer when a ship hit it. Repairs were made to its hull and electronic report system in August, but the next month the entire wind sensor system failed. Although NOAA knew this, no repairs were made, and as a consequence the weather service suffered a critical void in its information gathering system. NOAA was waiting for a scheduled replacement which was due in January. However, they failed to warn mariners that they were not getting Georges Bank buoy information and could not therefore provide forecasts as accurately as would have been the case with the needed data.

2.2 Basis for the Lawsuit

On November 22, 1980 four lobstermen, including Honour Brown's husband Gary, were drowned at Georges Bank after they set out in fair weather from Cape Cod for a week of fishing. They were taken by surprise by a storm which was not adequately predicted until it was too late to do much more than attempt to ride it out. Three of the men were lost when their boat, the Fairwind, capsized and sank. One sailor on board managed to climb onto a raft from which he was rescued two days later. Another man was lost when he was swept overboard from his vessel, the Sea Fever.

Honour Brown and other family members of the lost men sued the United States of America for the loss of their loved ones under the Suits in Admiralty Act which required them as plaintiffs to prove that the conduct of NOAA was careless and that it caused the deaths. District Judge Joseph Tauro ruled there was negligence. NOAA had no legal duty to establish the data buoy system, but once they undertook to provide it and induced mariners' reliance on it, NOAA was obligated to use due care in maintenance or, at least, to warn users that the system was not functioning correctly. They failed to do either. NOAA was negligent and that negligence caused the deaths.

2.3 Discretionary Function

As well as contesting the negligence issue, the government argued that it was immune from liability because of the FTCA discretionary function exception which was incorporated into the Suits in Admiralty Act. The trial judge, however, found that NOAA conduct in Brown fell outside the scope of that exception as interpreted in Dalehite and Varig. This case was neither a challenge to a properly performed, congressionally authorized activity nor an effort to review an authorizing statute. The plaintiffs simply were asserting that NOAA had induced reliance and then negligently failed to perform. That is not policy making.

Generally, courts in FTCA cases have ruled that NOAA is not liable for losses resulting from inaccurate forecasts. Although leading authorities in liability law are baffled how forecasting can be considered policy making (Keeton, 1984), the United States wins such cases. The district court in Brown was able to distinguish the forecast cases. The Bartie Case in 1963, the Chanon Case in 1972, and the Williams Case in 1980 had all ruled for the federal government when claims were based on inaccurate weather forecasts, but in all of those cases the basic reason for the rulings was failure by the claimants to establish that the government was negligent. In Brown, on the other hand, negligence was established.

3. BROWN AND WEATHER MODIFICATION

3.1 Federal Weather Modification

Federal weather modification research funding is now low. But the AMS recently has urged that "[s]tronger and more consistently funded research programs should be developed by federal and state agencies to meet the demands created by a society that increasingly affects and is affected by weather." (1984) And annual reports from NOAA's Environmental Modification Office (1973-83) indicate that many federal dollars have been spent in the past on weather modification. If harm comes from federally-funded projects, claims against the United States will be filed under FTCA.

3.2 Federal Liability Exposure

One of the two weather modification related suits that have been filed against the government, Montana Wilderness Association v. Hodel, involved environmental law rather than liability. The case became moot when the sponsor voluntarily terminated the project (Davis, 1975).

The other case, Lunsford v. United States, was a tort claim action for losses allegedly caused by a flood enhancing federally funded cloud seeding program at Rapid City, South Dakota. There were both factual and legal problems with the lawsuit. Investigation asserted there was no causal link between the flooding and the seeding (St.-Amand, Davis & Elliott, 1973). And, on an interlocutory appeal, it was ruled that the case could not be brought as a class action and that the immunity issue could be decided only after a trial on the merits by the individually named plaintiffs. They never did follow through with the full trial.

4. CONCLUSIONS

Although there has been no federal weather modification case in which the immunity issue has been decided, the forecast cases have been seen as the basis for governmental immunity in weather modification related lawsuits. Brown v. United States teaches, though, that under certain circumstances claimants can beat the immunity. Planning, setting up, and directing a federal weather resources management program are policy decisions and mistakes that cause harm will not result in governmental liability. But, should federal employees or contractors carelessly maintain equipment, and should persons rely to their detriment on such equipment, liability for harm caused can result. In such instances, governmental immunity will not bar federal liability.

5. REFERENCES

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