The Federal Tort Claims Act and the National Practitioner Data Bank

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Federal Tort Claims Act

- Passed by Congress in 1946 to reduce the negative impacts of the doctrine of sovereign immunity
- Designed to eliminate the practice of congressman introducing bills to help their constituents who had been injured by government negligence
- Government gives its consent to be sued in federal court in front of a district court judge (no jury) in accordance with the law of the place where the act or omission took place
For alleged medical malpractice

- Plaintiff must prove by a “preponderance of the evidence”—More likely than not
- “Negligence” is defined by the state in which it occurred
- Causation; the injuries suffered were due to the negligent act
- Punitive damages are not allowed under the FTCA—even though the state law might allow them

Federal trumps state law
FTCA

- Any person who alleges that an employee of the federal government has caused an injury must commence a lawsuit only under the FTCA.
- There are numerous exceptions where sovereign immunity still applies e.g., post office losing letters, government enforcing unconstitutional statutes, actions of the military in time of war, damages caused by fiscal operations of the Treasury Department, intentional torts, etc.
- Government will not be liable for interest prior to judgment or for punitive damages.
The Federal Tort Claims Act

- Under the FTCA, the Federal Courts have jurisdiction for “torts by government employees acting within the scope of their duties.” *United States v. Smith, 499 U.S. 160, 166 (1991)*

- Claims of medical malpractice in the federal system (where the practitioners are employees of the federal government) will have to be brought under the FTCA

- Practitioners do not need to pay for malpractice insurance as judgments will be paid by the United States
Federal Tort Claims Act

• Claims must be filed within two years of the incident or knowledge of the alleged injury
• Once claim is filed, claimant may not file a suit for six months while the government decides what to do
• If case not resolved during the six month review period, claimant may file a suit
• If government denies the claim, the suit must be filed within six months of the date of denial
Here’s the rub

- A judgment paid on a malpractice claim may subject the practitioners involved in the case to reporting to the National Practitioner Data Bank and to State licensing boards.
- These reports can impact the practitioners ability to maintain his credentials and privileges and his ability to seek work at another location.
In 1986, the Health Care Quality Improvement Act went into effect. A section of this law established the National Practitioner Data Bank (NPDB).
NPDB

- Congress felt that medical malpractice was increasing and the quality of medical care had become a nationwide problem
- Physicians were being discouraged from participating in meaningful peer review; Congress thought the Quality Improvement Act would provide an incentive for peer review
NPDB

• Intent was to restrict the ability of incompetent practitioners from moving from State to State without disclosing their previous malpractice payments and any adverse actions e.g., licensure, privileges, and professional society memberships
• This created a clearinghouse to collect and release certain information that was believed to be related to professional competence and conduct
This was meant to be an alert system. The information it contained was limited but it was intended to lead to further inquiry into a practitioner’s licensure, malpractice history, behavior, and professional society memberships. The burden was still on the hospitals, licensing boards and other health care entities to make final licensure, hiring and credentialing decisions.
Veterans Administration Physicians

- Even though malpractice claims against VA physicians and dentists are handled under the Federal Tort Claims Act (FTCA) whereby the plaintiff must first seek an administrative remedy before he can bring a suit against the United States, it is possible for the practitioner to be named to the NPDB if a payment is made as a result of a judgment or settlement on the claim.
Malpractice in the VA

- The majority of malpractice claims brought against the VA (United States) under the FTCA do not result in any payment as the case is usually denied by Regional Counsel.
- If a payment is denied, the Plaintiff then has the option of bringing suit in the Federal court system.
- If a suit is brought in the Federal Court, the suit will then proceed as any other malpractice action that would usually be brought in the State court system.
- The laws of the State would apply as there is no federal malpractice law.
If a payment is made

- The medical center Director where the case occurred must make a list of all the practitioners involved and send that list to the Office of Medical Legal Affairs (OMLA); he must also send all pertinent documents of the paid claim.
- This reporting does not involve the office of Regional Counsel and the practitioners on the list may not even be the providers who were originally contacted by Regional Counsel during their original investigation of the claim.
Office of Medical and Legal Affairs

- Once notified of the settlement, OMLA will form a review panel consisting of at least three health care professionals to review the case and make a judgment regarding the care that was provided by the individuals at risk of being reported to the NPDB.
- Each practitioner being reviewed is allowed to make a written statement concerning his involvement in the case.
The Panel

- Must include a member of the same profession and specialty as appropriate, of the practitioner who is being reviewed
- Each panelist must review all materials pertinent to the care that led to the claim
- The panel decides by majority vote, if the care that led to the claim constituted substandard care, professional incompetence, or professional misconduct
Reporting to NPDB

- A health care provider may be reported to the NPDB if a settlement or judgment is paid to the plaintiff of a malpractice suit if the payment is ...“related to substandard care, professional incompetence, or professional misconduct on the part of the physician, dentist, or other licensed health care practitioner.”

VHA Handbook 1100.17
The process by which the VA decides on whether or not to make a report to the NPDB is related to a Memorandum of Understanding (MOU) between the VA and the Department of Health and Human Services (HHS) where it was agreed that certain malpractice payments made for the benefit of a practitioner would be submitted to the NPDB
If payment was strategic and not due to malpractice, etc.

- Payments made for claims of malpractice where the Review Panel determines that the standard of care was met and there was no professional incompetence or professional misconduct, or due to circumstances beyond the practitioner’s control (power failure, drugs mislabeled by supplier, equipment malfunction, etc) are not to be reported.
If Payment is made

- After a payment has been made, the Director must notify, within 30 days, all involved practitioners of the opportunity to provide a written statement concerning the care that led to the claim for consideration by the Review Panel. This is the one best chance to plead your case to the Panel.
- This request for a statement does not imply blame or fault.
The written statement

- This is the practitioners best opportunity to argue that he did not act negligently and/or that his care was not the cause of the plaintiff’s harm; 60 days to submit
- These two issues are the “standard of care” and the “causation” elements of a malpractice case which must be proven by a preponderance of the evidence standard in any malpractice action

I advise my faculty to write a strong statement as the Panel is likely to give this written statement great weight
Medical Center Director

- Reviews conclusions of the paid malpractice claim Review Panel for further action
- Notifies involved practitioners of the Review Panels conclusions
- Files report with NPDB and appropriate State Licensing Boards in accordance with Handbook requirements
- Prohibited from entering into a formal or implied agreement not to report in return for a personnel action, e.g., resignation, retirement, reassignment
Changing the NPDB Record

- If, at a later time, the Director and the OMLA determines that a mistake was made, a correction can be sent to the NPDB which could amend or void the original report.
What about residents and students or dead practitioners?

- Reports must be submitted to the NPDB if a payment is made for the benefit of a licensed resident or intern.
- Payments made for the benefit of medical or dental students will **not** be reported to the NPDB.
- Payments made for the benefit of deceased practitioners will be reported because a fraudulent practitioner could assume the identity of the dead person.
Payment made for multiple practitioners

- If the payment can be apportioned, only the amount apportioned to the practitioner will be reported.
- If the amount cannot be apportioned, the total amount will be reported along with the total number of practitioners on whose behalf the payment was made.
It’s not over until it’s over
Post NPDB Reporting

- If the practitioner believes the report has factual inaccuracies, he should contact the reporting facility and request it file a correction. If the facility declines to change the report, the provider is allowed to add a statement or initiate a dispute of the report through the NPDB dispute process, or both. This process is external to the VA and is initiated by the practitioner (it is thru a dispute process with HHS)
Post NPDB Reporting

- The dispute process cannot be used to protest a payment or to appeal the underlying reasons for the reporting.
- It can only be used to dispute the factual accuracy of the report or that the report was not submitted in accordance with NPDB reporting requirements.

This is a good thing to keep in mind if you were not notified timely or were not given the appropriate documents so that you could do the written statement.
Be Aware

- Regional Counsel may make a payment to the plaintiff for strategic reasons
- The OMLA may conclude that the standard of care was breached and make a recommendation to report to the NPDB
- If you are not diligent, you may be reported to the Data Bank without having exercised your right to make a written response
- Don’t let this happen!
Questions