

COURSE: Prescribed Fire Planning and Implementation

TOPIC: Civil and Criminal Liability (UNIT 10)

HANDOUT 2: Arguments to the Hypotheticals

Argument #1: Jane could be liable because she was not acting within the scope of her duty in conducting the burn. Identifying sites for recreational use probably is within the scope of her duties; preparing sites may be as well. But conducting prescribed burns, even for recreational purposes, likely is not. To avoid liability, Jane might 1) effectively amend her scope of duty by getting permission to conduct the burn from an authorized supervisor; 2) Jane could get someone whose duty it is to conduct prescribed burns to oversee the project.

Argument #2: The statute only exempts negligent acts. Acts committed with the intent to cause the resulting harm, or with reckless disregard as to the result, are not exempted. Frank could be personally liable. Conducting the burn clearly was within the scope of his duty, but if his conduct was accompanied by the intent to harm Tom's fence, or knowledge the harm would result, Frank is personally liable.

Argument #3: Tom will probably name both in the claim. However, Tom realistically seeks to recover from the government treasury -- the ultimate deep pocket. Even if Tom could get a judgment against Jane, he would have a difficult time collecting on it.

Argument #4: Development of the Fire Management Plan was a policy decision. The plan was developed at the planning level. It involved consideration of particular management objectives. This is the kind of policy judgment the judiciary should not review. Therefore, even though Laura and her staff may have been negligent in defining the specifics of the limited suppression prescription (e.g., the allowable fuel moisture or humidity), development of the plan was discretionary and the government is immune.

Argument #5: 1) Be sure the Management Plan is in writing and updated, including the fire prescriptions; 2) Identify in the plan the objectives that guided each decision and how the particular decision will further that objective; 3) Hold public meetings to gather information to assist decisions; 4) Hold interdisciplinary staff meetings to analyze gathered information and weigh policy considerations; 5) ACT QUASI-LEGISLATIVELY.

Argument #6: Yes, Chuck can bring suit. While Marcos made a decision, and it did

involve some discretion, this is not the kind of conduct the judiciary is prevented from reviewing. The decision did not involve the weighing of substantive policy considerations. The decision was merely operational, and is subject to FTCA.

Argument #7: Yes. Development of the plan and its component prescriptions was policy judgment, within the discretionary function exception. But Sue's negligent application or execution of that policy was not within the exception; it was operational and the type of conduct the judiciary can review.

Argument #8: This hypothetical is based on the United States Supreme Court case Rayonier, Inc. v. U.S. The discretionary function exception argument was not specifically raised. The court did hold that the fact that forest firefighting is uniquely a governmental activity did not prevent suit under FTCA. Subsequent decisions have cited Rayonier as implied authority that the discretionary function exception is inapplicable to fire suppression decisions. However, Rayonier does not specifically state that principle. A possible explanation for Rayonier is that government liability existed not because the decision for patrols was not discretionary, but that application of that decision was negligent. Perhaps if the patrol and mop-up order had been properly carried out, the discretionary exception would have applied, i.e., the Forest Service was immune from suit, even though the FMO's decision may have been negligent (e.g., because patrols were too infrequent, more extensive mop-up was necessary, etc.) because the decision was a discretionary policy judgment.

Argument #9: Bob had training as a Division Supervisor and was functioning as one. The applicable standard of care was what a reasonable and prudent Division Supervisor would do under the circumstances. Bob probably failed to meet the standard. A reasonable Division Supervisor would have listened to the weather forecast during briefing, particularly when a burnout was planned for his or her division. The fact that Bob had no experience in this type of vegetation and fuel type is no excuse. The reasonable person standard does not account for beginners. In fact, Bob's lack of experience in this vegetation type is likely further evidence of negligence. A reasonable Division Supervisor not having experience in conducting burnouts in heavy brush and timber would have obtained help from someone with experience.

The fact that houses were nearby did not make the standard of care greater. Remember, the standard is always reasonableness under the circumstances. However, what conduct is reasonable changes as

the circumstances change. The existence of homes nearby increased the likelihood of harm. Therefore, to be reasonable under the circumstances, Bob needed to be more careful.

The F&WS might argue contributory or comparative negligence on the part of the property owner whose house was damaged because failure to clear brush away allowed the fire to spread to the house. Additional information would be helpful and should be gathered: Were the other homes saved because they did clear brush away? Is there a local ordinance or regulation requiring removal of brush from around a residence?

FINAL ARGUMENT

This problem is based on the case Defrees v. U.S., Through U.S. Forest Service, 738 F.Supp. 380 (D. Or. 1990). Some minor factual modifications were made. A reading of the opinion is interesting in that it is illustrative of many of the principles covered in this lecture.

A government employee is not personally liable for negligent acts committed within the scope of employment. Ross was a government employee. Therefore, even if Ross' decision to leave the fire without 100% mop-up were negligent, no personal civil liability exists. There is no evidence Ross acted intentionally or recklessly in leaving the fire. Therefore, his actions were not outside the protection of the statute.

The court in Defrees held the IC's decisions with regard to priority fire suppression resources were within the discretionary function exception. In reaching its conclusion, the court noted that the decisions not only involved discretion on the part of the IC, but that "the exercise of that discretion [was] grounded in the social, economic, and political policies that the discretionary function exception was designed to protect." The IC was required to balance the value of communication installations, private property, natural resources, and safety to personnel. In the mind of the court, the IC was "required to make social and economic policy decisions." These are the kinds of decisions the judiciary should not be able to review.

The applicable standard of care to the IC was that of a reasonable and prudent IC under the circumstances. The IC did conform to that standard. The court in Defrees reached the same conclusion. Although it held the FTCA inapplicable, the court stated that even if the FTCA were applicable, the IC was not negligent. The IC acted reasonably under the circumstances. With limited resources to devote to many fires, it was reasonable to establish suppression priorities. Furthermore, a reasonable IC under the circumstances would not send resources to the Huckleberry Fire when other fires presented a more immediate threat to persons, property and resources.

The standard of care is always reasonableness under the circumstances. However, the amount of care necessary to act reasonably may increase as the circumstances change.

The threat of fire to homes and communication installations presented circumstances requiring more care in order to be reasonable. As noted above, the IC met this standard.

An argument exists that Lyla was negligent in conducting a burnout, and that the negligent burnout operation contributed to the damage of her property. An investigation of the circumstances of the burnout and damage to the buildings is needed to support this argument.

Finally, Lyla cannot prosecute Ross or the IC criminally. The state, not private individuals, prosecute criminal suits. Moreover, neither Ross nor the IC acted with the necessary criminal intent to be criminally liable. Remember, criminal liability generally requires both a guilty act and the necessary criminal intent.