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Federal Tort Claims Act Liability: 50 Years After the Crash*

By Jeffrey C. Anderson**

I. INTRODUCTION

Most lawyers, even those who do not practice personal injury law, are at least somewhat acquainted with the Federal Tort Claims Act.[1] Most attorneys know that the Federal Tort Claims Act (FTCA) is "a limited waiver of sovereign immunity" applicable to the United States of America.[2] While most of us will agree that a statute that provides a remedy to a victim of government negligence is a good concept, the execution of this concept has been poor. Many of the provisions of the FTCA are unnecessarily restrictive and only act as a hinderance to the claimant. For this reason, many practitioners do not find handling FTCA cases satisfying or rewarding experiences.

This article examines the various provisions of the FTCA and provides case-by-case examples to demonstrate how some of those provisions can be beneficial to the medical malpractice claimant. This article is not intended as a comprehensive review of the act.

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II. BRIEF HISTORY OF THE ACT

Prior to passage of the FTCA, a citizen's only way to seek redress against the United States was through passage of a private duty relief bill. Private duty bills were those submitted by an individual's legislative representative that requested relief for personal injury. This awkward procedure inevitably resulted in the introduction of thousands of private bills at the end of each legislative session. The FTCA basically codified and simplified this individualized private duty relief bill process.

The FTCA was born of the union of a B-17 bomber and the Empire State Building. On July 28, 1945, a U.S. Army B-17 bomber collided with the Empire State Building killing and injuring, not only people in the building, but those in the street who were unfortunate enough to be struck by large pieces of the airplane. That event awakened the general public to the fact that they had no remedy for their losses caused by the government. The Army, and more specifically, the United States, had no legal obligation whatsoever to respond in damages to anyone. On August 2, 1946, after having languished in Congress and Congressional committees for more than thirty years, the legislature passed the FTCA, and made it retroactive to January 1, 1945. Some of the first to seek relief under the Act were victims of the B17/Empire State Building crash.[3]

III. GENERAL PRINCIPLES

Generally, the FTCA is a limited waiver of sovereign immunity providing relief *only* if the cause of action falls within the limited parameters of the statutory waiver. The United States is liable only for injury to or loss of property or for death caused by the negligent or wrongful act or omission of a federal employee acting within the course and scope of his or her employment. The standard of liability is that the Federal Government will be liable if a private person would have been liable under the same or similar circumstances. Liability is determined by the law of the state where the negligent act or omission occurred. Although born of *equity*, the FTCA provides only a *legal* remedy in the form of lump sum money damages. No equitable or injunctive relief is available under the act.[4] Only causes of action based on negligence may be pursued.

A cause of action may not be based upon strict or absolute liability.[5]

A summary of the limitations and requirements of a tort case against the United States are as follows:

1. The timely filing of an administrative claim (i.e. notice letter) is a jurisdictional prerequisite to filing suit against the United States.
2. The United States is the only proper party.
3. Suit must be filed in federal court.
4. No jury is permitted.
5. No punitive damages are allowed.
6. No prejudgment interest is allowed.
7. No post-judgment interest is permitted unless the Government appeals.
8. Damages are capped in accordance with the law of the state where the cause of action occurred or by the administrative claim, whichever is less.
9. Attorney's fees are capped with criminal penalties imposed against attorneys who receive more than the caps allow.

IV. STATUTES OF LIMITATIONS

There is a substantial difference between the statute of limitations for medical malpractice cases filed pursuant to provisions of Article 4590i of the Texas Civil Practice and Remedies Code and the statutes of limitations for similar cases filed against the United States pursuant to provisions of the FTCA. You *must* know these differences.

Under the FTCA, there are actually two statutes of limitations. First, a claim must be filed with the appropriate federal agency and be received by that agency within *two years* of the date that the cause of action accrues.[6] More specifically, the claim must be *received* by the proper agency within two years, not just mailed within that time.[7] Second, once the claim has been denied in writing and sent by certified or registered mail, suit must be filed against the United States (not the agency) within *six months* after the *mailing* date of the notice of the claim's final denial by the agency to which it was presented.[8]

A. Statutes of Limitations *May Be* Jurisdictional

One of the most important things to consider about both the two year and the six month statutes of limitations is that the statutes *may be* jurisdictional. Until recently, most courts considered the compliance with the two year and six month statutes of limitations a jurisdictional requirement, meaning the burden was on the plaintiff to both plead and prove compliance with the statutes of limitations.[9] It was not necessary for the U.S. Attorney to raise the statute of limitations as an affirmative defense because the burden to prove jurisdiction always remained with the claimant.[10]

Recently, however, the United States Supreme Court in *Irwin v. Veterans Administration*[11] backed away from its position that the statutes of limitations in suits against the United States are jurisdictional. In *Irwin*, the Court held that the statutes of limitations are subject to equitable tolling. The Supreme Court stated:

> The same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.[12]

The *Irwin* holding has been accepted by the United States Court of Appeals for the Eighth Circuit, *Schmidt v. United States*,[13] but apparently *has not yet been reviewed* by the United States Court of Appeals for the Fifth Circuit.[14] It appears that within the Fifth Circuit, the two year and six month statutes of limitations may still be interpreted as jurisdictional, which need not be pled as an affirmative defense, cannot be waived, and are not subject to estoppel.[15] It is also difficult to reconcile the language and holding of the United States Supreme Court in *Irwin v. Veterans Admin.*[16] (the statute of limitations in suits against the United States are subject to equitable tolling) with the United States Supreme Court's previous decision of *United States v. Kubrick*,[17] (the filing of a claim is jurisdictional and cannot be waived or extended by agreement).

B. INITIATION OF LIMITATIONS

The initiation of the statute of limitations is governed by the following law:

1. The two year statute of limitations begins to run under the FTCA when the claim "accrues." A claim "accrues" for purposes of Section 2401(b) when the plaintiff knows of his injury and its probable cause.[18]
2. It is not necessary for initiating the period of limitations that a plaintiff know that the cause of his injury was a negligent act.[19]
3. The determination of whether a claim has accrued in accordance with 28 U.S.C. Section 2401(b), is a federal question.[20]
4. In the case of a continuing tort, such as repeated failure to diagnose cancer, the cause of action accrues on the date of the last tortious act.[21]
5. Under the FTCA, a statutory cause of action for wrongful death accrues on the date of death.[22]
6. Within the Fifth Circuit, "the Discovery Rule" is alive and well in regard to medical malpractice cases filed pursuant to provisions of the FTCA.[23] The Discovery Rule is a "pure one" meaning, a cause of action under the Federal Tort Claims Act may not accrue for many, many years, and the plaintiff's claim will still be viable until he learns of his injury and *the cause of that injury.*[24]

V. TOLLING THE STATUTE OF LIMITATIONS

The tolling of the two year statute of limitations is governed by the following:

1. Infancy and minority do not toll the statute of limitations.[25]
2. Insanity and incompetency do not toll the statute of limitations.[26]
3. A previously dismissed claim will not interrupt or toll a statute of limitations for a second action. The two year statute will be computed from the time the first claim accrued.[27]
4. If the agency or individual is sued rather than the United States, the statute of limitations is not tolled.[28]
5. The statute will be tolled, however, if agents of the United States fraudulently conceal the cause of action or if the claimant is in the armed forces.[29]

One of the interesting tolling provisions of the statutes of limitations under the FTCA actually involves the interaction of the two year statute of limitations within which to file a claim and the six month statute of limitations within which to file suit after a claim is denied. Once a claim has been filed with the proper agency within two years after the accrual of the cause of action, the two year statute of limitations remains tolled for the six month period of administrative review and then, thereafter, until the claim is finally denied in writing by the agency. In theory, once a timely claim is filed with the administrative agency, the statute of limitations can remain tolled *indefinitely.*

There are three elements involved in the initiation of the six month statute of limitations for filing suit:

1. a final denial of the claim;
2. by the agency to which the claim was presented; and
3. the written notice must contain the correct language and be sent by registered or certified mail.[30]

The Attorney General's regulations require that in order to constitute a final denial of the claim, the agency's letter must state that, "if the claimant is dissatisfied with the agency's action, he or she may file suit within six months."[31] If the agency fails to include this language, the letter of notification may not constitute a final denial and, therefore, will not trigger the initiation of the six month statute of limitations.[32] Once the agency sends a final denial, the critical date for computing the period of limitations is the date of *mailing*, not the date of receipt.[33]

After the agency has had six months to review the claim, the plaintiff need not wait for the agency's final denial. The plaintiff may assume the claim has been denied by inaction.[34]

VI. APPLICATION OF THE COLLATERAL SOURCE RULE

The general rule in Texas—that the defendant cannot obtain damage reduction when the plaintiff has some expenses paid from or by a collateral source—is applicable in cases brought under the FTCA. In suits arising under the

FTCA where the defendant is the United States, a more difficult problem becomes *what* benefits constitute a collateral source. In other words, what is and what is not a "collateral source" for purposes of entitling the United States to an off-set in damages.

A. Social Security—Not Deductible

Social Security benefits are generally considered to be a collateral source and are *not* deductible from a recovery against the United States under the Federal Tort Claims Act.[35]

B. Medicare and Medicaid—Not Deductible

Most courts have also found that Medicare benefits are from a collateral source and, therefore, are not deductible by the United States.[36]

C. Life Insurance—Not Deductible

Benefits received under the National Life Insurance Policy, or from the Federal Old Age and Survivors' Insurance Trust Fund, are collateral sources and, therefore, are not available to set off damages awarded against the United States under the FTCA.[37]

D. Civil Service Retirement—Not Deductible

Civil service retirement benefits are also not available to reduce or set off damages against the United States.[38]

E. Veteran's Benefits—Deductible

In contrast to the above benefits, however, most courts have held that veteran's benefits are not from a collateral source and, therefore, must be deducted against any judgment obtained under the FTCA against the United States.[39] Under *United States v. Kubrick*,[40] the United States Supreme Court held that damages paid under the FTCA should not include compensation for hospital expenses already paid by the Veteran's Administration in connection with the injuries sued on, and that the award may be reduced by the amount of disability benefits paid under the Veteran's Act. The rationale for this opinion was that the benefits were paid from unfunded general tax monies appropriated for a specific purpose, and that this source was the same as that from which the appropriations were made for payment of the FTCA award.[41] Under *Kubrick*, anticipated future payments were not deducted from the judgment, but future payments under 38 U.S.C. Section 351 et seq. were suspended by statute until a judgment was recouped.[42]

F. Champus Benefits—Deductible

Champus benefits are also considered non-collateral and are, therefore, deductible from any judgment against the United States.[43]

G. Handicapped Benefits—Deductible

Education of All Handicapped Children Act (EAHCA) benefits are also considered benefits that do not derive from a collateral source to the United States. They are, therefore, deductible from any judgment against the United States.[44] The United States Attorney has the burden of pleading and proving that benefits paid to a plaintiff did not derive from a collateral source under state law and are, therefore, deductible from damages awarded against the United States under the FTCA.

VII. THE CURRENT STATUS OF MILITARY RELATED CLAIMANTS

The FTCA has two statutory exceptions to it that apply only to military personnel (i.e. active service members and reservists). The first is the *Feres* Doctrine, which is well--known in the legal community. The second is the Gonzales Act, which has had very little exposure.

A. The *Feres* Doctrine

It probably comes as no surprise to anyone who is even remotely familiar with the FTCA that, very early after its enactment, the courts determined that the Act should not apply to military personnel.[45] Under what has been termed the "*Feres* Doctrine," the United States may not be sued under provisions of the FTCA for injuries or death to a service member arising out of or in the course of an

activity incident to military service. Although there are *no* express exclusions for military personnel within the FTCA itself, the *Feres* Doctrine has remained the law for more than forty-five years.

1. Service Member's Claims — Probably Barred

As a general rule, active-duty military personnel and reservists who have been placed on active duty for training are barred from recovery if their injury or death was incident to service.[46] Of course, in theory if the service member's injuries were not incurred "incident to service," then he or she is not barred from recovery by the *Feres* Doctrine regardless of a service connection. But some courts have carried the "incident to service" nexus to extremes. For example, courts have held that a FTCA suit by a serviceman and his wife to recover for the negligence of military medical personnel in performing an elective vasectomy on the serviceman was barred because the injuries were sustained in a course of activity "incident to service."[47]

2. Dependent's Derivative Claims — Barred

Where a service member's claims are barred, then the derivative claims of his or her relatives and dependents are also barred.[48]

3. Dependent's Claims — Not Barred

Suits filed by families of service members are not barred under the FTCA if the injury or death has been sustained by the member of the service member's family.[49]

4. Service Member's Derivative Claims — Not Barred

Likewise, an active duty service member's derivative claim for the injuries or death of a non-service member relative or dependent, is also permitted.[50]

5. Claims Involving Prenatal/Obstetrical Care

There does not appear to be a consensus among the courts regarding the applicability of the *Feres* Doctrine to claims involving prenatal care or childbirth. The United States Court of Appeals for the Eleventh Circuit in *Del Rio v. United States* found that a child's suit for prenatal injuries caused by the negligence of the military medical staff, was not barred by the *Feres* Doctrine because the rationale for the doctrine did not apply to the child.[51] The United States District Court for the Southern District of Indiana found in a similar case, that where a dependent child's injuries were negligently caused by the treatment from Air Force physicians of the child's active-duty mother during her pregnancy, the *Feres* Doctrine barred the parents' claims for the child's injuries, but did not bar the child's claim for damages.[52]

In 1984, the United States District Court for the Eastern District of New York in an "Agent Orange" case, found that the *Feres* Doctrine did not preclude the claims of wives and children of active duty servicemen who sustained injuries as a result of exposure to Agent Orange in Vietnam. Where the plaintiffs presented claims that their husbands' exposure to Agent Orange damaged their sperm resulting in miscarriages and genetic damage to their children, the children's claims for their own injuries were not barred.[53] Some courts have also held that FTCA claims arising out of medical malpractice brought on behalf of a deceased infant of an active-duty serviceman, was barred by the *Feres* Doctrine where the child's injuries and subsequent death resulted from negligent prenatal care.[54]

The United States Court of Appeals for the Fifth Circuit seems to accept this argument. In *Scales v. United States*,[55] the plaintiffs sued complaining of injuries to their minor son as a result of negligent medical treatment provided to his pregnant mother during her Air Force basic training. Air Force medical personnel negligently administered a rubella vaccination to the plaintiff's active-duty mother, without first determining whether she was pregnant. She later contracted rubella and the plaintiff was born with severe birth defects. Although the trial court refused to dismiss the case based on the *Feres* Doctrine, the United States Court of Appeals for the Fifth Circuit reversed the trial court and stated that the minor plaintiff's cause of action was barred.[56]

B. The Gonzales Act

The Gonzales Act is a little known statute that may provide expanded causes of action in some medical malpractice cases filed pursuant to the FTCA.[57] Under the Gonzales Act, the usual exceptions to the FTCA regarding intentional torts such as assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, liable, and slander, "should not apply to any cause of action arising out of negligent or wrongful act or omission in the performance of medical, dental or related healthcare function (including clinical studies and investigations)."[58] Under the Gonzales Act, any injury or damage relating to an intentional tort arising out of a *military* healthcare function, will not be barred by the intentional tort exclusion found in the FTCA.

The Gonzales Act also allows for military medical personnel to be sued in their individual capacities for negligent or wrongful conduct that occurs while providing medical care at a military facility *outside* of the United States.[59] Therefore, this Act may provide some relief of a last resort if a plaintiff is faced with a foreign country exclusion to the FTCA.

The Gonzales Act is not applicable in negligent or wrongful conduct committed at Veterans Administration Hospitals by non-military healthcare providers.[60] Also, the FTCA exclusion for intentional torts cannot be avoided in regard to Veterans Administration personnel.[61]

VIII. EXCEPTION TO THE INTENTIONAL TORTS BAR

One of the best known exceptions to the FTCA limited waiver of sovereign immunity, relates to intentional torts. This exception retains the government's sovereign immunity for:

> Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, liable, slander, misrepresentation, deceit, or interference with Government contracts.[62]

These exceptions to the government's waiver of sovereign immunity are specific and cannot be expanded upon by judicial decisions.[63] These exceptions are strictly construed in favor of the United States.[64]

However, exceptions *not* specifically mentioned in the Act are construed in favor of the claimant. Such an exception appears in the United States Court of Appeals for the Fifth Circuit's decision in *Truman v. United States*.[65] In *Truman*, the court found that the plaintiff's cause of action could be fairly construed as one stating a claim for "intentional infliction of emotional distress." Since this claim did not necessarily arise out of an assault or battery, or any of the other specific intentional torts set out in 28 U.S.C. Section 2680(h), the court determined it was not barred by the intentional tort exception to the FTCA.[66] The *Truman* decision may also provide for recovery under the FTCA where a physician or healthcare provider wrongfully discloses confidential information about a patient to third persons without the patient's written consent. It might also be used against government healthcare personnel who wrongfully withhold vital or otherwise important medical information from a patient. Other intentional torts not barred by Section 2680(h) include invasion of privacy,[67] trespass,[68] and intentional violations of a constitutional right.[69] Generally, the United States has waived its sovereign immunity for certain intentional torts committed by investigative or law enforcement personnel.

IX. NEGLIGENT ACTS VS. WRONGFUL ACTS

One of the interesting aspects of the FTCA is that the limited waiver of sovereign immunity set forth in the Act is not restricted to only "negligent" conduct, but imposes liability for "wrongful acts or omissions" also. During the committee hearings when the FTCA was being drafted, the House Judiciary Committee expanded the language set out in the Senate bill to include wrongful acts and omissions. The rationale for this decision was that such language would afford relief for certain acts and omissions that may be wrongful but are not necessarily negligent.[70] Since its enactment, very little case law exists exploring the parameters of conduct that may be considered "wrongful." Some cases have held that the phrase "wrongful act or omission" can be used to impose liability upon the government for trespass under circumstances where the act of trespass is

deliberate, not negligent.[71] Cases have also held that where a plaintiff is injured through the intentional misconduct of a federal employee and the conduct is regarded as tortious under state law, but which may not be negligent or one of the intentional torts that is expressly excluded by the Act, the courts will most likely determine the conduct to be "wrongful" and, therefore, actionable under the FTCA.[72]

Although no cases have been found arising out of wrongful, but not negligent, medical conduct that resulted in liability being imposed on the United States under the FTCA, the word "wrongful" has been held to include conduct that could constitute duress and, therefore, may have some application to federal cases. In *Sheehan v. United States*,[73] the United States Court of Appeals for the Ninth Circuit found that a cause of action based upon the intentional infliction of emotional distress was not barred by provisions of 28 U.S.C. Section 2680(h), but was actionable due to the "wrongful act" language in the FTCA.[74] It seems reasonable to conclude that a cause of action for intentional infliction of emotional distress resulting from the wrongful disclosure of confidential medical information could impose liability upon the United States under the "wrongful act" language within the FTCA.[75] Such wrongful conduct has also been found to encompass claims of "invasion of privacy" and is, therefore, recoverable under the Act if it was recoverable pursuant to state law.[76]

One unfortunate criteria applicable to causes of action based upon "wrongful acts" is that a cause of action must be considered actionable or tortious under the state law in order to qualify as a cause of action under the FTCA.[77] Therefore, it does not appear that plaintiffs in Texas will be able to pursue claims against the United States for injuries resulting from the "*negligent* infliction of emotional distress" because the Texas Supreme Court does not recognize such a tort under Texas law.[78]

X. REQUIREMENTS OF AN ADMINISTRATIVE CLAIM

In order to perfect his cause of action under the FTCA, a claimant must exhaust his administrative remedies. To do this, each claimant must present his claim, in writing, to the appropriate federal agency. This claim must identify the claimant by name, the occurrence forming the basis of the claim, a description of the injuries and damages, and the specific sum of money which the claimant seeks to recover.[79] It is not necessary that this written claim be submitted on any particular form as long as the written document contains the requisite information. Most claims are submitted on the Standard Form 95, which is available at the legal or administrative offices of most government hospitals.

Although the administrative claim is generally considered sufficient to satisfy statutory requirements if it identifies the occurrence giving rise to the claimant's injuries or damages, the amount of information that has been deemed adequate, has been the subject of several recent opinions. As a general rule, a claimant need only provide the agency with sufficient detail of the event or occurrence to enable that agency to begin its own investigation and to place a value on the claim.[80] A claim that provides adequate detail of the occurrence, need not elaborate all possible causes of action or theories of liability.[81]

Some courts have held, that in order to exhaust the administrative remedies, a claimant must identify each factual incident that forms the basis of his claim. Factual incidents not identified in the administrative claim may be dismissed from subsequent lawsuits under the FTCA.[82] Recently, the United States District Court for the Western District of Texas in *Portillo v. United States*,[83] granted the defendant's motion for summary judgement stating the theories of liability, which were not presented to the administrative agency could not form the basis of a complaint under the FTCA. In that case, the complainant submitted a Standard Claim Form 95 alleging that he suffered from permanent urinary bladder disfunction and a worsening prostate condition as the result of the negligence of the medical personnel at William Beaumont Army Hospital. This claim was timely filed. Once the case was in litigation, however, the plaintiff included within his pleadings allegations of negligent administration of spinal anesthesia resulting in a back injury. This amended complaint was filed three and one half years after the surgery, and more than one and one half years after the

expiration of the statute of limitations. The court granted the defendant's motion to dismiss those claims.

The validity of this opinion as authority today is questionable in view of the United States Court of Appeals for the Fifth Circuit's recent decision of *Franz v. United States*.[84] In *Franz*, the Fifth Circuit found that an administrative claim of negligent diagnosis and treatment was sufficient notification to permit a cause of action based upon a lack of informed consent. The *Franz* court found that the government's investigation of the claim should have revealed the possibility of an informed consent claim and was adequate for purposes of satisfying the administrative requirements.[85] In deciding *Franz*, the court relied upon its previous decision in *Rise v. United States*,[86] which held that claimants are not required to specifically enumerate every legal theory of recovery in their administrative claims.[87]

A. Who May Submit a Claim?

Claims may be submitted by: the individual suffering the loss; the claimants agent or legal representative; the executor or administrator of a deceased claimant's estate; or by an insurer to perfect subrogation rights.[88] A claim for injuries and damages made by a claimant will not preserve the rights of a spouse's derivative claim because those rights must be the subject of a separate administrative claim filed by the claimant's spouse or relative.[89]

However, it is not necessary that each individual claimant file his or her claims on an individual claim form. All may be included within a single claim form if the capacity in which they are claiming is specifically identified.

B. What Evidence or Information Should be Submitted?

In a claim for personal injuries resulting from the medical mismanagement by government physicians filed pursuant to the FTCA, a claimant may be required to furnish the following information or documentation in support of his claim:

1. a written report by the attending physician or dentist setting forth the nature and extent of the injury, the nature and degree of the treatment, any degree of temporary or permanent disability, the prognosis, the period of hospitalization, and any diminished earning capacity;
2. itemized bills for medical, dental, and hospital expenses incurred, or itemized receipts for payment of such expenses;
3. if the prognosis reveals the necessity for future medical treatment, a statement of expected expenses for such treatment;
4. if a claim is made for loss of time from employment, a written statement from the employer showing actual time lost from employment, whether the claimant is a full-time or part-time employee, and the wages or salary actually lost;
5. if a claim is made for the loss of income and the claimant is self-employment, documentation or other evidence showing the amount of earnings actually lost; and
6. any other evidence or information which may have a bearing on the responsibility of the United States for either personal injury or the damages claimed.[90]

If the claim involves a cause of action based upon the Wrongful Death Statute or the Survival Statute, the claimant's representative may be required to furnish the following documentation:

1. an authentic death certificate or other competent evidence showing the cause of death, date of death, and the age of the decedent;
2. evidence of the decedent's employment or occupation at the time of death, including his monthly or yearly salary earnings, and the duration of his last employment or occupation;
3. the full names, addresses, birthdates, kinship and marital status of the decedent's survivors, including identification of those survivors who were dependent for support upon the decedent at the time of his death;
4. evidence of the degree of support afforded by the decedent to each survivor dependent upon him for support at the time of his death;
5. documentation of the decedent's general, physical, and mental condition before death;

6. itemized bills for medical and burial expenses incurred by reason of the incident causing the death, or itemized receipts of payment for such expenses;

7. if damages for pain and suffering prior to the death or claim are requested, a physician's detailed statement specifying the injuries suffered, the duration of pain and suffering, the types of drugs administered for pain, and the decedent's physical condition in the interval between injury and death; and

8. any other evidence or information which may have a bearing on the responsibility of the United States for either the death or the damages claimed.[91]

In most malpractice cases, the information requested by the government is already available to the agency in the form of the agency's own medical records. Information relating to military compensation or veteran's benefits is also available through the agency and need not be furnished in support of a written claim.

C. Claim for "A Sum Certain"

Although the courts give claimants some latitude in regard to the substance of the factual information provided in the claim, the statutes and the courts are clear that the claim must be for "a sum certain" in order to exhaust administrative remedies.[92]

However, even when the complaint requests a specific amount of damages, the "sum certain" requirement may not be satisfied within the Fifth Circuit if the face value of the claim far exceeds any reasonable figure based upon the substance of the claim itself.[93] It is always advisable to file a claim setting out a sum certain in excess of what you believe the evidence will establish, since for all practical purposes, the administrative claim caps the damages recoverable in the subsequent lawsuit. It appears in the Fifth Circuit, however, that some care should be taken to insure that there is a relationship between the damages sought and the injuries sustained.

It is also advisable to leave off qualifying words when presenting a claim for a sum certain. In theory, a claim seeking damages "in excess of $100,000.00" or "not less than $100,000.00," has not satisfied the statute's sum certain requirement. However, courts are not always strict in their interpretations. For instance, courts within the Fifth Circuit have been liberally construing the language of a claim and have ignored inartfully phrased damage requests by discarding qualifying phrases as surplusage.[94]

XI. CONCLUSION

As evidenced by the above discussion, the Federal Tort Claims Act has both provisions that aid the victims of governmental negligence and provisions that impede the progress of justice when the victim seeks redress. Some of the restrictive provisions are contained within the Act itself, while others are the result of judicial interpretation.

For lawyers who handle these cases before the federal bar, it is crucial to know the nuances of each provision of the FTCA in order to receive the most benefit for their clients.

NOTES

1. 28 U.S.C. § 1346(b), 2671-2678. *See also,* 28 U.S.C. §§ 1291, 1402, 2401, 2402, 2411, and 2412.
2. *Id.*
3. *See INS Fund v. U.S.,* 72 F.Supp. 549 (S.D. Ny. 1947).
4. *Moon v. Takisaki,* 501 F.2d 389 (9th Cir. 1974).
5. *See Laird v. Nelms,* 406 U.S. 797 (1972).
6. 28 U.S.C. § 2401(b).
7. *See Crack v. United States,* 694 F.Supp. 1244 (E.D. Va. 1988).
8. *Id.*
9. *See e.g., Gillespie v. Civiletti,* 629 F.2d 637 (9th Cir. 1980).
10. *See Emmons v. Southern Pacific Transp. Co.,* 701 F.2d 1112 (5th Cir. 1983).
11. 498 U.S. 89 (1990).
12 *Id.* at 95-96.
13. 933 F.2d 639 (8th Cir. 1991).
14. *See e.g., Houston v. United States Postal Serv.,* 823 F.2d 896 (5th Cir. 1987) *reh'g denied, en banc* 830 F.2d 1126 (5th Cir. 1987) and *cert. denied* 485 U.S. 1006 (1988).
15. *See also, Lien v. Beehner,* 453 F.Supp. 604 (N.D. Ny. 1978).
16. 498 U.S. 89 (1990).
17. 444 U.S. 111 (1979).

18. *Fernandez v. United States,* 673 F.2d 269 (9th cir. 1982); *United States v. Kubrick,* 444 U.S. 111 (1979).

19. *See Price v. United States,* 775 F.2d 1491 (11th Cir. 1985).

20. *Vega-Velez v. United States,* 800 F.2d 288 (1st Cir. 1986); *Radman V. United States,* 752 F.2d 343 (8th Cir. 1985); *Stolesen v. United States,* 629 F.2d 1265 (7th Cir. 1980).

21. *See Gross v. United States,* 676 F.2d 295 (8th Cir. 1982) *appeal after remand* 723 F.2d 609 (8th Cir. 1983).

22. *See Kington v. United States,* 396 F.2d 9 (6th Cir. 1968) *cert. denied* 393 U.S. 960 (1968).

23. *Waits v. United States,* 611 F.2d 550 (5th Cir. 1980); *Quinton v. United States,* 304 F.2d 234 (5th Cir. 1962).

24. *Chamness v. United States,* 835 F.2d 1350 (11th Cir. 1988); *Colleen v. United States,* 843 F.3d 329 (9th Cir. 1987).

25. *Robbins v. United States,* 624 F.2d 971 (10th Cir. 1980).

26. *Casias v. United States,* 532 F.2d 1339 (10th Cir. 1976).

27. *Houston v. U.S. Postal Serv.,* 823 F.2d 896 (5th Cir. 1987) *reh'g denied, en banc* 830 F2d 1126 (5th Cir. 1987) and *cert. denied* 485 U.S. 1006 (1988).

28. *See Williams v. United States,* 711 F.2d 893 (9th Cir. 1983); *Hughes v. United States,* 701 F.2d 56 (7th Cir. 1982).

29. *See Soldiers and Sailors Civil Relief Act,* 50 U.S.C. § 501 *et seq.*; *Pannell v. Continental Can Co.,* 554 F.2d 216 (5th Cir. 1977); *Carr v. United States,* 422 F.2d 1007 (4th Cir. 1970);

30. *See Raddatz v. United States,* 750 F.2d 791 (9th Cir. 1984); *Miller v. United States,* 741 F.2d 148 (7th Cir. 1984); *Goff v. United States,* 659 F.2d 560 (5th Cir. 1981).

31. 28 C.F.R. § 14.9(a) and *Hatchel v. United States,* 776 F.2d 244 (9th Cir. 1985).

32. *Dyniewicz v. United States,* 742 F.2d 484 (9th Cir. 1984); *Maritinez v. United States,* 728 F.2d 694 (5th Cir. 1984).

33. *Berti v. V.A. Hospital,* 860 F.2d 338 (9th Cir. 1988); *Carr v. Veterans Admin.,* 522 F.2d 1355 (5th Cir. 1975);

34. 28 U.S.C. § 2675(a).

35. *Siverson v. United States,* 710 F.2d 557 (9th Cir. 1983).

36. *Manko v. United States,* 830 F.2d 831 (8th Cir. 1987); *Berg v. United States,* 806 F.2d 978 (10th Cir. 1986).

37. *United States v. Hayashi,* 282 F.2d 599 (9th Cir. 1960); *Wham v. United States,* 180 F.2d 38 (D.C. Cir. 1950).

38. *Smith v. United States,* 587 F.2d 1013 (3rd Cir. 1978).

39. *United States v. Gray,* 199 F.2d 239 (10th Cir. 1952).

40. *United States v. Kubrick* , 444 U.S. 111 (1979).

41. *Id.* at 117.

42. *See Steckler v. United States,* 549 F.2d 1372 (10th Cir. 1977).

43. *Mays v. United States,* 806 F.2d 976 (10th Cir. 1986), *cert, denied* 482 U.S. 913 (1987); *Overton v. United States,* 619 F.2d 1299 (8th Cir. 1980).

44. *See Scott v. United States,* 884 F.2d 1280 (9th Cir. 1989).

45. *Feres v. United States,* 340 U.S. 135 (1950).

46. *Anderson v. United States,* 724 F.2d 608 (8th Cir. 1983).

47. *Harten v. Coons,* 502 F.2d 1363 (10th Cir. 1974) *cert. denied,* 420 U.S. 963 (1975).

48. *Loughney v. United States,* 839 F.2d 186 (3rd Cir. 1988); *Rayner v. United States,* 760 F.2d 1217 (11th Cir. 1985) *reh'g denied en banc* 767 F.2d 938 (11th Cir.) *cert. denied* 474 U.S. 851 (1985).

49. *Brandes v. United States,* 783 F.2d 895 (9th Cir. 1986); *Hicks v. United States,* 368 F.2d 626 (4th Cir. 1966).

50. *Grigalauskas v. United States,* 103 F.Supp. 543 (D.C. Mass. 1951) *aff'd,* 195 F.2d 494 (1st Cir. 1952).

51. 833 F.2d 282 (11th Cir. 1987). *See Chamness v. United States,* 835 F.2d 1350 (11th Cir. 1988).

52. *Utley v. United States,* 624 F.Supp. 641 (S.D. Ind. 1985).

53. *See In re "Agent Orange" Product Liability Litigation,* 580 F.Supp. 1242 (E.D. Ny. 1984).

54. *Irvin v. United States,* 845 F.2d 126 (6th Cir. 1988) *cert. denied* 488 U.S. 975 (1988); *Monaco v. United States,* 661 F.2d 129 (9th Cir. 1981) *cert. denied* 456 U.S. 989 (1982).

55. 685 F.2d 970 (5th Cir. 1982).

56. *Id.*

57. *See* 10 U.S.C. § 1089 and *Campbell v. United States,* 962 F.2d 1579 (11th Cir. 1992).

58. 10 U.S.C. § 1089(e).

59. *See* 10 U.S.C. § 1089(f).

60. *Id.*

61. *Moos v. United States,* 118 F.Supp. 275 (D.C. Minn. 1954) *aff'd* 225 F.2d 705 (8th Cir. 1955).

62. *See* 28 U.S.C. § 2680(h).

63. *See Rayonier, Inc. v. United States,* 352 U.S. 315 (1957).

64. *Atorie Air, Inc. v. Federal Aviation Admin.,* 942 F.2d 954 (5th Cir. 1991).

65. 26 F.3d 592 (5th Cir. 1994).

66. *Id.* at 595.

67. *Lopez-Pacheco v. United States,* 627 F.Supp. 1224 (D.C.-Puerto Rico 1986) *aff'd* 815 F.2d 692 (1st Cir. 1987); *Black v. Sheraton Corp. of Am.,* 564 F.2d 531 (D.C. Cir. 1977).

68. *Birnbaum v. United States,* 588 F.2d 319 (2nd Cir. 1978).

69. *Carlson v. Green,* 446 U.S. 14 (1980); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

70. House Reporter No. 2245, 77th Congress, Second Session, Page 11 (1942); *see "In Re: Bomb Disaster at Roseville, California,"* 438 F.Supp. 769 (E.D. Cal. 1977).

71. *Roman v. Velarde,* 428 F.2d 129 (1st Cir. 1970).

72. *Ruffalo v. United States,* 590 F.Supp. 706 (W.D. Mo. 1984).

73. 896 F.2d 1168 (9th Cir. 1990).
74. *See also, Hart v. United States,* 894 F.2d 1539 (11th Cir. 1990).
75. *See O'Donnell v. United States,* 891 F.2d 1079 (3rd Cir. 1989).
76. *Lopez-Pacheco v. United States,* 627 F.Supp. 1224 (D.C.-Puerto Rico 1986) *aff'd* 815 F.2d 692 (1st Cir. 1987).
77. *See Hurwitz v. United States,* 884 F.2d 684 (2nd Cir. 1989), *cert. denied,* 493 U.S. 1056 (1990).
78. *Boyles v. Kerr,* 855 S.W.2d 593 (Tex. 1993).
79. 28 U.S.C. § 2675; 28 C.F.R. § 14.2.
80. *Williams v. United States,* 693 F.2d 555 (5th Cir. 1982).
81. *Broudy v. United States, 722 F.2d 566 (9th cir. 1983); Barnson v. United States,* 531 F.Supp. 614 (D.C. Utah 1982).
82. *Bush v. United States,* 703 F.2d 491 (11th Cir. 1983).
83. 816 F.Supp. 444 (W.D. Tex. 1993).
84. 29 F.3d 222 (5th Cir. 1994).
85. *Id.* at 224.
86. 630 F.2d 1068 (5th Cir. 1980).
87. *Id.*
88. 28 C.F.R. § 14.3.
89. *See Rispoli v. United States,* 576 F.Supp. 1398 (E.D. Ny. 1983) *aff'd without opinion,* 779 F.2d 35 (2nd Cir. 1985).
90. *See* 28 C.F.R. § 14.4(b) and *Daniel A. Morris,* Federal Tort Claims, *Clark Boardman Callaghan* at § 18: for page 13-14.
91. *See* 28 C.F.R. § 14.4(a) and *Daniel A. Morris,* Federal Tort Claims, *Clark Boardman Callaghan* at § 18: for page 12-13.
92. *Livera v. First Nat'l State Bank,* 879 F.2d 1186 (3rd Cir. 1989), *cert. denied,* 493 U.S. 937 (1989).
93. *See Lovell v. Unknown Fed. Correction Officers,* 595 F.2d 281 (5th Cir. 1979).
94. *See Martinez v. United States,* 728 F.2d 694 (5th Cir. 1984); *Williams v. United States,* 693 F.2d 555 (5th Cir. 1982).

Case Notes

DRAM SHOP LIABILITY AND COMPARATIVE RESPONSIBILITY

A bar owner was liable to a patron who was injured when she drove home from the bar in an intoxicated state, when the owner promised to ensure that the patron would not drive home drunk.

Venetoulias v. O'Brien, No. 14-94-001280-CV Op. Serv.—Civil T2-95-41-183 (Houston [14th Dist.] October 5, 1995).

FACTS: Tressie O'Brien went out with friends to a country and western nightclub. Mr. Venetoulias, co-defendant and owner of the parent of the establishment, approached O'Brien and asked her to join him at the bar, which she did. She originally refused when he offered her a drink, saying that she was driving. Venetoulias assured O'Brien that he, a friend, or a cab would take her home. She accepted the drink offer then, and gave Venetoulias her keys, license, and money because he asked for them to ensure that she did not try to drive home drunk. Over the next four hours, she drank approximately 15 drinks; there was testimony that she was obviously intoxicated.

When the club closed, Venetoulias helped O'Brien to his car. In the car, he placed his hand on her knee and asked her to go to a party with him. She refused. Venetoulias then escorted O'Brien to her own car, put her in it, put her keys into the ignition, returned her license and money, and left in his own car. While attempting to drive home, O'Brien was injured in a one-car collision.

O'Brien sued the parent company of the nightclub for Dram Shop Act (TEX. ALCO. BEV. CODE § 2.10 *et seq.*) liability and Venetoulias for negligence. The trial court found each of the three parties (one plaintiff and two defendants) to be one-third negligent.

DECISION: The Texas Comparative Responsibility Act applies to dram shop actions. Thus the plaintiff is only entitled to recover damages if her percentage of responsibility is less than or equal to 50%. The defendants argued that the plaintiff's "extraordinary, egregious degree of personal irresponsibility," as evidenced by the quantity of alcohol that she consumed, necessarily rendered her over 50% at fault. O'Brien was in no danger in her parked car and could have waited until she was sober or called someone to pick her up using a phone that was within walking distance. The appellate court ruled that nothing in the record showed the trial court's determination of responsibility to be against the great weight and preponderance of the evidence.

The defendants further contended that the plaintiff's decision to start her car and attempt to drive home was an intervening cause that was not reasonably foreseeable, thus

negating the necessary element of proximate cause in the plaintiff's causes of action. The court responded that, "[w]hile her driving while intoxicated might have been a criminal act, it is not an intervening cause. An actor's negligence is not excused when the criminal conduct is the foreseeable result of the actor's negligence."

Venetoulias also argued that he did not breach a legal duty owed to O'Brien. Even if he accepted the duty to drive her home, O'Brien voluntarily abandoned the duty she was owed by declining Venetoulias's invitation to go to a party. The court disagreed, finding that, by creating the situation, Venetoulias was then under a duty to act reasonably in response to it. "Based on Venetoulias' promise, O'Brien began drinking. When she thwarted his advances, he placed her in her automobile and her keys in the ignition even though she was extremely intoxicated. Her driving and injuring herself was foreseeable and Venetoulias' conduct was also a proximate cause of her injuries."

The trial court's judgment was affirmed.

DUTY OF CARE
INDEPENDENT CONTRACTOR OF THE STATE

A contractor paid by the state to mow grass on a highway median is not liable to a person who claims to have been injured in a collision caused by her view being obstructed by tall grass on the median.

Sipes v. Langford, No. 06-95-00046-CV. Op. Serv.—Civil T2-95-41-083 (Texarkana [6th Dist.] October 12, 1995).

FACTS: Plaintiff Jamie Sipes was struck by a car when she drove onto the highway from a cross street. She contended that the accident was caused by her view being obstructed due to tall grass on the highway median. She brought this action against the defendant, Mark Langford, because he had a contract with the Texas Department of Transportation to mow that section of the median.

The plaintiff contended that the contract with the state imposed a duty to the traveling public on the defendant. The contract term to which the plaintiff points as creating this duty stated: "The safety of the public and the convenience of traffic shall be regarded as prime importance. Unless otherwise provided herein, all portions of the highway shall be kept open to traffic. . . ." The defendant contended that the contract did not require him to monitor the growth of vegetation, but only to mow when instructed to do so by the Transportation Department.

The trial court granted summary judgment in favor of the defendant.

DECISION: The Court of Appeals for the Sixth Circuit found that the contract language imposed only the duty on the defendant to use reasonable care when mowing. The plaintiffs did not allege that Langford had mowed negligently, only that he should have mowed more often. Thus the court found that Langford was not liable to Sipes under any express contract duty.

Concerning implied contract duties, the court considered *Hamric v. Kansas City Southern Ry. Co.*, 718 S.W.2d 916, 918 (Tex.App.—Beaumont 1986, writ ref'd n.r.e.), "which imposes a duty on an owner or occupier of premises abutting a highway to use reasonable care not to endanger the safety of motorists . . . ," and also "imposes a duty on the state highway commission and the state highway department to maintain highways such as to ensure that the view of passing motorists is not obstructed." *State Dept. of Highways & Public Transp. v. Payne*, 838 S.W.2d 235, 237-38 (Tex. 1992), imposed a duty on the state to use reasonable care and to warn of defects; *Couch v. Ector County*, 860 S.W.2d 659, 662 (Tex.App.—El Paso 1993, no writ), required the city to maintain streets in a safe condition. Finally, Seay v. Travelers Indemnity Co., 730 S.W.2d 774, 775-78 (Tex.App.—Dallas 1987, no writ), "imposed a duty of reasonable care on one who undertakes to render services to another for the protection of a third person."

The court distinguished all of the cited cases and the duties imposed from the factual situation in this case: "none [of the cases] impose a duty of reasonable care on an independent contractor of the state to perform a function he has not contracted to undertake; i.e., monitoring

and deciding when the grass should be mowed." Thus the judgment of the trial court was affirmed.

INVASION OF PRIVACY

A newspaper will not be held liable for invasion of privacy for disclosing private facts about a sexual assault victim that made the victim identifiable by her acquaintances when those facts could not be said to be outside the realm of legitimate public concern.

The Star-Telegram, Inc. et al. v. Jane Doe, 38 Tex. Sup. Ct. J. 718 (June 8, 1995).

FACTS: Jane Doe was raped in her home at knife-point. The assailant robbed her and escaped in her black 1984 Jaguar, leaving Doe tied to her bed. She was able to free herself and call the police. She gave a statement to the police and a written report was prepared.

There is some discrepancy as to how a reporter from the Fort Worth Star Telegram obtained information about the incident. The reporter alleged that a Fort Worth police officer provided her with a copy of the police report. However, the police officer denied releasing any identifying information about Ms. Doe and stated that he told the reporter at the time that it was against department practice and procedure to release such information about sexual assault victims.

Two articles were published in the Star-Telegram. The first article disclosed Ms. Doe's age, the general location of her home, that her home was equipped with a security system, that she took medication, and that she owned the Jaguar. The second article added that she owned a travel agency. Ms. Doe contended that this was sufficient information to allow her to be readily identified by her acquaintances.

Doe sued the Star-Telegram and its reporter for public disclosure of private facts, intentional and negligent infliction of emotional distress, negligence, and negligent supervision. Without specifying the grounds, the trial court rendered summary judgment in favor of the defendants. The court of appeals reversed and remanded, concluding that a genuine issue of material fact remained as to whether the information reported in the articles was obtained lawfully.

DECISION: The Texas Supreme Court reversed the decision of the court of appeals. The Court provided the three elements of the invasion of privacy tort for public disclosure of embarrassing private facts: "(1) publicity was given to matters concerning one's personal life, (2) publication would be highly offensive to a reasonable person of ordinary sensibilities, and (3) the matter publicized is not of legitimate public concern." The Court's decision turns upon the third element.

Doe admitted that the crime itself was of legitimate public concern. Nevertheless, she argued that the personal factual details that were disclosed in the articles "combined to go beyond merely reporting the crime."

The Court held, "The determination whether a given matter is one of legitimate public concern must be made in the factual context of each particular case. . . . While the general subject matter of a publication may be a matter of legitimate public concern, it does not necessarily follow that all information given in the account is newsworthy." Specifically, "[p]rivate details about a rape victim . . . may be irrelevant when the details are not uniquely crucial to the case. . . ."

The Court concluded that the articles, considered in their full context, could not be said to disclose embarrassing private facts that were not of legitimate public concern. While the court suggested that the media should "take precautions to avoid unwarranted public disclosure and embarrassment of innocent individuals," the justices note that "it would be impossible to require them [the media] to anticipate and take action to avoid every conceivable circumstance where a party might be subjected to the stress of some unpleasant or undesired notoriety without an unacceptable chilling effect on the media itself."

Because the third essential element of Ms. Doe's invasion of privacy cause of action was negated, the Supreme Court reversed the court of appeals without the

necessity of ruling on the constitutional issue of whether the information was lawfully obtained. Judgment was rendered that the plaintiff take nothing.

NEGLIGENCE
PRE-EMPLOYMENT DRUG TESTING

A drug testing laboratory owes no duty to warn that consumption of poppy seeds could lead to a test result showing positive for opiates. However, the lab may be liable for tortious interference with a potential employment contract due to misleading test results.

SmithKline Beecham Corp. et al. v. Jane Doe, 38 Tex. Sup. Ct. J. 1058 (July 21, 1995).

FACTS: Jane Doe was offered employment by the Quaker Oats Company, contingent upon her satisfactory completion of a drug screening examination. In completing a medical history form, the only medication Ms. Doe listed as taking was birth control pills. A urinalysis performed by SmithKline Beecham Clinical Laboratories (SBCL) revealed the presence of opiates.

When Quaker told Doe of the positive test result, Doe attributed it to her having taken a pain medication prescribed for her roommate. Because she had not listed the pain medication on the medical history form and had admitted to taking a prescription drug for which she had no prescription, Quaker withdrew its offer of employment.

Through her own research, Ms. Doe learned that eating poppy seeds can lead to a drug test result positive for opiates. Ms. Doe revealed to Quaker that she had lied under the stress of the situation, that, in fact, she had not taken pain medication, but that she had eaten several poppy seed muffins before her specimen had been collected. Quaker still refused to hire her, basing its decision upon her lie about the pain medication.

SBCL was aware that poppy seeds could cause such a result, but informed neither Doe nor Quaker. SBCL's advertising brochure stated, "a positive result . . . can be accepted with virtual certainty as evidence of drug use." However, there was no evidence as to Quaker's awareness of this statement.

Doe sued SBCL for negligence, breach of the duty of good faith and fair dealing, defamation, and tortious interference with a prospective contract. She also sued Quaker. The trial court granted summary judgment in favor of both defendants. The appeals court reversed the summary judgment for SBCL on the negligence and tortious interference claims.

DECISION: The Texas Supreme Court declined to impose a duty on SBCL to warn either Doe or Quaker of the possibility of poppy seeds having an effect on the drug test. The Court states, "The more possibilities that must be suggested to the person tested, the more excuses the person will have for positive results. Moreover, the duty Doe seeks would charge SmithKline with responsibility that belongs to its client [Quaker]." Thus the Court held, "A simple duty to warn of the possibilities that information may be misinterpreted is unworkable."

The court of appeals had suggested that SBCL might be liable for its negligent representation that test results could be accepted with "virtual certainty" as proof of drug use. The Supreme Court reached no conclusion of this issue, noting instead that Ms. Doe did not plead misrepresentation, so the issue was not properly before them.

Ms. Doe alleged that SBCL should have asked her whether she had eaten poppy seeds and should have investigated whether poppy seeds could have caused the positive test result. She also alleged that SBCL had a duty to return her urine specimen to her. According to the court, "None of these claimed duties has any basis in law." Due to the lack of any special relationship between SBCL and Doe, the Supreme Court further found that SBCL owed Doe no duty of good faith and fair dealing.

In its motion for summary judgment, SBCL failed to negate Doe's contention that its conduct was willful and intentional interference with Quaker's conditional offer of employment to Doe. Thus, the case was remanded for further consideration of this issue.