

## Medical Malpractice, Military Providers, & the Veterans Administration

David A. Domina is among the nation's most experienced trial lawyers. Mr. Domina is also a military veteran and a former JAG lawyer. Domina Law Group has handled, with success, claims against military medical care providers, hospitals, and the Veterans Administration. The firm has sued, and succeeded, in claims for personal injuries and wrongful death against the United States Air Force.

Harvard Medical School's recently published study confirmed that thousands of deaths occur annually because of medical malpractice, while only a few of those deaths result in the prosecution of claims. Even fewer are pressed against military or VA providers.

Claims against military and VA physicians must be brought under the *Federal Tort Claims Act*<sup>1</sup>. While active duty personnel face a severe limitation on such claims, known as the *Feres Doctrine*<sup>2</sup>, veterans, and non-military family members do not.

The *Feres Doctrine* has grown in strength and not been diminished by numerous attempts to define its contours.<sup>3</sup> In 1985, the U.S. Supreme Court said that the *Feres Doctrine* "cannot be reduced to a few bright-line rules, but rather each case must be examined in light of the [*Tort Claims Act*] as it has been construed in *Feres* and subsequent cases."<sup>4</sup>

The doctrine does not bar claims arising from an injury committed by the government after a soldier is discharged.<sup>5</sup> But the doctrine was applied to a suit involving the death of a soldier who was off a military base on authorized leave when kidnapped and murdered by a fellow soldier with a known history of violence.<sup>6</sup> The doctrine also applies to third parties seeking indemnity from the federal government.<sup>7</sup> The doctrine has long been criticized as unfair to servicemen.<sup>8</sup>

These thoughts may help one considering a potential claim against a military or VA provider. These are important questions to be answered before bringing a suit for wrongful death or medical malpractice against a federal official or facility.

- What is the statute of limitations?

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<sup>1</sup> 28 USC §§ 1291, 1346(b), (c), 1402 (b), 2401(b), 2402, 2671-80.

<sup>2</sup> *Feres v. United States*, 340 US 135 (1950).

<sup>3</sup> The *Feres Doctrine* has been examined by Congress for potential changes. See, the *Feres Doctrine: An Examination of the Military Exception to the Federal Tort Claims Act*, hearing before Committee on Judiciary, United States Senate, 107<sup>th</sup> Congress 2d Session GPO 10-8-2002.

<sup>4</sup> *United States v. Shearer*, 473 US 52 (1985).

<sup>5</sup> *United States v. Brown*, 348 US 110, (1954).

<sup>6</sup> *United States v. Shearer*, *supra*

<sup>7</sup> *Stencel Aero Engineering Corp v. U.S.*, 431 US 666 (1977).

<sup>8</sup> *United States v. Johnson*, 481 US 61 (1987); *U.S. v. Stanley*, 483 US 669 (1987).

The *Federal Tort Claims Act* (FTCA) contains a two (2) year statute of limitations. This limitation period runs from the time of the malpractice, not the time of death. These times often do not coincide.

- Who may bring a claim?

Subject to the *Feres Doctrine* limitation noted above, claims may be brought by the injured patient, or in the case of a death, the deceased patient's next of kin. In Nebraska and Iowa, the technical, though simple, steps involved in opening an estate must be accomplished to have a personal representative appointed. The PR is the named plaintiff and sues on behalf of the next of kin. The recovery belongs to the next of kin and not the estate, though its distribution is administered through the probate court system. The process of opening and processing the estate is a part of legal work involved in presenting a medical malpractice claim against a federal provider or agency.

- What damages may be recovered?

Though the claim prosecuted is controlled by federal law procedurally, and for liability purposes, state law controls most damages issues. In a wrongful death case, pre-morbidity pain and suffering damages may be recovered in Nebraska. Some states do, while others do not, allow claims for these losses. Damages for loss of the deceased person's care, comfort, companionship, society, love, advice, counsel, support, services, and relationship are recoverable.

In a personal injury case not resulting in death, the injured party, and his or her spouse, may recover for pain, suffering, lost earnings, limitations on the ability to enjoy life, lost future earnings, past and future medical expenses and expenses associated with the impairment caused by the injury, and other general damages.

Many different forms of medical negligence produce claims against military providers in federal facilities. These can include:

- Birth trauma or injury
- Surgery mistakes and surgical malpractice
- Failure to correctly diagnose an illness, condition or cancer
- Errors in prescribing or dispensing medication
- Pharmacy negligence or malpractice
- Nursing negligence or malpractice
- Physician negligence or malpractice of other types
- Mistakes in selection and operation of medical equipment
- Bacteria, bedsores, ulcers, and other conditions resulting from neglect

Claims against military and VA physicians are complicated and require an in depth understanding of the requirements and limitations imposed in maintaining such actions. Contact an experienced lawyer who has handled these types of claims so you can be sure you and your loved ones are taken care of.