

DOES U.S. FLOOD CONTROL IMMUNITY INCLUDE RESERVOIR RECREATION?

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In 1989, the "NRPA Law Review" column begins its eighth year of publication in *Parks & Recreation*. One of the major themes during recent years has been the availability of various forms of limited immunity for public entities against recreational injury liability. One such form of limited immunity described in this column has been the growing body of case law which has found state recreational use statutes applicable to public entities, including the federal government. This month's column looks at a landmark decision which considered another form of recreational use immunity for federal flood control projects.

Under the Federal Tort Claims Act, the federal government is liable for negligence like a private individual under the law of the jurisdiction where the injury occurred. Federal courts will, therefore, apply state law when the federal government is involved in a recreational injury lawsuit. As a result, recreational injury does not usually involve those questions of federal law or rights under the United States Constitution which are more likely to be reviewed by the Supreme Court of the United States. The *James* case described herein presents one of those rare instances where the Court did address the issue of recreational injury liability as a question of federal law. Specifically, the Supreme Court considered the scope of federal immunity under the Flood Control Act for recreational injuries sustained on reservoir sites controlled by the U.S. Army Corps of Engineers.

NO LIABILITY OF ANY KIND?

In the case of *United States v. James*, 478 U.S. 597, 106 S.Ct. 3116, 92 L.Ed.2d 483 (1986), the federal government was sued following several "serious accidents at flood control projects in Arkansas and Louisiana." In each instance, recreational users of the reservoirs were swept through retaining structures when those structures were opened to release waters in order to control flooding." The circumstances surrounding the incident in Arkansas were as follows:

The project in Arkansas, Millwood Dam, was dedicated in 1966 and is located in the southwestern corner of the State. The Millwood Reservoir behind the structure is used for fishing, swimming, boating, and water-skiing. This reservoir has marina and launching areas for small boats. The United States Government Printing Office has printed brochures that promote and encourage the public to water-ski at Millwood Reservoir.

Enormous underwater portals set within Millwood Dam, called "tainter gates," allow the discharge of water from the Reservoir into a spilling basin below. On June 8, 1979, the level in the Reservoir was such that the United States Corps of Engineers designated it at "flood stage." As part of the flood control function of the Millwood facility, the Corps of Engineers began to release water through the tainter gates. This release created a

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swift, strong current toward the underwater discharge.

Charlotte James and Kathy Butler, who were water skiing in that area because the water appeared to be calm, fell and began drifting toward the tainter gates. Their husbands, who were operating the ski boat, circled back to give them the two lines, apparently intending to pull them away from danger. Because of the swift currents, James and Butler were unable to hold onto the lines. Their husbands' attempts to pull James and Butler aboard by hand also failed because each time the current pulled the skiers out of reach. Eddy Butler then dove into the water in an attempt to save his wife, but all three were pulled through the tainter gates. He drowned and James and Butler were injured. The boat still occupied by Mr. James and his daughter Sonja, became lodged in the tainter gates, and the occupants were rescued without injury.

The federal district (i.e. trial) court in this case noted that "a cable strung with orange buoys delineating the area of danger near the tainter gates had broken and drifted away." Further, the court found that "white anchor buoys marking a restricted area near the Dam were also out of place and consequently offered no warning to a reasonably prudent user." In the opinion of the court, "the United States knew that the dangerous condition created would result in injury to those situated as James and Butler if an adequate warning was not given." According to the court, this case "went beyond gross negligence and constituted a classic classroom example of a death and injuries resulting from conscious governmental indifference to the safety of the public."

Under the circumstances of this case, the court also found that "James and Butler were not negligent" in looking out reasonably for their own safety. The court fixed Butler's damages at \$1 million and \$40,000 for James. While finding the "Federal Government agents had acted willfully and even maliciously [when they] failed to warn of a known danger," the federal district court, however, concluded that "the Federal Government was immune from damages under [the Flood Control Act] 33 U.S.C. sec. 702(c). In pertinent part, this federal statute provided that "no liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." James and Butler appealed.

The circumstances surrounding the incident in Louisiana were as follows:

The relevant flood control project in Louisiana, the Cortableau Drainage Structure, is located near the West Atchafalaya Basin. On May 17, 1980, the waters in the reservoir of Bayou Courtableau Basin were at flood stage, and consequently the Corps of Engineers opened the gates in the project. This created a strong current. Kenneth Clardy and his father, Joseph Clardy, were fishing in the Basin. Only two faded signs at the entrance of the drainage structure warned of the dangerous current. The boaters could not see the signs until they had already been swept past them. The boat became disabled and was drawn through the open gates of the spillway. Kenneth Clardy was thrown into the approach basin and drowned while being pulled through a 220-foot-long barrel of the drainage structure. His father survived without injury.

The federal district court in this case similarly found that "the United States was immune under [the Flood Control Act] sec. 702c from damages for personal injury caused by floods or flood waters in the negligent operation of flood control projects." Clardy appealed.

The appeals court consolidated the *James* and *Clardy* cases (i.e. considered the cases together) because both cases raised the same issue on appeal. Specifically, the issue before the appeals court was whether the immunity provision of the Flood Control Act "bars recovery where the Federal Government would otherwise be liable under the Federal Tort Claims Act for personal injury caused by the Federal Government's failure to warn of the dangers from the release of flood waters from federal flood control projects."

In the opinion of the federal appeals court, "Congress intended sec. 702(c) to immunize the Federal Government from liability for damage resulting directly from the construction of flood control projects and from liability for flooding caused by factors beyond the Government's control." As a result, the appeals court concluded that "Congress had not intended to shield the negligent or wrongful acts of government employees - either in the construction or in the continued operation of flood control projects, including the failure to warn the public of the existence of hazards to their accepted use of government-impounded water, or nearby land." The Supreme Court agreed to review this decision.

As noted by the Supreme Court, "the starting point in statutory interpretation is the language of the statute itself." Further, the Court stated it would "assume that the legislative purpose is expressed by the ordinary meaning of the words used." In this particular instance, the Court emphasized that the immunity provision of the Flood Control Act "outlines immunity in sweeping terms" as follows: "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." (Emphasis supplied by Court.) In the opinion of the Court, it was "difficult to imagine broader language."

On its face, the language covers the accidents here. The injuries occurred as a result of the release of waters from reservoirs that had reached flood stage. Given the nature of the accidents at issue, and given the plain terms of the statute, it requires some ingenuity to create ambiguity...

Nor do the terms "flood" and "floodwaters" create any uncertainty in the context of accidents such as the ones at issue in these cases. The Act concerns flood control projects designed to carry flood waters. It is thus clear from sec. 702c's plain language that the terms "flood" and "floodwaters" apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control...

We have repeatedly recognized that when the terms of a statute are unambiguous judicial inquiry is complete except in rare and exceptional circumstances. In the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive.

In addition, the Court found that the legislative history of the Flood Control Act did not justify

"departure from the plain words of the statute." On the contrary, the Court found that "the legislative history of the Flood Control Act of 1928 *reinforces* the plain language of the immunity provision of sec. 702c."

The Flood Control Act enacted a comprehensive ten year program for the entire Mississippi River valley, embodying a general bank protection scheme, channel stabilization and river regulation, all involving vast expenditures of public funds. The Act was the Nation's response to the disastrous flood in the Mississippi Valley in 1927. That flood resulted in the loss of nearly 200 lives and more than \$200 million in property damage; almost 700,000 people were left homeless.

It is not surprising, in light of the devastation wrought by the 1927 flood and the magnitude of Congress' undertaking, that the legislative history of sec. 702c shows a consistent concern for limiting the Federal Government's financial liability to expenditures directly necessary for the construction and operation of the various projects. Numerous statements concerning the immunity provision confirm that it was intended to reaffirm sovereign immunity in such a dangerous and extensive project... [Numerous] congressmen unequivocally stated that the United States should not be liable for any expense other than the direct cost of constructing the project... Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the government from "any" liability associated with flood control.

As a result, the Court concluded that "the legislative history fully supports attributing to the unambiguous words of the statute their ordinary meaning."

James, Butler, and Clardy had also argued that the Federal Government was "not entitled to immunity here because their injuries arose from Government employees' alleged mismanagement of recreational activities wholly unrelated to flood control." The Supreme Court rejected this argument. In the opinion of the Court, "the manner in which to convey warnings, including the negligent failure to do so, is part of the 'management' of a flood control project." As a result, the Court decided to "follow the plain language of sec. 702c... and hold that the Federal Government is immune from suit in these cases." In so doing, the Court rejected the attempt by the appeals court to "find a principled way to hold the Government responsible for its concededly negligent conduct." The Supreme Court, therefore, refused to impose a narrow interpretation on "a section of the 1928 [Flood Control] Act that received careful consideration by Congress and that has remained unchanged for nearly sixty years..."

[O]ur role is to effectuate Congress' intent, and Congress rarely speaks more plainly than it has in the provision we apply here. If that provision is to be changed, it should be by Congress and not by this Court.

As a result, the Supreme Court (with three of nine justices dissenting) reversed the judgment of the federal appeals court. In so doing, the judgments of the lower courts in favor of the defendant United

States were affirmed.

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