ECCLES M. IKOSIA, Plaintiff

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS

Civil Action No. 56

Trial Division of the High Court

Yap District

December 23, 1975

Action against territorial government for negligent damage to property. The Trial Division of the High Court, Hefner, Associate Justice, held that under statute government was not liable where it would not have been liable had it been a private person.

1. **Trust Territory—Suits Against—Sovereign Immunity**

   Under statute subjecting territorial government to liability for loss of property under circumstances where it would be liable were it a private person, government was not liable where its firemen were charged with failure to act and with negligent maintenance of fire equipment such that it could not be used. (6 TTC §§ 251–253)

2. **International Law—Sovereignty—Sovereign Immunity**

   Implicit in the sovereignty of nations is the right to determine how, when and under what circumstances the government may be sued. (6 TTC §§ 251–253)

HEFNER, *Associate Justice*

The defendant has filed a motion to dismiss this action

based on the ground that there is no liability of the Government which can be imposed upon it under the allegations contained in the complaint.

Rule 9b, Rules of Civil Procedure, provides that a defendant may assert a defense by motion permitted by the Federal Rules of Civil Procedure.

Rule 12b, Federal Rules of Civil Procedure, allows the defendant to file a motion to dismiss the complaint on the grounds that it fails to state a claim upon which relief can be granted. No matters outside the pleadings are presented to the Court and therefore this motion will not be treated as one for summary judgment according to Rule 56, Federal Rules of Civil Procedure. The motion presented is therefore not a "speaking motion". It is one solely addressed to the legal issue of sovereign immunity and tests the sufficiency of the plaintiff's claim. *Tahir Erk v. Glenn L. Martin Co.*, 116 F.2d 865. The matter of defense to the merits of the case is not presented. *Ellis v. Stevens*, 37 F.Supp. 488.

Several basic guidelines are established when considering such a motion.

First, since the granting of a motion to dismiss circumvents the determination of the matter on the merits and avoids a trial, the motion is not favored. *Rennie and Laughlin, Inc. v. Chrysler Corp.*, 242 F.2d 208.

It is only where it appears to a certainty that no set of facts could be proven at trial which would entitle the plaintiff to any relief, that the motion to dismiss will be granted. *Dann v. Studebaker-Packard Corp.*, 288 F.2d 201.

However, where the law is clear and there is no dispute as to the facts, the trial court may properly dispose of the case on a motion to dismiss. *Blumenthal v. Girard Trust Co.*, 141 F.2d 849.

Secondly, the allegations in the complaint are construed in favor of the plaintiff. *Scheuer v. Rhodes* (1974), 416 U.S. 232, 94 S.Ct. 1683.

The allegations of the complaint are to be taken as true. *United States v. Mississippi* (1965), 380 U.S. 128, 85 S.Ct. 808.

Therefore, in considering this motion, the Court assumes the Yap Public Safety Department was negligent on the night of the fire and the negligence was the proximate cause of the damages alleged by plaintiff.

The issue, simply stated, is whether the government is immune from the suit assuming it was negligent in its operation of the fire department in Yap. Not only is it alleged that the personnel were negligent but that the Government failed to maintain its equipment and that it could not be used on the night of the fire.

The defendant relies mainly on the case of *Dalehite v. United States* (1953) 346 U.S. 15, 73 S.Ct. 956. The Supreme Court ruled the Government had no liability in an action for damages caused by an explosion of fertilizer stored at a government facility.

The United States District Court had found that the Coast Guard was negligent in fighting the fire after it started. The Supreme Court at 346 U.S. 43, held that such actions were not included within the Federal Tort Claims Act and that the Act did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights.

Previously, the Supreme Court had stated that the liability assumed by the Government under the Federal Tort Claims Act was limited to "the same manner and to the same extent as a private individual under the circumstances." *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153.

In order to determine if the *Dalehite* case is applicable here, the Trust Territory tort claims act must be compared with the Federal law. While the Court is not bound by the United States Supreme Court decisions, it should recognize

such precedents as goals to be reached so far as they are applicable to conditions existing in the Trust Territory. *Trust Territory v. Ngiraitpang*, 5 T.T.R. 282.

The matter of sovereign immunity was previously discussed by the Court in Palau District High Court Case No. 22-74, *Antonio v. Trust Territory*, wherein a comparison of the Federal Tort Claims Act (28 U.S.C. §§ 1346, 2671–2678, 2680) and the Trust Territory statute (6 TTC 231–253) was made.

As pointed out in *Antonio*, supra, § 252(2) of Title 6 is almost identical to 28 U.S.C. 2680(a), and 6 TTC § 251 is similar to 28 U.S.C. 1346h. The legislative history of 6 TTC §§ 251–253 demonstrates an intent to follow the United States provision.

It is important to note that both sections subject the Government to liability for loss of property "under circumstances where [The Government], if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Both *Feres*, supra, and *Dalehite*, supra, turned upon whether the negligent act complained of was one which would have subjected a private individual to liability. In other words, if a person sees the store of another in flames and he fails to act or negligently acts in attempting to put out the fire, does the store owner have a cause of action against the individual? The answer is clear, there is no such liability.

[1] Putting this in the context of the case at bar, the plaintiff has pled facts which charge the firemen with the failure to act and by negligently maintaining the fire equipment so it couldn't be used. Certainly, if the Government was a private person, the plaintiff would have no cause of action against him.

This Court finds the reasoning of *Feres* and *Dalehite* persuasive and determinative here.

The legislative history and wording of the pertinent sections of 6 TTC 251–253 make it clear that the Congress of Micronesia did not intend to create new causes of action where none existed before. To hold otherwise would be to give no effect to the wording found in 6 TTC § 251(c) and 6 TTC § 253. A reading of those sections reaffirms the conclusion that if a private person does not incur liability for an act he fails to perform or which he negligently performed, then the Government does not have liability for the same act.

[2] Implicit in the sovereignty of nations is the right to determine how, when and under what circumstances the Government may be sued. *Urrimech v. Trust Territory*, 1 T.T.R. 534.

The plaintiff relies upon the case of *Rayonier Incorporated* (1957) 352 U.S. 315, 77 S.Ct. 374. This case was decided four years after *Dalehite* and held that the Government would be liable for losses sustained by reason of the United States Forest Service's negligence in fighting a forest fire if the proof is "sufficient to impose liability on a private person under the laws of the State of Washington". (352 U.S. at 321) The Court in *Rayonier* stated that it would not rule out governmental liability just on the general proposition that public firemen are not liable for their acts. *Rayonier* overruled *Dalehite* only to the extent of holding that the Government cannot escape liability on the ground that a municipal corporation might not be liable for similar negligence of its employees while performing a sovereign governmental function. *Dushon v. United States*, 243 F.2d 451 at 454. If there was any question as to the effect of *Dalehite*, the case of *Indian Towing Co. v. United States* (1955) 350 U.S. 61, 76 S.Ct. 122, clarified the test to be used. That test is whether a private person would be responsible for similar negligence under the laws of the

State where the acts occurred. This is the same test the Court used in *Rayonier*.

After remanding to the District Court and appeal to the Circuit Court of Appeals, the latter court found that the facts alleged were sufficient to show actionable negligence on the part of a private person under the laws of the State of Washington where the fire occurred. *Arnhold v. United States* 284 F.2d 326 (1960). A review of the facts alleged and proven in the case discloses how the court could make a finding of governmental liability and it also demonstrates why there can be no liability imposed on the government in the case at bar.

In *Rayonier (Arnhold)*, the fire started on Government land. The Forest Service, under an agreement with the State, took exclusive control of all fire fighting activities and the plaintiffs knew about the agreement and relied upon the Forest Service to put out the fire. The Forest Service reduced the fire and by normal means could have put it completely out but negligently allowed it to subsequently expand to damage the plaintiff's property. "But it is the law of Washington, as it is the law generally, that a land occupier has an affirmative obligation to use care to confine any fire on his premises, regardless of its origin, in favor of all persons off his premises who are subjected thereby to an unreasonable risk of damage due to escape of the fire." *Arnhold v. United States*, supra, at page 328. Thus, it is clear that the ultimate disposition of *Rayonier* rested on the test of *Indian Towing Company v. United States*, supra, and that is precisely the test which must be used in this case.

The difference between the facts in *Rayonier* and the case at bar are obvious and need not be explored further. The important thing is that the facts in each case must be analyzed to find if a private person would be held liable for similar acts.

Since there is no State law in the Trust Territory to determine if the acts alleged would constitute negligence, the Trust Territory Courts must look to the common law. 1 TTC § 103.

Applying the test used in *Indian Towing Co.* and *Rayonier,* supra, the conclusion is inescapable that the plaintiff's complaint does not allege facts which would impose liability upon the government since a private person would not be liable for similar acts.

The fact that the defendant maintained a fire station and equipment and employed firemen in the Yap District does not impose liability.

The fact that the government's own equipment was not kept in serviceable condition does not impose liability.

The fact that the personnel acted in the manner alleged in the complaint does not impose liability.

The plaintiff argues that once the Government establishes a fire department, the people rely on it to use reasonable care in maintaining its equipment and personnel. The same could be argued for the police force or public works. Does the store owner have a cause of action against the government for losses sustained from a burglary because the police were negligent in arriving at the scene too late to apprehend the criminal? Does the store owner have a cause of action against the government for losses sustained because the power is negligently cut off by the government?

None of the authorities cited by the plaintiff can be used to answer these questions in the affirmative.

Certainly, this Court cannot accept the argument that the Congress of Micronesia intended to allow such claims.

The defendant's motion is hereby granted and the plaintiff's complaint shall be and the same is hereby Dismissed with prejudice.