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NOTES

MILITARY PERSONNEL AND MILITARY MEDICAL NEGLIGENCE

I. Introduction

A thirty by eighteen inch towel marked "Medical Department U.S. Army" was left in the stomach of a serviceman during an abdominal operation in a military hospital. The United States Supreme Court in *Feres v. United States,* 340 U.S. 135 (1950), denied this serviceman the right to sue the federal government under the Federal Tort Claims Act.[1] A military doctor left surgical sutures in the kidney area of an enlisted man. This negligence necessitated a second operation in which the kidney was removed. This enlisted man was denied the right to sue the military doctor personally. *Bailey v. Buskirk,* 345 F. 2d 298 (9th Cir. 1965). Both of these cases appear to involve flagrant acts of negligent medical practice. If both the doctors and the servicemen had been civilians, the patients would undoubtedly have been permitted to bring civil tort actions against these doctors and medical personnel.

This article will present an analysis of two basic questions arising out of a reading of the above noted decisions: 1) Should the serviceman[2] have the right to sue either the federal government under the Federal Tort Claims Act or the military doctor personally? 2) Is there any need for a serviceman to bring either of these suits?

II. The Right to Sue the Federal Government

The reasons for denying a serviceman the right to sue either the federal government or the military doctor personally are outlined in a series of cases beginning with *Feres v. United States, supra.* In this case the United States Supreme Court inferred the following reasons for denying the serviceman recovery.

A. The Serviceman's Available Compensation

The Court noted[3] that the primary purpose in enacting the Federal Tort Claims Act was to extend a remedy in tort to certain of those who were without remedy against the sovereign, i.e., the United States Government. Since military personnel can avail themselves of a comprehensive system of compensation, it was the Court's opinion that the provisions of this act are not applicable to servicemen.

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[1] Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1964) (codified in scattered sections of 28 U.S.C.)

[2] The term "servicemen" as used in this article includes personnel of the Army, Air Force, Navy and Marine Corps.

[3] 340 U.S. at 140.

The Court in the prior case of *Brooks v. United States,*[4] however, allowed a serviceman to recover under the Federal Tort Claims Act even though he was already receiving disability benefits from the Veterans Administration. The only specification required by the Court in this case was that the amount receivable under the servicemen's benefit laws should be deducted or taken into consideration when he obtains judgment under the Federal Tort Claims Act.[5] The Court explicitly stated that:

> provisions in other statutes for disability payments to servicemen, and gratuity payments to their survivors, 38 U.S.C. §701, indicate no purpose to forbid tort actions under the Tort Claims Act. Unlike the usual workman's compensation statute, e.g., 33 U.S.C. 905, there is nothing in the Tort Claims Act or the veterans' laws which provide for exclusiveness of remedies.[6]

The Court in the *Brooks* case also placed a different interpretation on the Federal Tort Claims Act by saying that the terms of the statute "provide for jurisdiction over any claim founded on negligence brought against the United States." The Court noted that it was "not persuaded that 'any claim' means 'any claim but that of servicemen.' "[7]

The Court in the *Feres* case, however, distinguished that case from *Brooks* on the grounds that the serviceman's injuries in the latter case had nothing to do with his relationship to the military service.[8] The injuries to Brooks resulted from a collision between a military vehicle driven by a civilian employee of the United States Army, and an automobile driven by Brooks, who was on furlough at the time. The collision, furthermore, did not occur on government lands. The Court in *Feres* interpreted the *Brooks* case as being applicable only to cases in which the serviceman's injuries were incurred while not in the line of duty.[9] The term "any claim" appears to be interpreted by the Court in the *Feres* case to mean "any claim other than that of a serviceman who is acting in the line of duty." Since the *Feres* case is the more recent case, and since it has not been overruled, the term "any claim" of the Federal Tort Claims Act will have the above qualification.

As a reason for denying a serviceman the right to sue the federal government, can the Court in the *Feres* case take notice of the fact that

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[4] Brooks v. United States, 337 U.S. 49 (1949).
[5] *Id.* at 53-54.
[6] *Id.* at 53.
[7] *Id.* at 51.
[8] 340 U.S. at 146.
[9] 28 U.S.C. §2680 (1964) lists thirteen exceptions to the federal government's liability under the Federal Tort Claims Act. 28 U.S.C. §2680(j) (1964) sets out the following exception: "Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during the time of war." The Court in the *Feres* case stated that claims arising out of line of duty activities might be implied as a part of the above exception. 340 U.S. at 138.

the serviceman already has available to him a comprehensive system of compensation? If a serviceman can avail himself of certain Veterans' benefits regardless of whether his permanent injuries or disability occurred as an incident to his military service, he should not be denied the right to sue the federal government in one case and not in the other.

B. *Choice of Habitat*

A basis for determining the federal government's liability, the cases applying the Federal Tort Claims Act apply the substantive law of the place where the act or omission occurred.[10] The second reason for denying the serviceman the right to recover under the claims act was his lack of freedom to choose his own habitat.[11]

The distinction between the *Feres* case and *Brooks* may be justified by this second reason. A serviceman on furlough has the freedom to go where he wishes. The jurisdiction in which the government's liability will be determined, thus, will not be restricted by the military.

A Federal District Court in *Grigalauskas v. United States*,[12] however, allowed a serviceman's dependent to recover under the Federal Tort Claims Act. The dependent's injuries had resulted from a military doctor's failure to read the label on an ampule of medication and thus his consequent failure to dilute this solution with water. This incident occurred in a military hospital. As a result of the doctor's negligence, it was determined that the dependent would never be able to retain employment and would also have great difficulty in bearing children.

One of the distinctions made between this case and the *Feres* case was that the serviceman's dependent "is free to choose his own habitat and thereby limit the jurisdiction in which it will be possible for federal activities to cause him injury."[13] The practical question is whether the serviceman's wife and his minor dependents are in fact free to choose their own habitat. When a serviceman is stationed within the United States, the serviceman's family often accompanies him to his place of duty. The military, in many instances, provides housing for the serviceman and his family. It could be said that in many instances the dependent's choice of habitat would be controlled by the habitat of the serviceman himself.

C. *Creating New Liability*

The Court in the *Feres* case stated that the purpose for enacting the Federal Tort Claims Act was to lift the veil of sovereign im-

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[10] 28 U.S.C. §1346(b) (1964).
[11] 340 U.S. at 142-143.
[12] 103 F. Supp. 543 (D. Mass. 1951).
[13] *Id.* at 549.

munity from the federal government for certain tort actions.[14] The claims act, it was further pointed out, was not enacted to create new liability but to remove immunity, i.e., to make the federal government liable as if it were a private person.[15] If a serviceman were allowed to bring suit under the claims act, the Court maintained that it would be creating new liability on the federal government, because "no American law . . . ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving."[16] This statement is subject to some qualification. The Court apparently did not view Brooks in the *Brooks* case as a "serviceman" at the time he was injured. A United States Court of Appeals in *Feeley v. United States*[17] stated that "the only reason the plaintiff in *Brooks* was able to maintain his action at all, in light of *Feres*, was that at the time of the injury he was made in the posture of a private citizen than a serviceman."[18] It appears that what the Court in the *Feres* case meant by "soldier" was a "soldier acting in the line of duty."

The basic question, thus, remains: Did Congress intend to limit the term "any claim" in the Federal Tort Claims Act to refer to any claim but those of a serviceman who is acting in the line of duty. If this is what Congress intended, the Supreme Court in the *Feres* case interpreted the Federal Tort Claims Act correctly; if not, further clarification is needed.

III. The Right to Sue Personally

A United States Court of Appeals, in the case of *Bailey v. Buskirk*,[19] affirmed the dismissal of an action in which an enlisted man was attempting to sue a military doctor personally for injuries resulting from forgotten surgical sutures. The court relied on the policy reasons set out in the *Feres* case.

The court specifically reasoned that the serviceman would be compensated for his injuries occurring while he was acting in the line of duty.[20] This reason is questionable in view of the availability of compensation in both the *Feres* and *Brooks* cases.

The suits of enlisted men against superior officers, the court also noted, are not yet within the American legal concept.[21] The reasons for granting public officials as well as military doctors immunity from being sued personally have been adequately set forth in the case of *Gamage v. Peal*:[22]

[14] 340 U.S. at 139-140.
[15] *Id.* at 141.
[16] *Ibid.*
[17] 337 F. 2d 924 (3d Cir. 1964).
[18] *Id.* at 933.
[19] 345 F. 2d 298 (9th Cir. 1965).
[20] *Ibid.*
[21] *Ibid.*
[22] 217 F. Supp. 384 (N.D. Cal. 1962).

> The policy underlying the rule of immunity is that government officials owe their duty to the public at large and the Government and not to the individual citizen. . . . If the act complained of is within the scope of an official's duties as defined by law, he should not be subjected to the harassment of civil litigation.[23]

The court goes on to point out that this rule is applicable to military officers and military doctors.[24] This case involved an action brought by an Air Force officer who alleged that an Air Force medical officer and a civilian contract psychiatrist had made false statements concerning his physical and mental condition in order to have him involuntarily released from active duty. It is, therefore, a case of an intentional wrong rather than that of negligence. However, this reasoning may be applicable in negligence cases involving personal suits against a military doctor.

IV. The Need To Sue

Does a serviceman need to sue either the federal government or the military doctor personally? As in any tort action, the primary purpose of a medical malpractice suit is to provide compensation to those who have been injured through another's negligence. Since the serviceman cannot maintain an action for his injuries caused by the military doctor's negligence or malpractice, the question arises: Will the serviceman be compensated for permanent injuries resulting from military medical negligence as a civilian would be in a civil suit?

A serviceman who has been permanently disabled is assured of both free hospitalization[25] and military pay[26] while he remains on active duty. After his honorable discharge from the military service, he can be assured of certain pay allowances from either the military itself[27] or the Veterans Administration.[28] The allowances from the military are, for the most part, based on a certain per centum of his prior service base pay. If a serviceman has a permanent disability of less than thirty percent as computed by the Veterans Administration's disability ratings and has served less than eight years in the military service, he is entitled to a severance pay of twice the amount of his base pay.[29] If his disability is above thirty percent, he is entitled to receive from the military monthly payments which do not exceed seventy-five percent of his base pay.[30] He, and in some cases his dependent or dependents, may avail themselves of additional Veterans Administration benefits which will vary according to the degree of his disability.[31] The serverance

[23] *Id.* at 388.
[24] *Id.* at 389.
[25] 10 U.S.C. §1074(a) (1964).
[26] 37 U.S.C. §§201-204 (1964).
[27] 10 U.S.C. §§1201-1212, 1401 (1964).
[28] 38 U.S.C. §§314, 315, 334, 335 (1964).
[29] 10 U.S.C. §§1203, 1206, 1212 (1964).
[30] 10 U.S.C. §§1201, 1202, 1204, 1205, 1401 (1964).
[31] 38 U.S.C. §§314, 315, 334, 335 (1964). (The amount of compensation). 38

disability pay received from the military itself will be deducted from any compensation for the same disability to which he may become entitled to from the Veterans Administration.[32] The adequacy of the compensation given by the Veterans Administration, however, is pointed out in the *United States Code* when it specifically states that the ratings of the Veterans Administration "shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civilian occupations."[33]

It is important to note that the permanently disabled military medical patient is always assured of some relief. This relief is available by the mere fact that he was permanently disabled while on active military duty. He does not have to prove negligence on anyone's part. A civilian patient, on the other hand, receives compensation only after he has proved that the civilian doctor or his assistants were negligent. A civilian, thus, cannot be assured of any compensation. The analysis of some 123 verdicts involving civilian doctor's malpractice suits by Jury Verdict Research, Inc. indicated that only in twenty-four percent of these verdicts was the plaintiff or patient able to recover.[34] The neglected patient was allowed recovery in forty-eight percent of fifty verdicts involving suits against hospitals.[35]

V. Conclusion

Servicemen cannot, at the present time, recover in suits brought either against the federal government under the Federal Tort Claims Act or against the military doctor personally for injuries caused by military medical negligence. Even if they were able to sue either the federal government or the military doctor personally, however, it is questionable whether they need to bring such suits because compensation is available. Two factors which would make them hesitate in bringing such a suit are the expenses of litigation and the limited chance of recovery.

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U.S.C. §3001 (1964) specifies that a form prescribed by the Veterans Administration must be filed with the Veterans Administration in order for a person to be entitled to Veterans' benefits. Chapter 51-61 of Title 38 of the U.S. Code (§§3001-3505) set forth the administrative procedures for making a claim for the Veterans Administration's disability compensation.

[32] 38 U.S.C. §§3104-3105 (1964).

[33] 38 U.S.C. §355 (1964).

[34] Jury Verdict Research, Inc., 3 Personal Injury Evaluation Handbooks 403 (N.D.).

[35] *Id.* at 407.