

## MARCH 1999 NRPA LAW REVIEW

### GOVERNMENTAL IMMUNITY & LIABILITY FOR WILD ANIMAL ATTACKS

The *Carlson* and *Tippett* cases described illustrate governmental liability for negligence and discretionary function immunity for wild animal attacks on public land. Governmental liability for negligence is usually defined by the terms of a tort claims act. Many of these state tort claims acts are similar to the Federal Tort Claims Act (FTCA). Under the FTCA, the federal government may be held liable for negligence, like a private individual, under the law of the jurisdiction where the injury occurred.

As illustrated by the case of *Palumbo v. State Game and Fresh Water Fish Commission*, 487 So. 2d 352 (Fla.App. 1986), landowners generally owe no legal duty to prevent attacks by wild animals. In this particular case, plaintiff was attacked by an alligator. In his complaint, plaintiff alleged that the State was negligent in failing to “fence, block or otherwise prevent alligators from moving from Paynes Prarie State Park to adjoining Lake Wauberg.” As noted by the appeals court, the law generally “does not require the owner or possessor of land to anticipate the presence of or to guard an invitee or trespasser against harm from wild animals, unless one of two conditions exists: the animal has been reduced to possession, or the animal is not indigenous to the locality but been introduced onto the premises.” Applying these principles to the facts of the case, the court noted that the State “had not reduced the alligator to possession before the attack.” Moreover, “since alligators are indigenous to Florida,” the court held that the State was “not required to have the alligator under dominion and control.” The appeals court, therefore, dismissed plaintiff’s negligence claims against the State.

In contrast to *Palumbo*, the state supreme court, in *Carlson* found the State could be held liable for knowingly creating a dangerous situation which made an attack by a wild animal more likely. In so doing, the *Carlson* court applied “ordinary principles of negligence” which require landowners to maintain their property in a reasonably safe condition, including the likelihood of injury from wild animals on the premises.

The FTCA and many state tort claims acts, however, have retained immunity from liability where the alleged governmental negligence involved the exercise of discretion on the part of government officials. For example, the Alaska state tort claims act applied in the *Carlson* provided governmental immunity for negligence claims “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused.” While the deciding may be immune, the doing is not. As illustrated by *Carlson*, once a policy decision is made, an operational duty may arise to implement policy directives in a non-negligent fashion.

The *Tippett* decision applies similar principles from the FTCA in determining the applicability of discretionary function immunity for wild animal attacks on public lands. However, in contrast to *Carlson*, the federal court in *Tippett* found the federal government was immune from negligence liability

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because the ranger had exercised discretion in balancing the preservation of wildlife with the desire of the citizenry to access the national park.

### UNCOLLECTED GARBAGE ATTRACTS BEAR

In the case of *Carlson v. State of Alaska*, 598 P.2d 969 (Ak. 1979), particular case, the issue was “whether the State of Alaska may be held liable for personal injuries inflicted by a bear, when the bear is attracted to the site of the attack by garbage that had accumulated on state-owned property.” The facts of the case were as follows:

On the evening of October 22, 1975, Julie Carlson was attacked and mauled by a bear at the Robe River turnout at Mile 2 of the Richardson Highway near Valdez. The Robe River turnout is a state-owned roadside area built and designed for tourist use. It was equipped with six to ten fifty-five gallon drums, without lids, for use as litter barrels...

On the day of the attack... [t]he barrels were running over, and garbage and trash were scattered around on the ground. The attack occurred as the Carlsons were walking to their pick-up truck.... As they crossed the turnout toward their truck, a bear appeared. It threw James into the woods then attacked Julie. Julie was severely wounded, suffering a broken leg and lacerations on her back, and it appears that she now may be suffering permanent partial disability.

In her complaint, Carlson alleged that “the State was negligent in allowing garbage to accumulate at the turnout, since it knew that there were bears in the area, and it knew or should have known that garbage would attract bears and pose a danger to people who used the turnout.” The trial court granted summary judgment in favor of the State. Carlson appealed to the state supreme court. On appeal, the State argued as follows that it owed no legal duty to control wild animals not in its possession:

It is clear that the only basis for a cause of action against the state of Alaska must come from a duty flowing from its inherent possession or control of all wild animals within its dominion, and for its failure to properly control such animals. However, liability for animals *ferae naturae* [i.e., wild animals] has never been recognized unless, somehow, those animals have been reduced to the possession of a particular person or agency.

While acknowledging that “the State's statement of the law is probably correct,” the state supreme court found this general rule was “inapplicable to this case.” As characterized by the court, plaintiff did “not contend that the State was liable simply because of its ‘inherent possession or control’ of wild animals.” On the contrary, the court found plaintiff’s negligence claims alleged that “the State created a dangerous

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situation, that it knew the situation was dangerous, and that it failed either to correct the situation or to warn people of the danger.” In so doing, the court rejected the State’s contention that the “conceded lack of control over the attacking bear” necessarily precluded any landowner liability under the circumstances of this case.

Accordingly, in considering the State’s liability for injuries caused by wild animals, the Alaska state supreme court applied the following “ordinary principles of negligence”:

A landowner or owner of other property must act as a reasonable person in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden on the respective parties of avoiding the risk.

At the time, the court noted “a surprising dearth of case law--not only in Alaska but also in other states and in the federal courts--on the issue of liability for damage caused by a wild animal when the animal is not under the control of the defendant.” In those few cases which addressed the issue, the court noted the following general rule of law had been applied:

[I]f a landowner knows that a wild animal is creating a dangerous situation on his property, he has a duty either to remove the danger or to warn the people who may be threatened by the danger.

In so doing, the Alaska court provided the following description of the “most helpful case” on point, *Wamser v. City of St. Petersburg*, 339 So.2d 244 (Fla. App. 1976)

*Wamser* involved a lawsuit against a city by a swimmer who had been attacked by a shark at a city-operated beach. The court held that, because the danger was not reasonably foreseeable, the city had no duty to guard the swimmer against a shark attack or to warn him of the possibility of such an attack. The city also was found to have no duty to seek information about the frequency of sharks in the beach area, since no shark attacks had ever occurred at the beach so as to indicate the necessity for obtaining such information.

Similarly, the Alaska supreme court found the government could not be held liable for the completely unforeseeable actions of wild animals. However, under the circumstances of this particular case, it was unclear whether the bear attack was completely unforeseeable. Specifically, there was evidence that the bear was attracted to the site of the attack by garbage that had accumulated on state-owned property. As a result, the Alaska court found further proceedings were necessary to resolve the following issues:

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It will be necessary to decide, for example, the extent of the State's knowledge of the presence of bears at the Robe River turnout; whether it was reasonably foreseeable that a bear would attack a person who was using the turnout; and whether the state had sufficient knowledge of danger so as to give rise to a duty to post warning signs.

### PLANNING-OPERATIONAL TEST

The state supreme court in *Carlson* also considered whether the State was immune from negligence liability in this particular instance based upon the "discretionary acts exception" to the state tort claims act. Based upon the following "undisputed evidence," trial court had found "the State's decision regarding maintenance of highway turnout areas was a discretionary function for which the state was immune from suit.

[I]t was the State's normal practice to cease all litter barrel pick-up at roadside turnouts around October 1 and that pick-ups at the Robe River turnout had been discontinued around October 1, 1975, in accordance with that practice.

As cited by the state supreme court, no claim could be brought under the state tort claims act if the alleged negligence was "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused." AS 09.50.250(1). As described by the state supreme court, the following "planning-operational test" would determine the applicability of the "discretionary act exception of the Alaska Tort Claims Act":

[D]ecisions that rise to the level of planning or policy-making are considered discretionary acts which do not give rise to tort liability, while decisions that are merely operational in nature are not considered to be discretionary acts and therefore are not immune from liability.

The distinction between planning decisions and operational decisions does not depend merely on who made the decision. Rather the distinction is based on the type of decision that is being made, examined within an analytical framework which is sensitive to the policies underlying the discretionary function or duty exception . The reason for preserving sovereign immunity for certain acts of the State is the necessity for judicial abstention in certain policy-making areas that have been committed to other branches of government.

Applying these principles to the facts of the case, the state supreme court found "a decision not to remove the litter barrels from the turnout after October 1 when trash pick-up was discontinued was an

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operational decision, not a policy decision.”

The State's decision on the broad question of whether to maintain highway turnouts in the winter at all is indeed a policy determination that cannot give rise to tort liability. However, the decisions made pursuant to that policy, on how to implement it--that is, decisions on how to cease maintenance--are operational decisions. As to these the State is under a duty to act with reasonable care... If the State negligently implemented the decision to cease trash pick-up at the Robe River turnout, the discretionary act exception to the waiver of sovereign immunity does not shield the State from liability.

The state supreme court, therefore, reversed the summary judgment of the trial court.

### DISCRETIONARY FUNCTION IMMUNITY

In contrast to *Carlson*, the federal appeals court in the case of *Tippett v. United States* found that plaintiff's claims were barred under the Federal Tort Claims Act (FTCA) because the alleged negligence involved an exercise of judgment and discretion on the part of the park ranger. In this particular case, plaintiff for an attacked by a moose while snowmobiling in Yellowstone National Park. The facts of the case were as follows:

Frank Tippett and his wife Judy Rand were members of a guided snowmobile tour exploring parts of Yellowstone National Park in February 1993. Plaintiffs' group entered the park through the south gate and, as they began up the road toward Old Faithful, they encountered a moose standing in the road. When a group of snowmobilers ahead of plaintiffs' group attempted to pass the moose, the moose charged one of the snowmobiles and knocked two passengers to the ground. The moose then proceeded south past plaintiffs' vehicles, and plaintiffs' group proceeded into the interior of the park.

Mr. Dave Phillips, a Yellowstone park ranger, learned of the moose's presence and monitored its activities during the day. At the end of the day, he observed several groups of snowmobilers going southbound who successfully passed the moose on their way out of the park. When plaintiffs' group approached the moose in the course of their departure, Ranger Phillips directed them to pass the moose on the right, staying in line with other snowmobilers. As Mr. Tippett attempted to go around the moose, the animal charged his vehicle and kicked in his windscreen striking him in the helmet and knocking him off the snowmobile. Mr. Tippett suffered a broken neck from which he has since recovered; the moose broke one of its legs as a result of the encounter and had to be destroyed.

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As noted by the court, under the FTCA, the federal government retains immunity for claims based upon the exercise discretionary functions, i.e., conduct involving an element of choice or judgment.

Under the circumstances of this case, the court found there were “no specific regulations dealing with confrontations between wildlife and snowmobiles or other motorized vehicles.” As a result, in the absence of such mandatory directives, the ranger had to “balance the preservation of wildlife with the desire of the citizenry to access the park.” In so doing, the ranger’s alleged negligent “failure to somehow remove the moose to avoid its further contact with snowmobilers” involved an exercise of discretion which was immune from liability.