# GOVERNMENT LIABILITY IN TORT

EDWIN BORCHARD
Yale University Law School

The United States and Great Britain have recently undertaken what may justly be called a revolution in legal principles. Instead of adhering to the old maxim that "the King can do no wrong", inadvertently adopted in the case of the United States, each has enacted a statute by which the country is subject to suit in tort.

The American statute, the Federal Tort Claims Act, was enacted as Title IV of the Legislative Reorganization Act of August 2nd, 1946,[1] and owes its insertion to the alertness of Senator McCarran, then chairman of the Judiciary Committee of the Senate. The Crown Proceedings Act, 1947, of the United Kingdom, unlike the short American Act which contains some 2,100 words, runs to approximately 14,000 words. It is a much better drawn statute than its American counterpart, and it is a tribute to the parliamentary draftsmen that they were able to draft two such comprehensive measures as the Crown Proceedings Bill of 1927 and the Act of 1947, whose contents vary considerably. Many questions are left unanswered by the Federal Tort Claims Act.[2]

The American Act has its origins in the Underhill bills of 1924 and 1925. It was passed twice in the House and twice in the Senate, but only once in the same session of Congress. The 1928 Act, adopted under the chairmanship of Senator Means of Colorado, was vetoed by President Coolidge because the Comptroller General inserted himself in the Act, not only as a judge of claims, but as the attorney of the United States in the appeal to the Court of Claims from his decision. This was too much for the Attorney General who advised the President to veto the bill. From the Underhill bill in 1924, to 1946, the struggle continued and is identified with some distinguished names, such as those of Senators Howell, Bayard and Deneen. In a message to Congress in 1942 President Franklin Roosevelt expressed as follows the grounds upon which the change should be made:

> In these critical days of our national defence effort, I feel there should be a joint endeavor on the part of the Congress and of the heads of the Executive Branch of the government to divest our minds as far as possible of matters of lesser importance which consume considerable time and effort. We should grant the responsibility for handling such matters to those equipped with year round facilities to dispose of

[1] Federal Tort Claims Act, August 2nd, 1946, c. 753, Title IV, Public No. 601, 28 USCA ss. 921-946.

[2] See Aron, Federal Tort Claims Act: Comments and Questions for Practising Lawyers (1947), 33 Amer. Bar Assoc. Journal 226.

> them . . . It would also make available a means of dispensing justice simply and effectively to tort claimants against the government, and give them the same right to a day in court which claimants now enjoy in fields such as breach of contract, patent infringement, and admiralty claims.[3]

Wars and depression, with their exigent legislation, prevented the calm necessary for such a legal revolution.

The United States Federal Government, under the Federal Tort Claims Act, exposes itself to suit in tort, which heretofore it has allowed only in limited sectors. Whereas the American statutes dictating piecemeal liability in tort have been allowed to survive, all similar acts have been repealed by the new English Act. The United States is suable for patent infringement under an Act of 1910,[4] under the Suits in Admiralty Act, 1925, under several military claims Acts assuming federal liability for the acts of American soldiers abroad, and under the important Act of December 1922, which authorized the heads of governmental departments to settle claims against them up to $1,000.[5] In addition the Uniform Motor Vehicle Act[6] has been adopted by twenty states and contemplates recovery against the community in any type of business in which the motor vehicle is engaged. It may now no longer be necessary to distinguish sharply between contracts implied in fact and tort claims — although the fact that the former are within the jurisdiction of the Court of Claims under the Tucker Act and the latter are within the jurisdiction of the District Courts of the United States may still furnish some difficulty.

The Underhill bill of 1924 and the following bill contained a limitation of federal liabilities. There is no limitation as to amount in the new federal Act, a matter deemed an important improvement. The committee on claims in both houses has been abolished and their duties transferred to other committees. Presumably no committee of Congress would allow a claim rejected by the courts, but there is nothing except implication to suggest that the duty of Congress has changed. The federal Act does not expressly limit the powers of Congress or its committees, but the implication is inescapable that a transfer has taken place. The American Act makes an exception of all torts except negligence. While no such exceptions can be found in the English Act, the two statutes will probably be interpreted similarly.

[3] Cong. Rec., Jan. 14th, 1942, p. 313.
[4] See Anderson, Tort and Implied Contract Liability of the Federal Government (1946), 30 Minnesota Law Review 133, at p. 154.
[5] Many tort claims were allowed.
[6] Uniform Laws Annotated, Vol. II, 1938, pp. 5ff.

The enactment of the Federal Tort Claims Act and of the Crown Proceedings Act will serve purposes other than making the central government liable in tort. Their enactment should produce valuable results in the states, counties and even the cities of the United States, and may persuade the Canadian authorities to adopt legislation changing the ancient law of Canada. It has long been felt by some state judges that the old anachronism that "the King can do no wrong" should not apply to the United States in any respect. Nevertheless, so long has the law been entrenched that they have, with only a few exceptions, stated, while applying the old law, that a change was necessary, but that the legislature was the body entrusted with the duty of making it. To some extent legislatures have acted; it is now possible to sue the state in tort in New York, Michigan, Illinois and California.[7] But in principle municipal corporation counsel have objected to changes in the law that might increase the liability of their communities. Actually it is unlikely that they would do so, because such claims are now submitted administratively or to a legislative committee.

Municipalities as subdivisions of the state have also availed themselves of the ambiguous maxim that "the King can do no wrong", but by developing exceptions, based upon the corporate entity, they have submitted the municipality to a considerable degree of tort liability. For this reason the artificial division between corporate and governmental activities is not to be despised. If the association of corporation counsel were to withdraw their objection there would probably be little obstacle to the adoption in statute form of the report of a committee of the American Bar Association, Municipal Law Section, which was the result of many years of study.[8]

*Summary of the 1946 Legislation*

Title IV of the La Follette-Monroney Act incorporates the Federal Tort Claims Act, which follows very closely the terms of the original Underhill bills of 1924 and 1925. It begins with the definition of "federal agency", "employee of the government" and "acting within the scope of his office or employment".

The next part deals with the administrative adjustment of tort claims against the United States, leaving in force the provision of the Act of 1922 which gave the administrative department or agency power to settle claims of less than $1,000.

[7] Shumate, Tort Claims Against State Governments (1942), 9 Law and Contemporary Problems 242.

[8] See footnote 22 *infra*.

The claims are to be paid out of appropriations that may have been made by Congress, and Congress is annually to receive from each agency a report of the claims paid. While the section is not as clear as it should be, it is presumed that, even though the claimant asked for more, the department or agency involved may settle the claim if he is willing to accept less than $1,000. The substantive provisions of the section relate to damage to property or personal injury 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". The United States is as liable as a private person would be for such a loss or injury.

The Attorney General is authorized to compromise or settle any claim whether under or in excess of $1,000, although it is provided that, if he settles one of the larger claims, he can do so only with the consent of the court.

*Jurisdiction Given to the District Courts*

Claims on which the claimant is unwilling to accept $1,000 or less, and all larger claims, are assigned to the District Court of the United States for the district in which the plaintiff is resident or in which the act or omission complained of took place. The claim is to be heard by the court sitting without a jury. In contrast with former legislation, no ceiling is placed on the amount that may be claimed.

The United States assumes the same position as a private defendant, except that the United States shall not be liable for interest prior to judgment or for punitive damages. Costs are to be allowed in all courts, to the successful claimant, to the same extent as if the United States were a private litigant, except that attorneys' fees are not to be included. The judgment obtained by the claimant is a complete bar to any action against the employee of the government whose act or omission gave rise to the claim. If the claim has already been presented to a federal agency, no suit is to be brought upon it unless the federal agency has made a final disposition of the claim; provided, however, that the claimant may, upon fifteen days' notice in writing, withdraw the claim and commence suit thereon, and provided, further, that the suit shall not be instituted for a sum in excess of the amount claimed from the federal agency unless newly-discovered evidence has increased the claim.

*Procedure, Judgment and Review*

The procedure follows the Civil Practice rules adopted by the Act of June 19th, 1934. The same provisions for counterclaim and set-off, for interest upon judgment and for payment of judgments are applicable as were embodied in the Tucker Act of 1887.

Final judgments in the district courts are reviewable in the circuit courts of appeal or in the Court of Claims. The provisions of sections 239 and 240 of the Judicial Code, relating to certiorari and the certification of questions to the United States Supreme Court, remain in force. By another section, as already observed, the Attorney General is authorized to arbitrate, compromise or settle any claim on which suit has been brought, provided he obtains the consent of the court.

*A Short Statute of Limitations*

It is possible that claims will still be presented to the Congress. The new Act contains a short statute of limitations barring claims under the Act which are not presented within one year after the claim accrued or within one year after the date of the Act (August 2nd, 1946). If a claim for less than $1,000 is presented to a federal agency, the time within which a suit must be instituted is extended for six months from the date of mailing a notice to the claimant by the federal agency as to its final disposition of the claim.

*Exceptions to Jurisdiction Under the Act*

Although the new Act covers torts arising out of the negligence of a government employee, specific exceptions are written into the statute. No claim is allowed that is based (1) upon an act or omission of an employee of the government who is exercising due care in the execution of a statute or regulation whether or not it be valid, or upon the exercise of or a failure to exercise a discretionary duty; (2) upon the negligent transmission of mail matter; (3) upon the assessment or collection of a tax or customs duty or a detention of goods by customs officials; (4) upon causes justiciable under the Suits in Admiralty Acts of 1920 and 1925; (5) upon an act or omission in administering the Trading with the Enemy Act; (6) upon the imposition of a quarantine; (7) upon an injury to a vessel while passing through the Panama Canal; (8) upon an assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresen-

tation, deceit, or interference with contract rights; (9) upon the fiscal operations of the Treasury; (10) upon the activities of the military or naval forces during a time of war; (11) upon an act done in a foreign country; or (12) upon activities of the TVA.

*Attorneys' Fees as Part of the Award*

Any court, agency or Attorney General is to include, as a part of the award, attorneys' fees which, if the amount recovered is $500 or more, are not to exceed ten per cent thereof or, if suit is brought, twenty per cent of the amount recovered, to be paid out of the judgment, award or settlement obtained. Violation of the provision by any attorney is punishable criminally.

*Exclusiveness of the Remedy Under the New Statute*

Section 423 provides that, after the date of the Act, the authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits cognizable under the Act. By Section 424 all provisions of law authorizing any federal agency to determine or adjust a claim are repealed, if the claim accrued after January 1st, 1945.

The statutes repealed are specifically mentioned, but it is added that nothing in the Act shall be deemed to repeal any provision of law authorizing any federal agency to consider or adjust any claim not arising out of the negligent or wrongful act or omission of an employee of the government.

*Judicial Interpretation of the Act*

While some cases have already been brought under the Federal Tort Claims Act, we still need authoritative advice on such questions as the following: does the Act apply to cabinet officers, how do res ipsa loquitur, respondeat superior and the rule of agency apply, and so on ad infinitum. The cases which have arisen since the Act, about a dozen including those in the latest supplements, are an unconnected series of determinations on random points. While they do not give the overall interpretation we would expect in the case of an older statute, we can get some idea of the statute in action by studying such of the decisions as have been rendered.

In the only Supreme Court case touching on the Act, *American Stevedores Inc.* v. *Porello*,[9] the court, in sustaining a libel against the United States under the Public Vessels Act, said this

[9] 330 U.S. 446.

as obiter dictum: "The passage of the Suits in Admiralty Act, the Public Vessels Act, and the Federal Tort Claims Act attests to the growing feeling of Congress that the United States should put aside its sovereign armour in cases where federal employees have tortiously caused personal injury or property damage".

In *Englehardt* v. *United States*,[10] plaintiff sued the United States and an individual defendant as joint tortfeasors. The plaintiff was riding in defendant's car when it collided with a government car. The individual claimed that he could not be sued jointly with the government, firstly, because the Act provides that there shall be no jury and, secondly, because it limits attorney's fees. Maryland law provides for joint contribution between joint tortfeasors, and the accident occurred in that state. The court held it benefitted the United States to have a joint tortfeasor pay part of the cost, and frequently there are joint tortfeasors in tort suits. If the individual defendant demanded a jury, as he has a right to do, the jury and judge could render separate awards as to the various defendants; the awards would be less variable than they would be in separate trials. This result is predicated on the clause in the Act making the United States suable as a private person in the locality; thus the United States is treated just as any other defendant. If Congress had intended otherwise it would have so stated in the list of exceptions.

The court distinguished the ruling of *United States* v. *Sherwood*[11] holding that other defendants could not be joined with the government in non-tort suits arising under the Tucker Act. Since, under that Act, the Court of Claims has concurrent jurisdiction with the District Courts over amounts under $10,000 and the Court of Claims can have no jury, the District Courts could not permit individual defendants; but that situation does not apply to the Tort Claims Act.

In *Alchley* v. *TVA*,[12] the court said as obiter dictum: "The present case comes clearly within the principle that the performance by executive officers of discretionary governmental duties entrusted to them by statute is not subject to judicial review. The principle has recently been reaffirmed by Congress in the Federal Tort Claims Act, which authorizes tort actions against the Federal Government, but expressly excludes suits based on alleged abuse of discretion. The court here refers to the exception excluding claims based on non-negligent acts under an invalid statute and abuse of discretion.

[10] 69 F.S. 451, D.Ct. Md., Jan. 18th, 1947.
[11] (1941), 312 U.S. 584.
[12] (1947), 69 F.S. 952, at p. 955.

In the case of *State of Maryland, to the Use of Burkhardt* v. *United States*,[13] an army truck had negligently run down and killed plaintiff's husband on September 2nd, 1945. Fifteen months later, but within one year of the passage of the Act, this suit was filed. The applicable law of the state required that, as a condition precedent, suits for wrongful death be instituted within one year. The court, citing that passage of the Act making the United States liable as if a private person under the laws of the place where the act or omission occurred, held that, since a private individual would not be liable, the government could not be. The plaintiff then claimed that no remedy was available because the Act provided that no private bill be given to the Congress if it were within the scope of the Act. The court, reiterating its former opinion, suggested that ways were still available to get such private bills before Congress.

This decision forebodes the possibility of considerable modification of the Act by the law of the localities of the injuries. The opinion indicates also that the Act will be strictly construed to the government's benefit.

Necessary to an understanding of the role played by local state law is the doctrine enunciated by Mr. Justice Brandeis in *Erie R. R.* v. *Tompkins*,[14] requiring the federal courts, in the absence of applicable federal law, to apply the substantive law of the state in which the cause of action arose.

The liability of the government for the wrongful acts of its law enforcement agents was denied in *Bell* v. *Hood*.[15] Here the plaintiff claimed that the defendants, F.B.I. agents, illegally and without authority imprisoned plaintiffs and searched their property in violation of the Fourth and Fifth Amendments. The court held that these amendments limit federal action, but that no statutes exist giving federal courts the power to award damages for these common law offences. Since diversity of citizenship had not been established, the Federal courts could not enforce local law.

The court in its opinion said:

> But the Federal Government as sovereign has never consented to be sued for damages resulting from invasions of the rights protected by the Fourth and Fifth Amendments. To the contrary, since the commencement of the action, Congress has expressly denied consent to sue the Federal Government upon 'any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of pro-

[13] 70 F.S. 982, D.C. Md., March 31st, 1947.
[14] (1938), 304 U.S. 64.
[15] 71 F.S. 813, D.C., S.D. Calif., May 2nd, 1947.

> cess' . . . even when such torts are committed by a federal officer . . . 'while acting within the scope of his office or employment'.

In *Bullock* v. *United States*,[16] plaintiff instituted suit against the United States under the Act, and a bus company, alleging injuries arising under a law regulating interstate and foreign commerce. A motion to dismiss the co-defendant was denied, *Englehardt* v. *U.S.* (*supra*) being cited. However the suit was dismissed on the ground that it was an ordinary tort action and that commerce regulation invested no federal jurisdiction.

The case of *Dickens* v. *Jackson* [17] reiterates the doctrine that an individual may be sued with the government as a joint tortfeasor under the Act. In this case the plaintiff sued the United States and its driver for damages caused by an automobile collision. The court, citing *Englehardt* v. *U.S.*, denied the motion to dismiss the individual defendant as contrary to the Act. But, on other grounds, the court did drop this co-defendant. The state law, New York being the locale of the cause of action, does not permit contribution among joint tortfeasors until a judgment has been recovered. Here again we see the moulding influence of the local law.

*Sweet* v. *United States* [18] holds that the provision of the Act permitting suit within one year of its passage applies even though state law prescribes a simple one year from injury rule. The court, looking at the legislative intent, overruled the local law. This contradicts the decision of *Burkhardt* v. *U.S.*, unless the fact that the Maryland one-year rule is a condition precedent to an action and not a limitation is considered a distinction from the California one-year statute of limitation.

An interesting case is that of *Skeets* v. *United States*,[19] in which the plaintiff was fishing six miles out in the Gulf of Mexico when a piece of pipe fell on him from a target or plane being then used by the army for target practice. Plaintiff claimed that no danger zone had been proclaimed and that res ipsa loquitur applied. The Government moved to dismiss, claiming, firstly, that the accident had happened during combat action (the war had not yet ended), which was specifically exempted by the Act, and secondly, that no negligence was shown. The court ruled that military practice or training remote from the zone of combat is not combatant activity within the meaning of the Act. The judge allowed the application of the doctrine of res ipsa loquitur,

[16] 72 F.S. 445, D.C. N.J., May 9th, 1947.
[17] 71 F.S. 753, D.C. E.D. N.Y., May 15th, 1947.
[18] 71 F.S. 863, D.C. S.D. Calif., May 28th, 1947.
[19] 72 F.S. 372, D.C. W.D. La., July 7th, 1947.

since the Army should have expected that harm might have resulted.

*In Commissioners of the State Insurance Fund* v. *United States,*[20] the court, after reciting the old doctrine that the sovereign was immune from suit unless consent were given, upheld the right of injured persons to sue the government for harm received when an Army bomber piloted by an officer of the United States ran into the Empire State Building.

In the most recent case reported, *Spell* v. *United States,*[21] plaintiff claimed that her husband had been killed by the negligent operation of a Navy bus. The bus was proceeding some distance behind decedent's car when an approaching car blinded both drivers. The bus driver testified that he slowed to 28 or 30 miles an hour when suddenly fifteen feet in front of him, he saw decedent's car; that he plowed straight into the tail end of this car and drove the front end of the bus so far into its rear end that it took two wreckers to pull the two cars apart. The laws of the State of Florida require motorists blinded by approaching lights to stop: failure to do so is negligence. Decedent did stop so that he could not be held guilty of contributory negligence. The court held the Florida law controlling and the bus driver negligent: hence under the Act the United States was liable.

The decedent earned $55 per week, had a life expectancy of 33 years and left surviving him a widowed mother and three small children. The court ascertained damages at $15,000 and, at the request of the plaintiff, awarded a 20% attorney's fee. In 1944 there would have been no recovery.

*State and Municipal Liability in Tort*

The present issue is no longer designed to prove the impropriety of the old rule which purported to discharge a societal obligation by throwing liability on a negligent but often irresponsible officer or body, but seeks to distribute effectively and justly the costs of official maladministration due to the inevitable consequences of human deficiencies in the operation of the governmental machine.[22]

The distinction between governmental and corporate activities of the State or city has been dissipated: (1) by the legislative

[20] 72 F.S. 549, D.C. S.D. N.Y., July 21st, 1947.
[21] 72 F.S. 731, D.C. S.D. Fla., July 23rd, 1947.
[22] For the text of reports of the Committee of the Section of Municipal Law of the American Bar Association, which reports, discusses and annotates the subject in full detail, readers may apply to the Secretary of the Section.

expansion of liability for the defective care and maintenance of highways, streets and sidewalks, essentially governmental functions; and (2) by the legislative admission that injuries inflicted through the negligent operation of publicly owned or operated motor vehicles should impose liability, regardless of whether the vehicle was employed by a municipal transportation system, a public supplier of gas or electricity, a garbage collector, a policeman, or a fireman.

However much agreement there may be on substantive community responsibilitity within certain exceptions, we are still far from agreement on the statutory expression of such liability and the procedural conditions on which it must be administered. The community has to demand protection against unfair and dishonest claimants. Some States, like New York and California, have exhibited great advances in tort liability and may well serve as models. The admission of liability for State activity is of comparatively recent origin and, in this respect, New York, Michigan and Illinois appear to be in the vanguard.

During the last ten years, Committees of the Section of Municipal Law in the American Bar Association and of the American Political Science Association have studied the subject with a view to sound statutory change. The Committee on Public Administration of the Social Science Research Council has sponsored exhaustive investigations in several American cities. This experience is now available.

*Statutes for State and Municipal Liability*

The studies already made indicate that possibly five-sixths of community tort liability is already covered by the statutes or judicial law which admit municipal liability in the field of "corporate" activity, in the care of streets and sidewalks, in the management of public buildings and in the operation of municipally owned or commandeered vehicles.

These studies establish also that the bulk of the claims are small in amount. Most of them are either settled or withdrawn and, of those which go to courts, only a relatively small percentage, if any, of the total claim is recovered. The gap to be filled relates mainly to governmental activity, police and fire administration, recreation and public education, public health and hospitalization, transportation facilities like airports, and similar public services.

It is debatable whether there should be separate Acts for the administration of State liability through a State board or court, and for municipal liability to be administered by the city

alone on its own responsibility. It is not known whether it is feasible to include both State and political subdivisions in one statute, to be administered under the supervision of a central State administrative board, with the State assuming some of the liability of the small towns beyond a certain amount. This is a practical problem, since small towns are likely to cause their representatives to vote against the assumption of community liability if they themselves are to bear more than a limited amount.

The Committee of the Section of Municipal Law has drafted statutes after long deliberation, presenting certain alternatives between (a) State liability alone; (b) municipal liability alone; and (c) a limited joint assumption of the liability. Some of the questions considered by the Committee are as to whether the exceptions from jurisdiction shall follow the Federal Act; whether a jury shall be permitted or whether there should be an option; whether the standard of negligence or lack of due care is susceptible of definition; what is an emergency — important in California; whether the statute should assess liability in general, with certain exceptions, or work from the specific items to a wider plan; whether liability should always be based on fault or some exception should be allowable, as in the case of the stray bullet of the policeman and the damage to parked automobiles from passing fire apparatus; whether contributory negligence should defeat a claim; whether the "comparative negligence" rule has any application; whether pain and suffering should be included as an element of damage, or should it be eliminated, as it is in Boston.

*Procedural Limitations as to Claims*

In general, fairly prompt notice of the claim is necessary, whether prosecution follow or not. Some cities require notice within thirty days, and Massachusetts limits notice in "snow and ice cases" to ten days. Should the thirty-day period be extended by a court or by city attorneys? Should the conditions attached to notice be applied strictly or loosely?

States differ in this respect, some holding that if the defect was not vital it should be waived. But there is no waiver of the requirement that notice must be filed within the statutory period. The claimant should, as in New York and Chicago, be compelled to submit to examination before trial, including a medical examination. In Chicago, an examination is a condition of settlement, which is permissible only after a suit has been filed. In New York a claimant for judicial relief must show that he has filed the claim

and submitted to examination and that the Comptroller has failed to pay the claim.

*Settlement of Meritorious Claims*

There should be an opportunity to settle meritorious claims before suit and trial, but there is considerable difference of opinion as to who should assume the responsibility for such settlement. A large degree of responsibility in all cases is imposed upon the city attorney's office, either by way of recommendation or by way of authority to settle. In New York the Comptroller decides on the payment of claims, the law department coming into the case only after the Comptroller rejects. There is some opinion that the city council should assume responsibility for settlement. Perhaps the city attorney, as in Los Angeles, should have authority finally to settle only small claims at any stage of the proceedings, whereas large claims should be settled by the council upon advice and recommendation of the city attorney. The city attorney ought to consider himself a quasi-judicial officer, acting as much in the interest of the citizen as in that of the community.

*Notice of the Defect Claimed*

In addition to the notice of claim, notice of the defect is a condition of municipal negligence. A municipality has not ordinarily the facilities to watch hundreds of miles of streets and to detect promptly all the defects that storms, etc., might create. It is general law therefore that the defect must be called to the attention of the mayor or city council or other appropriate official before a duty to repair, and therefore negligence from failure to repair, can operate. Nevertheless, courts in many States have invented the doctrine of constructive notice by which an unsatisfactory condition of long standing may take the place of actual notice.

The time allowed for repair cannot be stated in a statute but must be designated as "reasonable".

California in 1936 developed a "minor defect" rule which materially limited the number of "sidewalk" cases. The rule was to the effect that when the defect is minor the inference is warranted that there was an assumption of risk or that there was no constructive knowledge; therefore, recovery is not allowed. Yet cities differ in what they consider a minor defect. The "snow and ice" cases give rise to similar considerations. It is difficult to prove municipal negligence in failing to remove accumulations,

so that some argument could be made either for assuming or denying liability.

*Liability in the Small Town*

It appears that in small towns there is an indisposition either to make claims for accidents or to press them, and it is asserted that very often such claims are advanced only by outsiders. The questions arise as to whether the small town should be made wholly liable, whether an arbitrary limit on town liability per person should be set, whether a State bill should cover only the largest cities, and whether the town's liability should be limited with the balance assumed by the State. The New York law of 1941 appears to make no differentiation between cities, counties, towns and villages. A third bill presented by the Section's committee undertakes to limit the liability of small towns to a small percentage of the tax lists, with appropriate credit for accident prevention and efficiency in avoiding tort.

*Municipal Insurance Against Liability*

The experience of cities insuring themselves against liability is inconclusive. Actuarial experience is limited. In motor vehicle cases the city might benefit from small premiums. Nevertheless, in other cities the experience would indicate that, over a long period, insurance premiums exceeded the amount of tort liability.

On the whole, experts seem to conclude that self-insurance is cheaper than premiums paid to private companies. The administration of tort liabilityis exceedingly important to reaching any conclusions. The administration varies greatly from city to city, even apart from financial considerations. The statute can furnish guiding lines but can set out only the principal safeguards.

*Statutory Liability of the State*

Four States have a constitutional prohibition against suing the State. Twenty-two permit suit in some form, and twenty-two seem to be silent on the subject. Yet the situation is not as sterile as it seems. Of the four States which prohibit suit, Illinois has nevertheless established a Court of Claims, permitting a petition even in tort; and another State has long established a Claims Commission to pass upon claims with recommendation to the legislature.

Among the silent twenty-two States, the legislatures often by special Act grant authority to sue in a given case, in States

where special legislation is not constitutionally forbidden. This means simply that the claims are presented to the legislature and are passed upon by claims committees. Such claims run all the hazards of political claims generally. Whether justice is done is a matter of chance.

Even in the twenty-two States where suit is permitted, liability does not generally extend to tort claims.[23] Yet this prohibition is not as absolute as it seems, for numerous States have adopted the Motor Vehicle Act or other Uniform Acts imposing liability.

In the three States which provide for judicial administration before a Court of Claims — Illinois, Michigan and New York — tort liability is usually included. In New York, the broadest of all, jurisdiction extends to all cases arising from the management of canals, defects in highways, the appropriation by the State of private lands, the elimination of grade crossings, erroneous payment of taxes, contracts with the State and torts of State officers and employees. It is noteworthy that this broad liability has not cost New York an excessive amount.

*Procedure for Settlement of Claims*

Aside from the private bill or reference to the Court of Claims for the advice of the legislature, nine States have adopted an administrative settlement by a Claims Commission. Such a commission is likely to act more judicially than a legislative committee. While its findings are as a rule advisory only and a dissatisfied claimant can present his claim to the legislature or a court, its finding is usually upheld. The cost of administration is trifling.

The administrative board, as formerly was the case in Michigan, and the State Board of Control, as in California, may play an important part in the administration of tort claims. It could unify the practice throughout the State, make small administrative settlements so as to relieve the courts, institute uniform investigating methods, adopt uniform rules for preventing and reporting accidents, and in other ways effectively regularize the practice and administration of tort liability. Courts are preferable, as they are under the federal Act, but the progress in this respect is likely to be slow. Only a few States have established a Court of Claims.

[23] In a New York case liability in tort was denied in connection with a bill allowing suit. See other cases to the same effect in 169 A.L.R. 105.

The cost to the State of permitting suits in tort is relatively small, in all States which permit such liability. The report of the Section's Committee gives the statistics of various States. From fifteen to eighteen per cent in the claims allowed, in relation to the amounts of claims advanced, appears to represent the experience of most States.

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## INTERNATIONAL REFUGEE ORGANIZATION

The Governments accepting this Constitution,

RECOGNIZING: that genuine refugees and displaced persons constitute an urgent problem which is international in scope and character;

that as regards displaced persons, the main task to be performed is to encourage and assist in every way possible their early return to their country of origin;

that genuine refugees and displaced persons should be assisted by international action, either to return to their countries of nationality or former habitual residence, or to find new homes elsewhere, under the conditions provided for in this Constitution; or in the case of Spanish Republicans, to establish themselves temporarily in order to enable them to return to Spain when the present Falangist regime is succeeded by a democratic regime;

that resettlement and re-establishment of refugees and displaced persons be contemplated only in cases indicated clearly in the Constitution;

that genuine refugees and displaced persons, until such time as their repatriation or resettlement and re-establishment is effectively completed, should be protected in their rights and legitimate interests, should receive care and assistance and, as far as possible, should be put to useful employment in order to avoid the evil and anti-social consequences of continued idleness;

that the expenses of repatriation to the extent practicable should be charged to Germany and Japan for persons displaced by those Powers from countries occupied by them:

HAVE AGREED: for the accomplishment of the foregoing purposes in the shortest possible time, to establish and do hereby establish a non-permanent organization to be called the International Refugee Organization, a specialized agency to be brought into relationship with the United Nations and accordingly HAVE ACCEPTED THE FOLLOWING ARTICLES.

(Preamble of the Constitution of the International Refugee Organization)