HANDLING TORT CLAIMS AND SUITS AGAINST THE STATE OF IOWA: PART I

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INTRODUCTION

Prior to passage of the Iowa Tort Claims Act in 1965,[1] the maxim that "the King can do no wrong" prevailed in Iowa. No tort action could be maintained against the State or its agencies.[2] Throughout this period of time, one who suffered damage as the result of a negligent or wrongful act of a State employee had the limited choice of bringing suit against the employee personally or seeking redress from the Iowa General Assembly in the form of private relief.[3]

The Iowa Tort Claims Act[4] expressly waives the State's immunity "from suit and liability"[5] with respect to claims as defined by the Act. While the Act does not provide a blanket waiver of immunity as to all kinds of tortious conduct, it does constitute a comprehensive remedy in terms of coverage against the State for personal injury, death or property damage resulting from the negligent or wrongful acts of State employees. *Graham v. Worthington*,[6] is as yet, the only pronouncement by the Iowa Supreme Court relative to the Act. Many of its provisions are, however, identical to those found in the Federal Tort Claims Act,[7] and the federal decisions construing such provisions will no doubt be received with considerable judicial respect and deference.[8]

This Article will consider the handling of tort claims against the State both administratively and judicially. The more significant provisions of the Act will be discussed as bearing on the nature and extent of the State's liability under the Act. Due to the lack of case law relative to the new Act, federal cases con-

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1 Ch. 79 1965 Iowa Acts of 61st. G.A. 104 (codified in IOWA CODE ch. 25A (1966)).

2 *See, e.g.*, Montandon v. Hargrave Constr. Co., 256 Iowa 1297, 130 N.W.2d 659 (1964); Boyer v. Iowa High School Athletic Assn., 256 Iowa 337, 127 N.W.2d 606 (1964).

3 IOWA CODE ch. 25 (1962), is illustrative of the procedure utilized for many years in bringing various kinds of claims against the State before the General Assembly for legislative disposition.

4 Hereinafter referred to in the text as "the Act."

5 IOWA CODE § 25A.4 (1966).

6 146 N.W.2d 626 (Iowa 1966).

7 The provisions of the Federal Torts Claims Act (originally enacted as Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842) are scattered throughout various sections of the United States Code. The majority of its provisions are codified in and can be found between 28 U.S.C. §§ 1346-2679 (1964), *as amended*, Pub. L. No. 89-506, 80 Stat. 306 (1966).

8 In Stromberg Hatchery v. Iowa Employment Security Comm'n, 239 Iowa 1047, 33 N.W.2d 498 (1948), the interpretation of a 1943 amendment to the Iowa Employment Security Law, which was modeled after a similar federal provision, was at issue. The Iowa court noted that decisions construing the federal provision, while not conclusive, were "entitled to unusual respect and deference."

sidering comparable provisions under the Federal Tort Claims Act will be referred to in support of many of the comments and observations made hereinafter. That which constitutes a "claim" within the meaning of the Act and related matters will be discussed in Division III hereof. With respect to the discussion contained in Divisions I and II, it will be assumed that the claimant has a "claim" as defined in section 25A.2(5) of the Act.[9]

I. Claims Against the State—The Administrative Process

A tort claim against the State must, in the first instance, be presented for administrative consideration and disposition. In this respect, section 25A.3 of the Act authorizes the State Appeal Board,[10] subject to the advice and approval of the Iowa Attorney General, "to consider, ascertain, adjust, compromise, settle, determine, and allow any claim as defined in this chapter." A claim is formally commenced by filing the same with the State Comptroller, Chairman, State Appeal Board, Des Moines, Iowa, 50319.[11] Since the Act contains a two-year statute of limitations for filing claims after accrual,[12] a claim lodged with a State agency or State official other than the State Comptroller would not comply with the Act and seemingly would not toll the limitations provision. The Appeal Board has adopted claim forms to be used in executing claims, and copies of the same may be obtained either from the State Comptroller or from the Attorney General's Office, Tort Claims Division.

When a claim is filed it is referred to the Tort Claims Division of the Attorney General's Office where an investigation is commenced as to its factual accuracy and legal validity. The agency employing the individual whose alleged act or omission is complained of is usually requested to make a report on the claim. Where an agency reports favorably to the claimant, which is not an uncommon occurrence, an award will generally be made if the claim otherwise falls within the purview of the Act. The extent of the investigation of a claim will, of course, vary somewhat depending on the type and size of the claim. Those claims involving significant factual disputes and requesting substantial sums of money are the subject of extensive independent investigation by personnel of the Tort Claims Division.

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9 Iowa Code § 25A.2(5) (1966), in part, provides:

> "Claim" means any claim against the state of Iowa for money only, on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state while acting within the scope of his office or employment, under circumstances where the state, if a private person, would be liable to the claimant for such damage, loss, injury, or death, in accordance with the law of the place where the act or omission occurred.

10 The State Appeal Board is a board composed of three members, to wit: the State Auditor, the State Treasurer and the State Comptroller. See Iowa Code §§ 25A.2(2), 23.1 (1966).

11 Iowa Code § 25A.3 (1966), in part, provides: "Claims made under this chapter shall be filed with the state comptroller, who shall acknowledge receipt on behalf of the state appeal board."

12 *Id.* § 25A.13. The interpretation of the limitations provision will be considered elsewhere with respect to the commencement of suit in the district court.

When the investigation of a claim is finished a written report is made and filed with the State Appeal Board. The report ordinarily analyzes the factual basis of the claim, draws conclusions as to its legal validity or the lack thereof and concludes with a recommendation as to whether the claim should be allowed and, if so, in what amount. It is the present practice of the Appeal Board to meet the first Tuesday of each month, at which time claims against the State are presented to the Board, considered and discussed, and a disposition reached with respect thereto.

In the event the claim is allowed either in the amount prayed for or in a reduced sum, the claimant is required to execute a written release in a form approved by the Attorney General, before the award will be made.[13] The execution of the release and acceptance of the award is conclusive not only as to the State but also constitutes a release by the claimant of any claim "against the employee of the state whose act or omission gave rise to the claim."[14] An award in excess of $5,000 requires the unanimous approval of all members of the State Appeal Board and the Attorney General and the approval of the District Court of Iowa in and for Polk County.[15] If the claimant is represented by an attorney and an award is made, the Appeal Board is required, as a part of its disposition, "to determine and allow reasonable attorney's fees and expenses" to be paid out of the award.[16] Since section 25A.15 of the Act makes it an indictable misdemeanor for an attorney to collect for services rendered in connection with a claim "any amount in excess of that allowed under this section," it is important that the claim indicates legal representation where such is the case. Moreover, where it is known that an attorney represents a claimant it is the practice of the Tort Claims Division, where an award is made, to send the warrant to the attorney made payable to counsel and the claimant.

Subsequent to the ruling in *Graham v. Worthington*,[17] holding the Act constitutionally valid, some 186 tort claims have been administratively disposed of, either favorably or unfavorably to the claimants, between February 1, 1967, and January 2, 1968. With respect to these claims, the Appeal Board has awarded a total sum of approximately $55,736. The administrative process has been beneficial to a number of claimants and, in some instances, has no doubt made it unnecessary to participate in lengthy and expensive litigation. Finally, it should be noted that section 25A.3 of the Act authorizes the Appeal Board to adopt rules and regulations for handling claims administratively which the Board has taken advantage of. It now appears, however, that the

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13 *Id.* § 25A.11.

14 *Id.*

15 *Id.* § 25A.3. To date the Polk County District Court has approved three claims allowed administratively, each in excess of $5,000. While the statute does not spell out the nature of the role to be played by the court in approving such awards, the court has informally indicated that it desires a file be opened for each such matter containing the materials before the Appeal Board when it approved the claim and that a hearing be had with respect to that court's action on the claim.

16 *Id.* § 25A.15.

17 146 N.W.2d 626 (Iowa 1966).

rules and regulations adopted present certain problems calling for some modification and changes and, accordingly, the adopted procedures will not be considered further.

II. Claims Against the State—The Judicial Process

Prior to passage of the Tort Claims Act, Iowa courts lacked jurisdiction of suits sounding in tort against the State and its agencies.[18] The subject law contains a grant of exclusive jurisdiction, enabling an appropriate district court "to hear, determine, and render judgment on any suit or claim as defined in this [Act]."[19] This jurisdictional grant provides that the State's liability regarding such claims is to be determined "in the same manner, and to the same extent as a private individual under like circumstances."[20] Suing the State is not, however, like suing a private person. In many respects the Act provides procedural and substantive differences between bringing suit against the State and suing a private person in tort. It is the purpose of this Division to reflect upon the principal differences and otherwise discuss the handling of tort suits against the State.

A. *Exhausting the Administrative Process*

As a prerequisite to suit under the Act, a claimant is required to present his claim to the State Appeal Board for administrative disposition. Section 25A.5 of the Act provides that no suit shall be permitted until the claim is disposed of by the Appeal Board, except that if such claim is not disposed of within six months after it is filed, the claimant may, by notice in writing, withdraw the claim and begin suit. It seems obvious that the exhaustion of the administrative process is jurisdictional, and a suit commenced without complying therewith is subject to dismissal.

B. *Limitation of Actions*

Section 25A.13 of the Act provides, in pertinent part, as follows:

> Every claim . . . permitted under this chapter shall be *forever barred*, unless within two years after such claim accrued . . . the claim is made in writing to the state appeal board . . . and a suit is begun under this chapter. The time to begin a suit under this chapter shall be extended for a period of six months from the date of mailing of notice to the claimant by the state appeal board as to the final disposition of the claim or from the date of

18 Montandon v. Hargrave Constr. Co., 256 Iowa 1297, 130 N.W.2d 659 (1964). This is not to say the Act created a new cause of action—rather it gave "recognition to and a remedy for a cause of action already existing by reason of a wrong done but for which redress could not previously be had because of the common law doctrine of governmental immunity." Graham v. Worthington, 146 N.W.2d 626, 637 (Iowa 1966).

19 Iowa Code § 25A.4 (1966).

20 *Id.*

> withdrawal of the claim . . . if time to begin suit would otherwise expire before the end of such period.
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> *This section is the only statute of limitations applicable to claims as defined in this chapter.* (Emphasis added.)

This provision, generally speaking, establishes a two-year statute of limitations for filing an administrative claim and commencing suit after the accrual of a claim. Where a claim is timely filed administratively, however, the time for commencing suit is extended for six months from the date of notice as to administrative disposition or from the date of withdrawal of the claim, if the two-year period has otherwise expired. Stated differently, a suit must be commenced within such six-month period only if two years has otherwise elapsed since the claim accrued.

This limitation provision is an example of one of the major differences, remedy wise, between suing the State and suing a private person in tort. For example, under the Act a claim for tortious injury to property must be asserted within two years after its accrual, notwithstanding section 614.1(5) of the Iowa Code which provides a five-year statute of limitations for property damage suits. Neither time nor space permits detailed consideration of the many problems that will no doubt arise with respect to the Act's limitation provision. By way of illustration of such potential problems, comments are proffered on the following two questions: (1) Will the claimant's infancy or mental illness toll the Act's limitation period? (2) May the Act's limitation period be waived or is it jurisdictional in nature?

1. Chapter 614 of the Iowa Code contains numerous limitation provisions for commencing designated civil actions, and section 614.8 thereof extends such periods in favor of minors and mentally ill persons. It is arguable, however, that the disability provision is inapplicable to a claim under the Tort Claims Act. In the first place, the Act's limitation provision expressly provides that it is "the only statute of limitations applicable to claims as defined in this chapter." Moreover, there is authority for the proposition that legislation waiving governmental immunity creates a new legal liability, and that with respect to such legislation a "statute of limitation" must be distinguished from conditions which are affixed to the liability created by the statute.[21] The federal courts, in construing a comparable limitation provision of the Federal Tort Claims Act,[22] have ruled that infancy does not toll the limitation provision.[23] The rationale in reaching this conclusion is stated in *Simon v. United States*,[24] as follows:

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21 L. JAYSON, HANDLING FEDERAL TORT CLAIMS § 275.02 (1967); *cf.* Montandon v. Hargrave Constr. Co., 256 Iowa 1297, 130 N.W.2d 659 (1964), wherein the Iowa Supreme Court noted that statutes in derogation of sovereign immunity are to be strictly construed in favor of the sovereign.

22 28 U.S.C. § 2401(b) (1964).

23 *See, e.g.*, Brown v. United States, 353 F.2d 578 (9th Cir. 1965); Simon v. United States, 244 F.2d 703 (5th Cir. 1957).

24 244 F.2d 703, 704-05 (5th Cir. 1957), quoting from 34 AM. JUR. *Limitation of Actions* § 7 (1941) (emphasis deleted).

> A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right. Such a provision will control, no matter in what form the action is brought. The statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist, and the defendant is exempt from liability.

It will be noted that the position adopted by the court in *Simon* assumes that the limitation provision of the Federal Act is jurisdictional. Such is precisely the ruling in *Humphreys v. United States*[25] where the Ninth Circuit said: "[N]o waiver [of immunity] exists under 28 USCA § 1346 once the two-year period of limitations has run. Thus, after the two-year period the District Court has no jurisdiction over the action."

2. The Iowa Supreme Court, in construing the limitation provisions of Chapter 614 of the Iowa Code, has repeatedly ruled that such provisions constitute an affirmative defense which must be pleaded and that the failure to so plead operates as a waiver of the defense.[26] If, however, the Iowa court adopts the reasoning of the federal cases relative to the jurisdictional nature of the limitation statute in the Federal Act,[27] there could be no waiver of the limitation provision of the Iowa Act. Thus, a suit commenced after the limitation period had run would be vulnerable to a special appearance[28] or motion to dismiss[29] filed by the State and could be raised at any stage of the proceedings by the court on its own motion.

C. *Service of Process and Venue*

The Act contains no express provision as to how process is to be served upon the State in order to commence suit thereunder. The Iowa Rules of Civil Procedure are applicable to tort suits against the State,[30] but the rules do not answer the question of upon whom service may be made. Iowa Rule of Civil Procedure 48 states that a civil action is commenced by serving the

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25 272 F.2d 411, 412 (9th Cir. 1959).

26 *See, e.g.*, Ehlinger v. Ehlinger, 253 Iowa 187, 111 N.W.2d 656 (1962); Harrison v. Keller, 254 Iowa 267, 117 N.W.2d 477 (1962).

27 *See* text accompanying notes 23 and 24 *supra*.

28 IOWA R. CIV. P. 66.

29 *Id.* 104.

30 IOWA CODE § 25A.6 (1966), in part provides: "In suits under this chapter, the forms of process, writs, pleadings, and actions, and the practice and procedure, shall be in accordance with the rules of civil procedure promulgated and adopted by the supreme court of the state . . . ."

defendant with an original notice, and rule 56 provides that original notices are "served" by delivering a copy to the proper person. Rule 56, subsection (k), provides further that personal service may be had upon the State "where made a party pursuant to statutory consent or authorization for suit *in the manner provided by such statute or any statute applicable thereto.*" (Emphasis added.) As has been noted, the subject law does not provide for the manner of service of process, and there is no other relevant statute applicable to such service.[31] Since the new Act otherwise contemplates that the Iowa Attorney General will defend suits brought thereunder, logic dictates that the original notice be served on that official or his delegate in charge of the Tort Claims Division. In practice the Attorney General or his delegate has accepted service of the original notice by mail, and, of course, notice could be personally delivered.

With respect to venue, a suit may be commenced in the "district court of . . . Iowa in which the plaintiff is resident or in which the act or omission complained of occurred."[32] This provision differs from the ordinary rule in Iowa which permits suits sounding in tort in the county where the defendant resides.[33] Moreover, the difference could be crucial, if the potential plaintiff is a non-resident of the State, and the act or omission occurred in another jurisdiction. In keeping with the venue provision there would be no "district court of . . . Iowa" at the plaintiff's residence or where the tort occurred. The potential dilemma of a non-resident claimant appears to be more than hypothetical conjecture, since administrative claims have been filed involving alleged tortious conduct of State employees beyond Iowa.[34] It is most unlikely that the legislature intended to deny a judicial forum to a non-resident claimant—rather it appears that the venue provision was copied from the Federal Tort Claims Act[35] without regard to any problem it might cause in the context of the Iowa Act. If the non-resident filed suit in a district court of Iowa and the State failed to object to the forum, the question remains as to whether the Act's venue provision is jurisdictional. Professor Moore has stated that venue is a privilege personal to the defendant, which can be waived.[36] In this respect, the Iowa Supreme Court has noted that venue differs from jurisdiction,[37] and that it would not pass upon an issue as to improper venue not raised by the defendant.[38] The federal

[31] *Id.* §§ 613.8-.13, which provisions waive immunity as to specified causes of actions against the state and detail how service of process is to be affected.

[32] *Id.* § 25A.4.

[33] *Id.* § 616.17. *See also* §§ 616.2, 616.8 authorizing suits in the defendant's county involving injury to real property or personal injury on property damage caused by the operation of a motor vehicle.

[34] At the administrative level, there is nothing in the Act prohibiting the State Appeal Board from considering the claim of a non-resident and making an award for damages caused by a State employee in another jurisdiction.

[35] 28 U.S.C. § 1402(b) (1964), in part, provides: "A tort claim against the United States . . . may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred."

[36] 1 J. Moore, Federal Practice ¶ 0.140 [1.-2] (2d ed. 1964).

[37] Hulburd v. Eblen, 239 Iowa 1060, 1063-64, 33 N.W.2d 825, 827 (1948).

[38] Des Moines Transp. Co. v. Haring, 238 Iowa 395, 398-99, 27 N.W.2d 210, 212 (1947).

courts have rejected the government's contention that the venue provision of the Federal Tort Claims Act is jurisdictional.[39]

Apart from the venue problem that could be encountered by the non-resident claimant, the Act otherwise provides that the "laws and rules of civil procedure of this state on change of place of trial shall apply."[40]

D. *Trial De Novo to the Court*

Where the State Appeal Board disposes of a claim unfavorably to the claimant and suit is commenced, the district court's jurisdiction is de novo and not limited to judicial review of the administrative record. This is obvious from those portions of the Act which (1) render the State liable to a claimant in the same manner and to the same extent as a private individual under like circumstances[41] and (2) make applicable to such suits the rules of civil procedure relative to pleadings, actions and practice and procedure.[42] The State cannot, however, be held liable for "interest prior to judgment or for punitive damages."[43] The provisions in Iowa law relating to counterclaims, setoff, interest upon judgment and payment of judgments are applicable to such suits, but no writ of execution shall issue against the State by reason of any judgment under the Act.[44] Where judgment is awarded the claimant, the court, as a part of the judgment, must determine and allow reasonable attorney's fees and expenses.[45]

In suing under the Act counsel, generally to his displeasure, will find that the plaintiff is not entitled to a jury trial. The Act provides that the District Court "sitting without a jury" shall hear, determine and render judgment on such suits.[46] This restriction does not violate Article 1, § 9, of the Iowa Constitution, providing the right of trial by jury in that: (1) the right exists only in cases where it existed at the time the constitution was adopted[47] and (2) the waiver of governmental immunity to suit is subject to those restrictions which the legislature saw fit to impose.[48]

Suits have been commenced under the Act wherein the allegedly negligent State employee or an alleged concurrent tortfeasor has been joined as a party defendant. In some instances, the claimant has argued that since the Act

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39 Nowotny v. Turner, 203 F. Supp. 802, 805 (M.D.N.C. 1962); Abramovitch v. United States, 174 F. Supp. 587, 591-92 (S.D.N.Y. 1959).

40 IOWA CODE § 25A.4 (1966). With respect to the laws governing change of venue *see* IOWA R. CIV. P., Division VIII.

41 IOWA CODE § 25A.4 (1966).

42 *Id.* § 25A.6.

43 *Id.* § 25A.4.

44 *Id.* § 25A.6.

45 *Id.* § 25A.15. The statute makes it an indictable misdemeanor for an attorney to demand, charge or receive an amount in excess of that allowed by the court in its judgment.

46 *Id.* § 25A.4.

47 Hunter v. Coal Co., 175 Iowa 245, 327, 154 N.W. 1037, 1067 (1916); *see* Danner v. Hass, 257 Iowa 654, 658, 134 N.W.2d 534, 537 (1965).

48 United States v. Sherwood, 312 U.S. 584, 587 (1941); *see* Montandon v. Hargrave Constr. Co., 256 Iowa 1297, 130 N.W.2d 659 (1964).

permits joinder[49] and since he is entitled to a jury trial as to the private defendant, a joint trial is permissible at which the jury can decide the issues relative to the private defendant, and the court can pass on the State's liability. The State maintains, however, that the non-jury provision means that no jury may be present for any purpose at a trial where it is defendant under the Act.[50] In those cases to date where the issue has arisen, the State has been successful in obtaining a ruling that it is entitled to a separate trial.[51]

A claimant may, of course, bring suit personally against the State employee whose act or omission is complained of. In view of the Act's non-jury provision, some attorneys have preferred to sue the employee where it has been known or suspected that the employee is covered by insurance, insuring his activities with the State.[52]

E. *Compromising Suits Against the State*

"With a view to doing substantial justice," the Act permits the Attorney General to compromise or settle a suit with the approval of the Court in which the suit is pending.[53] This compromise provision reflects legislative recognition that in some cases compromise and settlement of tort suits is obviously desirable.[54] In accordance with the compromise authority, to date six such suits praying a total sum of $377,685.36 have been settled for the total amount of $42,592.75.

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49 In view of § 25A.6 of the Act which provides that the practice and procedure with respect to suits shall be in accordance with the Iowa Rules of Civil Procedure, joinder of a private defendant is seemingly permissible. *See* IOWA R. CIV. P. 24(a) relating to permissive joinder of defendants.

50 The State argues that it is likely to be subjected to legal prejudice if a jury is permitted to decide issues relative to a defendant joined with the State, the contention being that the jury, in resolving such issues, might be influenced by the presence of a highly solvent defendant and that the court in determining the State's liability might be tempted to follow the verdict of the jury as though it were an advisory panel. *See* Honeycutt v. United States, 19 F.R.D. 229 (W.D. La. 1956), holding that under the Federal Tort Claims Act Congress intended that there should be no jury of any kind where the government was a defendant. The opinion quoted from a House debate on the subject as follows:

> [I]nasmuch as the Government is the defendant and the money comes out of the Treasury, the juries will decide cases with their hearts rather than their heads, just as they do when an insurance company is the defendant, so the awards in jury trials would probably be much larger, in view of the sympathy the jurors might have than they would be in trials before the court.

Id. at 231. *But see* United States v. Yellow Cab Company, 340 U.S. 543, 555-56 (1951) suggesting by way of *dictum* that the non-jury provision of the federal act might not preclude a joint trial with a jury trying the issues between the claimant and the private defendant, but also recognizing that if the situation called for a separation of the claims the court could order their separate trial.

51 Druivenga v. State, Law No. 78460 (Woodbury County Dist. Ct. Sept. 28, 1967); Chance v. Akers, Law No. 49368 (Scott County Dist. Ct. Dec. 8, 1967). The issue is under submission for ruling in Smith v. State, Law No. 78692 (Woodbury County Dist. Ct.).

52 *See e.g.*, IOWA CODE § 517A.1 (1966), authorizing State agencies to purchase liability insurance to insure against individual personal liability that may be incurred by the officers or employees of such agency.

53 *Id.* § 25A.9.

54 This legislative policy is also reflected in § 25A.3 of the Act which authorizes the State Appeal Board to "adjust, compromise, settle, determine and allow any claim as defined in this chapter."

It would appear that a suit could be compromised and settled, even if it is pending on appeal before the Iowa Supreme Court.[55] In such a case it would seem appropriate for the parties to make application to the supreme court for a remand of the case to the district court for its consideration and approval of the compromise agreement.[56]

Where a suit is to be compromised and settled, the Attorney General is required, as a part of the compromise agreement, to determine and allow reasonable attorney's fees and expenses to be paid out of the award.[57] The acceptance by the claimant of an award reached by compromise agreement constitutes "a complete release by the claimant of any claim against the state and against the employee . . . whose act or omission gave rise to the claim, by reason of the same subject matter."[58]

F. *Suing the Agency Involved*

A suit permitted under the Act is against the State of Iowa and not against the agency employing the individual whose act or omission gave rise to the claim. In this respect, section 25A.16 provides that the "authority of any state agency to sue or be sued in its own name shall not be construed to authorize suits against such state agency on claims as defined in this chapter." The Federal Tort Claims Act contains a comparable provision,[59] and the federal decisions hold that a tort suit against a federal agency rather than against the United States is subject to dismissal on jurisdictional grounds.[60] The danger of bringing suit against the agency is illustrated by *Lomax v. United States*,[61] where one day before the statute of limitations had run, a suit was commenced, but the United States Post Office Department was named as defendant. A subsequent motion to dismiss filed by the Government on the grounds that a tort suit is not permitted against the agency and that the limitation provision had expired as to the United States was granted.

It should be noted that if a claim is filed *under any other law* of this State and a determination is made by the court that the Tort Claims Act provides the exclusive remedy for the claim, the time to make a claim and to begin suit under the Act is extended for a period of six months from the date of the court order making such determination, if the time to make a claim and to begin suit under the Act would otherwise expire before the end of such period.[62] Thus, if a tort suit was commenced against a State agency under

[55] *Id.* § 25A.7, provides for appellate review of district court judgments under the Act.

[56] Such was the procedure used under the Federal Tort Claims Act where a compromise agreement was reached while a case was pending before the United States Supreme Court. Hubsch v. United States, 338 U.S. 440, 441 (1949).

[57] IOWA CODE § 25A.15 (1966).

[58] *Id.* § 25A.10.

[59] 28 U.S.C. § 2679(a) (1964).

[60] Walder v. United States of America Post Office, 179 F. Supp. 956 (E.D. Pa. 1959); Lomax v. United States, 155 F. Supp. 354 (E.D. Pa. 1957); Wickman v. Inland Waterways Corp., 78 F. Supp. 284 (D. Minn. 1948).

[61] 155 F. Supp. 354 (E.D. Pa. 1957).

[62] IOWA CODE § 25A.13 para. 2 (1966).

some other law of the State and the court determined that Chapter 25A of the Iowa Code provided the exclusive remedy, a claim could seemingly be made against the State if the Act's limitation provision[63] had not expired when the suit against the agency was commenced.

G. *Jurisdiction Not Extended to All Tort Claims*

In waiving governmental immunity to suits sounding in tort the legislature may impose conditions to and restrictions on the waiver.[64] In this respect, the new Act, while providing a comprehensive remedy in terms of coverage, is not a blanket waiver of immunity with regard to all tortious conduct. Section 25A.4 grants jurisdiction to an appropriate district court to render judgment only as to such suits or claims "as defined in this chapter," and the same statute provides: "[T]he immunity of the state from suit and liability is waived *to the extent provided in this chapter.*" (Emphasis added.) In the latter respect, section 25A.14 sets forth some nineteen (19) claims that are expressly excluded from coverage under the Act. While some of the excluded claims will be considered in detail in Division III hereof, it will be noted that the provisions of the Act do not apply to the following:

(1) Any claim based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion be abused.

(2) Any claim arising in respect to the assessment or collection of any tax or fee, or the detention of any goods or merchandise by any law enforcement officer.

(3) Any claim for damages caused by the imposition or establishment of a quarantine by the state, whether such quarantine relates to persons or property.

(4) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(5) Any claim by an employee of the state which is covered by the Iowa workmen's compensation law or the Iowa occupational disease law.

The Federal Tort Claims Act contains several such excluded claims in identical language,[65] and the federal courts have ruled that the same are jurisdictional in nature. Thus in *Dalehite v. United States*,[66] sustaining the government's contention that suit was barred by the discretionary function

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[63] *Id.* § 25A.13.

[64] *See* United States v. Sherwood, 312 U.S. 584, 587 (1941); Montandon v. Hargrave Constr. Co., 256 Iowa 1297, 1302, 130 N.W.2d 659, 662 (1964).

[65] 28 U.S.C. § 2680 (1964).

[66] 346 U.S. 15, 24 (1953).

exception of the Federal Act,[67] the Court ruled that as a matter of law the facts found "cannot give the District Court jurisdiction of the cause under the Tort Claims Act." In *United States v. Spelar*,[68] it was held that there was no jurisdiction to try a tort action that arose in Newfoundland in that claims arising in a foreign country are excluded from coverage under the Federal Act.[69] It appears that a petition filed under the Iowa Act setting forth any one or more of the excluded claims would be subject to dismissal. In many cases, however, it will not be possible to determine in advance of the trial if the petition actually sets forth a claim that is expressly excluded from coverage. In such instances, it would seem wise for the State to raise the matter as a defense in its answer and offer evidence to prove the contention.[70]

III. Claims Against the State—Nature of the State's Liability

In Divisions I and II the emphasis has been on the practical approach to handling tort claims and suits against the State. The remainder of this Article considers some of the more significant questions relative to the nature of the State's liability under the new Act. Issues such as what constitutes a "claim," when a claim accrues, and what are the nature of claims expressly excluded from coverage by the Act will be explored in some detail. Once again, the lack of judicial decision relative to our Act calls for consideration of federal cases passing on questions under comparable or identical provisions of the Federal Tort Claims Act.

A. *That Which Constitutes a Claim Under the Act*

The Act authorizes both administrative and judicial disposition of a "claim as defined in this chapter."[71] Since the legislature in waiving the State's immunity to liability in tort could attach such terms and conditions as it saw fit[72] and since jurisdiction was conferred only as to a "claim" defined by the Act, it is of singular importance to consider that which constitutes a claim under the Act. Section 25A.2(5) of the Act, as pertinent, provides:

> "Claim" means any claim against the state of Iowa for money only, on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state while acting

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67 *Compare* Iowa Code § 25A.14(1) (1966), with 28 U.S.C. § 2680(a) (1964).

68 338 U.S. 217 (1949).

69 28 U.S.C. § 2680(k) (1964).

70 To illustrate: Iowa Code § 25A.14 (1966) excludes a claim "based upon an act or omission of an employee of the state, *exercising due care*, in the execution of a statute or regulation, whether or not such statute or regulation be valid . . . ." (Emphasis added.) The issue of whether the employee was "exercising due care" presents a factual question to be resolved by the evidence.

71 *Id.* §§ 25A.3, 25A.4.

72 *See* note 48 *supra*.

> within the scope of his office or employment, under circumstances where the state, if a private person, would be liable to the claimant for such damage, loss, injury, or death, in accordance with the law of the place where the act or omission occurred.

An analysis of the definition of a "claim" reveals that in each case the claimant must establish the following five elements in order to posit liability under the Act: (1) The relief sought must be money damages; (2) the claim must be for damage to or loss of property or personal injury or death; (3) the injury complained of must have been caused by the negligent or wrongful act or omission of a State employee; (4) the State employee, at the time of the act or omission, must have been within the scope of employment; and (5) the circumstances must be such that if the State were a private person it would be liable to the claimant for such damage, loss, injury or death. In considering these elements necessary to liability under the Act, it should be noted that the definition of a "claim" under the Federal Tort Claims Act is almost identical.[73]

1. *Money Only*

The Act confers jurisdiction only as to a tort claim or suit seeking money damages. Thus, *e.g.*, injunctive relief and restitution, which are common law tort remedies,[74] are not available under the Act.[75] Moreover, an action for a declaratory judgment to determine the State's liability for tort would seemingly not lie under the Act; however, there is some conflict as to this issue among the federal cases construing the Federal Tort Claims Act.[76]

2. *Property Damage, Personal Injury or Death*

The subject matter of a claim or suit is restricted to damage to or loss of property, personal injury or death. The concepts of property damage, personal injury and wrongful death are common to the law of this jurisdiction, and their use in the new Act should raise few, if any, novel problems.

3. *Negligent or Wrongful Act of a State Employee*

As a condition to the State's liability under the Act, the claimant must establish that the injury complained of was caused by the negligent or wrongful act or omission of a State employee. The language "negligent or wrongful act or omission" are terms of art in the field of tort liability and where a claim

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[73] District Courts; Jurisdiction, 28 U.S.C. § 1346 (b) (1964).

[74] *See* Chrischilles v. Griswold, 150 N.W.2d 94, 99 (Iowa 1967) (injunction as tort remedy).

[75] *Accord*, Fowler v. United States, 258 F. Supp. 638 (C.D. Calif. 1966) (injunctive relief not available); Smith v. United States, 101 F. Supp. 87 (D. Colo. 1951) (claims seeking restitution of grazing rights).

[76] Pennsylvania R.R. Co. v. United States, 111 F. Supp. 80 (D.N.J. 1953); Aktiebolaget Bofors v. United States, 93 F. Supp. 134 (D.D.C. 1950). The former case resulted from the Port of South Amboy, New Jersey, explosion and involved thousands of claimants and many defendants. While not granting such relief, the district court indicated that a declaratory judgment proceeding would lie under the federal act to obtain a prior determination as to whether the United States was negligent with respect to the disaster. 111 F. Supp. at 86-87.

under the Act is concerned they presuppose culpable conduct by the actor whose act or omission gave rise to the claim. Thus, while Iowa law, in some instances, recognizes the doctrine of "liability without fault,"[77] the new Act seemingly does not permit a claim or suit predicated on such theory. The federal decisions under the federal act have generally held that recovery cannot be based on the doctrine of absolute or strict liability.[78]

The use in the Act of the words "negligent . . . act or omission" should present no new problems to the Iowa attorney handling a tort claim or suit. The language covers nothing more than a claim based on negligence, which encompasses both acts of commission and omission.[79] The use, however, of the term "wrongful act" contemplates something more than mere negligence,[80] and that which constitutes a "wrongful act" within the meaning of Chapter 25A will no doubt be the subject of future interpretation by the Iowa court. The definition of a claim under the federal act[81] also refers to a "wrongful act," and the decisions have ruled that the language covers such torts as trespass,[82] conversion[83] and waste.[84]

The Iowa Code contains a number of provisions enjoining State agencies to do or not to do a specific thing in a given way.[85] Where such statutory provisions have been violated, where the conduct complained of was intentional and where injury is incurred by reason thereof, it can be anticipated that claims will be made on the theory of a "wrongful act."[86]

The negligent or wrongful act to be actionable must have been that of a State employee. In this respect, section 25A.2(3) of the Act defines a State employee as follows: "3. 'Employee of the state' includes any one or more officers or employees of the state or any state agency, and persons acting on behalf of the state or any state agency in any official capacity, temporarily or permanently in the service of the state of Iowa, whether with or without compensation."

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77 Lubin v. City of Iowa City, 257 Iowa 383, 390, 131 N.W.2d 765, 770 (1964) (liability resulting from broken water main could be imposed upon city without a showing of negligent conduct); Healey v. Citizens Gas & Elec. Co., 199 Iowa 82, 87, 201 N.W. 118, 120 (1924) (damages resulting from percolating water actionable irrespective of any question of negligence).

78 *See, e.g.*, Dalehite v. United States, 346 U.S. 15, 44-45 (1953); Strangi v. United States, 211 F.2d 305 (5th Cir. 1954); *But see* United States v. Praylou, 208 F.2d 291 (4th Cir. 1953).

79 *See, e.g.*, Lindquist v. Des Moines Union Ry. Co., 239 Iowa 356, 360, 30 N.W.2d 120, 122 (1948).

80 *See* Dalehite v. United States, 346 U.S. 15, 45 (1953) (word "wrongful" in Federal Tort Claims Act covers trespasses which might not be considered strictly negligent).

81 District courts; Jurisdiction, 28 U.S.C. § 1346(b) (1964).

82 Hatahley v. United States, 351 U.S. 173, 181 (1956) (government agents intentionally destroyed claimants' horses; the Court said "the addition of this word ['wrongful'] was intended to include situations like this involving 'trespasses' which might not be considered strictly negligent"); Dalehite v. United States, 346 U.S. 15, 45 (1953).

83 Aleutco Corp. v. United States, 244 F.2d 674 (3d Cir. 1957).

84 *See* Palomo v. United States, 188 F. Supp. 633 (D. Guam 1960).

85 *See, e.g.*, IOWA CODE § 314.7 (1966), which enjoins officers, employees, and contractors in charge of improvements or maintenance work on any highway not to "turn the natural drainage of the surface water to the injury of adjoining owners."

86 *See* note 83 *supra*. Highway construction has resulted in numerous claims involving alleged water damage to adjoining land owners.

In most cases there will be little difficulty in ascertaining if one is a State employee within the definition of the Act. The issue does, however, present some problems that should be considered. For example, is a road contractor who constructs a highway under contract with the State Highway Commission an employee of the State or that State agency? The Act itself seemingly requires a negative answer to the question. Section 25A.2(1) of the Act, in defining a "State agency," specifically provides that the definition "shall not be construed to include any contractor with the state of Iowa." Moreover, section 25A.4 equates the State's liability on a claim to that of "a private individual under like circumstances." As a general proposition, a private employer in Iowa is not liable for the torts of an independent contractor.[87] There are, however, circumstances under which a private employer is liable for the tortious conduct of an independent contractor,[88] and it remains to be seen if such exceptions to liability will apply to the State under the new Act. Decisions under the Federal Tort Claims Act, which also excludes a contractor from the definition of "federal agency,"[89] have recognized exceptions to the general rule.[90]

Since the definition of an employee speaks of an officer or employee "of . . . any state agency" and since the Act otherwise defines a "State agency" to include various entities acting as "instrumentalities or agencies of the state of Iowa,"[91] a question is presented as to whether the State is liable for the torts of employees of the various political subdivisions of the State. The issue was resolved in *Graham v. Worthington*,[92] which held that political subdivisions, such as cities, school districts and counties, are not agencies of the State within the meaning of the Act.[93]

A particularly troublesome issue has arisen as to whether members of the Iowa National Guard are, under certain circumstances, State employees within the meaning of the Act. The Iowa National Guard is a federally recognized "reserve component of the Army . . . [or] of the Air Force" as the case may

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87 *See, e.g.*, Aita v. John Beno Co., 206 Iowa 1361, 222 N.W. 386 (1928); Francis v. Johnson, 127 Iowa 391, 101 N.W. 878 (1904).

88 *See, e.g.*, Giarratano v. Weitz Co., 147 N.W.2d 824 (Iowa 1967) (exception to general rule of non-liability where work under contract likely to create a particular risk of physical harm); W. PROSSER, LAW OF TORTS § 64 (2d ed. 1955).

89 Torts Claims Procedure Act, 28 U.S.C. § 2671 (1964).

90 Benson v. United States, 150 F. Supp. 610, 611-12 (N.D. Cal. 1957), citing PROSSER on TORTS, *supra* note 88, recognizes the following exceptions:

> (1) An employer is held liable for his own negligence in failing to exercise ordinary and reasonable care in the selection of a competent contractor . . . .(2) The employer may be vicariously liable for the negligence of the independent contractor where the law imposes upon such employer a duty to protect the plaintiff, or the class of which plaintiff is a member, from the particular harm suffered, and such duty may not be delegated to the independent contractor. . . . (3) Where an "inherently dangerous activity" is undertaken, the employer may be held liable for his own negligence in failing to take reasonable precautionary measures, even though the independent contractor may also have been negligent.

91 IOWA CODE § 25A.2(1) (1966).

92 146 N.W.2d 626, 632-33 (Iowa 1966).

93 The General Assembly passed an act in 1967 relating to the tort liability of governmental subdivisions. Ch. 405, 1967 Iowa Acts of 62d G.A. 793 (effective January 1, 1968). This act is applicable only to claims, as defined therein, that accrue on or after its effective date.

be.[94] Congress has declared that the National Guard is "an integral part of the first line defenses of the United States [to] be maintained and assured at all times,"[95] and it has the authority to order the Guard to active federal duty when needed.[96] The training, discipline and numerous other matters touching the operations of the Iowa Guard are regulated by federal law.[97] Moreover, an Act of Congress[98] requires members of the Iowa National Guard to participate annually in at least 15 days of field training under regulations prescribed by the Secretary of the Army or the Air Force. It is a matter of common knowledge that such field training is often conducted at federal establishments and in joint participation with federal troops. The training itself may likely involve matters such as preparation for nuclear warfare or the acquisition of skills in using and maintaining heavy weapons. Certainly, no one could maintain that "nuclear warfare" is, strictly speaking, the business of a state as an employer. Predicated on these observations it is arguable that members of the Iowa National Guard, participating in the required annual field training, are not employees of the State within the purview of the Iowa Tort Claims Act. Whether the argument will ultimately succeed in the Iowa courts remains to be seen. The federal courts, in cases arising under the Federal Tort Claims Act, have ruled that national guardsmen are not federal employees within the meaning of that act.[99]

Since recovery is predicated on proving a negligent or wrongful act or omission of a State employee, a question arises as to whether the claimant must establish that a particular employee caused the injury. In view of the nature of the State's activities as an employer, such could, in many instances, be an impossible burden. Apart from the Tort Claims Act, it is the rule in Iowa that to recover from an employer in tort the plaintiff must show by a preponderance of the evidence that the tortious injury complained of was caused "by one of defendant's employees."[100] There are Iowa decisions, however, which indicate that an employer will be liable without the necessity of showing just which employee was at fault.[101] The decisions under the Federal Tort Claims Act generally hold that it is not necessary to establish which particular employee caused the injury.[102]

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94 National Guard Organization Act, 32 U.S.C. §§ 101(5), (7) (1964).

95 *Id.* § 102.

96 *Id.*

97 *See, e.g., id.* §§ 104, 105, 109, 110, 301, 303, 305, 313, 314(d), 322, 326, 327, 328, 329, 501 and 502.

98 National Guard Training Act, 32 U.S.C. § 502 (1964).

99 Maryland v. United States, 381 U.S. 41 (1965); Blackwell v. United States, 321 F.2d 96 (5th Cir. 1963); Spangler v. United States, 185 F. Supp. 531 (S.D. Ohio 1960).

100 Comparet v. Metz Co., 222 Iowa 1328, 1331, 271 N.W. 847, 848 (1937).

101 *See* Sutcliffe v. Fort Dodge Gas & Elec. Co., 218 Iowa 1386, 1390-91, 257 N.W. 406, 408-09 (1934); Stokes v. Gollmar Bros., 163 Iowa 530, 535-36, 145 N.W. 59, 61 (1914). In the former case, the Fort Dodge Gas & Elec. Co. was held liable for injuries suffered as the result of a gas heater explosion. The doctrine of *res ipsa loquitor* was relied on to establish negligence and there was no contention of negligence as to a specific employee even though the corporation could only conduct its business through its employees.

102 United States v. Hull, 195 F.2d 64, 66 (1st Cir. 1952); Pierce v. United States, 142 F. Supp. 721, 733 (E.D. Tenn. 1955), *aff'd*, 235 F.2d 466 (6th Cir. 1956); *But see* Schetter v. Housing Authority, 132 F. Supp. 149 (W.D. Pa. 1955).

4. *Scope of Employment*

As a further condition to the State's liability, it must be shown that the act or omission complained of occurred while the State employee was acting within the scope of his employment. The term "acting within the scope of his . . . employment" is defined in the Act as "acting in his line of duty as an employee of the state."[103] There is, of course, nothing novel about the concepts of "scope of employment" or "line of duty." The issue of "scope of employment" must be resolved by the facts of each case, but the Iowa court has indicated a tendency to solve any doubts on the question against the employer.[104]

5. *Liability of State Equated to That of a Private Person*

As a final element to recovery, the claimant must establish that the circumstances are such that if the State were a private person, it would be liable for the damage to or loss of property, personal injury or death. The same idea is expressed in Section 25A.4 of the Act which, in part, states: "The state shall be liable in respect to such claims . . . in the same manner, and to the same extent as a private individual under like circumstances . . . ." It has been said that the effect of similar language in the Federal Tort Claims Act "is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities."[105] The Act simply equates the State's liability to that of a private employer in the same manner and to the same extent under like circumstances.

The United States Department of Justice has argued on occasion that if the activity giving rise to the claim was of a kind not performed by a private employer, the private-person analogy did not exist, and the United States was not liable under the federal act.[106] The Government's argument did not prevail. In *Indian Towing Co. v. United States*,[107] recovery was sought for damages allegedly caused by the negligence of the Coast Guard in the operation of a lighthouse light. The Court, in rejecting the government's contention that there could be no liability for negligent performance of "uniquely governmental functions," stated:

> The Government reads the statute as if it imposed liability to the same extent as would be imposed on a private individual "under the same circumstances." But the statutory language is "under like circumstances . . . ."
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> . . . .
>
> The language of the statute does not support the Government's argument . . . . The broad and just purpose which the statute was designed to effect was to compensate the victims of

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103 IOWA CODE § 25A.2(4) (1966).
104 Johnson v. Chicago R.I. & P. Ry. Co., 157 Iowa 738, 744, 141 N.W. 430, 432 (1913).
105 Feres v. United States, 340 U.S. 135, 142 (1950).
106 Rayonier Inc. v. United States, 352 U.S. 315 (1957); Indian Towing Co. v. United States, 350 U.S. 61 (1955).
107 350 U.S. 61 (1955).

> negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable . . . .[108]

B. *The Accrual of a Claim*

As noted elsewhere,[109] the Act, generally speaking, establishes a two-year statute of limitations for filing a claim and commencing suit after the accrual of a claim. The Act does not define when a claim accrues; however, in light of a recent development in the law of Iowa relative to this issue, the problem should be considered. It has probably been the law of Iowa that the right to a cause of action accrues in tort from the time the injury was done[110] and that ignorance of that right did not prevent the running of the statute of limitations.[111] The recent decision of *Chrischilles v. Griswold*[112] contains dictum which indicates that these propositions are now of doubtful validity. The tort involved in that case was the alleged negligent performance of a contract in 1960 with resulting injury, but the injury was not discovered until December 1964. Mr. Justice Mason in the course of the opinion for the majority made the following observations:

> If an injured party is wholly unaware of the nature of his injury and the cause of it, it is difficult to see how he may be charged with a lack of diligence or sleeping on his rights.
>
> We have said ignorance of a right does not prevent the running of the statute of limitations. Campbell v. Long, 20 Iowa 382, 387; Garrett v. Olford, 152 Iowa 265, 269, 132 N.W. 379, 381. Of course, the statute cannot commence to run until the cause of action accrues.

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108 *Id.* at 64, 68. In Rayonier Inc. v. United States, *supra*, note 106, involving alleged negligence of the Forest Services in fighting a forest fire, the Government similarly contended that the Federal Tort Claims Act did not waive the United States' immunity from liability for the negligence of its employees when they act as public firemen. The Court, in response to the argument, stated:

> It [the Government] argues that the Act only imposes liability on the United States under circumstances where governmental bodies have traditionally been responsible for the misconduct of their employees and that neither the common law nor the law of Washington imposes liability on municipal or other local governments for the negligence of their agents acting in the "uniquely governmental" capacity of public firemen. But as we recently held in *Indian Towing Co. v. United States*, 350 U.S. 61, the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred. We expressly decided in *Indian Towing* that the United States' liability is not restricted to the liability of a municipal corporation or other public body and that an injured party cannot be deprived of his rights under the Act by resort to an alleged distinction, imported from the law of municipal corporations, between the Government's negligence when it acts in a "proprietary" capacity and its negligence when it acts in a "uniquely governmental" capacity.

352 U.S. at 318-19.

109 *See* discussion under Division II, sub-division B, *Limitation of Actions*, *supra*.

110 Ogg v. Robb, 181 Iowa 145, 162 N.W. 217 (1917); Gustin v. County of Jefferson, 15 Iowa 158 (1863).

111 *See* Garrett v. Olford, 152 Iowa 265, 269, 132 N.W. 379, 380 (1911); Campbell v. Long, 20 Iowa 382, 387 (1866).

112 150 N.W.2d 94 (Iowa 1967).

> The trend since that time has been toward what may, for identification purpose, be designated the "discovery rule." This rule is not to be confused with the completely distinct concept of fraudulent concealment which is the subject of an express statute. Section 614.4. It has been said "[s]imply and clearly stated the discovery rule is: The limitation statute or statutes in malpractice cases do not start to run until the date of discovery, or the date when, by the exercise of reasonable care, plaintiff should have discovered the wrongful act." Johnson v. Caldwell, 371 Mich. 368, 123 N.W.2d 785, 791.
>
> . . . .
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> We now believe the better rule to be that a cause of action based on negligence does not accrue until plaintiff has in fact discovered that he has suffered injury or by the exercise of reasonable diligence should have discovered it and are persuaded the rationale of the discovery doctrine should be adopted.[113]

C. *Contribution, Indemnity, Subrogation and Assignments*

Since the Act provides that the State shall be liable in respect to a claim as defined therein "in the same manner, and to the same extent as a private individual under like circumstances,"[114] a question remains as to whether an assigned claim or a claim for contribution, indemnity or subrogation is within the purview of the Act. The decisions considering the question under the Federal Tort Claims Act have ruled that such claims fall within the coverage of that act.[115] *United States v. Yellow Cab Co.*[116] is illustrative of the rationale invoked by the federal courts in holding that such claims are actionable. The Capitol Transit Company, one of the petitioners therein, impleaded the United States as a third-party defendant in a personal injury action charging that the negligence of a government employee was the sole or a contributing cause of the plaintiff's injury. The Transit Company sought judgment against the United States for a contributable portion of any sum which might be awarded against the company. The government's motion to dismiss on the ground that the third-party complaint failed to state a claim was granted, and the Court of Appeals for the District of Columbia affirmed. The Supreme Court in reversing the case stated: "The words *'any claim* against the United States

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113 *Id.* at 100. Garfield, C. J., and Larson and Snell JJ., concurred in the opinion. Stuart, J., concurred in the opinion except that he dissented from one division thereof not concerned with the question of when a cause of action occurs. It would thus seem that a majority of the court is in accord with Mr. Justice Mason's assertion that the "discovery doctrine" should be the rule in Iowa.

114 IOWA CODE § 25A.4 (1966).

115 United States v. Yellow Cab Co., 340 U.S. 543 (1951) (United States suable for contribution under Federal Tort Claims Act); Chicago, R.I. & P. Ry. Co. v. United States, 220 F.2d 939 (7th Cir. 1955) (same as to an action for indemnity); United States v. Aetna Surety Co., 338 U.S. 366 (1949) (subrogated claims actionable under Federal Act). The Aetna Surety decision also stands for the proposition that a claimant having an assignment by operation of law may sue the United States under the federal act. A voluntary assignment of a claim is not, however, actionable under the federal act. United States v. Shannon, 342 U.S. 288 (1952).

116 340 U.S. 543 (1951).

. . . *on account of* personal injury' . . . are broad words in common usage. They are not words of art. Section 421 [Federal Tort Claims Act] lists 12 classes of claims to which the waiver [of immunity] shall not apply, but claims for contribution are not so listed."[117]

117 *Id.* at 548 (emphasis supplied by the Court).

DRAKE LAW REVIEW

VOLUME 17 MAY 1968 NUMBER 2

Published two times a year by law students of
Drake University.

Member, National Conference of Law Reviews

Notes

THE OBLIGATION OF APPOINTED LEGAL COUNSEL TO REPRESENT AN INDIGENT ON APPEAL

Introduction

What is the nature and extent of the obligation required of an attorney once he has been appointed by the court to represent an indigent defendant appealing a criminal conviction, such as to satisfy the guarantees of due process and equal protection of the law as enumerated in the United States Constitution, and thus to accord such defendant a meaningful appeal of his conviction? Assuming that an indigent defendant is entitled at least to the assistance of counsel, the crucial problem concerns itself not with the right of appointment of counsel itself, but instead with the role that such legal counsel is expected to perform in regard to his duty to the court that appointed him and his professional obligations to his client. The narrow issue to be drawn out of this legal dilemma is whether counsel for an indigent defendant is duty-bound to prosecute frivolous appeals on behalf of his client in order to satisfy due process and equal protection of the laws, or whether he may withdraw from the case after giving some explanation as to why he feels that the appeal is without merit. Assuming that counsel is permitted to withdraw from the case after stating that he can find no non-frivolous issue to be pursued, is the indigent defendant entitled to appointment of further counsel to examine the merits of his case, or is he relegated to prosecute his appeal *pro se*?[1]

The question which has crucial bearing throughout the remainder of this discussion is whether the right of an indigent defendant to have the full and complete assistance of counsel in perfecting his appeal is absolute, or whether it may be abridged in cases where such an appeal would not be able to present anything other than frivolous issues.

I. Historical Developments of the Indigent's Right to be Afforded Counsel on Appeal

Any discussion of an accused person's right to counsel during any phase of a criminal proceeding must commence with the sixth amendment of the

[1] Appointment of second counsel to represent the indigent defendant presents additional corollary problems. How great would the prejudice factor be against the defendant's interests, in light of the fact that subsequent counsel may be aware that his predecessor felt that the case had no merit? Furthermore, if the second counsel should perfect the appeal, is it possible to measure the degree of prejudice that may have remained with the reviewing court after having heard the first appointed counsel argue the reasons why he felt the defendant's case was totally lacking any merit for purposes of perfecting an appeal? On the other hand, to require that a court-appointed attorney prosecute an appeal which he feels to be without merit, encourages lackadaisical effort on his part and economic burden upon the community as a whole, not to mention the fact that the indigent defendant may have been deprived of other able legal assistance.