



1963

# Federal Tort Claims Act - Federal Determines the Date upon Which the Period of Limitations Begins to Run

Robert Ted Enloe III

Follow this and additional works at: <https://scholar.smu.edu/smulr>

## Recommended Citation

Robert Ted Enloe III, *Federal Tort Claims Act - Federal Determines the Date upon Which the Period of Limitations Begins to Run*, 17 Sw L.J. 623 (1963)

<https://scholar.smu.edu/smulr/vol17/iss4/7>

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

## NOTES

### Federal Tort Claims Act — Federal Law Determines the Date Upon Which the Period of Limitations Begins To Run

Plaintiff brought a malpractice action against the United States under the Federal Tort Claims Act<sup>1</sup> for the negligent treatment of Plaintiff's wife at an Air Force hospital. An erroneous blood transfusion was administered on May 17, 1956, but Plaintiff and his wife did not learn of the error until June, 1959. Suit was filed on August 29, 1960. The United States pleaded that the two-year period of limitations contained in the Tort Claims Act<sup>2</sup> had run because, under the law of the state of Washington where the alleged negligent act occurred, Plaintiff's "claim accrued" when the blood transfusion was administered on May 17, 1956. Plaintiff argued that state law was applicable only to define the actionable wrong; that federal law determined when a "claim accrued" to start the period of limitations; and that under federal law the "claim accrued" when the injury was discovered. The district court granted the government's motion to dismiss on the ground that the suit was filed more than two years after the "claim accrued" and was, therefore, barred under section 2401(b) of the Tort Claims Act. *Held, reversed*: Under the Federal Tort Claims Act, state law determines only *whether* a substantive right of action exists against the United States; federal law governs *when* the "claim accrues" for purposes of the Act's two-year period of limitations. *Quinton v. United States*, 304 F.2d 234 (5th Cir. 1962). The principal case conflicts with *Tessier v. United States*,<sup>3</sup> in which the First Circuit held that state law controls when a "claim accrues" under the Tort Claims Act. Subsequent to the conflict between the First and Fifth Circuits, the Ninth Circuit, in *Hungerford v. United States*,<sup>4</sup> adopted the reasoning of the Fifth.

The conflicting interpretations were caused by the ambiguous wording of the Tort Claims Act which purports to make the United States liable as a "private person."<sup>5</sup> The *Quinton* and *Hungerford*

---

<sup>1</sup> Provisions of the Federal Tort Claims Act are found in 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80 (1958), hereafter referred to as sections of the "Tort Claims Act."

<sup>2</sup> 28 U.S.C. § 2401(b) (1958) provides: "A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later. . . ."

<sup>3</sup> 269 F.2d 305 (1st Cir. 1959).

<sup>4</sup> 307 F.2d 99 (9th Cir. 1962).

<sup>5</sup> 28 U.S.C. § 1346(b) (1958) provides:

[T]he district courts . . . shall have exclusive jurisdiction of civil actions on

cases held that although this provision adopts the state law to define the existence of an actionable federal wrong, Congress chose to utilize a federal period of limitations, and, therefore, federal law controls the starting of the period of limitations. The court, in *Tessier*, held that the provision adopts the substantive law of the state, and it also adopts state law to govern when the "claim accrues" under the Act.

Contrary to other federal statutes, the Tort Claims Act does not define the acts or omissions which constitute the basis of a suit under it. Instead, it adopts the substantive law of the various states, except in specified instances,<sup>6</sup> to determine if a tort has been committed by the United States.<sup>7</sup> Some courts consider the Act to be a mere "waiver of governmental immunity" since it does not define the substantive wrongs for which suit is permitted.<sup>8</sup> However, others have concluded that the Act creates a federal substantive right of action against the United States.<sup>9</sup> The latter view is superior because, until the enactment of the Tort Claims Act, no right of action against the United States existed at common law.<sup>10</sup>

In *Maryland v. United States*,<sup>11</sup> one of the early cases involving the Tort Claims Act, the Fourth Circuit stated that courts should not apply state law so as to circumvent the intent and purpose of Congress. The court refused to allow a state statute of limitations to control the period of limitations under the Federal Act. The relevant Maryland one-year period of limitations is a condition precedent to the right to sue and not merely a restriction on the remedy.<sup>12</sup> There-

---

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. (Emphasis added.)

<sup>6</sup> 28 U.S.C. § 2401(b) (1958): defines a federal period of limitations; § 2402 (1958): does away with trial by jury; § 2674 (1958): disallows interest prior to judgment; § 2674 (1958): disallows punitive damages.

<sup>7</sup> 28 U.S.C. §§ 1346(b), 2674 (1958).

<sup>8</sup> *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951); *Lloyds' London v. Blair*, 262 F.2d 211 (10th Cir. 1958); *Glasspool v. United States*, 190 F. Supp. 804 (D. Del. 1961); see also Heuser, *Dalbite v. United States: A New Approach To The Federal Tort Claims Act*, 7 Vand. L. Rev. 175 (1954).

<sup>9</sup> *Indian Towing Co. v. United States*, 350 U.S. 61 (1955); *Young v. United States*, 184 F.2d 587 (D.C. App. 1950); *Bates v. United States*, 76 F. Supp. 57 (D. Neb. 1948).

<sup>10</sup> *Dalehite v. United States*, 346 U.S. 15, 30 (1953); *Commissioners of the State Ins. Fund v. United States*, 72 F. Supp. 549, 554 (S.D.N.Y. 1947).

<sup>11</sup> 165 F.2d 869 (4th Cir. 1947).

<sup>12</sup> *Stasciewicz v. Parks*, 148 Md. 477, 129 Atl. 793 (1925). The other view, as exemplified by Texas, is that a statute of limitations affects only the remedy, and, therefore, it must be pleaded or it is waived. *Edwards Mfg. Co. v. Southern Sur. Co.*, 283 S.W. 624 (Tex. Civ. App. 1926); *Chapman v. Mooney*, 257 S.W. 1106 (Tex. Civ. App. 1924).

fore, under Maryland law, the government would not have been liable as a "private person" because the year had elapsed and a right to sue no longer existed. However, in holding the United States liable to suit, the Fourth Circuit stated:

We think, however, the purpose and effect of the language of the statute is that we shall look to the law of the state for the purpose of *defining* the actionable wrong for which liability shall exist on the part of the United States, but to the act itself for the limitations of time within which action shall be instituted to enforce the liability.<sup>13</sup> (Emphasis added.)

Thus, the court held that even if the state period of limitations conditions a right and denies the existence of a cause of action, the federal period of limitations must control.

Three cases have been decided by the courts concerning whether federal or state law controls when a "claim accrues" and when the period of limitations begins to run under the Tort Claims Act.<sup>14</sup> All three held that federal law controls.

In *Foote v. Public Housing Comm'r*,<sup>15</sup> a federal district court held that the Tort Claims Act period of limitations starts running upon a decedent's death and not, as under applicable Michigan law, upon appointment of an administrator. The court turned to other federal acts<sup>16</sup> to determine the applicable federal rule on the ground that to follow state law for starting the period of limitations would permit circumvention of the federal period.

Two years later, in *Bizer v. United States*,<sup>17</sup> a district court held that federal law controls when a "claim accrues" under the Tort Claims Act. The defendant, United States, contended that federal law and not California law controlled when the period of limitations began to run.<sup>18</sup> Under California law, a cause of action arises at the time of the injury, but the California period of limitations does not begin to run until the person has knowledge of his injury. In accepting the government's contention that federal law controls, the court said:

Thus the state law does control when the Tort Claims limitation be-

<sup>13</sup> 165 F.2d 869, 871 (4th Cir. 1949).

<sup>14</sup> *United States v. Reid*, 251 F.2d 691 (5th Cir. 1958); *Bizer v. United States*, 124 F. Supp. 949 (N.D. Cal. 1954); *Foote v. Public Housing Comm'r*, 107 F. Supp. 270 (W.D. Mich. 1952).

<sup>15</sup> *Foote v. Public Housing Comm'r*, *supra* note 14.

<sup>16</sup> Federal Employers' Liability Act, 53 Stat. 1404 (1939), 45 U.S.C. §§ 51-60 (1958); Admiralty Act, 41 Stat. 525 (1920), 46 U.S.C. §§ 741-52 (1958).

<sup>17</sup> 124 F. Supp. 949 (N.D. Cal. 1954).

<sup>18</sup> Significantly, the United States was successful in *Bizer* in contending that federal law controlled, but in the principal case, the government took the opposite position and was unsuccessful in contending state law controlled.

gins to run in one very important sense. There must be in existence a state cause of action before the statute has anything to run on, or if you will, before the "claim accrues." State law governs the existence of the cause of action. But this is quite a different thing from the date from which the state statute begins to run. . . . *I hold that the state law governs when the cause of action comes into existence but the federal law governs when the Tort Claims limitation begins to run.*<sup>19</sup> (Emphasis added.)

The court recognized that under the Act a "cause of action" and a "claim" are not interchangeable and that the former is determined by state law and the latter by federal law. However, under the particular facts in the *Bizer* case, the court decided that the cause of action arose and the claim accrued at the same time.<sup>20</sup> The important issue decided was that federal law controls when a "claim accrues." Similarly, in *Jackson v. United States*,<sup>21</sup> the court said: "Federal law governs the construction of the statute, including the meaning of the quoted language [referring to section 2401(b) of the Tort Claims Act, 'two years after such claim accrues']; state law governs what acts or omissions are negligent or wrongful and when the cause of action comes into existence."<sup>22</sup>

The confusing state substantive law applied and the unclear language used in the 1958 case of *United States v. Reid*<sup>23</sup> contributed to the conflict between the Fifth<sup>24</sup> and Ninth<sup>25</sup> Circuits on one side and the First Circuit<sup>26</sup> on the other. In *Reid*, the negligent act occurred on March 10, 1949, but was not discovered until February 16, 1950, with the onset of pains. Suit was filed on November 29, 1951. The Fifth Circuit held that the suit was filed within the two-year period of limitations contained in the Tort Claims Act for two alternative reasons. Consequently, the *Reid* case must be read carefully to determine which reason the court was supporting at the time.

Under Georgia substantive law, which the Tort Claims Act adopts

<sup>19</sup> 124 F. Supp. 949, 952 (N.D. Cal. 1954).

<sup>20</sup> In the *Bizer* case, the plaintiff suffered a traumatic injury at the time of the negligent act. This accounts for the result that the "cause of action" and "claim accrual" coincided, as distinguished from the federal rule enunciated by the *Quinton* case. In fact, the court said:

*I need not hold, and do not hold, that in every malpractice case under the Tort Claims Act, the period of limitations begins to run on the date of injury. Here the injury was caused while plaintiff was conscious; the injury was traumatic; plaintiff knew that he was injured, he was told the examination had burst his bladder, and he knew that this had not happened in a previous examination of a similar type.* 124 F. Supp. at 953. (Emphasis added.)

<sup>21</sup> 182 F. Supp. 907 (D. Md. 1960).

<sup>22</sup> *Id.* at 911.

<sup>23</sup> 251 F.2d 691 (5th Cir. 1958).

<sup>24</sup> *Quinton v. United States*, 304 F.2d 234 (5th Cir. 1962).

<sup>25</sup> *Hungerford v. United States*, 307 F.2d 99 (9th Cir. 1962).

<sup>26</sup> *Tessier v. United States*, 269 F.2d 305 (1st Cir. 1959).

to define the actionable wrong, a cause of action arises only when the damage has been sustained.<sup>27</sup> In order to ascertain when the damage occurred, the court had to find a point in time between March 10, 1949, when the negligent act occurred, and February 16, 1950, when the plaintiff learned of his injury with the onset of pains. The court inferred that no damage occurred until within two years of filing suit, and thus the substantive actionable wrong was not committed until then.<sup>28</sup>

However, the Fifth Circuit, in *Reid*, did not stop with finding that the suit was timely filed on the ground that under Georgia law the substantive actionable wrong was committed within two years prior to filing suit. As its alternative reason, the court held that the federal rule, as expressed in *Urie v. Thompson*,<sup>29</sup> was applicable and that the "claim accrued" when the plaintiff had knowledge of the injury on February 16, 1950. If the court had only applied state law, then, of course, the federal rule would have been inapplicable. However, it is clear that the court considered the *Urie* rule controlling and that when the period began to run was a federal question. This is evidenced from the language used in a footnote, which reads: "[I]t is the *state* law which determines *when*, if ever, a claim comes into being. But once it does the time in which the F.T.C.A. suit must be filed is controlled by the Federal Act."<sup>30</sup>

After the *Reid* opinion had been written, *Tessier v. United States*<sup>31</sup> was decided by the First Circuit. Under Massachusetts law, the cause of action for medical malpractice arises at the time of the

---

<sup>27</sup> *Barrett v. Jackson*, 44 Ga. App. 611, 162 S.E. 308, 309 (1932).

<sup>28</sup> The court stated:

Assuming that *Reid*, as the plaintiff, had the burden of bringing himself within the time period qualifying the right . . . we think that the evidence satisfactorily established it, at least prima facie, so that it was then up to the Government to rebut it. Since the Trial Court was acutely aware of the significance of limitations, his express holding of a timely suit is without doubt an implied crediting of persuasive evidence that from March 10, 1949 down to the time just a few weeks before February 16, 1950, no perceptible change had occurred. . . . The inference that the adverse effects first began to make inroads on his body [damage] after November 28, 1949, [two years before action was filed] certainly has as much record support as one that it *must* necessarily have occurred between March 10 and November 29, 1949. 251 F.2d at 695.

<sup>29</sup> 337 U.S. 163 (1949). In *Urie*, the Supreme Court held that the period of limitations contained in the Federal Employers' Liability Act does not begin to run until the injured party knows or has reason to know of his injury in certain classes of nontraumatic injuries.

<sup>30</sup> 251 F.2d at 694 n.4.

<sup>31</sup> 269 F.2d 305 (1st Cir. 1959). *Tessier* had an almost identical fact situation with the *Quinton* case. Government doctors negligently left two metallic needle fragments between the plaintiff's diaphragm and liver which subsequently caused an abscess. The negligent act occurred in June, 1947, but the damage was not discovered until March, 1954.

negligent act, and the period of limitations begins to run at that time. The court held that state, not federal, law controls for three reasons. First, the court held that the federal rule as expressed in *Urie v. Thompson*<sup>32</sup> was inapplicable since the *Urie* case concerned the Federal Employer's Liability Act,<sup>33</sup> which creates a federal substantive right as distinguished from the Tort Claims Act which only "waives governmental immunity."<sup>34</sup> Secondly, the court cited *Bizer v. United States*<sup>35</sup> for the proposition that a "claim accrues" when a similarly situated private person would become liable to suit under the law of the state. Thirdly, the court cited the *Reid* case as holding that the state law controls when the period of limitations begins to run.<sup>36</sup>

The principal case appears to be a reaffirmation of the principles expressed in the early cases under the Tort Claims Act, *i.e.*, Congress, in creating a federal substantive right of action against the United States, chose to delineate in that Act the time within which the suit must be brought, and this should not be circumvented by state law. The purpose and intent of Congress in creating a federal period of limitations was to create uniformity throughout the federal system. Consequently, if state law is permitted to either broaden or constrict the time within which suit must be brought by controlling when the period starts to run, then the uniformity Congress intended can be circumvented.

Furthermore, Congress has decided for reasons of policy that the period for bringing suit shall be within two years after a "claim accrues." Thus, the time when a "claim accrues" should be a federal question in order to effectuate the federal policy. Clearly, if the policy of state X is to start the period of limitations upon occurrence of the act and then to provide for a lengthy period of limitations, and state Y chooses to start its period of limitations upon knowledge of damage and to use a shorter period of limitations, then to apply the individual state's starting point but not its period of limitations would frustrate the federal, as well as state, policy.

Judge Hutcheson, in his concurring opinion in the principal case,<sup>37</sup> significantly pointed out that if a period of limitations is contained in an act which creates a new liability, then the period limits the right created.<sup>38</sup> In other words, the period of limitations is not remedial, as

<sup>32</sup> 337 U.S. 163 (1949); see note 29 *supra*.

<sup>33</sup> 53 Stat. 1404 (1939), 45 U.S.C. § 51 (1958).

<sup>34</sup> See text accompanying notes 8-10 *supra*.

<sup>35</sup> 124 F. Supp. 949 (N.D. Cal. 1954); see notes 17-22 *supra* and accompanying text.

<sup>36</sup> 251 F.2d 691 (5th Cir. 1958); see notes 23-30 *supra* and accompanying text.

<sup>37</sup> 304 F.2d at 241.

<sup>38</sup> *Id.* at 242; see also *Davis v. Mills*, 194 U.S. 451 (1904).

in the general statute of limitations, but creates a limitation on the substantive right.<sup>39</sup> Moreover, it has been held that a statute which creates a time limit within which to sue the United States should be interpreted restrictively.<sup>40</sup> If suit is not brought within the stated period, the court no longer has jurisdiction to take cognizance of the claim.<sup>41</sup> Although courts, in dictum, have often referred to section 2401(b) as a statute of limitations, when forced to distinguish between the two, they have held that the section is a jurisdictional prerequisite to the right of suit.<sup>42</sup> Thus, once the period of limitations is recognized as a federal jurisdictional requirement, it is evident that it should be controlled by federal and not state law. Further, since it is *not* a statute of limitations which affects only the remedy and which can be waived, state decisions and policy concerning state statutes of limitations are inapplicable.

It is submitted that the Fifth Circuit correctly decided in *Quinton v. United States* that federal law controls the starting of the period of limitations. The holding effectuates the uniformity which Congress intended. The clear language employed by the court should prevent fuzzy thinking by many federal courts long accustomed to applying state substantive law in cases involving state-created rights in accordance with *Erie R.R. v. Tompkins*.<sup>43</sup> The *Quinton* case follows the earlier cases<sup>44</sup> which held that section 1346,<sup>45</sup> in making the government liable as a "private person," adopts the state law only to define the actionable wrong, but does not adopt the state statute of limitations. Thus, section 1346 does not limit the federal period of limitations contained in section 2401(b).<sup>46</sup>

The *Quinton* case is in line with a recent Supreme Court decision which also concerns the Tort Claims Act. In *Richards v. United States*,<sup>47</sup> the Court stated: "[I]t seems sufficient to note that Congress has been specific in those instances where it intended the federal courts to *depart completely* from state law."<sup>48</sup> (Emphasis added.)

<sup>39</sup> See *Engel v. Davenport*, 271 U.S. 33, 38 (1926); *Atlantic Coast Line R.R. v. Burnette*, 239 U.S. 199, 201 (1915). See also note 12 *supra* and accompanying text.

<sup>40</sup> *United States v. Wardwell*, 172 U.S. 48 (1898).

<sup>41</sup> *Ibid.*

<sup>42</sup> *Simon v. United States*, 244 F.2d 703 (5th Cir. 1957); *Foote v. Public Housing Comm'r*, 107 F. Supp. 270 (W.D. Mich. 1952).

<sup>43</sup> 304 U.S. 64 (1938). This rule essentially requires federal courts, when deciding cases upon state created rights, to apply the local substantive law of the state in which the court sits.

<sup>44</sup> *Maryland v. Burkhardt*, 165 F.2d 869 (4th Cir. 1949); *Jackson v. United States*, 182 F. Supp. 907 (D. Md. 1960); *Bizer v. United States*, 124 F. Supp. 949 (N.D. Cal. 1954); *Foote v. Public Housing Comm'r*, 107 F. Supp. 270 (W.D. Mich. 1952).

<sup>45</sup> 28 U.S.C. § 1346(b) (1958). See note 5 *supra* for text of the statute.

<sup>46</sup> 28 U.S.C. § 2401(b) (1958). See note 2 *supra* for text of the statute.

<sup>47</sup> 369 U.S. 1 (1962), noted in 17 Sw. L.J. 303 (1963).

<sup>48</sup> 369 U.S. at 14.



The Court cited section 2401(b), the Tort Claims Act's period of limitations, as an example.

The decision of *Tessier v. United States*<sup>49</sup> appears incorrect. The three reasons given for the result do not withstand careful analysis. First, the Tort Claims Act does create a federal substantive right of action and does not merely waive governmental immunity.<sup>50</sup> Secondly, the *Bizer* case did not hold that in every instance in which a cause of action arises under state law a claim will likewise "accrue" under the Federal Act.<sup>51</sup> Thirdly, the *Reid* case did not hold that state law controls when a "claim accrues," but held that federal law controls.<sup>52</sup> In fact, the *Reid* opinion adopted the federal rule expressed in *Urie v. Thompson*.<sup>53</sup> The *Tessier* case is without firm basis and should not be followed.

Future cases which consider the federal period of limitations contained in the Tort Claims Act should recognize that one of the problems created by sections 1346<sup>54</sup> and 2401(b)<sup>55</sup> is semantic. It is important to distinguish between a "cause of action" and the "accrual of a claim" and to realize that they are not interchangeable, although in the majority of cases they will coincide in point of time. A cause of action arises only under state law and is suable in a state court. However, only a claim is the subject of suit under the federal substantive right created by the Tort Claims Act. Nevertheless, a state cause of action is important under the Tort Claims Act since a completed cause of action is necessary for an actionable wrong to have been committed by the government. Since in many cases the "cause of action" and the "claim" arise at the same point in time, the courts will often use the terms interchangeably. In other words, the courts speak of a cause of action arising under the Tort Claims Act which seems as if state law is applied to determine when the period of limitations begins to run, although in fact a claim accrued at the same time under federal law. Because of this loose language in court opinions, it is dangerous to rely upon the courts' exact choice of words. For example, in a normal case involving a traumatic injury when the negligent act is committed, a cause of action will arise under state law, and a claim will accrue under the federal rule. However, if the "cause of action" and the "claim accrual" are not

---

<sup>49</sup> 269 F.2d 305 (1st Cir. 1959).

<sup>50</sup> See notes 8-10 *supra* and accompanying text.

<sup>51</sup> See notes 17-22 *supra* and accompanying text.

<sup>52</sup> See notes 23-28 *supra* and accompanying text.

<sup>53</sup> 337 U.S. 163 (1949); see note 29 *supra*.

<sup>54</sup> 28 U.S.C. § 1346 (1958); see note 5 *supra*.

<sup>55</sup> 28 U.S.C. § 2401(b) (1958); see note 2 *supra*.