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STRICT LIABILITY WITHIN THE FEDERAL TORT CLAIMS ACT: DOES IT BELONG?

Smith v. Pena
621 F.2d 873 (7th Cir. 1980)

In Smith v. Pena, the United States Court of Appeals for the Seventh Circuit addressed the issue of the combined effect of the Federal Tort Claims Act and the Illinois Dram Shop Act. The FTCA subjects the United States Government to tort liability for certain negligent or wrongful acts or omissions of its employees. The Illinois DSA, however, is based on a theory of strict liability and imposes tort liability regardless of fault on those tavern operators who serve alcoholic beverages to one who becomes intoxicated and while in an intoxicated state causes personal injury or property damage.

The role of strict liability within the framework of the FTCA has been the subject of much controversy. While the FTCA states that the applicable state law of the place where the tort occurred shall be used to determine the Government's liability, the United States Supreme Court has held that there is an exception to this rule when the applica-

1. 621 F.2d 873 (7th Cir. 1980).
2. 28 U.S.C. § 1346(b) (1976) [hereinafter referred to as the FTCA] provides in pertinent part:
   [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of 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, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
3. ILL. REV. STAT. ch. 43, § 135 (1979) [hereinafter referred to as the DSA] provides in pertinent part: “Every person who is injured in person or property by any intoxicated person, has a right of action in his own name, severally or jointly, against any person who by selling or giving alcoholic liquor, causes the intoxication of such person.”
5. ILL. REV. STAT. ch. 43, § 135 (1979).
6. In United States v. Aetna Cas. and Sur. Co., 338 U.S. 366 (1949), one of the first cases interpreting the FTCA, the Supreme Court squarely rejected a strict interpretation of the statute in the context of the anti-assignment exception to the Congressional waiver of sovereign immunity contained within the Act. Later, in Dalehite v. United States, 346 U.S. 15, 44-45 (1953), the Court strictly construed the waiver of immunity, and held that strict liability could not be imposed on the Government.

ble state law imposes strict liability. Under such circumstances the Government will not be held liable.\(^8\) However, the legislative history of the Act indicates that the Court's exclusion of strict liability from the FTCA may not have been warranted.\(^9\) Consequently, the Seventh Circuit in *Smith* was caught in the middle of the controversy when it was called upon to find a remedy for the plaintiffs under the FTCA when the applicable state law, the Illinois DSA, imposed strict liability. The Seventh Circuit held that if the plaintiffs were able to meet the requirements of the DSA, and in addition prove that the Army employees were negligent according to Illinois law, they would not be deprived of a remedy under the FTCA.\(^10\)

This comment will first discuss the legislative history of both the FTCA and the DSA and evaluate their combined effect. The specific factual details of the case and the Seventh Circuit's opinion will then be presented. Finally, an analysis and critique of the court's decision in *Smith* will be presented. The comment will conclude that although the court in *Smith* properly "custom-fashioned" a remedy so as to avoid the strict liability exception to United States Government liability under the FTCA, it is this restrictive interpretation of the FTCA itself which merits re-examination.

**HISTORICAL BACKGROUND**

**Federal Tort Claims Act**

No court has jurisdiction to entertain suits against the United States except where Congress has consented.\(^11\) The terms of Congress' consent to be sued in any court define that court's jurisdiction to entertain the suit.\(^12\) In 1946, after nearly thirty years of Congressional consideration, the Seventy-Ninth Congress enacted the FTCA,\(^13\) which,
with various exceptions, subjects the United States Government to tort liability for certain negligent or wrongful acts of its employees. The language of the Act makes the United States liable, in the same manner and to the same extent as a private individual under similar circumstances, for negligent or wrongful acts or omissions of Government employees acting within the scope of their employment. The statute provides that the Government's liability is to be determined by the law of the place where the negligent act or omission occurred, which enables the federal courts to treat the United States in the same manner as a private citizen would be treated under similar circumstances.

While Congress desired to waive the Government's immunity from suit for the actions of its agents who cause injuries to person and property while acting within the scope of their employment, it was not intended that the Government should be subject to liability arising from acts of a governmental nature or function. Thus, exceptions to the Act were created to preclude any suits against the Government growing out of an authorized activity where no negligence on the part of any Government agent is shown, and the only ground for the suit is the contention that the same conduct by a private individual would be tortious. The exceptions protect the Government from tort liability for errors in administration or in the exercise of discretionary functions. Thus, where an official's action or inaction requires the exer-

14. 28 U.S.C. § 2680 (1976) provides in part:
   The provisions of this chapter and section 1346(b) of this title shall not apply to—
   (a) Any claim based upon an act or omission of an employee of the Government,
   based upon the exercise or performance or the failure to exercise or perform a
discretionary function or duty on the part of a federal agency or an employee of the
Government, whether or not the discretion involved be abused.
15. "Employee" is defined to include "members of the military or naval forces of the United
States, and any person acting on behalf of a federal agency in an official capacity." 28 U.S.C.
§ 2671 (1976).
16. Id. at § 1346(b).
17. Id. Where the negligence and the injury occur simultaneously in a single jurisdiction, the
law to be applied is clear, and no interpretation of the words "the law of the place where the act or
omission occurred" is required. However, in multi-state tort actions, deciding the applicable law
becomes more difficult. Normally, the law of the jurisdiction where the acts of negligence took
18. A section of a statute should not be read in isolation from the context of the whole act in
which it is contained: "We must not be guided by a single sentence or member of a sentence, but
look to the provisions of the whole law, and to its object and policy." Mastro Plastics v. NLRB,
19. See note 100 infra for a history of sovereign immunity.
23. A "discretionary function" is one in which an official has a power and duty to make a
cise of discretion, the official is not liable for harmful consequences flowing from his conduct as long as he acts within the scope of his authority.24

Requirement of a Negligent or Wrongful Act

The phrase "negligent or wrongful act or omission" in the FTCA25 has been the subject of much controversy in determining what is necessary to impose liability on the Government. In Dalehite v. United States,26 an action was brought under the FTCA to recover damages for a death resulting from an explosion of ammonium nitrate fertilizer, which was being produced according to the specifications and under the control of the United States.27 The United States Supreme Court held that the claim was based upon the exercise or performance of a discretionary function or duty within the meaning of the exceptions contained in the Act; as a result, the Government was immune from any negligence liability.28 The petitioners also claimed that the nitrate fertilizer was an "inherently dangerous commodity" and that the Government was engaging in an "extrahazardous" activity.29 When any damages result from the decision to engage in an "extrahazardous" activity, strict liability is imposed on the tortfeasor irrespective of the tortfeasor's conduct.30 Consequently, the petitioners asserted that the Government should be held strictly liable for the accident without any regard to negligence.31 The petitioners relied on the presence of the word "wrongful" in the FTCA in addition to "negligent" to indicate that Congress did not intend to limit liability to negligent torts only.32 The Court, however, rejected the petitioners' claim, holding that the

choice among valid alternatives. Jaffe, Suits Against Governments and Officers: Damage Actions, 77 HARV. L. REV. 209, 218 (1963) [hereinafter referred to as Jaffe].

24. "Discretionary function or duty" that cannot form a basis for suit under the Act includes more than the initiation of programs and activities; it also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. The Act is also not intended to authorize suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion. Adopting regulations for the preservation of public health, passing ordinances, prescribing and regulating the duties of policemen and firemen, are generally regarded as examples of discretionary activities, because in their nature they are legislative. See Dalehite v. United States, 346 U.S. 15 (1953).


27. Id. at 17-18.

28. Id. at 17-45.

29. Id. at 44-45.

30. Id. at 44.

31. Id. at 44-45.

32. Id. at 45. See note 2 supra for the text of the Act.
Act required some brand of misfeasance or nonfeasance,33 and thus did not apply to absolute liability situations.34 In support of this holding the Court stated: "Had an absolute liability theory been intended to have been injected into the Act, much more suitable models could have been found."35

Nonetheless, the word "wrongful" has become the lever through which judges have either expanded or reduced federal tort liability.36 While the Court in Dalehite ruled that the word "wrongful" did not add absolute liability to the coverage provided by the Act, the United States Court of Appeals for the Fourth Circuit in United States v. Praylou37 equated "wrongful" with the Restatement of Torts definition of "tortious,"38 and held that tortious activity included the concept of strict liability. The Fourth Circuit stated that "[t]o say that a tort giving rise to absolute liability is not a wrongful act would be a technical re-

33. Id. "Misfeasance" is defined as the improper performance of some act which a man may lawfully do. BLACK'S LAW DICTIONARY 902 (5th ed. 1979). "Nonfeasance" is defined as the omission of an act which a person ought to do. Id. at 950.
34. 346 U.S. at 45.
35. Id. Another view on the availability of more suitable models can be found in Maryland ex rel Burkhardt v. United States, 165 F.2d 869, 871 (4th Cir. 1947):

Congress was creating a liability not theretofore existing on the part of the government. To have defined all of the tort rules under which liability could be established would have been an almost impossible undertaking; but standards of liability were necessary and Congress was compelled, as a practical matter, to adopt the principles and standards of local law in defining them.

36. The term "wrongful" was added after the term "negligent" with some intention of expanding liability. The problem has been determining how far beyond traditional negligence principles that liability should be expanded. See Reynolds, supra note 6, at 815-16.
38. The word "tortious," which means "wrongful," is: appropriate to describe not only an act which is intended to cause an invasion of an interest legally protected against intentional invasion, or conduct which is negligent as creating an unreasonable risk of invasion of such an interest, but also conduct which is carried on at the risk that the actor shall be subject to liability for harm caused thereby, although no such harm is intended and the harm cannot be prevented by any precautions or care which is practicable to require.

Restatement (Second) of Torts § 6, Comment a at 12 (1965).
39. 208 F.2d at 294, quoting Purcell v. United States, 104 F. Supp. 110, 116 (S.D.W.Va. 1951). See United States v. Aetna Cas. and Sur. Co., 338 U.S. 366, 383 (1949), where the Court observed, "We think that the Congressional attitude in passing the [FTCA] is more accurately reflected by Judge Cardozo's statement in Anderson v. Hayes Constr. Co., 243 N.Y. 140, 147, 153 N.E. 28, 29-30: 'The exemption of the sovereign from suit, involves hardships enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'"
government business. The applicable state law imposed strict liability on owners of aircraft for injury caused by its flight, irrespective of negligence. The Government relied on the decision in Dalehite and asserted that it could not be held liable because the FTCA requires a negligent act and does not hold the Government liable in strict liability situations. The Fourth Circuit, however, stated that while the language in Dalehite lent some support to the Government’s argument, the doctrine laid down in Dalehite was not intended to apply to a case such as Praylou, where the result of its application would be absurd. The Fourth Circuit stated that it would be contrary to the requirement of the FTCA that the United States be liable “in the same manner and to the same extent as a private individual in like circumstances” if it were to hold that the Government would be liable only on a showing of negligence, whereas a private individual would be held to the strict liability of a state statute.

The decision in Praylou achieved a position of prominence in the area of government liability when certiorari was denied by the Supreme Court, but only until an opposite view was expressed in Laird v. Nelms. Laird concerned property damage which resulted from a sonic boom caused by United States military planes. The plaintiffs were unable to show negligence in the planning or operation of the flight but asserted they were entitled to proceed on a theory of strict liability for such ultrahazardous activities conducted by the Government, based on the decision in Praylou. The Supreme Court in Laird reaffirmed Dalehite and thereby rejected the plaintiff’s argument, holding that the language of the FTCA did not permit, under any circumstances, the imposition of liability upon the Government where

40. 208 F.2d at 292.
41. Id.
42. Id. at 292-93.
43. Id. at 295.
44. Id.
45. 347 U.S. 934 (1954). This denial was interpreted by many commentators as an indication that the Supreme Court had accepted the Praylou rationale. See, e.g., Reynolds supra note 6, at 822-23; Peck, Absolute Liability and the Federal Tort Claims Act, 9 STAN. L. REV. 433, 434 (1957) [hereinafter referred to as Peck]. Additional support for this view was commanded when the Supreme Court acknowledged Praylou in a footnote in Rayonier, Inc. v. United States, 352 U.S. 315, 319 n.2 (1957).
47. Id.
48. Id. at 798.
there had been neither a negligent nor a wrongful act.\textsuperscript{49}

The Court in \textit{Laird} stated that the \textit{Praylou} decision was inconsistent with \textit{Dalehite}, in that \textit{Dalehite} did not depend on the factual differences of whether the Government was handling a dangerous property as opposed to operating a dangerous instrument, but rather that the Act did not authorize the imposition of absolute liability of any sort upon the Government.\textsuperscript{50}

Justice Stewart, dissenting in \textit{Laird}, stated that nothing in the history of the Act supported the notion that strict liability was considered inapplicable in cases arising under the FTCA.\textsuperscript{51} Stewart interpreted the history of the phrase "negligent or wrongful act or omission" to include the entire range of conduct classified as tortious under the state law;\textsuperscript{52} and stated that "[t]he only intended exceptions to this sweeping waiver of governmental immunity were those expressly set forth and now collected in § 2680."\textsuperscript{53} Justice Stewart reviewed the legislative history of the Act and stated that while a bill passed by the Senate in 1942 covered only actions based on the "negligence of Government employees,"\textsuperscript{54} the House Committee later substituted the phrase with "negligent or wrongful act or omission."\textsuperscript{55} The reason for the change was that the "committee prefers its language as it would afford relief for certain acts or omissions which may be wrongful, but not necessarily negligent."\textsuperscript{56} According to Justice Stewart, the legislative history of the Act seems to indicate that Congress intended "wrongful" to be interpreted more broadly than was done in \textit{Laird}.\textsuperscript{57}

Thus, \textit{Laird} represents the Supreme Court's most recent decision on the role of strict liability within the FTCA framework. However, as pointed out by Justice Stewart, there is still some question as to whether the Supreme Court has correctly interpreted the legislative history of the Act, and the role of strict liability within the Act.

\textsuperscript{49} \textit{Id.} at 798-99.
\textsuperscript{50} \textit{Id.} at 803.
\textsuperscript{51} \textit{Id.} at 805.
\textsuperscript{52} \textit{Id.} at 806.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Id.} n.4.
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.} quoting H.R. REP. No. 2245, 77th Cong. 2d Sess., 11. The language used by the House Committee was carried over into the bill finally enacted in 1946, without further mention in the Committee reports of the intended scope of the words "wrongful act." \textit{Id.}
\textsuperscript{57} According to Justice Stewart, the holding in \textit{Laird} was contrary to the whole policy of the FTCA. \textit{Id.} at 809.
The Illinois Dram Shop Act

At common law, the sale or gift of intoxicating liquor to a strong, able-bodied man was not an actionable tort and did not give rise to suit against a tavern owner for the torts of the tavern's patrons. Courts held that no causal connection existed between the sale or gift of the beverage and the subsequent actions of the intoxicated individual. Toward the end of the nineteenth century, however, state legislatures began to provide a statutory remedy for those injured by an intoxicated individual against the person who sold or provided the intoxicating liquor. In Illinois, the General Assembly enacted the Liquor Control Act, commonly referred to as the Dram Shop Act. The Illinois DSA imposes strict liability on those who sell liquor on the retail market for damages which result from intoxication caused by liquor they have sold or given. While the object of the statute is to punish those who furnish the means of intoxication by making them liable for damages, the statute is also designed to encourage temperance in the consumption of alcohol.

The DSA was established as the exclusive remedy against tavern operators and owners of tavern premises for injuries to person, property, or means of support in the Illinois Supreme Court case of Cunningham v. Brown. In Cunningham, an action was brought by an administratrix and widow suing for damages caused to her and her children on the ground that the decedent became intoxicated from alcoholic beverages served him by the defendants, and as a result of such

58. See, e.g., Cruse v. Aden, 127 Ill. 231, 20 N.E. 73 (1889).
59. There was no common law liability predicated on the sale or gift of liquor to an able-bodied man because the voluntary action of the man drinking the liquor was considered to be the cause of his intoxication and the proximate cause of any damages which resulted; the damages were not considered caused by the sale or gift of the intoxicants to the drinker. Responsibility for his intoxication and for any injuries resulting from such intoxication rested at common law on the able-bodied person who drank the liquor and became intoxicated. Moran, Theories of Liability, 1958 U. ILL. L.F. 191, 192.

In the few older cases where the common law has recognized a remedy against the provider for damage caused by a person's intoxication, the intoxicated person to whom the liquor was furnished was incapable because of drunkenness, infancy or mental debilitation of resisting either the consumption or the effect of the beverage. Comment, The Illinois Dram Shop Act and the Common Law: A Continuing Drama, 5 J. MARSH. J. 342, 344 (1972).

61. ILL. REV. STAT. ch. 43, § 135 (1979). See note 3 supra for pertinent part of the DSA. The general subject of the liquor trade in Illinois is covered by chapter 43 of the Illinois Revised Statutes under the title "The Liquor Control Act." However, when the term "Dram Shop Act" is used, the speaker is generally referring only to section 135 of chapter 43.
64. 22 Ill. 2d 23, 174 N.E.2d 153 (1961).
intoxication decedent took his own life. The plaintiff's claim was based not only on a violation of the DSA, but also on a common law negligence theory. The plaintiff sought the common law remedy in addition to the remedy provided under the DSA so that she would not be limited to the damages provided under the DSA. The common law claim was based on a theory that when a sale of intoxicants is made to one who is intoxicated or insane, and that incapacity is or should be known to the vendor, the sale and consumption are merged and become the act of the seller and the proximate cause of the injury or damage.

The substantive issue in the common law claim was one of first impression before the court, as there were no cases prior to the enactment of the original DSA where recovery was sought from a supplier of alcoholic liquor for damages inflicted by an intoxicated person. The court stated that "after passage of that act [the DSA] and its subsequent amendments, all actions against tavern owners were brought under the statute." Further, the Cunningham court stated that the legislative history of the DSA indicated that the "legislature did not intend the act to be complementary to a common law right it knew nothing about, but, on the contrary, intended to create a remedy in an area where it believed none existed." The court stated that while plaintiff's common law argument had some merit, the lack of common law precedent for such liability motivated the legislature to create the DSA to be applied in such situations. Thus, if the court were to allow the plaintiffs a common law remedy in addition to the remedy provided in the DSA, the remedial purpose of the DSA would be undermined. Also, the effect of applying the common law would be the same as applying the DSA, except that the damages recoverable would be higher. The legislature, however, did not intend the common law to complement the DSA. Consequently, the plaintiff's common law claim failed, and Cunningham established the DSA as the exclusive remedy against tavern operators and owners of tavern premises.

However, the decision in Cunningham did not completely settle the

65. Id. at 24, 174 N.E.2d at 154.
66. Id.
67. Id. at 24, 174 N.E.2d at 155.
68. Id. at 30, 174 N.E.2d at 157.
69. Id. at 25-26, 174 N.E.2d at 154-55.
70. Id. at 26, 174 N.E.2d at 155.
71. Id. at 29, 174 N.E.2d at 156.
72. Id. at 30, 174 N.E.2d at 157.
73. Id.
74. Id.
issue of the common law's role within the framework of the DSA, especially in situations where the DSA is found to be inapplicable. Such was the case in *Waynick v. Chicago's Last Department Store*, where a diversity action was brought by plaintiffs who alleged that the defendants had furnished intoxicants in Illinois to the owner and driver of an automobile. Subsequently, their car collided in the state of Michigan with an automobile in which the plaintiffs were riding, causing injuries to the plaintiffs. In *Waynick*, it was argued that no common law liability attached to the defendants, and that the DSA was the exclusive remedy against the tavern operators. However, it was held in *Eldridge v. Don the Beachcomber, Inc.* that the Illinois DSA has no extra-territorial effect; thus the Illinois DSA does not apply to situations such as that presented in *Waynick*, where the tortious act occurs outside the state of Illinois as a result of the sale of intoxicants in Illinois. Like the Illinois DSA, the Michigan DSA also has no extra-territorial effect. Thus, there was a void in the law in cases where the DSA was found to be inapplicable.

The Seventh Circuit in *Waynick* turned to the common law for a remedy, stating that "[i]f the common law does not cover the situation before us, there is actually no law applicable," which would leave the plaintiffs without a remedy. To settle the issue, the Seventh Circuit held that because the DSAs of both Illinois and Michigan were inapplicable, the common law of Michigan, the place where the tort occurred would be applied to fill the void that is left when the DSA is inapplicable. Michigan common law indicated that while there was generally no common law duty on a vendor of intoxicating liquors to a third party, in some circumstances there may be such a duty when the sale is made to one already intoxicated, or known to be a drunkard. The court stated that every person has a general duty to use due or ordinary care not to injure others by any agency set in operation by him.

75. 269 F.2d 322 (7th Cir. 1959).
76. *Id.* at 323-24.
77. *Id.* at 324.
78. 342 Ill. App. 151, 95 N.E.2d 512 (1951).
79. *Id.* at 154, 95 N.E.2d at 515. The appellate court based its decision on the premise that if the legislature wanted the DSA to have extra-territorial effect it would have so provided. *Id.*
80. 269 F.2d at 324.
81. *Id.*
82. *Id.* at 325. The Seventh Circuit stated that when given a choice between the law of the place where the negligent act or omission occurred, and the law of the place where the injury or death was inflicted, the law of the situs of the tort, meaning the place where the injury or death was inflicted, governs the liability and substantive matters. *Id.*
83. *Id.* at 325-26.
84. *Id.* at 325.
vendor serving alcohol to one already intoxicated is willfully violating this duty to one other than the consumer, and the vendor's actions are the proximate cause of the injury sustained by that third party. The Seventh Circuit held that the sale of the intoxicants by the defendants in Waynick to one who was already intoxicated was a breach of this common law duty, and liability was imposed on the defendants. Despite the fact that the DSA was inapplicable, the Seventh Circuit allowed the plaintiffs a remedy based on a theory of common law negligence.

A similar fact situation occurred in Colligan v. Cousar, where an action was brought against several defendant tavern operators who served intoxicants in Illinois to one who, while driving an automobile in Indiana in an intoxicated condition, injured the plaintiff. As in Waynick, the Illinois DSA had no extra-territorial effect. In an attempt to apply the common law of the place where the tort occurred, the appellate court discovered that Indiana had no common law on the issue. Consequently, the court was compelled to determine what the common law of the forum state of Illinois would have been had there been no DSA in existence.

The appellate court in Colligan held that when the defendants continued to sell alcoholic beverages to the parties after they were intoxicated, they violated the duty imposed on them by the DSA, and also their common law duty to use care to avoid injury to others by any agency they set in operation. Under the circumstances the court held that the acts of the defendants were acts which, had there been no DSA in Illinois, would have given rise to a common law cause of action on behalf of the plaintiff.

In summary, Cunningham established that the DSA is the exclusive remedy in Illinois for the injured party against tavern operators, and that it was not intended to complement a common law remedy. However, in situations where the DSA is inapplicable, the courts in Waynick and Colligan determined and applied what the common law would have been had there been no DSA in existence.

85. Id.
86. Id. at 326.
87. Id.
89. Id. at 397, 187 N.E.2d at 294.
90. Id. at 403, 187 N.E.2d at 296-97.
91. Id. at 414, 187 N.E.2d at 302.
92. Id.
SMITH V. PENA

Facts of the Case

On January 27, 1978, Stephen and Cynthia Smith were traveling in an automobile when Robert Pena's automobile crossed the center median line of the road and struck the plaintiffs' vehicle head-on, causing serious personal injuries to the Smiths. Pena's reckless manner of driving was directly caused by his excessive consumption of alcoholic beverages served him by Army employees at the Rock Island Arsenal, Rock Island, Illinois.

Count I of plaintiffs' complaint, brought under the FTCA, alleged that Army employees negligently served alcoholic beverages to Pena which caused him to become intoxicated and that his intoxication caused the accident. In Count II, plaintiffs relied on the Illinois DSA. They alleged that the Army sold and served liquor to Pena and that as a result of consuming the liquor, Pena became intoxicated and, while in a drunken condition, caused the accident. The Illinois DSA imposes strict liability; therefore plaintiffs did not allege negligence in the second count of their complaint. However, in their brief on appeal, plaintiffs argued that they were entitled to proceed on Count II under the Dram Shop Act if they were able to prove negligence on the part of the federal tavern keeper.

The federal district court dismissed both counts of the complaint for failure to state a claim upon which relief could be granted. The judge concluded that under Illinois law, the Dram Shop Act is the exclusive remedy for acts within its coverage, so that no common law negligence claim (Count I) was possible. As to Count II, the court held that the FTCA could not support a claim brought under the Dram Shop Act because the DSA is a strict liability statute and the waiver of sovereign immunity under the FTCA does not extend to strict liabil-

93. 621 F.2d at 875.
94. Id.
95. Plaintiffs further contended that these employees knew or should have known the excessive drinking habits of Pena and also of his inebriated condition, yet they permitted him to leave the arsenal driving an automobile. Id. at 875-76.
96. Id. at 875.
97. Id.
98. Id.
99. Id.
100. The Government enjoyed “sovereign immunity” prior to passage of the FTCA. This meant that the Government avoided liability in tort under all circumstances. The origin of the idea stems from the common law theory that “the King can do no wrong” and that it was a contradiction of his sovereignty to allow him to be sued as of right in his own courts. See gener-
The decision of the district court deprived plaintiffs of any claim against the Army.

**The Seventh Circuit's Decision**

On appeal, the United States Court of Appeals for the Seventh Circuit addressed the issue of whether one who seeks damages for personal injuries can invoke the FTCA by alleging negligence when, were he to sue in an Illinois court, his claim would be governed by a strict liability statute. The Seventh Circuit held that the DSA did not deprive plaintiffs of a remedy within the jurisdictional coverage of the FTCA if they were able to meet the requirements of the DSA and, in addition, prove that the Army employees were negligent according to Illinois law. The court, therefore, vacated the dismissal of the complaint and remanded the case to provide plaintiffs an opportunity to amend their second count to include an allegation of negligence.

**Reasoning of the Majority Opinion**

The court in *Smith* resolved the conflict between the liability requirements of the FTCA and the DSA by holding that if the plaintiffs were able to meet the requirements of the Illinois DSA, and in addition prove that the Army employees were negligent according to Illinois law, then the DSA would not deprive them of a remedy within the jurisdictional coverage of the FTCA.

To arrive at this decision, the court distinguished *Dalehite*, which had been relied on by the trial judge. First, the Seventh Circuit stated that there was no negligence action possible in *Dalehite* because the type of activity engaged in by the United States in that case fell within the "discretion" exception of the FTCA, whereas the negligent acts of the Army employees in *Smith* were not within this exception. Second, the court asserted that the plaintiff's alternative claim in *Dalehite*, based on the theory of strict liability, was barred because the FTCA required some "misfeasance or nonfeasance" and so could not

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101. 621 F.2d at 875.
102. *Id.* at 874-75. *See* text accompanying note 17 *supra* for discussion on determination of the applicable law.
103. *Id.* at 880-81.
104. *Id.*
105. *Id.* at 880.
106. *See* text accompanying note 28 *supra*.
107. The Army did not contend that the operation of an arsenal which dispensed alcoholic beverages fell within the discretion exception of the Act. 621 F.2d at 877.
extend to liability without fault. However, in *Smith* the court noted that the plaintiffs did not rest their claim on a theory of strict liability; rather, they asserted that although their claim fell within the parameters of the Illinois statute, they were prepared to prove that the Army employees were in fact negligent. Had the plaintiffs in *Smith* relied solely on a strict liability claim, *Dalehite* would have barred their recovery. However, by also alleging negligent conduct, their claim conformed to the *Dalehite* requirement of a showing of some misfeasance or nonfeasance.

Consonant with the language of the FTCA, a private tavern owner in these circumstances would also have been liable under the Illinois DSA. However, the conflict was not solved at this point because the FTCA requires the federal defendant's conduct to be negligent and under the Act, negligence must be determined according to Illinois law. Because the applicable state law, the DSA, could not be used to determine if the defendant's conduct was negligent, the court had to determine if an Illinois court faced with the same issue would find the Army's conduct to be negligent.

The court in *Smith* reviewed the evidence that the Illinois Supreme Court would consider in determining what constitutes negligence in respect to tavern operators. In *Cunningham*, the Illinois Supreme Court had recognized a distinction between selling alcoholic beverages to a sober person and to one who is intoxicated and stated that under the latter circumstances it may be plausible to impose common law liability on the vendor. However, in *Cunningham* the plaintiff claimed she was entitled to both a common law remedy and the remedy provided under the DSA. The Illinois Supreme Court rejected her claim, holding that the DSA provided the exclusive remedy against

108. The FTCA holds the federal government liable as a private individual would be in accordance with the law of the place where the act or omission occurred. *See* 28 U.S.C. § 1346(b) (1976).

109. 621 F.2d at 877.

110. The court noted that a negligent tavern operator will always be liable under the Dram Shop Act even though proof of negligence is not required. The significance of the absolute liability theory upon which the Dram Shop Act is based is that non-negligent as well as negligent tavern owners are liable. Because the Dram Shop Act is an absolute liability statute, it imposes liability on more persons than with a traditional negligence cause of action. For the negligent tavern operator, the result is identical. *Id.* at 880.


112. In *Huff v. White Motor Corp.*, 565 F.2d 104 (7th Cir. 1977), a products liability case, it was stated that a federal court may evaluate and look to whatever data the state supreme court would consider in determining what constitutes negligence.

113. 22 Ill. 2d at 30, 174 N.E.2d at 157. *See* text accompanying notes 64-74 *supra*. 
the dram shop operators in Illinois and was not intended to complement a common law remedy.114

However, the Smith court found that in a situation where the DSA was inapplicable, the appellate court in Colligan v. Cousar relied on the common law to find a remedy for the plaintiffs.115 In Colligan the appellate court reasoned that if the common law were not referred to in a situation where the DSA is inapplicable there would be a void in the law, and consequently the plaintiffs would have no cause of action against the tavern operators.116 The appellate court in Colligan relied upon a common law negligence theory and held that the acts of the defendants in serving the intoxicants to the tortfeasor were acts which, had there been no DSA in existence in Illinois, would give rise to a common law cause of action on behalf of those injured by the tortfeasors.117

The fact situation in Smith was similar to that of Colligan in that in both cases the Illinois DSA was inapplicable. Thus, the Seventh Circuit in Smith viewed the Colligan holding as a guide to the path the Illinois Supreme Court would follow if presently faced with the question before it.118 Therefore, the Seventh Circuit in Smith held that the Illinois Supreme Court would hold that when a tavern operator knowingly sells liquor to a person already intoxicated and that person causes injuries, the operator is liable for his negligence which proximately caused the injuries inflicted.119 The court accordingly held that if the plaintiffs could prove that under Illinois law the Army employees were negligent in serving drinks to Pena because he was intoxicated or for any other reason which would negate his self-control and thus establish the causation, their FTCA action could be maintained.120

114. Id.
116. Id.
117. Id. at 302.
118. Also, in an analogous situation, the Illinois Supreme Court allowed a common law cause of action by finding a negligent first actor to be the proximate cause of injuries when an intervening second actor was the one who inflicted the harm. The facts indicate that the owner of a parked car left his keys in it. A third person took the car and while driving it injured another. The owner's act in negligently leaving his keys in the car was held to be a proximate cause of the injury. Ney v. Yellow Cab Co., 2 Ill. 2d 74, 117 N.E.2d 74 (1954).
119. 621 F.2d at 880.
120. Id. Policy considerations also support the court's decision. The Illinois legislature imposed absolute liability under the Dram Shop Act because they wished for both penal and remedial purposes to impose liability on more tavern operators, not fewer, than if a negligence standard were used. The court stated that it would be incongruous, in the circumstances where the state cast its net wider than in a traditional negligence action, to automatically excuse a Government employee from liability if his negligence could not be proved. Id.
Reasoning of the Dissent

Judge Wood, dissenting in Smith, was of the opinion that the majority custom-fashioned a remedy for the plaintiffs. He emphasized that Cunningham had established that there is no common law on the subject and that the Illinois DSA is the exclusive remedy in Illinois against tavern operators.

Judge Wood asserted that Dalehite represented the Supreme Court's decision on the issue of strict liability within the FTCA framework. To further develop his point, Judge Wood relied on the more recent decision in Laird, where the Supreme Court concluded that the Act does not authorize the imposition of strict liability of any sort upon the Government. Thus, Judge Wood viewed the majority's decision in Smith as an "original hybrid" law for Illinois with no purpose other than to permit plaintiffs a cause of action under the FTCA.

ANALYSIS

The decision in Smith is consistent with the goal behind the FTCA which is to hold the Government liable for the torts of its employees in the same manner as a private individual would be liable in similar circumstances. While the outcome of the case is consonant with this goal, the means which the Seventh Circuit used to arrive at this result were "custom-fashioned" in that neither the FTCA nor the DSA was applied as the language of these acts suggest. The reason the Seventh Circuit found it necessary to "custom-fashion" this remedy was because it was bound by the United States Supreme Court decisions in Dalehite and Laird which hold that strict liability cannot be imposed on the Government under the FTCA. This "custom-fashioned" remedy approach is a reasonable application of Illinois law in a situation where the DSA does not apply and is justifiable given the desire to provide the injured plaintiffs with a remedy against the tavern operator. However, the legislative history of the FTCA indicates that the

121. Id. at 881.
122. Id. Judge Wood further stated that Colligan, relied on by the majority as indicating what the common law of Illinois may have been in the absence of the Dram Shop Act, was of no consequence because Illinois in fact does not have any common law on the subject, but does have the Dram Shop Act to rely on. Id. at 882.
123. Id.
124. Id.
125. Id. at 883.
127. Although the majority in Smith made no mention of Laird, Laird represents the latest decision by the Supreme Court on governmental liability and should have been discussed.
decisions in Dalehite and Laird may not have correctly determined the place of strict liability within the FTCA framework. 128

The "Custom-Fashioned" Remedy

The FTCA states that the applicable state law should be applied to determine the Government's liability. 129 The applicable state law in Smith was the DSA. However, it was not applied by the Seventh Circuit because the United States Supreme Court in Dalehite had held that the FTCA's requirement of a negligent or wrongful act did not include the imposition of strict liability on the Government. 130 In order to conform to the Dalehite holding the Seventh Circuit added an additional requirement to the DSA by insisting the plaintiffs not only prove that the defendants had violated the DSA, but also that the defendants were negligent. 131 While the addition of this requirement was inconsistent with the language of the DSA which provides for strict liability without any regard to negligence, it was a necessary measure in order to provide the plaintiffs with a remedy.

Before the Seventh Circuit could require the plaintiffs to prove negligence on the part of the defendants in addition to a violation of the DSA it was necessary to distinguish the Illinois Supreme Court decision in Cunningham. Cunningham held that the DSA is the exclusive remedy in Illinois against tavern operators and was not intended to complement a common law remedy. 132 The Seventh Circuit did this by reasoning that while the plaintiff in Cunningham was claiming entitlement to two remedies—that provided in the DSA and also one under a negligence theory—the situation in Smith was greatly different. In Smith the DSA was inapplicable, and without a common law remedy the plaintiffs would be deprived of any remedy against the tavern operators. Thus, the Seventh Circuit held that in a situation where the DSA is inapplicable it is permissible to determine what the common law would have been if there were no DSA in Illinois. 133 This holding anticipates what the Illinois Supreme Court would probably decide if faced with a case where the DSA is inapplicable. To hold otherwise would leave a void in the law and plaintiffs would be left with no remedy against the tavern operators. Keeping in mind that the goal of the

128. See text accompanying notes 11-57 supra for a discussion of the history of the FTCA.
131. 621 F.2d at 880-81.
132. See text accompanying notes 64-74 supra.
133. 621 F.2d at 879-80.
DSA is to impose liability on more rather than fewer tavern operators by holding them strictly liable for the torts of their customers, it is consistent with this goal to hold negligent tavern operators liable in circumstances where the DSA is inapplicable. The Seventh Circuit also found support for this holding in its own previous decision in Waynick and in the Illinois Appellate Court decision in Colligan where the common law was also determined and applied in situations where the DSA was inapplicable.\(^{134}\)

The Seventh Circuit's "custom-fashioned" remedy approach involves a reasonable determination and application of Illinois common law in a situation where the DSA does not apply. It also satisfies the restrictive interpretation of the FTCA under Dalehite and Laird. However, it is this interpretation of the FTCA which merits re-examination.

\textit{Re-examination of Strict Liability Within the FTCA Framework}

The United States Court of Appeals for the Seventh Circuit was unable to apply the FTCA in a manner consonant with its language, which calls for the application of the law of the state where the tort occurred. In \textit{Smith} the applicable law was the DSA. However, the Seventh Circuit was required to look beyond the DSA to determine what the Illinois common law of negligence under the \textit{Smith} facts would have been had the strict liability statute not been enacted. The fact remains that the DSA does exist and should have been applied. As a result of the exception the United States Supreme Court has read into the FTCA when the applicable state law is a strict liability statute, lower courts are required to find a way to conform to that holding in whatever way they can. However, this exception for strict liability is not warranted under the language of the Act. If Congress had intended to exclude strict liability from the Act, then the legislators' desire for comprehensive and unambiguous draftsmanship would have dictated that strict liability be included in the list of exceptions.\(^{135}\)

When the FTCA was passed strict liability was firmly established in the tort law of almost all the states. As the Act provides for application of the law of the state where the alleged tort by the Government has occurred,\(^{136}\) it logically follows that if the applicable state law im-

\(^{134}\) See text accompanying notes 75-92 \textit{supra}.

\(^{135}\) See note 14 \textit{supra} for the text of the exceptions.

\(^{136}\) 28 U.S.C. § 1346(b) (1976). The wording of the Act strongly indicates that state law controls what constitutes a "wrongful act" under the statute. Moreover, state law and not federal law has been used to give meaning to other crucial words in the FTCA. State law determines whether an "employee" was working within the course of his employment. Williams v. United
poses strict liability, Congress must have intended for the Government to be held to the same standard or strict liability would have been included in the list of exceptions. As noted by one commentator, to read into the statute an exception for strict liability causes an unreasonable departure from the use of local standards and defeats the policy of uniform treatment regardless of whether a defendant is an individual or the Government.\footnote{137}{See Reynolds, supra note 6, at 823.}

Moreover, the legislative history of the word “wrongful” in the FTCA indicates that it was added to expand the Government’s liability beyond liability for negligence.\footnote{138}{See text accompanying notes 52-57 supra for a discussion of the legislative history of the FTCA.} To exclude strict liability from within its scope makes “wrongful” very limited in its application. Since there is nothing in the Act which indicates that a “wrongful” act requires blameworthy or socially disapproved behavior to any degree greater than that which tort law normally requires for liability, strict liability should be included within the definition of “wrongful.” If “wrongful” is not expanded, the FTCA is not equating the Government’s liability with that of a private person.\footnote{139}{See Reynolds, supra note 6, at 815-19.}

The dissent in \textit{Smith} viewed \textit{Laird} as being dispositive of the case because the \textit{Laird} decision reaffirmed \textit{Dalehite}.\footnote{140}{621 F.2d at 882.} However, \textit{Laird} has been regarded by some commentators as being an anomaly—a retreat from the progressive direction in which the Supreme Court appeared to be moving.\footnote{141}{See Peck, \textit{Laird v. Nelms: A Call for Review and Revision of the Federal Tort Claims Act}, 48 Wash. L. Rev. 391 (1973).} The \textit{Laird} decision ignored the predominant purpose of the FTCA, which is to make the state law determinative of what constitutes a “wrongful” act. Thus, the \textit{Laird} decision, as the decision in \textit{Dalehite} before it, did not correctly interpret the language of the FTCA.

It is unfortunate that the Seventh Circuit had to decide the case by referring to the common law for a remedy when there is a remedy already provided in the DSA. As the language of the FTCA clearly states that the law of the place where the tort occurred should be ap-
plied, the Illinois DSA should have provided the remedy. However, because the Dalehite and Laird decisions have not given the FTCA the interpretation it warrants, the Smith court found it necessary to look elsewhere to find a remedy. If the FTCA were administered as its language suggests, the Seventh Circuit would not have had to look any further than the Illinois DSA.

**CONCLUSION**

Imposition of strict liability on the Government is not precluded by any provision of the FTCA, nor does the legislative history of the Act evidence any intent by Congress to exclude it. Nonetheless, the United States Supreme Court has held that the Government cannot be held strictly liable under the FTCA. Consequently, the Seventh Circuit in Smith could not apply the FTCA in a manner consonant with its language. Instead of applying the applicable state law as the FTCA requires, the Seventh Circuit was compelled to look beyond the DSA to determine what the law would have been had the DSA not been enacted. The fact remains that the DSA does exist and it should have been applied.

Until the FTCA is interpreted as its language warrants, plaintiffs will either find no relief in strict liability situations against the Government, or courts will have to look past the applicable state law to find a remedy wherever possible. This defeats the purpose of the Act and leads to inequitable results. Today the Government is involved in an ever-increasing variety of extra-hazardous activities, such as supersonic flights, nuclear energy programs, and blasting, which typically carry with them the application of strict liability to those engaging in the activity. If a private individual were involved in the activity, that individual would be held strictly liable for any injury or damage caused by his choice to engage in such an activity. The FTCA states that the Government should be treated as a private citizen. Nonetheless, the Supreme Court has held that strict liability cannot be imposed on the Government under the FTCA. Despite the Supreme Court's holding there is nothing in the legislative history of the Act which indicates that even though a private citizen engaging in these types of activities will be held strictly liable, the Government will be immune from suit. Such a result is at odds with the basic rationale of the Act.

It is suggested that Congress intercede to settle the dispute over the role of strict liability within the framework of the Act. Then the Government will be treated as a private individual under like circum-
stances, and the courts will not have to look to the common law for relief as the Seventh Circuit did in Smith, but rather will find it in the applicable statutes of the state whose law governs.

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