Military Medical Malpractice: Remedies for the Overseas Dependent

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Elizabeth Grigalauskas is the daughter of an enlisted man in the United States Army. She was born in a United States military hospital, and shortly after her birth she was negligently injected with undiluted medication by the attending Army doctor. Elizabeth and her parents sued for damages for her permanent disabilities. The court held that they had a cause of action against the government and a substantial verdict was awarded.¹

Marcelle Rafftery also brought suit against the United States alleging medical malpractice by American military doctors in an American military hospital. In this case, the court held that no valid cause of action existed and sustained a motion to dismiss.²

Why was Elizabeth allowed a judicial remedy while Marcelle was not? Both Elizabeth and Marcelle were American citizens, and both were treated by American doctors in United States military hospitals. The former had a cause of action; the latter did not. The answer lies in the limited remedy provided military dependents who are victims of medical malpractice committed by military doctors abroad. Elizabeth was in the United States when her case arose;³ Marcelle was in Germany.⁴ This Note attempts to investigate this congressionally induced discrepancy in the legal remedies available to military dependents.

The Department of Defense and the armed forces of the United States maintain a worldwide system of hospitals and clinics⁵ to serve the medical needs of service personnel and their dependents at home.

3. 103 F. Supp. at 545.
4. 150 F. Supp. at 618.
and abroad. The recent rapid rise in civilian medical malpractice claims has been accompanied by a concurrent growth in similar claims against the United States and the medical personnel who practice in armed services facilities. Because of the dissimilarity in the statutory bases used for these claims and the complexity of the administrative procedure, there exists a distinct dichotomy in the recovery available to dependent patients injured stateside and to those injured abroad.

The best source for a monetary recovery lies with the federal government as the employer of the military doctor. The strong financial base of the government, as contrasted with that of the doctor, ensures satisfaction of any judgment awarded. Because our national government has historically been cloaked with sovereign immunity, a statutory waiver must exist which grants a cause of action before a tort suit is possible. The principal legal means of reaching the sovereign is not available to military dependents whose injuries occur outside the United States. The Federal Tort Claims Act affords relief for the dependent victims of medical malpractice in cases in which the situs of the tort is within the United States. By statutory wording victims elsewhere are excluded from recovery under the Act.

7. Welch & Shear, Malpractice Claims in the Federal Sector, in HEW, REPORT OF THE SECRETARY’S COMMISSION ON MEDICAL MALPRACTICE 26, 27 (1973) [hereinafter cited as Welch & Shear].
8. See note 162 & accompanying text infra.
10. "No maxim is thought to be better established, or more universally assented to, than that which ordains that a sovereign . . . cannot ex delicto be amenable to its own creatures or agents employed under its own authority for the fulfilment merely of its own legitimate ends. A departure from this maxim can be sustained only upon the ground of permission on the part of the sovereign . . . ." Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850). See generally Kramer, The Governmental Tort Immunity Doctrine in the United States 1790-1955, U. ILL. L.F. 795 (1966); Note, Sovereign Immunity — An Anathema to the "Constitutional Tort," SANTA CLARA LAW. 543, 547-50 (1972); Note, Accountability for Government Misconduct: Limiting Qualified Immunity and the Good Faith Defense, 49 TEMPEL L.Q. 938, 940-41 (1976).
11. This Act is distributed in the Judiciary Code at 28 U.S.C. §§ 1291, 1346(b), 1402(b), 1504, 2110, 2401(b), 2402, 2411(b), 2412, 2671-2680 (1970).
12. 28 U.S.C. § 2680 (1970). "The provisions of this chapter and section 1346(b) of this title shall not apply to "
(k) Any claim arising in a foreign country." Id.
Another potential means of reaching the sovereign is denied these claimants. Under the Foreign Claims Act, persons abroad who are victims of torts committed by members or employees of the United States government ordinarily receive damage and injury compensation. This law, with its avowed congressional purpose of fostering and enhancing international relations, allows for the prompt settlement of claims presented by foreign nationals or their governments. By definition, military dependents who are inhabitants of the United States and who are abroad in response to military orders are not permitted to recover under the Foreign Claims Act.

The overseas military dependent seeking relief from the government may find statutory aid in the Military Claims Act. This law provides a purely administrative procedure that is discretionary in nature and that has no provision for judicial review. Under the Act, the military evaluates the merits of the claim filed against it and decides whether to award damages and if so, in what amount. Beyond appeal to the same branch of the military which made the original denial or reduction of the claim, no statutory recourse exists.

Failing to recover from the government, the injured dependent will look to the other possible defendant, the doctor. In October 1976, however, Title 10 of the United States Code was amended to make the Federal Tort Claims Act the exclusive remedy in those cases cognizable thereunder for medical malpractice in the military. The statutory change prevents suits against the individual tortfeasor for negligence and automatically transmutes the action into one against the federal government under the provisions of Title 28. The amendment also grants discretionary powers to the Secretary of Defense to hold harmless military personnel subjected to suit for medical mal-

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14. See notes 97-98 & accompanying text infra.
17. 10 U.S.C. § 2733 (1970). "Under such regulations as the Secretary concerned may prescribe, he, or . . . the Judge Advocate General of an armed force under his jurisdiction . . . may settle, and pay . . . a claim against the United States for " . . .
18. Id. (a).
20. Id. (a).
21. Id. (c).
practice if the action is not under the purview of the Federal Tort Claims Act.22

The military dependent seeking damages for malpractice operates within this basic legal scheme. The stateside dependent can sue the government but not the individual doctor. The overseas dependent may not sue the government but may file a claim for an administrative settlement. Whether the overseas dependent may sue the individual doctor is uncertain.

This Note will consider the recovery problems presented to the overseas military dependent by examining the legislative and judicial development of the law and by evaluating the adequacy of the present system of remedies. Finally, the Note will make recommendations for legislative reconsideration of this particular aspect of federal tort law.

**Legislative and Judicial History**

The Federal Tort Claims Act,23 the Foreign Claims Act,24 and the Military Claims Act25 were passed, and later amended, to meet specific needs as Congress perceived them. As discussed below, this evolving development has resulted in a tort recovery system with areas of overlap, areas of no coverage, and areas in which a law is used for a purpose never anticipated by Congress because no other remedy exists. Although each of these three statutory schemes is an important method for military tort recovery, only the Military Claims Act offers a remedy for the overseas dependent.

**The Federal Tort Claims Act**

The most comprehensive waiver of sovereign immunity is the Federal Tort Claims Act.26 There seems little doubt that for many years Congress recognized the need for the government to accept responsibility for certain of its actions that resulted in damage to its residents. Delay was caused in resolving how best to provide for the payment of these claims. Early attempts came via the Court of Claims, which was established in 185527 as a fact finding body to aid Congress but which was not a decisionmaking body in its own right. Congress still made the final determination in each case. As the work-

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22. *Id.* (f).
26. See notes 11-12 & accompanying text *supra*.
load increased, the jurisdiction of the Court of Claims was gradually expanded\(^{28}\) until, under the Tucker Act of 1887,\(^ {29}\) it could both hear and determine claims arising under the Constitution, the laws of Congress, and any executive order or contract. Cases sounding in tort were expressly excluded, however.\(^ {30}\) Each tort claim continued to be heard by Congress in the form of a private relief bill which received individual consideration. This procedure was patently unsatisfactory, and the members of Congress faced increasing pressure for reform. The first reform bill was introduced into the House in 1919.\(^ {31}\) For the next twenty-seven years the legislature debated a succession of bills concerning the issue of tort liability and finally resolved the matter with passage of Title IV of the Legislative Reorganization Act of 1946.\(^ {32}\)

Officially referred to as the Federal Tort Claims Act, this remarkable legislation put the federal government in approximately the position of a private citizen for certain specific purposes. By the Act’s terms, it makes the United States liable in an action in tort for money damages on account of property loss or damage, personal injury, or death, caused by the negligent or wrongful action of a government employee acting within the scope of employment “if a private person, would be liable [in respect to such claims] to the [same] claimants.”\(^ {33}\) Suits under this Act are filed in United States district courts,\(^ {34}\) and the law of the situs of the tort is applied.\(^ {35}\)

While granting this broad waiver of immunity, Congress specifically excluded certain tort actions from coverage.\(^ {36}\) Two of these exclusions directly affect the military dependent. These exclusions are: (1) any claim based upon the exercise or failure to exercise a discretionary function or duty,\(^ {37}\) and (2) any claim arising in a

28. Act of Mar. 3, 1863, ch. 92, 12 Stat. 765. This Act conferred jurisdiction on the Court of Claims to render judgments on petitions and bills for private claims against the government and to consider setoffs and counterclaims. \textit{Id.}
30. “All claims founded upon the Constitution . . . or any law of Congress . . . or upon any regulation of an Executive Department, or upon any contract . . . with the Government of the United States . . . in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States . . . if the United States were suable . . . .” \textit{Id.} \S 1.
33. 28 U.S.C. \S 1346(b) (1970).
34. \textit{Id.}
35. \textit{Id.} The United States, however, reserves liability under local law for interest prior to judgment and for punitive damages. 28 U.S.C. \S 2674 (1970).
37. \textit{Id.} (a).
foreign country.\(^{38}\) Both of these provisions have resulted in case law defining the limits under which actions for medical malpractice injuries to dependents will be cognizable under the Federal Tort Claims Act.

The Federal Tort Claims Act has been amended several times since 1946\(^ {39} \) but the basic recovery rights have remained constant. The changes have generally been inconsequential procedural matters, except for the 1966 amendment in which the settlement requirements of the law were substantially increased.\(^ {40} \)

As originally passed, each head of a federal agency had the power to "consider, ascertain, adjust, determine, and settle any claim against the United States . . . where the total amount of the claim [did] not exceed $1,000."\(^ {41} \) This remedy, available to the claimant on a voluntary basis, offered an alternative to court action.\(^ {42} \) Under the law as it presently reads, however, each potential plaintiff must present a claim for a sum certain to the agency accountable for the damage.\(^ {43} \) The agency has six months in which to attempt to reach a settlement or to pay the claim in full before court action may be initiated.\(^ {44} \) There is no limit on the amount that may be awarded by the department; however, damages paid in excess of $25,000 require the signed advance approval of the Attorney General.\(^ {45} \) Any administrative settlement accepted by the claimant is final and bars further recovery.\(^ {46} \)

In the event no administrative accord is reached, a trial on the merits of the case may be held in district court.\(^ {47} \) In the trial, without a jury,\(^ {48} \) the plaintiff has available the full range of discovery, evidence,
cross-examination, and argument permissible in any other suit arising in tort. The judgment of the district court is reviewable in the federal appellate system. 49

By combining the required attempts at settlement outside the court system with the availability of judicial remedies, Congress has reached a balance between expeditious, cost saving procedures and the more protracted, costly trial system. Both parties are aware that if good faith negotiation does not succeed and there is no agreement as to the amount of damages due, an impartial trial is available.

Congress further recognized the urgent need of injured persons to be competently advised as to their legal rights and to be adequately represented in their dealings with the government. To implement this avowed public policy, in the original Federal Tort Claims Act Congress made attorney's fees recoverable within the judgment or award. 50 At present, an attorney is entitled to fees equal to twenty percent of any settlement figure and twenty-five percent of any court judgment. 51

Several factors lead to the conclusion that the Federal Tort Claims Act is the congressionally preferred method of dealing with those claims arising out of federal medical malpractice. First, the statute states that the federal government will be liable if a private individual would be liable in like circumstances. 52 This language indicates a congressional intent to incorporate into the bill the general type of tort litigation prevalent at enactment. 53 Medical malpractice cases had been appearing in the courts for a number of years, and they had become a part of the general body of tort law. 54 If Congress did not intend to include litigation of this type, it could have expressly excluded it. No such exclusion was made.

Second, the Federal Tort Claims Act has continued to be utilized for malpractice actions without congressional intervention. Since its

53. The Supreme Court in Feres v. United States, 340 U.S. 135, 141 (1950) took note of the language used by Congress in the Federal Tort Claims Act. The Court found the law did not create new causes of action but rather accepted liability under circumstances in which private liability would exist. A historical study of private tort liability is properly usable to determine congressional intent to include or exclude a certain type of liability from the Act.
passage, the Federal Tort Claims Act has been repeatedly used to seek damages from federal health care providers, especially the Veterans' Administration. Yet the law was codified without substantive change in the recovery rights of claimants. Through repeated amendments, the Federal Tort Claims Act has remained a viable force in malpractice recoveries.

The most conclusive showing of intent is congressional legislation making the Federal Tort Claims Act the sole remedy in certain malpractice actions. Doctors and other health care personnel in the Veterans' Administration, the Public Health Service, the Department of Defense (including the Army, Navy, and Air Force), the Central Intelligence Agency, and the National Aeronautics and Space Administration are protected from civil suit if the case is one that is cognizable under the Federal Tort Claims Act. In debating these changes, Congress was squarely presented with the issue of medical malpractice in the federal domain, and it found that the Federal Tort Claims Act offered a sound means of determining liability, assessing damages, and resolving conflicts and that it was this type of action that was within the intended purview of the Act.

Shortly after the passage of the Federal Tort Claims Act, a body of case law began to develop defining the range and scope of its applicability. Although the legislative intent was to provide for extensive tort coverage, court decisions under the Act soon made it clear that the results intended would not be uniformly available within the military community. The use of the Act by service personnel and their dependents was severely limited.

The first significant decisions under the Federal Tort Claims Act for the armed forces were *Feres v. United States* and the companion

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55. Tyminski v. United States, 481 F.2d 257 (3d Cir. 1973); Toal v. United States, 438 F.2d 222 (2d Cir. 1971); Ashley v. United States, 413 F.2d 490 (9th Cir. 1969); Hungerford v. United States, 307 F.2d 99 (9th Cir. 1962); Quinton v. United States, 304 F.2d 234 (5th Cir. 1962); Hulver v. United States, 393 F. Supp. 749 (W.D. Mo. 1975); Schwartz v. United States, 230 F. Supp. 536 (E.D. Pa. 1964); Baker v. United States, 226 F. Supp. 129 (S.D. Iowa), aff'd 343 F.2d 222 (1964).


57. *To Provide for an Exclusive Remedy Against the United States in Suits Based Upon Medical Malpractice on the Part of Active Duty Military Medical Personnel, and for Other Purposes: Hearings on H.R. 3954 Before the House Comm. on Armed Services, 94th Cong., 1st Sess. 5-6 (1975) (testimony of Charles Kruse) [hereinafter cited as *Hearings]*.

58. 340 U.S. 135 (1950). The executrix of the estate of Feres brought suit under the Federal Tort Claims Act for the death of Feres, an Army officer, in a barracks fire allegedly caused by the negligence of his senior military officers. The United States
cases, *Griggs v. United States*59 and *Jefferson v. United States*.60 These actions for wrongful death and personal injury were brought on behalf of members of the armed forces who were injured on military bases or in military hospitals. Although the parties were not actually performing military duties at the time of the torts, they were officially on active service.61 Primarily because there was neither a history of liability within the military nor a comparable civilian liability,62 the Supreme Court held that damages for injury and death to a member of the armed forces are not recoverable under the Federal Tort Claims Act if the injuries "arise out of or are in the course of activity incident to service."63

Although *Feres* settled that members of the armed forces on active duty cannot sue under the Federal Tort Claims Act for military

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59. 178 F.2d 1 (10th Cir. 1949). The executrix of the estate of Griggs brought an action based on negligent medical practice resulting in the death of Griggs at an Army hospital in Illinois. The Court of Appeals for the Tenth Circuit said the statutory exclusion from coverage under the Federal Tort Claims Act for combatant activities of the military (28 U.S.C. § 2680(j)) did not apply, and it could find no other statutory exclusion applicable to the claim. It reasoned that Congress deliberately did not exclude the government-soldier relationship and thus allowed the claim. *Id.*

60. 178 F.2d 518 (4th Cir. 1949). Jefferson sued the United States under the Federal Tort Claims Act for damages caused by alleged negligent abdominal surgery performed at an Army hospital in Virginia while Jefferson was a member of the armed forces. The Court of Appeals for the Fourth Circuit upheld a judgment for the defendant based on recognition of the unique relationship between the armed forces personnel and their superior military authorities in which the federal courts should not interfere, the lack of express congressional intent to apply state law on federal military reservations, and other statutory means of recovery for military personnel. *Id.*

61. *Feres, Griggs* and *Jefferson* were consolidated on certiorari. "The common fact underlying the three cases is that each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces." 340 U.S. at 138.

62. The Court said the Federal Tort Claims Act must be construed in light of the total congressional statutory scheme. No American law had ever permitted a soldier to recover from a fellow military member on a theory of negligence. The Court did not find parallel activity for private citizens to meet the like circumstances test. Further, if actions under the Federal Tort Claims Act were allowed, it would subject the government-armed forces relationship to state law. It further held that other federal statutes provided compensation. *Id.* at 139-45. "We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command." *Id.* at 146.

63. *Id.*
medical malpractice, the question remained whether military dependents who were injured by virtue of being on a military installation incident to their sponsor's military service were excluded from recovery under the doctrine expressed in *Feres*. The answer has been a firm "no."

In *Herring v. United States*, for example, a dependent wife was injured through the negligence of the employees of a federal hospital where she had been admitted for care. The government pleaded that no liability could attach to the United States because the injuries were incident to military service. In rejecting this argument, the court said, "The determining factor appears to be the status of the injured party." The plaintiff's injuries incurred as a dependent wife were not incident to service on her part, and a cause of action existed for her.

The district court in *Messer v. United States* was faced with a similar problem. A dependent wife of a active duty serviceman was negligently given a spinal anesthetic in an Army hospital. The court, extending *Herring*, held that she was not barred from recovering damages for her injuries, nor was her husband barred from suing the government for her damages. The fact that he could not have recovered for his own injuries as in *Feres* did not preclude his seeking damages for injury to his dependent. Since 1951 there has been no serious challenge to the principle that the status of the injured party, not the spouse, determines whether *Feres* will bar suit. The Federal Tort Claims Act has consistently been used as a means for securing recoveries for dependent victims of medical malpractice.

Further challenges to dependent recoveries under the Federal Tort Claims Act were based on the first exception to its coverage. The title does not cover "any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused . . . ." In

64. 98 F. Supp. 69 (D. Colo. 1951).
65. Id. at 70.
66. 95 F. Supp. 512 (N.D. Fla. 1951).
67. Id. at 513. Edgar Messer sought to recover medical expenses and damages for the loss of assistance and companionship of his wife. The court held that the injuries suffered were not "incident to his service" and the statutory recovery rights of 38 U.S.C.A. § 701 underlying the *Feres* decision did not apply. Id.
68. Reilly v. United States, 513 F.2d 147 (8th Cir. 1975); Portis v. United States, 483 F.2d 670 (4th Cir. 1973); Quinton v. United States, 304 F.2d 234 (5th Cir. 1962); United States v. Gray, 199 F.2d 239 (10th Cir. 1952); Grigalauskas v. United States, 103 F. Supp. 543 (D. Mass. 1951), aff'd 195 F.2d 494 (1st Cir. 1952).
69. 28 U.S.C. § 2680(a) (1970). This specialized use of the term "discretionary function" within an administrative setting is not to be confused with its meaning when used as a defense in medical malpractice actions to denote the exercise of medical judgment and opinion.
Denny v. United States\textsuperscript{70} a dependent wife was negligently denied medical treatment by the military base where the husband was stationed. Recovery under the Federal Tort Claims Act was denied. The court, relying on statutory construction, decided that a dependent is entitled to care in military health facilities only if the medical officer in charge determines there is space available.\textsuperscript{71} The primary mission of the medical corps is to serve personnel on active duty, and sufficient bed space must remain available to meet any military need. The medical officer may exercise absolute discretion and may refuse care to dependents; the officer's decision is conclusive.\textsuperscript{72}

Shortly thereafter, the limits of the Denny ruling were tested in Costley v. United States.\textsuperscript{73} Mrs. Costley, an Army dependent wife, pleaded that she had been negligently given a spinal anesthetic at an Army hospital in Texas. The government contended that Denny applied and that by treating her the military was exercising a discretionary function. The court recognized the discretionary nature of dependent health care but held that the Army exercised its perogative by admitting her to the hospital. Once admitted, the discretion ceased, and Mrs. Costley as a patient was entitled to be treated with "due and reasonable care, skill, diligence and ability."\textsuperscript{74}

Costley thus affirms the proposition that dependents have no legal right to be admitted to military hospitals or treated in outpatient clinics. Once treatment has begun, however, Costley dictates that medical personnel must observe the standard of care applicable under local law. If this standard is not met and a tort ensues, the military dependent in the United States has a cause of action under the Federal Tort Claims Act.

The most significant limitation on the use of the Federal Tort Claims Act by dependents results from another exclusion within the Act. The provisions exclude "any claim arising in a foreign country."\textsuperscript{75} In 1949, the Supreme Court decided United States v. Spelar,\textsuperscript{76} a wrongful death action brought by the administratrix of the estate of a flight engineer who was killed at a United States airbase in Newfoundland. The Court of Appeals for the Second Circuit had held that the language in the Federal Tort Claims Act excluding "any claim arising in a for-
eign country" did not apply to a United States military base held under a long term lease.\textsuperscript{77} The Supreme Court reversed. It said:

Sufficient basis for our conclusion lies in the express words of the statute. We know of no more accurate phrase in common English usage than "foreign country" to denote territory subject to the sovereignty of another nation. By the exclusion of claims "arising in a foreign country," the coverage of the Federal Tort Claims Act was geared to the sovereignty of the United States.\textsuperscript{78}

The Court stressed that the transfer of the property used by the airbase did not include a transfer of sovereignty over the leased areas. The base remained subject to the sovereignty of Great Britain, and therefore, the claim arose in a foreign country within the meaning of the Act.\textsuperscript{79}

In \textit{Spelar} the Court considered in detail the legislative history of the Federal Tort Claims Act in an attempt to determine legislative intent. The Court expressly noted that an earlier version of the bill, which defined scope in terms of citizenship of the claimant, had been rejected in favor of limiting the Act in terms of national sovereignty.\textsuperscript{80} Because liability under the Federal Tort Claims Act was to be determined by the law of the situs, Congress expressed apprehension that foreign law would become involved in cases in which the tort occurred outside the United States. The lawmakers were anxious to avoid this unnecessary complexity and decided to keep such claims under the control of the Committee on Claims.\textsuperscript{81} The Court held that this "legislative will must be respected."\textsuperscript{82}

Because of the wording of the Federal Tort Claims Act and the judicial decision in \textit{Spelar}, the overseas military dependent is excluded from using the Federal Tort Claims Act as a means of securing a recovery for medical malpractice. This result is certain despite the fact the tort is committed in an American hospital by an American doctor on an American patient.

\textsuperscript{77} 171 F.2d 208 (2d Cir. 1948). Relying on Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948), in which the Fair Labor Standards Act was held applicable to a military base in Burmuda as a "possession" of the United States, the court held the Federal Tort Claims Act would also apply to United States military bases abroad as possessions. \textit{Id.} at 209.

\textsuperscript{78} 338 U.S. at 219 (footnote omitted).

\textsuperscript{79} \textit{Id.} The Court reaffirmed \textit{Vermilya-Brown} but said the United States never acquired sovereignty over the property of a military base. Such bases are merely possessions and as such do not come within the statutory definition for the Federal Tort Claims Act. \textit{Id.} at 221-22.

\textsuperscript{80} \textit{Id.} at 220.

\textsuperscript{81} See Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary, 77th Cong., 2d Sess. 35 (1942).

\textsuperscript{82} 338 U.S. at 221.
In discussing military medical malpractice during a subcommittee hearing of the House Armed Services Committee, Brigadier General Walter Reed, Assistant Judge Advocate General for the Air Force, specifically addressed the matter: "[T]here are a number of situations in which suit against the United States is not possible. For example, the United States cannot be sued under the so-called Federal Tort Claims Act . . . for claims arising in a foreign country, though other statutes allow the payment of claims — but not suits — in those cases." This Note now turns to consideration of these "other statutes" that allow for the payment of claims for torts occurring overseas.

The Foreign Claims Act

More than thirty years before Congress passed the Federal Tort Claims Act, the United States government recognized the need to accept financial responsibility for certain military activities that inherently contained a high risk factor for American and foreign civilian populations. Congress met the obligation with a twofold concept of administrative claim procedures. The first bill in 1912 was the precursor of the present Military Claims Act, and the second in 1918 was to set the pattern for the Foreign Claims Act. Both acts have continued to share much in their development, yet, they are distinct in purpose, underlying philosophy, and application.

The Foreign Claims Act is directed toward the achievement of prompt, expeditious settlement of all claims made under its provisions. Its avowed purpose is to foster friendly foreign relations on a worldwide basis, thereby becoming a part of our international political arm. Considerations beyond the claim itself may thus encourage a speedy resolution and a fair settlement.

Administrative payment for damages caused by the United States military was initially instituted at the conclusion of World War I when Congress approved payment for damage caused by our military forces in nonenemy nations. After the beginning of World War II, the Department of Defense urgently needed greatly expanded power to meet the accelerated pace of claims that accompanied our massive war effort. The result was passage of the Foreign Claims Act in a form

86. *Id.*
that has survived substantially unchanged until the present. To accomplish the Act's "purpose of promoting and maintaining friendly relations by the prompt settlement of meritorious claims," Congress authorized the Secretary of War and the Secretary of the Navy to appoint a commission that would "consider, adjust, determine, and make payments in final settlement of bona fide claims" up to $1,000 in amount. The scope of the Act extended to damages occurring in a foreign country that were caused by the Army, Navy, or Marine Corps forces or individual members of each service.

The current law reads much the same. "To promote and maintain friendly relations through the prompt settlement of meritorious claims arising in foreign countries, the Secretary of a military department . . . may . . . appoint one or more claims commissions . . . to settle and pay any claim." The jurisdictional amount has been increased from the original $1,000 to $25,000 to offset the effects of world-wide inflation and increasingly to relieve the Congressional Claims Commission of the burden of dealing with small amounts. Congress also authorized settlement of claims in excess of the jurisdictional limit by allowing the department concerned to pay up to $25,000 and to submit to Congress a request for payment of the remainder.

As originally passed, the law allowed payment to those victims who were inhabitants of the country where the damage or injury 88. This Act was codified in 10 U.S.C. § 2734 (1970) without substantive changes. 89. Act of Jan. 2, 1942, ch. 645, 55 Stat. 880 (repealed 1956, 1958) (current version at 10 U.S.C. § 2734 (1970)). 90. 10 U.S.C. § 2734 (1970). 91. 10 U.S.C. § 2734(a), (d) (Supp. V, 1975). 92. Id. § 2734(d). The settlement power to pay partial claims was considered an important factor in limiting resentment among foreign nationals and easing international problems in the wake of military accidents. H.R. REP. No. 91-211, 91st Cong., 1st Sess. 3 (1969). The procedure for the congressional remitting process is identical to that of the corresponding section of the Military Claims Act. See note 190 & accompanying text infra. 93. In matters of international law and jurisdiction, "inhabitant" has been defined as being synonymous with "citizen" or "subject." The three terms are based on the concept of "allegiance" to the nation state by the individual. The Pizarro, 15 U.S. (2 Wheat.) 227 (1817). Accord, Shaw v. Quincy Mining Co., 145 U.S. 444 (1892) (citizen and inhabitant equal in meaning for purposes of jurisdiction); Linton v. Cantrell, 34 F. Supp. 782 (E.D. Tenn. 1940) (citizen as used in the Judicial Code synonymous with inhabitant); People v. Guariglia, 187 Misc. 843, 65 N.Y.S.2d 359 (1941) (domicile abroad not incompatible with United States citizenship). These terms have been defined by various jurisdictions. E.g., People v. Renda, 313 N.Y.S.2d 816, 819 (1970) (domicile is the true fixed permanent home and the place to which a person whenever absent intends to return); Ozbolt v. Lumbermen's Indemnity Ex-
occurred. After passage of the law Congress realized that these recovery terms were not complete. Private relief bills were necessary to provide compensation in those cases in which the residence of the inhabitant and the tort situs were in different foreign countries. The legislators then amended the law so that inhabitants of any foreign country could recover damages. As envisioned in 1946, the Federal Tort Claims Act would cover those torts occurring in the United States, and the Foreign Claims Act would be used for the remaining areas of the world.

The military dependent who is injured by medical malpractice overseas is not provided tort recovery under either of these two acts. The Federal Tort Claims Act relies on the location of the tort, the United States, to define its statutory coverage, while the Foreign Claims Act defined its scope in terms of "inhabitants," thus excluding those citizens who owe their allegiance to the United States but reside elsewhere. Both the Code of Federal Regulations and the regulations of each of the military services state that military dependents who are overseas by virtue of a sponsor's duty assignment are excluded claimants for purposes of the Foreign Claims Act. Dependents are thus explicitly denied recovery for their claims under this Act.

When Congress considered the twofold statutory scheme of the Federal Tort Claims Act and the Foreign Claims Act, it apparently did not anticipate the post-World War II need to maintain large numbers of dependents abroad, nor the increase in malpractice actions arising from the treatment of military dependents in military hospitals. These two factors have created a problem not envisioned by Congress. The overseas dependent has been left without an adequate legal remedy.

The Military Claims Act

Military activities by their very nature involve risk of harm that is not necessarily the result of fault or wrongdoing. Other injuries occur for which the victim should, in the interest of fairness and good change, 204 S.W. 252 (Tex. Civ. App. 1918) (citizenship which is status of member of the body politic of a sovereign state not equivalent of residence).

will, be given recompense, although the injuries are not the result of
torts in classic legal terms. In 1912 Congress recognized the need and
authorized the military to settle small claims of this type without a
finding that the government was negligent as a prerequisite to re-
covery.99 The fact of injury was sufficient. In 1922 a new basis for
recovery was added; claims for damages up to $1,000 to private prop-
erty caused by the negligence of any officer or employee of the gov-
ernment acting within the scope of employment could be settled by
the head of each government agency.100 This latter development was
based on fault and was somewhat like the later Federal Tort Claims
Act, but no legal claim for relief was created. The law remained
administrative in nature.

After passage of a number of limited and restrictive recovery
bills,101 in 1943 Congress attempted to combine these measures into
a cohesive whole and passed the Military Claims Act.102 This legis-
lation authorized the Secretary of War and the Secretary's designees
to pay claims for damage to or loss of property or for personal injury
or death caused by military personnel or civilian employees of the
War Department or of the Army while acting within the scope of their
employment or otherwise incident to noncombat activities.103 This
Act maintained a twofold basis for recovery: first, recovery for acts
of military personnel that were "incident to noncombat activities" and
second, for acts of military personnel within the "scope of their em-
ployment." Any settlement thereunder was final.104

The 1943 law remains the basic form of the law today. In 1945
the Military Claims Act was expanded to cover the Navy,105 and in
1956 it was incorporated into the United States Code in Title 10,106

§2733 (1970)).
101. Act of July 2, 1942, ch. 477, 56 Stat. 611, 620 (repealed 1946) (military air-
craft damage); Act of July 2, 1942, ch. 477, 56 Stat. 611, 615 (repealed 1945) (private
property damages under War Department); Act of July 2, 1942, ch. 477, 56 Stat. 611
(repealed 1945) (field exercise damage); Act. of Dec. 28, 1922, ch. 16, 42 Stat. 1066
(repealed 1946) (ship collision); Act of Mar. 4, 1921, ch. 163, 41 Stat. 1436 (repealed
1945) (property damage and loss); Act of June 5, 1920, ch. 252, § 4, 41 Stat. 1015
(repealed 1943) (damage by Corps of Engineers); Act of June 4, 1920, ch. 227, art.
105, 41 Stat. 759, 808 (repealed 1956) (claims for thefts).
at 10 U.S.C. § 2733 (1970)).
103. Id. 57 Stat. 372, § 1.
104. Id. § 5a.
version at 10 U.S.C. § 2733 (1970)).
106. Military Claims Act, ch. 163, 70A Stat. 152 (1956) (current version at 10
but "every precaution against disturbing existing rights, privileges, duties, or functions" was taken.107

The Military Claims Act has the following characteristics. First, the remedy is exclusively administrative,108 and judicial review is not available.109 Judicial notice of this was taken in *Lundeen v. Department of Labor and Industries*,110 in which the court said, "No recourse to the courts is given under this act, and there must be an agreed settlement . . . ."111 Second, the settlement procedures are determined by the Secretary of Defense and the Secretary's designees112 in each military department. The rules are recorded in the *Code of Federal Regulations*113 and the regulations of each service.114 Third, each service settles claims charged to itself, with the exception that in each foreign country one arm of the military is assigned total responsibility for settlement of all claims against the armed forces in that country.115 As the settling agent it determines the merit of the case filed against it and acts as the only agency through which the claimant may seek redress.

Fourth, no appeal is available except to the agency that originally reduced or denied the claim.116 This particular aspect of the law was the subject of much discussion during the hearing before the Senate Committee on Military Affairs prior to the passage of the first version of the Act. The War Department advocated the provisions to save Congress work by removing the small claims from its consideration and to save the government money.117 Whether the saving of money was to come from less paperwork or from smaller payments to claimants was not made clear. Senator Chandler questioned this portion of the bill, asking whether it transferred from Congress the right to decide whether a claim was just. In response, Colonel Clark, testifying for the War Department, said:

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111. *Id.* at 70, 469 P.2d at 889.
115. See note 189 & accompanying text infra.
We evaluate these claims just as carefully from their legal side as we would if we were sitting as a judge or jury . . . . They are evaluated by lawyers, men of experience, men who are selected for that job . . . . [T]hey are impartial, and we believe we protect fully the interest of the individual and the interest of the Government.\textsuperscript{118}

Senator Chandler was not satisfied and expressed his concern that appeal to the same agency that previously denied the claim was no real review. The Senator was assured that a claimant who was not satisfied with the remedy offered by the military could still seek a private relief bill.\textsuperscript{119} After the topic was discussed on the floor of the House, the members of Congress were again reassured by the congressional supporters of the legislation that a private bill would be available,\textsuperscript{120} and the Military Claims Act passed the 78th Congress. In fact, Congress through the years has removed itself even further from the process of military claims, and the possibility of passage of a private relief bill after reduction or denial of a claim by the service involved is remote.\textsuperscript{121}

Fifth, the statutory amount that may be paid by the military is $25,000.\textsuperscript{122} Sixth, the settling authority may decide whether claims above its jurisdictional amount are meritorious. It is further authorized to make a partial payment to the claimant and submit a request for the remainder of the amount to Congress for consideration if the claimant will agree to the final settlement.\textsuperscript{123} By this technique, the military becomes a judge of all claims filed against it under the Act and is able to obtain settlements beyond the statutory limit of its own funding.

Seventh, the statute of limitations is two years.\textsuperscript{124} Eighth, a claim for damages must be presented for medical, hospital, and burial expenses, for loss or diminution of income, for physical disfigurement, and for pain and suffering.\textsuperscript{125} Ninth, any settlement is final.\textsuperscript{126} Because the overseas dependent is denied relief under the Federal Tort Claims Act and the Foreign Claims Act, the Military Claims Act, with these enumerated and limiting characteristics, provides the only option for recovery from the government for the injury to an American

\textsuperscript{118} Id.
\textsuperscript{119} Id. at 6-10.
\textsuperscript{120} 89 CONG. REC. 6748-49 (1943).
\textsuperscript{121} See generally S. REP. No. 2216, 85th Cong., 2d Sess. 3-4 (1958); H.R. REP. No. 93-539, 93d Cong., 1st Sess. 3 (1973).
military dependent by an American doctor in an American hospital abroad.

Recovery from the Individual Tortfeasor

The stateside military dependent injured by a military doctor has a basis for recovery from the government in the Federal Tort Claims Act. The dependent injured overseas has a basis for limited relief from the government in the Military Claims Act. The question is what relief may be available by bringing suit against the individual doctor or doctors involved.

Prior to October 1976, the military doctors and other health care providers were subject to civil suit for medical malpractice, as were their civilian counterparts. By the passage of public law 94-464, the so-called military malpractice bill, however, Congress has attempted to resolve the problem of medical malpractice in the military. The new law is important both for its legal impact and for the expression of congressional intent inherent in it.

The core provision of the military malpractice bill is that in cases cognizable under the Federal Tort Claims Act, the Act is the exclusive remedy. Suits against individual tortfeasors are foreclosed. The bill applies to any physician, dentist, nurse, pharmacist, paramedical, or other supporting personnel who by negligent or wrongful act or omission causes personal injury or death while acting within the scope of duties as a member of the armed forces or the Department of Defense. If suit is brought against the individual, the case is transferred to a United States district court, and it automatically becomes a case under the Federal Tort Claims Act, which will be defended by the Attorney General. Further, the Attorney General is empowered to settle and compromise the suit as in other Federal Tort Claims Act cases.

If the medical personnel are stationed abroad or are on loan to a nonfederal agency or institution, however, suit against them would not be cognizable under the Federal Tort Claims Act and the protective provisions would not apply. The new law provides some other measures of protection for such personnel because they are subject to private suit. Under the law, if the matter is not acceptable for action under Title 28, the head of the agency or a designee may provide

129. Id. (c).
130. Id. (d).
131. Id. (c).
liability insurance or "hold harmless" the individuals whose conduct has been called in question. The Attorney General will defend any person within the intended coverage of the Act in civil actions in any court.

For the stateside dependent the method of recovery is clear. The only remedy for military medical malpractice is the Federal Tort Claims Act, and no suit is allowed against the individual tortfeasor. For the overseas dependent the issue is unclear. When faced with a claim that does not fall within the purview of the Federal Tort Claims Act, the new law provides a purely discretionary function for the head of each department to hold harmless the individual tortfeasor or to provide insurance. The extent to which these tools will be used by the military is uncertain, and their application may vary with the philosophical viewpoint of the person holding the secretarial post at any given point in time. Under the provisions of the law, therefore, the Secretary of Defense exercises sole discretion in determining whether the government will pay a judgment against an individual doctor that results from malpractice committed abroad. Thus, no standard ongoing policy exists on which both doctors and patients can rely. The new military malpractice bill fails to define the full scope of the hold harmless doctrine so clarification of the full rights of the parties must await judicial decisions.

In order to anticipate the possible future extent of use by the military of the discretionary features of the law, a brief consideration of the background which led to its enactment may be enlightening. Congressional impetus for the military malpractice bill came from the military establishment as a result of Henderson v. Bluemink, decided in 1974. In that case Fifyne Henderson, a military dependent, filed suit against Major G. Bluemink alleging that he "improperly treated, diagnosed, and prescribed" for her and that he otherwise committed several acts of medical malpractice. Major Bluemink was granted a summary judgment in the district court on the ground that absolute immunity accompanied his performance of official military duties. The court of appeals remanded the case after finding that Major Bluemink's medical decisions were not clothed in official governmental immunity. In analyzing the functions of the immunity defense, the court stated that the "immunity conferred [is] not . . . the same for

132. Id. (f).
133. Id. (b).
134. "The head of the agency concerned or his designee may, to the extent that he or his designee deems appropriate, hold harmless or provide liability insurance . . . ." Id. (f).
135. 511 F.2d 399 (D.C. Cir. 1974).
all officials for all purposes," and it found that the primary purpose of the defense was to protect the discretionary function of those determining governmental policy. The court rejected the government's argument that vigorous administration of governmental policies would be hampered by holding military medical personnel liable for their negligence in the exercise of medical functions. The court expressly noted the fact that Congress had made the Federal Tort Claims Act the exclusive remedy in cases involving Veterans' Administration medical personnel but had not included military medical personnel in the law. It said, "The extension of similar protection to the class of which appellee is a member is properly within the realm of the legislative branch of the United States. We refrain from affording absolute immunity by judicial decision."

Following Henderson, a number of suits was filed against individual military doctors. The military services became alarmed at the resulting decline of morale in the medical corps and the consequent resignations of medical personnel from the services. Malpractice insurance policies were too expensive for the military doctor to afford on a limited salary, and many insurance companies refused to write policies for military doctors at any price. To "go bare" and practice without insurance coverage could mean financial ruin. For self-protection, doctors were leaving the military and entering the civilian medical field in which insurance costs could be passed on to the patient.

During the legislative hearings on the malpractice bill, testimony was given which focused attention on an aspect of medical practice unique to the military. Generally the civilian doctor may consider the potential legal risk of any procedure, and if the risk is perceived as being too high, the doctor will refuse to undertake the activity. The option of refusal is not often available to the military doctor. The service physician is assigned duties which, under military law, must be completed. Thus some members of the medical corps were reluctant to remain in situations in which they were working outside their field of specialization such as when assigned to emergency room duty or when assuming responsibility for the personnel participating in hospital training programs. The Washington policymakers realized some form of protection had to be developed if the services were to maintain the medical corps as a viable unit. The Federal Tort Claims Act had already been extended to cover Veterans' Adminis-

136. Id. at 401 (quoting Doe v. McMillan, 412 U.S. 306, 319 (1973)).
137. 511 F.2d at 404.
138. Malpractice Hearings, supra note 83, at 23, 25, 34.
139. Id. at 24.
140. Id. at 23.
141. Id. at 36.
tration personnel;\textsuperscript{142} Congress merely extended its coverage to the military.\textsuperscript{143}

The military malpractice bill was designed to protect the doctor in an individual capacity and the armed forces, not the patient. The history of the enactment seems to indicate a congressional intent that the doctor be protected from individual suits by the broad application of the provisions of the law. Whether the protection of the doctor will result from insurance purchased by the Department of Defense to protect the military doctor on overseas duty or whether the doctor overseas will be held harmless remains unanswered. The Federal Tort Claims Act provides the exclusive remedy for dependents within the United States injured by military medical malpractice. Whether individual suits against the military doctor will augment the limited recovery possible under the Military Claims Act for overseas dependents is unclear.

Foreign Recovery

An additional means of tort recovery for the overseas military dependent is theoretically available. A United States military dependent could seek recovery in the court of the nation where the injuries occurred. A cursory examination of a few of the problems encountered by the overseas dependent in attempting to use the foreign courts illustrates the shortcomings of this solution for an injured American.

Under the doctrine of sovereign immunity for acts that are exercises of public power,\textsuperscript{144} the court of a foreign state is unlikely to hold the United States accountable for torts committed by military personnel while acting pursuant to their official government orders.\textsuperscript{145} The court would extend the doctrine to the individual doctor if the tort was committed while the doctor was acting on military orders\textsuperscript{146} and if the exercise of medical discretion was not adjudged a private act. This position is reflected in a number of treaties between the United States and countries where United States troops are located.\textsuperscript{147}

\textsuperscript{142} See note 56 supra.

\textsuperscript{143} See note 128 supra.

\textsuperscript{144} Acts of a state that are sovereign in nature and are exercises of public power are designated as \textit{jure imperii} and can be contrasted with those which are \textit{jure gestionis} in which the state acts in a manner comparable to private activity. N. Leech, C. Oliver & J. Sweeney, \textit{The International Legal System} 322 (1973).


\textsuperscript{146} Id. at 39.

These treaties provide for the limited exercise of jurisdiction by the receiving state over the armed forces of the sending state. In the unlikely event that sovereign immunity or treaty provisions did not insulate the doctor, the difficulty in securing jurisdiction over a transient military person could preclude suit in a foreign court. Legally recognized bases for obtaining jurisdiction over the person differ from nation to nation, especially over a defendant who is a non-citizen. Many nations require personal service on the defendant.148 Military tours abroad are usually relatively short. The period in which the presence of the involved parties overlap may be brief, perhaps only a few months. Often by the time the full extent of the injuries is known, one or both parties will have left the country of the situs of the tort and relocated. By its very nature, court action is a protracted process which is not designed with the particular problems of mobile military personnel in mind. Thus, whether the injured dependent would remain in the country long enough to institute suit or whether the defendant would remain long enough for the foreign court to acquire jurisdiction through service of process is questionable.

Even if the threshold requirement of jurisdiction were met, the applicable law and recovery procedures vary substantially from nation to nation. Once a judgment is secured, the problem of enforcement remains. If the doctor has completed the tour of duty abroad, the plaintiff must seek enforcement of the judgment, perhaps in the United States.149 Further, costly legal action will be entailed. The possibility remains that a United States court may refuse to recognize the foreign civil judgment and thus leave the plaintiff without recourse.150

The variation of jurisdiction, recovery rights, and legal procedures among the nations in which United States forces serve prevent the use of the foreign courts as a viable solution for the overseas military dependent.

In sum, within this framework of laws the military dependent must seek damages for injuries inflicted by the negligence of military doctors. For the stateside dependent the Federal Tort Claims Act offers the means for a judicial determination on the merits of the case. For the overseas dependent the best opportunity for a recovery currently involves recourse under the Military Claims Act.


150. Id.
The Military Claims Act: An Inadequate Remedy

The United States military complex maintains a worldwide chain of fighting units and operational bases pursuant to the perceived needs of a national defense posture. Accompanying combat personnel are the necessary support personnel and facilities to ensure their well-being. This support includes a fully functioning medical arm for each service, designed to keep personnel in good physical condition for adequate completion of the defined job duties. Although in war this care entails the treatment of war-related injuries, in peacetime the military population is subject to the same physical health problems as the general population. The range of medical services required and ultimately provided, therefore, equals that of the civilian community.

Because many members of the military support a family and other economic dependents, care of these nonmilitary dependents must be considered in the total health care picture, and because some military personnel serve twenty or more years, long range health needs must be met. Care to dependents is provided as part of Title 10 of the United States Code, which authorizes such treatment for the dependent of any member of the uniformed services who is on active duty for more than thirty days or who has died during such active duty. Eligibility is subject to space availability and the capabilities of the medical and dental staff. Care may be provided by any branch of the military, not just that of the sponsor. The range of authorized care is quite complete. It includes hospitalization, outpatient care, drugs, physical examinations, immunizations, maternity and infant care, diagnostic procedures, and treatment of medical, surgical, nervous, mental, chronic, and contagious conditions.

Health care is provided through hospitals and outpatient clinics attached to various posts or bases stateside and abroad. Large hospitals, complete with internship programs and advanced specialty training, are usually located close to the concentrations of military population.

In 1971 more than fifteen thousand doctors and their support personnel, about five percent of the nation's medical force, were involved with providing health care to the military. This care involved

151. See note 5 supra.
155. Id. (a), (c).
156. Id. (d).
over one million hospital admissions and over fifty-seven million outpatient clinic visits during the year.\textsuperscript{158}

Many members of the services are stationed abroad. For example, in 1976 four hundred and fifty-five thousand American service personnel were overseas.\textsuperscript{159} Dependents often accompany their sponsor and thereby create large numbers of Americans under the military health care system. These dependents receive the same categories of treatment as stateside dependents and in addition receive routine dental work, prosthetic devices, and orthopedic footwear if not available on the local foreign market.\textsuperscript{160}

Because the scope of care in military hospitals and dispensaries equals that of a large community or university hospital, so too does the statistical probability of error on the part of the practicing physician.\textsuperscript{161} Consequently, the military, like the civilian health field, has experienced a significant increase in the filing of medical malpractice actions. For example, in 1964 only three claims were made against the Air Force for medical malpractice, and only $12.25 was paid in damages. In contrast, in 1974, ninety-one claims were made and over $130 thousand was paid. In the first five months of 1975 there were over one hundred claims with a total \textit{ad damnum} of more than $60 million.\textsuperscript{162}

This increase has resulted from a number of factors. First, one characteristic of modern medicine — its technical sophistication — has contributed substantially to this increase. Sophisticated equipment and procedures make more drastic treatment measures possible, but resulting injuries may also be more severe.\textsuperscript{163} Persons sustaining severe injuries bear burdensome physical and monetary costs and have

\begin{itemize}
  \item \textsuperscript{158} Welch & Shear, \textit{supra} note 7, at 27.
  \item \textsuperscript{159} \textit{Statistical Abstract of the United States} 334 (97th ed. 1976). The number of service personnel abroad is subject to substantial variation in response to the defense posture of the United States. In 1972, for example, 635 thousand American service personnel were abroad; \textit{Dep't of Defense, Selected Manpower Statistics} 37 (1973).
  \item \textsuperscript{160} 10 U.S.C. § 1077(b) (1970).
  \item \textsuperscript{161} "[M]odern high-quality medicine carries risks that unavoidably result in some injuries to patients, no matter how much care, skill and judgment is applied." \textit{Hew, Report of the Secretary's Commission on Medical Malpractice} 24 (1973). "The media causes patients to have greater expectations about the propensity for miracles by modern medicine . . . ." \textit{Calif. Assembly Select Committee on Medical Malpractice, Preliminary Report} 4 (1974).
  \item \textsuperscript{162} \textit{Malpractice Hearings, supra} note 83, at 33. The Air Force Claims Administration listed 26 claims for medical malpractice between 1963 and 1968 and total damages paid of $92.25. From 1969 to 1974, 374 claims were made, and $1,086,943 was paid in settlement. \textit{Id.} at 22.
  \item \textsuperscript{163} \textit{Hew, Report of the Secretary's Commission on Medical Malpractice} 1-2 (1973).
\end{itemize}
more incentive to seek money damages. Second, consumers generally are becoming more aware of their rights. Civilian and military persons are less hesitant to state a claim, even one that involves taking a stand against the established medical profession. Third, military medicine is basically impersonal. Care is given at large clinics with rotating staff members. A patient may not see the same doctor twice. A feeling of alienation and frustration between doctor and patient may result so that, if an injury occurs, blaming the treating physician is psychologically easier.

The increase in the military claims statistics is especially striking, however, because it has occurred notwithstanding a countervailing influence. The military, the agency from whom the dependent seeks recovery, employs not only the doctor but also the sponsor of the dependent. Some members of the military believe that success within the armed forces is related to the unquestioning acceptance of decisions made within the system itself. Thus, they may fear that asserting their rights in an overt and public manner ultimately may limit career potential and promotional opportunities. Before such persons decide to seek legal redress, they weigh the perceived potential career consequences against the severity of the injury and the financial burden. Thus, they could be expected to undertake legal action less frequently than those whose employer has no financial interest in the outcome of the claim.

Nonetheless, the statistics indicate a growing number of claims arising from medical malpractice in the military and the problem of recovery for the overseas dependent can be expected to assume greater importance. Consequently, an assessment of the Military Claims Act, the exclusive remedy for the overseas dependent under American law, is needed. It will be seen that the recovery provisions of the Military Claims Act as passed by Congress thirty-four years ago and as currently implemented by the Department of Defense fail to provide adequate relief for the overseas military dependent.

Filing the Claim

Typically, the initial contact with the legal system for the overseas dependent who is a potential claimant is a military lawyer stationed at an American base in the foreign country. Here the injured dependent is introduced to the provisions of the Military Claims Act and informed that no legal cause of action against the federal government

164. Id. at 25; see Calif. Assembly Select Committee on Medical Malpractice, Preliminary Report 4 (1974).
exists. All damages must be processed as claims against the military under an administrative procedure.

The most practical problem faced by the claimant is the lack of legal assistance. Any cost or inconvenience incurred while filing a claim is not recoverable in damages,\textsuperscript{166} as would occur under the Federal Tort Claims Act.\textsuperscript{167} Therefore, the claimant must absorb the cost of counsel or forego independent counsel and rely upon the aid of the base military lawyer, who represents the government. The limits within which this military attorney can function are severely restricted by law and military regulations. The staff attorney may provide the forms for filing a claim, explain the general requirements for a claim, suggest what supporting documentation might be necessary, and tell the claimant where properly to file the form.\textsuperscript{168} The military attorney is prohibited, however, from commenting on the merits of the claim or from discussing the settlement policy of the armed forces.\textsuperscript{169} At all times, the armed forces counsel must take care to operate within the federal law, which makes it a crime for any officer of the government to act as an agent or attorney in the prosecution of any claim against the United States.\textsuperscript{170} If the claimant is unwilling or unable to pay for further legal assistance, the result is that the United States is represented by active, qualified counsel, but the claimant is not. The claimant, nonetheless, must properly file the claim with the correct authorities and provide all the necessary substantiating evidence.\textsuperscript{171} These procedures may prove to be unduly complex if attempted without benefit of counsel.

A further problem is the statute of limitations. The Military Claims Act has a two-year statute of limitations,\textsuperscript{172} which is worded similarly to the Federal Tort Claims Act.\textsuperscript{173} The two-year period for the Federal Tort Claims Act has been judicially interpreted to run from the time when the plaintiff knows or should have known of the injury.\textsuperscript{174} Determining this point in time is a question of fact which under the Federal Tort Claims Act is impartially determined by the

\textsuperscript{168} 32 C.F.R. § 750.10(c) (1976) (Navy); 32 C.F.R. § 536.2(b) (1976) (Army); 32 C.F.R. § 842.6(b) (1976) (Air Force).
\textsuperscript{169} 32 C.F.R. § 536.2(a) (1976) (Army); 32 C.F.R. § 750.10(c) (1976) (Navy); 32 C.F.R. §§ 842.6(a), 842.7 (1976) (Air Force).
\textsuperscript{174} Quinton v. United States, 304 F.2d 234 (5th Cir. 1962).
trier of fact and may be reviewable on appeal.\textsuperscript{175} Under the Military Claims Act, however, the determination is made by the agency against whom the claim is made. Because both laws share the common two-year statute of limitations and both are concerned with claims against the government, the same standard for determining the running of the statute would probably be used,\textsuperscript{176} but the regulations do not state the standard to be applied. If a decision goes against the claimant, appeal to a third party or impartial mediator is not provided.

The Investigation

When a surgical accident or medical treatment error occurs, the service involved must investigate the incident if it appears that a claim against the government has resulted or may result.\textsuperscript{177} The federal regulations specify that the investigation is to be prompt and thorough and is to be conducted "in a fair and impartial manner . . . to the end that a comprehensive, accurate, and unbiased factual report of the incident may be made . . . ."\textsuperscript{178} The fact remains that the service against whom the claim is being made investigates its own actions. Utilizing the evidence gathered, service personnel decide whether to pay the claimant and, if so, in what amount. Although the regulations require an unbiased investigation, a staff member questioning the alleged tortfeasor may not exhibit the same vigor and intensiveness as would representatives of the claimant. Medical malpractice intrinsically has aspects that make investigation especially complex and elusive.\textsuperscript{179} In the military situation these may include a desire on the doctor's part to protect opportunities for promotion as well as overall medical reputation. Given the existence of such reasons to couch

\textsuperscript{175} Hanna v. United States Veterans' Admin. Hosp., 514 F.2d 1092 (3d Cir. 1975); Portis v. United States, 483 F.2d 670 (4th Cir. 1973); Tyminski v. United States, 481 F.2d 257 (3d Cir. 1973); Toal v. United States, 438 F.2d 222 (2d Cir. 1971); Hungerford v. United States, 307 F.2d 99 (9th Cir. 1962).

\textsuperscript{176} During congressional consideration of Pub. L. No. 446, 70 Stat. 60 (1956), which changed the original one-year statute of limitations of the Military Claims Act to two years, the expressed intention was that there be uniformity among the claims statutes. H.R. Rep. No. 288, 84th Cong., 1st Sess. 2 (1955).

\textsuperscript{177} 32 C.F.R. § 536.1-11(b) (1976) (Army); 32 C.F.R. § 750.3 (1976) (Navy).

\textsuperscript{178} 32 C.F.R. § 750.6(b) (1976).

\textsuperscript{179} It has been argued that as the result of the fact that medical error may be extremely serious, the medical profession has developed means of rationalizing and explaining mistakes to ease the sense of guilt often felt by medical personnel. It is an institutionalized neutralization of error through such tools as considering failure as a normal part of the "art of medicine," portrayal of the patient as difficult and uncooperative, the minimizing of the actual effect of the error, and explaining the doctor's conduct as reasonable in a medically poor situation. MILLMAN, THE UNKINDEST CUT 91, 107, 109, 117 (1976).
information in a self-serving light, the adversary process could clearly expand the information available to the fact finder. Yet, under the Military Claims Act there is no access to the wide range of discovery procedures nor the option for cross-examination as there is under the Federal Tort Claims Act. In the administrative procedure total reliance is placed on the service evaluation of the event. The service, however, is not bound by the findings of the investigation and is free to consider any facts it deems relevant in making a determination.

As part of the investigation process, the claimant may be required by the military to undergo a physical examination to assess the nature and extent of the injuries received. Under federal regulations this examination is to be conducted at a military hospital. If the claimant refuses to have the examination performed by military doctors, the entire claim for damages may be denied. Outside specialists are consulted only in specifically authorized situations. In effect, one military doctor evaluates the damage allegedly caused by another military doctor. The potential for a less than unbiased judgment is again present. The claimant may secure an independent evaluation by civilian specialists, but to what extent the settling service would rely on an outside source is unknown, especially if the claimant’s experts should disagree with the service’s own medical staff.

Recovery

Recovery under the Military Claims Act is a matter of grace, not of legal right. Any amount paid by the service is the result of its attempting to implement congressional policy that the government is responsible for damages its agents and servants cause. A threshold requirement for recovery, established by the statute, is that the damage be caused by a government employee while acting within the scope of employment.

The specific rules for recognizing claims are promulgated independently by each service, and differing standards have been adopted by each branch of the armed forces. The Air Force regulation encompasses and recognizes only those "tort-type claims not cognizable under other statutes, that involve property damage, personal injury, or death caused by the negligent or wrongful act or omission of military personnel . . . acting in the scope of their employment." In contrast the Navy regulation includes all damages caused by military personnel or civilian employees of the Navy while acting within the

180. 32 C.F.R. § 750.6(g)(1) (1976).
181. Id. (g)(4).
182. E.g., 32 C.F.R. § 842.41(b) (1976).
scope of their employment\textsuperscript{184} and excludes from payment only those damages proximately caused in whole or in part by the contributory negligence or wrongful act of the claimant.\textsuperscript{185} The Navy apparently requires only a direct causal connection between the harm and the act in order to award damages. On the other hand, the Army requires that the act or omission of the employee be "negligent, wrongful or otherwise involving fault."\textsuperscript{186}

The difference in philosophy and approach among the services toward the settlement of claims is reflected in a comparison of the dispositions of actual cases. In one study the Air Force "disallowed an overwhelming majority of their administrative claims, while the Army allowed payment in some 59 percent of its claims."\textsuperscript{187} Each service applies standard American law in reaching its determinations, but the results vary.\textsuperscript{188} Payment does not depend totally on the merits of the claim but, instead, on which service processes it.

For the overseas dependent, which service settles the claim depends entirely on the location where the tort took place. Although the Military Claims Act provides that a claim must be made against the agency responsible for the damages, the Department of Defense has, for administrative purposes, divided the jurisdictional areas abroad. Specific branches of the military have been assigned the task of processing all claims against the United States that are payable under certain statutory sections, including the Military Claims Act.\textsuperscript{189} For example, a claim made in Korea or Germany would be settled by the Army, one in Italy or Australia would be processed by the Navy, and a claim arising in Spain or the United Kingdom would go to the Air Force. As a result of this policy, even an Army dependent injured in an Army hospital would not benefit from the more liberal Army settlement provisions if the incident took place other than in the Army's settlement jurisdiction.

Once the service designated to take the claim has been determined, the actual settlement is made by military claims lawyers on various command levels. They have the authority to pay in full, award a partial amount, or deny in full. The command level at which the claim is processed depends on the monetary amount sought. Claims for $2,500 or less are usually handled at the nearest local command

\textsuperscript{184} U.S. DEP'T OF NAVY, MANUAL OF THE JUDGE ADVOCATE GENERAL, § 2052(a) (1970).
\textsuperscript{185} Id. at § 2055(d)(1).
\textsuperscript{186} U.S. DEP'T OF ARMY, REG. NO. 27-20, PARA. 3-4(a) (NOV. 25, 1974).
\textsuperscript{187} Welch & Shear, supra note 7, at 34.
\textsuperscript{188} Navy Times, Oct. 18, 1976, at 12, col. 4.
\textsuperscript{189} 32 C.F.R. § 750.24 (1976) (incorporating DEP'T OF DEFENSE DIRECTIVE NO. 5518.5 SERIES (NOTAL)).
level where a member of the Judge Advocate General Corps is stationed. The next level of claims go to major commands or to the service headquarters, and claims of $25,000 or more go to the Chief of the Claims Service or to the Judge Advocate General of the designated branch of the armed forces. For those claims above the statutory limit, the secretary of the department will determine whether the case is meritorious. If found to be meritorious, the Secretary is authorized to settle for an amount above the $25,000, to order the service to pay the claimant the $25,000, and to submit any remaining amount to be paid to Congress as part of the department's appropriation request. Of course, the Secretary may deny a claim in full.

Appeal

The regulations provide that if a claim is denied in whole or in part, the injured overseas dependent may within thirty days request reconsideration by the settling authority on the basis of fraud, collusion, new material evidence, or manifest error of fact. The request must be accompanied by a complete statement giving the reasons for reconsideration.

In addition, the claimant may also appeal any denial or reduction of a claim if the appeal is made within thirty days of the date of the denial. Appeals are limited, however, to the branch of the service that made the original denial. Navy appeals are sent to the Secretary of the Navy or the Judge Advocate General, and Air Force appeals go to the Secretary of the Air Force. In the Army, appeals are processed by the Secretary of the Army if the claim is in excess of $2,500; otherwise the appeal is decided by the Judge Advocate General, an assistant Judge Advocate General, or the Chief of the Army Claims Service. Any decision on appeal is final and binding, and no further action is provided. At no time does the claim go beyond the military.


193. 32 C.F.R. § 750.53(h)(2)-(3) (1976). Appeals for claims under $5,000 may be decided by lower level personnel, however, providing the decision is made by an official senior to the official who originally disapproved the claim. Id. (3).

194. U.S. Dep't of Air Force, Manual Reg. No. 112-1, ¶ 7-11 (Oct. 14, 1977). The Secretary of the Air Force has delegated the authority to consider appealed claims, but no settling authority may take appellate action on its own settlement. Id.

195. 32 C.F.R. § 536.24a(b) (1976).
In this situation, with no appeal within the judicial system, either the claimant takes what the military offers, albeit below the claimed amount and below damages that might have been awarded in a court settlement, or the claimant takes nothing. In the five years preceding 1971, the mean value of settled claims against the federal establishment was less than half the value of plaintiff judgments awarded against the government by the courts.\(^{196}\) An overseas dependent may thus recover substantially less than a stateside dependent for equal physical injury resulting from medical malpractice.

The administrative remedy provided by the Military Claims Act is insufficient to give adequate protection to dependents injured overseas by military medical personnel. First, recovery for the cost of independent legal counsel is denied the claimant, although it would be recoverable under the Federal Tort Claims Act. Second, there is no provision for an independent investigation of the circumstances surrounding the event alleged to have caused the harm nor of the extent of the physical damage to the claimant. Third, the "in house" determination and discretionary nature of the award provides a potential for denial of a just claim. Finally, the lack of meaningful appeal discourages refusal of inadequate settlement offers.

Conclusion

When military personnel are ordered overseas, they go in response to the perceived needs of the nation. Yet, the very act of going overseas accompanied by family denies military personnel the right to a judicial remedy if one of the dependent family members is injured by military medical personnel. Additionally, most members of the armed forces are unaware of the recovery limitations until after a tort takes place and damages are sought. The sacrifice by the family unit of serving the nation may become costly indeed.

Throughout the entire claims process the disparity between the rights of the stateside dependent and the rights of the overseas dependent are great. For the dependent injured in the United States, administrative settlement under the Federal Tort Claims Act is unlimited in authorized amount, legal fees are recoverable, a legal cause of action is created, discovery is available, a judicial trial on the merits is possible, and judicial decisions are reviewable by the federal appellate system. For the dependent injured overseas, administrative settlement under the Military Claims Act is limited in amount unless Congress specifically grants a larger award, no legal fees are provided, no legal cause of action exists, no discovery is available, no trial is possible, and no judicial review or appeal exists.

\(^{196}\) Welch & Shear, \textit{supra} note 7, at 30.
It is unlikely that Congress intended this result. Rather, the situation appears to have evolved as an anomaly in the law. Congress designed the Federal Tort Claims Act to provide a judicial remedy for victims of government torts in the United States. The Foreign Claims Act, with its liberal award policy, was intended to provide damages for torts committed abroad. The military dependent who is injured in a foreign country, however, is caught between these two laws, and the Military Claims Act, intended to cover military torts not generally associated with civilian counterparts, has been expanded to meet the ever rising number of medical malpractice claims from overseas military dependents.

It is time for Congress thoughtfully and directly to consider the issue. The problem can be solved by expanding the Federal Tort Claims Act to include those torts committed on a United States military base abroad by a member or civilian employee of the United States military within the scope of employment against a legal dependent of a member of the United States armed forces. Jurisdiction can be authorized within the federal court system, and either general American tort law or the tort law of a specific location, such as the District of Columbia, can be designated as the applicable law for the cases cognizable under the legislation.

The recovery rights of the overseas military dependent victim of medical malpractice should be made equal to those of the stateside counterpart. The present dual system makes the award of damages for malpractice committed abroad too uncertain and biased. Such a practice should not be allowed to continue unchallenged and uncorrected.

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