



Medical Malpractice Claims by Active Duty Service Members

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The views expressed in this presentation are those of the author and do not necessarily reflect the official policy or position of the Department of Defense, Defense Health Agency, nor the U.S. Government



AGENDA

- History
- Background
- Processing of Claims – Final Rule



What Would Ted Do?



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History

- Military Claims Act, 10 U.C.C. 2733
- Federal Tort Claims Act, 28 U.S.C. 2671-2680
- *Feres Doctrine*



Military Claims Act

- Applies world wide, prescribes bases and procedural requirements for settlement of claims against the U.S. for death, personal injury, or damage/loss/destruction of property
 - Caused my military personnel or civilian employees acting w/in scope of employment; or
 - Incident to the noncombat activities of the Armed Forces, e.g. weapons training, field exercises/manuevers



Military Claims Act

- Torts not arising out of noncombat activities – to determine liability, evaluate under general principles of law applicable in majority of American jurisdiction – except contrib. negl where situs of occurrence.
- Claims arising out of noncombat activities – Not tort claims and only need to establish causation. Same rules for contrib. negl
- Specifically excludes claims “for personal injury or death of such a member...whose injury or death is incident to his service...”
 - 10 U.S.C. 2733(b)(3)



Federal Torts Claims Act (FTCA)

- Limited Waiver of Sovereign Immunity
- Prescribes substantive bases for administrative settlement of claims against U.S. based on death, personal injury, or damage/loss/destruction of property caused by negligence of U.S. and employees acting w/in scope of employment
- Claims payable - when the injury or damage is caused by negligent or wrongful acts or omissions of military personnel or civilian employees of DA or DOD while acting within the scope of their employment under circumstances in which 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



FTCA

- Liability must rest on existence of a cognizable tort under state law
- Several claims not payable, e.g:
 - Constitutional torts
 - FECA/Longshore and Harbor Workers' Compensation Act
 - “Incident to Service” – *Feres Doctrine*





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Feres Doctrine

- *Feres v. U.S.*, 340 U.S. 135, 71 S.Ct. 153 (1950)
- Held U.S. is not liable under FTCA for injuries to SM where injuries arise out of or are in course of “activity incident to service”.
- Derivative claims, such as spouses of SM for WD, also barred as they are “incident to service”. See *Ortiz v. United States*, 786 F.3d 817 (10th Cir. 2015); See also *Scales v. U.S.*, 685 F.2d 970 (5th Cir. 1982); *Lombard v. United States*, 690 F.2d 215 (D.C. Cir. 1982).



Feres Doctrine

- Often considered harsh.
- “For the past sixty-three years, the Feres doctrine has been criticized by ‘countless courts and commentators’ across the jurisprudential spectrum...However, neither Congress nor the Supreme Court has seen fit to reverse course.” *Ritchie v. U.S.*, 733 F.3d 871, 874 (9th Cir. 2013) cert. denied, 134 S.Ct. 2135, 188 L. Ed. 2d 1124 (2014).



First, the loss of a baby, then the loss of legal rights

After enduring a stillbirth, a Navy chaplain discovers she can't sue a military hospital for medical malpractice



By [Ian Shapira](#)

September 14, 2023 at 7:00 a.m. EDT



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By [Stephanie Srakocic](#) | Fact-checked by [Davi Sherman](#) | Published September 19, 2023

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Key Takeaways

- Navy chaplain Mercedes Petitfrere is appealing the Defense Department's dismissal of her malpractice claim that centers on a 2018 stillbirth.
- Active duty service members are not permitted to bring lawsuits against physicians or facilities, but they can file claims with the Defense Department.

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What would Ted do?



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Military Claims Act

- Section 731 NDAA FY20 amended the Military Claims Act by adding section 2733a allowing members of uniformed services (or their reps) to file claims for compensation for PI or death caused by med mal of a DoD HCP.
- Section (f) required SecDef prescribe regulations to implement to include timely, efficient, processing and administration of claims; uniform standards used in majority of States consistent w/ FTCA in evaluation, settlement, and payment of claims.
- Atty fees capped at 20%



Final Rule – 32 C.F.R. Part 45

- Claim may only be paid if it is not allowed under other provisions of law, e.g. cannot be allowed under FTCA, 32 C.F.R. 45.2(b)
- Time for filing – 2 years after claim accrues (discovery). State SOL and repose inapplicable. 45.2(c)
- Adjudicated on national standards of SoC, causation, damages. “majority of States” without regard to place of occurrence. 45.2(e)
- FTCA’s exceptions apply, e.g. combatant activities, quarantine, no intentional torts, and no breach of medical confidentiality 45.2(f)



Final Rule – Authorized Claimants § 45.3

- Claim can only be filed by a member of uniformed service or their authorized representative on behalf of deceased (or incapacitated) member
- Reservists in some situations
- Third party claims or derivative claims permitted
- Personal injury or death must be incident to service.



Final Rule - Filing a Claim § 45.4

- Any written claim, but must meet below requirements, and be signed
 - Factual basis of claim – identification of alleged malpractice conduct
 - Demand for specified dollar amount
 - If filed by an atty, affidavit from claimant affirming atty's authority to file claim
 - If filed by a personal rep, affidavit from rep affirming authority to file



Final Rule - Filing a Claim § 45.4, cont'd

- Claimant not represented by atty – Unless alleged med mal is w/in general knowledge and experience of ordinary laypersons, must include affidavit from claimant affirming that they consulted with a HCP who opined DoD HCP breached SOC that caused harm.
- If represented by atty - Unless alleged med mal is w/in general knowledge and experience of ordinary laypersons, must include affidavit from atty affirming that atty consulted with a HCP who opined DoD HCP breached SOC that caused harm.



Final Rule – Filing a Claim § 45.5. cont'd

- On request, claimant must identify other HCP outside DoD and copy of medical records, to include statement they are complete
- Must provide medical release
- DoD may require claimant to provide add'l information DoD believes is necessary to adjudicate the claim, including submission of expert opinion
- No discovery process



Final Rule – Elements of Payable Claim § 45.5

- Must be a covered MTF – “medical center, inpatient hosp., ambulatory care center. Includes fixed dental clinics.
 - Does not include field stations, battalion aid stations, ships, planes, deployed settings
- DoD HCP in scope of federal employment. Includes personal services contractors.



Final Rule – Elements of Payable Claim § 45.6

- Breach of SoC – same field or specialty in comparable clinical setting – nat'l standard
- Claimant may present evidence what they believe is SoC and breach
- Apology by HCP or DoD is not evidence of breach of SoC
- DoD may consider all relevant information, including MQAR (but any info derived therefrom privileged)



Final Rule – Elements of Payable Claim § 45.7

- Proximate cause – only that portion attributable to DoD HPC negl.
- “Modified comparative negl” – comp negl reduces damages; barred if >50%
- Loss of Chance permitted. Must be “substantial” not “theoretical” or “de minimus”
- DoD may consider MQAR



Final Rule – Calculation of Damages: Disability Rating § 45.8

- SM receiving disability ratings also filing claim for med mal, (VA Schedule for Rating Disabilities (VASRD) is used for claim to calculate damages
- If SM appeals VA rating, claim can be held in abeyance
- If not received disability rating, e.g. retained on AD, DoD will use VASRD as standard for assessing degree of disability relevant to the claim



Final Rule – Calculation of Damages: Economic § 45.9

- Past medical – only those not provided or paid for by DoD or VA
- Future medical – only those not entitled to be received from, or reimburse by, DoD or VA. Those provided or paid for by DoD or VA are “deemed sufficient” to meet needs
- Past lost earnings – only that which is unrelated to compensation as a member of service – documentation required
- Loss earning capacity – Includes loss of retirement benefits
- Compensation for performance of ADLs – only those not entitled to from DoD or VA. “Deemed sufficient”



Final Rule – Damages: Non-economic § 45.10

- Past and Future conscious pain and suffering – includes loss of enjoyment, inability to perform recreational activities. Interview or statement from member or other person with knowledge of claimant may be requested
- Physical Disfigurement – diminishment of beauty or symmetry of appearance – unsightly, misshapen, imperfect. Documentation/photos may be required
- Non-economic damages capped at \$600,000. Updated to be published periodically



Final Rule – Damages: Offsets § 45.11

- Generally, potential damages are reduced by offsetting most compensation otherwise provided, or expected to be provided, by DoD or VA for the same harm that is subject of claim.
- No offsets for U.S. Gov't payments substantially funded by military member.
- DoD responsible for determining offsets
- DoD presumes claimant will receive all payments and benefits expected to be eligible for – whether or not steps are taken to receive benefits



Final Rule – Damages: Offsets § 45.11

- Payments/Benefits that are offsets
 - Pay and allowances while on active duty
 - Disability retired pay (in case of retirement d/t disability caused by med mal)
 - Disability severance pay in the case of non-retirement disability separation caused by med mal
 - Incapacitation pay
 - Involuntary/voluntary separation pays and incentives



Final Rule – Damages: Offsets § 45.11

- Payments/benefits that are offsets, cont'd
 - Death gratuity
 - Housing allowance continuation
 - Survivor Benefit Plan
 - VA disability compensation, including Special Monthly Compensation, attributable to disability resulting from malpractice
 - VA Dependency and Indemnity Compensation, attributable to the disability resulting from malpractice



Final Rule – Damages: Offsets § 45.11

- Payments/benefits that are offsets, cont'd
 - Special Survivor Indemnity Allowance
 - Special Compensation for Assistance with ADL
 - Program of Comprehensive Assistance for Family Caregivers
 - Fry Scholarship
 - TRICARE coverage, including TFL – future coverage is part of Gov't's compensation package



Initial and Final Determinations § 45.12

- Denial – deficient filing. 90 days to cure. Final determination if not cured
- Denial – failure to state a claim. Initial determination can be appealed UP §45.13
- Denial – absence of expert report. 90 days to submit. Final determination if not submitted when asked (SOC met)



Initial and Final Determinations § 45.12

- After review is complete, initial determination (ID) is made to either offer to settle or deny.
- Right to appeal
- Claimant may request reconsideration of damages calculation based on alleged clear error. (Definite and firm conviction)
- ID on Reconsideration (IDR) granting or denying reconsideration.
- Right to appeal IDR



Appeals § 45.13

- Right to file administrative appeal of all ID
- Must explain why they disagree with ID. No additional information to support permitted.
- Must be received w/in 90 days of receipt of ID (presumed 7 days after mailing or e-mailing). May be granted exception.



Appeals Board § 45.13(b)

- Appeals Board supported by OGC DHA. (3 – 5 attys)
- Consists of DoD attys experienced in med mal claims
- Must had no previous role in claim adjudication under appeal
- Written record, majority approval
- Non-adversarial and no hearing
- Claimant has burden of proof
- Final Determination issued. Can revise ID to grant or deny claim and adjust settlement amount upwards or downwards.
- Final and Conclusive



WHAT'S NEXT???

*Remember my disclaimer...

<https://www.congress.gov/bill/118th-congress/house-bill/4334/text?s=4&r=2&q=%7B%22search%22%3A%5B%22Darrell+issa%22%5D%7D>



One more from Ted



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Questions?

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