FEDERAL TORTS CLAIMS:
A PRACTICAL APPROACH TO THE PROCEDURAL ASPECTS OF A FEDERAL TORT CLAIM INVOLVING A LAPAROSCOPIC CHOLECYSTECTOMY

The Common Law Doctrine of Sovereign Immunity provides that a citizen may not sue the United States government without its consent. In 1946, the United States Congress partially waived this immunity by enacting the Federal Tort Claims Act (FTCA), 28 U.S.C. Section 1291. The FTCA eliminated the government's blanket immunity from suit and provided that actions against the government would be allowed in certain circumstances. The resulting Federal Tort Claims Act (FTCA) is a comprehensive legislative scheme in which the United States waives its sovereign immunity to allow civil suits for actions arising out of negligent acts of agents and employees of the United States. The Act, however, is a complex series of rules and procedures that one must comply with to prosecute a claim and is markedly different from a similar suit that one would bring under common law.

There are many procedural aspects that must be considered before a federal tort claim is pursued. At its beginning the claim must be pursued administratively. Thus, before an action may be filed under the Federal Torts Claims Act an administrative claim must have been presented to the federal agency employing the person whose acts or omissions caused the injury. Presentation of an administrative claim to the appropriate agency is a jurisdictional prerequisite to suit. The claimed filed as Standard Form 95 should be completed according to the instructions on the Form. Staff attorneys for the federal agencies will provide a Form 95 for presenting an administrative claim. The Form 95 is mailed by certified mail to the appropriate federal agency. After the

administrative claim is presented to the appropriate agency, the agency has six (6) months to either admit or deny the claim. A complaint in Federal District Court cannot be filed until the administrative claim has been denied or until six (6) months has passed without the agency acting on the administrative claim. Reconsideration proceedings for the claim will toll the final disposition for a further six months. See 28 U.S.C. Section 2675.

A claim of damages is set forth in the Form 95. An action in Federal District Court may not be brought for damages greater than the amount of the claim presented to the federal agency. An exception is made when the increased amount is based on newly discovered evidence that was not reasonably discoverable at the time the claim was presented or when there are intervening facts relating to the amount of the claim.

The statute of limitations applicable to a federal tort claim is found at 28 U.S.C. Section 2401(b), which states: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two (2) years after such claim accrues or unless action is begun six (6) months after the date of the mailing by certified or registered mail of notice of the final denial of the claim by the agency to which it was presented."

Once the claim is denied or six months have passed without the agency acting, a complaint can be brought in Federal District Court.

There is no right to a jury trial in an FTCA action. See 28 U.S.C. Section 2402. If the plaintiff prevails, damages are measured by the law of the place where the negligent act or omission occurred determined by applying the whole law of that jurisdiction. See *Richards vs. United States*, 369 U.S.1 1992. Generally, damages under the FTCA are

governed by state law. Since FTCA cases are tried to the Court and not to a jury, the standard for appellate review of damage awards entered by District Courts is the "clearest erroneous standard." Federal tort claims prohibit the award of punitive damages. 28 U.S.C. Section 2674. State statutory caps are applicable to FTCA.

Venue is proper in the federal judicial district where the claimant resides or where the act or omission occurred. 28 U.S.C. Section 1402.

In trying a federal tort claim, remember, it is a judge-tried case, the Judge acts as the sole fact finder of the claim. Therefore, educate the court with a trial brief which provides a synopsis of the case and your claim, provided to the judge prior to trial. The trial brief should contain legal arguments, counter argument of the Defendant, your expert's report, an outline of your opening statement, and a thorough explanation of damages with demonstrative evidence exhibits if appropriate.

The Attorney General has the entire responsibility of representing the United States in tort suits. Suits must be affected in conformity with the provisions of Federal Rule of Civil Procedure.

Attorneys' fees are controlled by statute. 28 U.S.C. Section 2678 provides attorneys' fees of twenty percent (20%) at the administrative level and twenty-five percent (25%) after suit is filed.

At the Administrative Level, claimants may be required to submit certain evidence or information in support of their administrative claim, such as written reports, itemized bills, and documents supporting lost wages. See 28 C.F.R. 14.1-14.11 which entitles the government to receive such information. But the claimant has no grounds to seek like evidence from the government.

Applying the systematic rules and procedures of the Federal Tort Claims Act, the case presented is of a 75-year-old man who developed complications following gallbladder surgery at a Veterans Hospital.

Gallbladder problems and resulting surgery are common occurrences. More than a million people in the United States will learn that they have gallstones yearly. They will join an estimated 20 million people that have previously been diagnosed with this condition. Cholecystectomy is the surgical removal of the gallbladder and is the standard method for treating symptomatic gallstones and gallbladder diseases. Until the end of the 1980s this surgery was done as an open procedure under general anesthesia requiring a six inch incision and a three to four day hospital stay, followed by a three to six week convalescent period. Around 1989 gallbladder surgery underwent a revolution with the introduction of the procedure known as a laparoscopic cholecystectomy. There a fiber optic surgery is performed through the abdominal cavity wall. About 90 percent of cholecystectomies are now done laparoscopically.

As far as the anatomy of the gallbladder and surrounding organs, one of the functions of the gallbladder is to produce a substance called bile, which is a combination of digestive enzymes and waste products. It plays a very important role in the digestion of fats in the intestinal tract. The bile is delivered from the liver into the intestines through a series of ducts which are tube shaped structures. Collectively, the gallbladder and these ducts are called the biliary system. From the liver the bile initially passes into the right and left hepatic ducts and then unite into one duct called the common hepatic duct. Merging into this duct is the cystic duct which comes from the gallbladder. There is also the common bile duct, which feeds on down into the small intestines. The

gallbladder resembles a pear-shaped sack that lies on the undersurface of the liver. This connects to the biliary ductile system through the cystic duct. The gallbladder collects and concentrates bile which is secreted continuously by the liver until the bile is needed to aid in digestion. When one eats fatty food, the gallbladder contracts and sends the stored bile into the small intestines by way of the biliary ducts. When digestion of the meal is completed, the gallbladder relaxes and once again begins to store bile. Bile is then re-circulated into the digestive tract by being absorbed in the intestines and returns to the liver and the blood stream.

Gallstones are formed when the bile solidifies and forms crystals. Consequences of gallstones may be severe ranging from a brief episode to potentially life-threatening complications. The only true cure for gallstones is the removal of the gallbladder itself. Fortunately, the gallbladder is not an organ necessary for our existence. Once it is removed, minor digestive problems may occur, but the primary functioning of the digestive system remains undisturbed.

Surgically the gallbladder can be removed in two ways. Now the common procedure is a laparoscopic cholecystectomy performed using video telephonic visualization of the gallbladder and surrounding vital structures. The patient is placed under a general anesthetic. One technique is begun by making a small incision by the naval and inserting a needle into the abdominal cavity. The cavity is then filled with carbon dioxide gas. This allows for easily viewing and creating a working space for the surgery to be performed. The needle is then removed and a sharp hollow metal cylinder, called a trocar, is inserted into the abdominal cavity. A laparoscope is then passed through the trocar. The laparoscope is equipped with a camera that allows a

magnifying view, and the abdomen is then examined. An additional trocar may then be placed in the abdomen through small incisions under direct observations through the laparoscope. In the typical procedure, the end of the gallbladder is pulled upwards toward the diaphragm. This allows the cystic duct, the cystic artery, and the common bile to be exposed. Once these structures have been clearly identified and dissected away from the surrounding tissue, the cystic duct is sealed with a clip placed near its junction with the gallbladder. Then the surgeon places two more clips near the point where the cystic duct joins the common bile duct. The cystic duct is cut and separated between the clips. The cystic artery, which provides the main blood supply to the gallbladder, is then divided in the same way.

To enhance observation and view of the structure, an inoperative cholangiogram can be performed. This procedure may also be done when it is suspected that a stone has been lodged in the common bile duct. The classic injury that occurs during a cholecystectomy is the cutting of the common bile duct or the common hepatic ducts. It is recognized that the higher the laceration occurs on the biliary tree, the worse the prognosis for the patient. The standard procedure for a bile duct injury is the roux en y hepatic choledochjejunostomy. In this procedure a part of the small intestine, the junum is looped up and joined to the hepatic ducts allowing the flow of bile from the liver directly into the intestines.

In the case presented, the patient, a 75-year-old U.S. Service Veteran, had a history of gallstones and cholecystitis. He had been treated at a Veterans Hospital for such symptoms and abdominal pains. He was scheduled and underwent laparascopic surgery at the Veterans Hospital for removal of his gallbladder, a cholecystectomy. The

procedure was stopped after the discovery of adhesions and inflammation, although several gallstones were removed. The procedure was done laparoscopically. The gallbladder was found to be nonfunctional - no bile was present. The patient was released and followed up for additional treatment. Two months later a second cholecystectomy was attempted by the same surgeon. It started as a laparoscopic procedure but was converted to an open cholecystectomy. An attending surgeon and a resident, both employees of the Veterans Hospital, were performing the surgical procedure.

The patient claimed that during the procedure the hepatic artery was lacerated and the transverse colon was perforated. The colon perforation was repaired and over sewn. The gallbladder was then removed. The patient later developed a biliary tract leak secondary to the claimed injury to the common bile duct and then developed recurrent septicemia bacteremia episodes, resulting in numerous hospitalizations. He underwent a bile duct reconstruction, a roux en y choledochjejunostomy at another hospital by another surgeon. The patient continued to develop septic episodes, numerous hospitalizations, and is on constant antibiotic therapy. A claim was filed with the appropriate federal agency, the Veterans Administration on a Form 95 by the patient himself seeking compensation in the amount of $500,000. That claim was denied by the administrative agency. Suit was commenced in Federal District Court.

Following suit filed in Federal District Court, discovery followed as in a normal civil case. The court imposed a scheduling order, depositions were taken of all the parties, and identification of experts occurred. Right before trial, the case was settled.

Pursuing a case under the Federal Tort Claims Act can be demanding and procedurally intense. Strict compliance with the rules is essential. These cases can be effectively presented, however, but it is essential to fully understand and follow the rules and procedures, and know and understand the medical aspects of the injuries involved.

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