Federal Tort Claims and Military Medical Malpractice

Marjorie Berg Pugatch, MA RN LNCC EMT-B

KEY WORDS
Federal Torts, Military Medical Malpractice

Federal laws govern who may bring suit for medical malpractice committed in military and veteran's health care facilities. Because this is a rather specialized area, there are plaintiff law firms that concentrate their practice in this area. Those firms would be a source for employment for legal nurse consultants (LNC), as would government agencies that handle the investigation of such claims. Knowledge of the similarities and differences between military and civilian malpractice laws would be an asset to LNCs and especially to those interested in this specialty area. This article discusses the federal health care system for military and veterans care, the history of federal laws governing military medical malpractice, the claims statistics related to military medical malpractice, how a claim is processed through the government tort system and how a lawsuit wends it way through the legal system.

There are more than 1.4 million members of the active military who, when combined with their dependents and the 26.4 million veterans, may receive medical care through the federal government either from the Department of Veteran's Affairs (VA) or the Department of Defense (DoD) (U.S. Census Bureau, 2003). The VA employs approximately 16,000 physicians and 62,000 nurses (VA Health care Statistics, 2006). These statistics make the VA health care system one of the largest in the country.

Scope of the Problem

Although military medical malpractice paid claims are submitted to the National Practitioner Data Bank (NPDB) and the Health care Integrity and Protection Data Bank the data in those interconnected data banks "is normally confidential and can be provided only to authorized queriers, such as hospitals, managed care organizations, and State licensing agencies for professional credentialing and licensing and peer review purposes" (NPDB, 2007). The data bank profile further states that "data may be released to a "'person or entity who requests information in a form which does not permit the identification of any particular health care entity'…" (NPDB 2007).

A request to access the data bank for the statistics related to the DoD and VA resulted in e-mail communication with Richard Granville, MD, a government official and author of several articles about military medical malpractice paid claims, who informed this writer that the DoD database is Quality Assurance protected under 10 U.S.C. §1102 and not available to private citizens (Granville, MD personal communication, August 28, 2007). The part of the database that is accessible to the public does not contain a separate category of military paid medical malpractice claims. Those statistics are imbedded within each State's reported numbers.

Despite that fact, some old data coupled with more current (albeit meager) information was combined to generate a sense of numbers. Between 1992 and 1998, the DoD paid out, on average, $79 million per year on approximately 350 claims per year (Granville and Rogers, 2000). The care delivered by the DoD is mostly supplied to active-duty personnel, a class of patients that are barred from submitting claims for medical malpractice as will be discussed later in this article. The DoD-paid claims would therefore be for the negligent care rendered to the dependents of active duty personnel.

Between October 1, 1992, and September 30, 1993, the VA had 770 filed claims (Fournier and Fitzsimmons 1994). The Judgment Fund, on behalf of the VA, paid $57 million in 1995 and $67 million in 1994, with 76% of those figures related to medical malpractice cases (VHA/DVA, n.d.). In 2004, the NPDB reported 17,696 medical malpractice payment reports for the entire U.S. health care system (NPDB, 2004).

Since the actual data is inaccessible, these figures conservatively suggest that there may be in excess of 1,000 medical malpractice claims per year emanating from these two federal health care programs, which may equate to $120 million per year in paid claims.

LNC Practice

These statistics support the idea that this is another avenue down which legal nurse consultants (LNCs) could seek employment. It is therefore a good practice for our profession to have some understanding of the similarities and differences between civilian and military medical malpractice laws and claims processes.

Not only would the LNC involved in such a case be expected to review, summarize, and analyze medical records, but the LNC would also be expected to understand and participate in filling out the special claim forms necessary in these cases (discussed elsewhere in this article) and to assist with educating the plaintiff-client on the procedures involved in the claims process and trial process. An LNC on the defense side of these cases would also need a working knowledge of the legal process, as well as the claims process in military medical malpractice cases.

History of Negligence Claims Against the Government

Prior to 1946, tort claims (negligence) against the government were barred by the legal doctrine of "sovereign immunity" derived from the old English law that "the King can do no wrong." Absent a waiver of the immunity, an injured person could not sue the federal government for a personal injury unless the government gave its permission. To circumvent sovereign immunity, legislators would routinely introduce private relief bills for their constituents who had been injured as a result of government negligence. The use of these private bills dates back to our earliest history as a nation and became so plentiful that "at times it dominated the legislature's work schedule" (Schamel, 1995, p. 5).

Although private claims were eventually put through a committee process, this system did not alleviate the "deluge of petitions for private legislation" (Schamel, 1995, p. 7). Not only was it a cumbersome system, but it was inherently unfair to those who did not have access to their legislators. Legislative attempts to alter the handling of such claims started in the 1920s, but all efforts failed until 1946.

Federal Tort Claims Act

In 1946, Congress enacted the Federal Tort Claims Act (28 U.S.C. §1346 (b) and 28 U.S.C. §2671-2680). The FTCA made the United States liable for the torts of its employees acting within the scope of their federal employment "to the extent that private employers are liable under state law for the torts of their employees" (Cohen, 2001, p.1). It is important to note that not all medical care providers in federal facilities are federal employees. Because they may be independent contractors with their own medical malpractice coverage, this is another area that will have to be investigated before deciding if civilian laws apply or the FTCA is applicable.

The FTCA is applicable to all such claims, running the gamut from motor vehicles accidents with post office vehicles to the claims of Vietnam Veterans exposed to Agent Orange to medical malpractice claims by members of our armed forces, their dependents, and veterans. This act essentially waived the Federal government's right to sovereign immunity. Unlike civilian law, the government would not be liable for accrued interest or punitive damages related to those cases (28 U.S.C. §2674). This initial waiver also contained an exception to claims arising out of combat (28 U.S.C. § 2680).

Feres Doctrine Limits FTCA

In 1950, the Supreme Court further limited the use of the FTCA in cases involving active military as decided in *Feres v. United States* (340 U.S. 135), which has become known as the *Feres* Doctrine.

Feres involved the case of a soldier who died in his barracks due to a fire. The executor of *Feres'* estate claimed that the United States was negligent in housing the active duty serviceman in a barrack with a defective heating system. The court rejected the claim for several reasons. The court concluded that the relationship between the government and the serviceman in this instance was not the same relationship that would exist between private employers and their employees, and the suit was therefore barred. The Supreme Court also noted that Congress had established a generous "no-fault" compensation system that included free medical care for active duty personnel, unlimited sick leave with full pay, a comprehensive disability retirement system for permanent injuries in the line of duty, and survivor death benefits insurance. The third reason, noted by the Court, included the necessity to maintain military discipline. Lawsuits, it was argued, would foster an adversarial relationship between the soldier and his superiors and would also divert the resources of the armed forces from their primary function of defending the nation.

One of the central issues in determining whether the *Feres* Doctrine is applicable in a case is ascertaining what constitutes "active military service." Courts generally decide this issue only after considering all of the facts and circumstances of each case. The *Feres* Doctrine barred claims for injuries to *active duty* members of the armed forces emanating from activities incident to military service, including claims of medical malpractice, that occurred during their service. Not only were combat situations exempt from suit, but now all activities of an active duty member were exempt from suit.

The *Feres* Doctrine would also bar claims by service members where the injury did not become apparent until many years after the service member had been discharged. An example of this exception is found in Agent Orange exposure cases, which occurred following the Vietnam War.

The *Feres* Doctrine does not bar claims where the negligence was committed after the active-duty soldier was discharged from the service. For example, if the active duty serviceman suffered an injury during his service but received additional care to this injury from a VA hospital after discharge and negligence occurred during that treatment, he would be able to bring a claim (348 U.S. 110). The *Feres* Doctrine does not bar a claim by a dependent of any active duty person for negligence committed to the dependent. Medical malpractice cases brought by either veterans (for after active duty medical malpractice) or military dependents are two areas where the LNC might be called upon to assist in the litigation process.

Handling Claims for Non-Active Duty Persons

As a condition to the waiver of sovereign immunity, the FTCA requires presentation of a claim "administratively" to the agency responsible for the alleged negligence as the first step. The claim form, Standard Form 95 (28 C.F.R. §14.2), must strictly comply with the requirements of the FTCA (28 U.S.C. § 2401). The FTCA requires that all claims must be filed within 2 years (strict statute of limitations) of "knowing of the existence and cause of the injury."

Among other things, the claim must contain a "sum certain" dollar amount. Once a claim has been filed, the agency has 6 months to conduct an investigation, reach a settlement, or deny the claim. If a claim is settled administratively,

the amount awarded will not be greater than the stated "sum certain" figure and could conceivably be settled for considerably less than the "sum certain" amount. A lack of response by the agency within this time period is deemed a denial. If the claim is not settled within 6 months or the claim is denied, the claimant must file suit against the government in Federal District Court within 6 months of the denial or refusal of any settlement offered (28 U.S.C. §§ 2401, 2675). Unlike civilian cases, minors are not afforded any extension to the 2-year statute of limitations. There is no tolling for minors (Grasso, 1987).

Should the plaintiff, after their claim is administratively denied, decide to bring suit against the federal government, there is *no right to a jury trial*. The judge acts as both judge and jury. Contingency fees for representation are 20% of any settlement during the administrative phase and 25% if the case proceeds to trial and the plaintiff prevails.

Although it might sound as though Feres makes the whole area of military medical malpractice final in terms of who can and who cannot sue, as well as who can be sued, the Feres Doctrine is continually being tested through various lawsuits that ask the court to define what constitutes active military activity under a given scenario and who is considered an employee of the federal government. There have been attempts by the House of Representatives to pass several bills to allow active military personnel to pursue lawsuits regarding injuries caused by improper medical care, but the bills have failed to win approval in the Senate.

As recently as 2002, the United States Senate Committee on the Judiciary held a hearing entitled *The Feres Doctrine: an Examination of this Military Exception to the Federal Tort Claims Act* (Tort Trial and Insurance Practice, 2003). Veterans' groups strongly support legislative action to overturn the *Feres* decision. They believe it imposes an unfair legal disability on military members and veterans by depriving them of the right to obtain relief for injuries suffered as a result of government negligence. To date, *Feres* remains intact.

Medical Claims Act

U.S. military medical care is also offered in foreign countries to active military and their families members, but neither the FTCA nor the Feres Doctrine are applicable where negligent care has occurred in an overseas facility. The Military Claims Act (MCA) governs claims in such facilities but only for non-active duty personnel (10 U.S.C § 2733). The MCA allows an administrative claim to be filed, but if a claim is denied, an individual does not have a right to sue the federal government. Rather he/she has the right to appeal the decision to a senior official within the DoD, but the decision of the senior official is a final decision.

Conclusion

Potential military medical malpractice cases require intricate legal analyses because of the complexity of the federal laws that control such cases. LNCs should have a basic understanding and appreciation of the intricate laws and processes that govern in order to participate fully in such cases. An LNC with life care planning experience is in a good position to assist with filling out the initial claims forms and in providing the "sum certain" figure along with supporting documentation of that figure. Likewise, an LNC with life care planning experience would be in a good position on the defense side to analyze the sum certain figure and provide documentation to mitigate the sum certain figure.

If a claim is not settled, the LNC would be an asset in the process of case development by performing the tasks she/he would do in a civilian case including reviewing, analyzing, and summarizing medical records, as well as educating attorneys on the medicine involved and participating in trial support.

Researching this article and specifically trying to find out how many claims of military medical malpractice are made each year has lead the researcher to the National Practitioner Data Bank. The statistics from the DoD and the VA are intentionally not available to the public through the data bank. Additionally, because active military cannot bring suit, the real number of military medical malpractice is not known. If the current laws are changed due to the efforts of veteran's groups, the field of military medical malpractice litigation may grow and, with it, offer more opportunities for LNCs.

References

28 C.F.R. §14.2 Standard form 95. Retrieved February 12, 2008, from http://www.usdoj.gov/civil/forms/SF95.pdf

348 U.S. §110

340 U.S. §135

10 U.S.C. §1102

10 U.S.C §2733

28 U.S.C. §§1346 (b), 2671-2680

28 U.S.C. §§ 2401, 2675

Cohen, H. (December 3, 2001). Federal Tort Claims Act: Current Legislative and Judicial Issues. Congressional Research Service, The Library of Congress.
Retrieved July 15, 2007, from http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/95-717_A_12032001.pdf

Fournier, D. & Fitzsimmons III, J. (1994). Department of Veterans Affairs Analysis of Medical Malpractice Claims – Initial Status Report. *Legal Medicine Open* File. 94-1. Retrieved August 18, 2007, from http://www.afip.org/Departments/legalmed/openfile94/va94-1.pdf

Granville, R. & Rogers W. (2000). Payment of Federal Malpractice Claims. *Legal Medicine 2000*. Retrieved August 14, 2007, from http://www.afip.org/Departments/legalmed/legmed2000/articles/payment.pdf

Grasso, C. (Summer 1987). The Statute of Limitations as Applied to Medical Malpractice Actions Brought Under the Federal Tort Claims Act. *Military Law Review*, Volume 117. Retrieved August 10, 2007, from http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/277C6D~1.pdf

National Practitioner Data Bank. (N.D). 2004 Annual Report. Retrieved August 19, 2007, from http://www.npdb-hipdb.hrsa.gov/pubs/stats/2004_NPDB_Annual_Report.pdf

National Practitioner Data Bank and Healthcare Integrity and Protection Data Bank. (May 2006). Fact Sheet on the National Practitioner Data Bank. Retrieved August 30, 2007, from http://www.npdb-hipdb.hrsa.gov/pubs/fs/Fact_Sheet-National_Practitioner_Data_Bank.pdf

National Practitioner Data Bank and Healthcare Integrity and Protection Data Bank. (June 30, 2007). National Practitioner Data Bank Public Use Data File. Retrieved August 30, 2007, from http://www.npdb-hipdb.com/publicdata.html

Schamel, C. (Spring 1995). Untapped Resources Private Claims and Private Legislation in the Records of the U.S. Congress. *Prologue Magazine*. The U.S. National Archives & Records Administration, 27:1. Retrieved July 15, 2007, from http://www.archives.gov/publications/prologue/1995/spring/private-claims-1.html

Tort Trial and Insurance Practice, (Winter 2003). Debating the Feres Doctrine. *Governmental Liability Committee Newsletter*. Retrieved August 15, 2007 from http://www.abanet.org/tips/governmental/GovtLiabilityWinter2003.pdf

U.S. Census Bureau, Public Information office. Facts for Features: Special Edition. (April 10, 2003). U.S. Armed Forces and Veterans. Retrieved August 15, 2007, from http://www.census.gov/Press-Release/www/2003/cb03-ff04se.html

VA Healthcare Statistics at a Glance, 2006 (June 11, 2007). Retrieved August 26, 2007, from http://www1.va.gov/vha_oi/docs/VA_Healthcare_Statistics_at_a_Glance_2006.pdf

Veteran's Health Administration. (N.D.) Department of Veteran's Affairs. *Accountability Report: FY 1995*. Retrieved August 24, 2007, from http://www.va.gov/corpdata/publications/ar/index.htm#contents

Marjorie Berg Pugatch, RN MA LNC EMT-B is an in-house Legal Nurse Consultant for Lewis Johs Avallone Aviles, LLP, a major defense firm in the metropolitan New York area. In addition, she has an independent LNC practice. Marjorie specializes in medical malpractice, personal injury, and toxic torts cases. Her clinical background includes pediatrics, neonatology, and pediatric cardiology. She has taught clinical pediatrics as an adjunct clinical professor on the university level. She is an active EMT affiliated with Roslyn Rescue Hook and Ladder Co. #1. She is the corresponding secretary of the New York City Chapter of the American Association of Legal Nurse Consultants and is on the test question panel of the American Legal Nurse Consultant Certification Board. She can be reached at **mpugatch@lewisjohs.com**.