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Source: U.S. Law Week: News Archive > 2013 > 03/05/2013 > Case Alert > United States—Federal Tort Claims Act: Supreme Court Interprets FTCA to Revive Medical Battery Claims Against Government

81 U.S.L.W. 1232

United States—Federal Tort Claims Act

Supreme Court Interprets FTCA to Revive Medical Battery Claims Against Government

By Kimberly Robinson

The plain language of the Gonzalez Act, 10 U.S.C. § 1089(e), abrogates the intentional tort exception to the Federal Tort Claims Act's waiver of sovereign immunity, the U.S. Supreme Court unanimously held March 4 (*Levin v. United States,* U.S., No. 11-1351, 3/4/13).

Writing for the court, Justice Ruth Bader Ginsburg called the government's alternative interpretation of the Gonzalez Act—that it merely instructs courts to make a counter-factual assumption—"most unnatural."

The court reversed the Ninth Circuit, allowing the plaintiff's medical malpractice claim against the federal government for a surgery performed by a U.S. Navy doctor to go forward.

Gregory Sisk, a professor at the University of St. Thomas School of Law, Minneapolis, told BNA March 4 that although the case may have little application beyond medical malpractice claims involving military doctors, the case is significant within that field because it "makes clear that all claims based on lack of informed consent"—whether categorized under state law as a negligence action or an intentional tort action—"can be brought against the United States."

BNA Snapshot

Levin v. United States, U.S., No. 11-1351, 3/4/13

Key Holding: The intentional tort exception to the Federal Tort Claims Act's waiver of sovereign immunity does not bar suit against the federal government for intentional medical malpractice claims.

Potential Impact: The plaintiff's battery claims against the federal government for injuries sustained after surgery performed by a Navy doctor can go forward.

Consent Withdrawn?

Steven Alan Levin suffered injuries after he had cataract surgery performed by a Navy doctor.

Based on his assertions that he withdrew his consent for the surgery, Levin sued the federal government for medical malpractice battery.

Finding that the government was immune from suit, the district court dismissed the complaint.

After the Ninth Circuit affirmed the dismissal, Levin sought review in the Supreme Court.

'Dueling' Interpretations

The Supreme Court began by explaining the parties' "dueling constructions" of the Gonzalez Act and its effect on the FTCA.

Both parties agreed that although the FTCA generally waives the government's sovereign immunity for tort suits caused by federal employees acting within the scope of their employment, claims for certain intentional torts, including battery, are exempt from the waiver.

Moreover, there was no disagreement that the Gonzalez Act precludes a medical malpractice action—whether based on negligent or intentional acts—against armed forces medical personnel, by making a claim against the government under the FTCA the "exclusive" remedy.

However, the parties vigorously disagreed over the effect of Section 1089(e), which states, "For purposes of this section, [the FTCA's intentional tort exception] shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions."

Levin argued that Section 1089(e) negated the FTCA's intentional tort exception for intentional torts caused by armed forces medical personnel, and permitted intentional medical malpractice claims to be brought against the government.

The government argued that the purpose of Section 1089(e) was "simply to shore up [the Gonzalez Act's]

immunization of medical personnel against tort liability," the court said.

Given that the Gonzalez Act makes a claim against the federal government the exclusive remedy for medical malpractice claims, the government argued that if a party could not bring an intentional medical malpractice claim against the government, then the Gonzalez Act could be interpreted as not prohibiting such actions against armed forces medical personnel.

Accordingly, the court explained that under the government's interpretation, Section 1089(e) merely instructs courts to "pretend" that an intentional medical malpractice claim could be brought against the government, and "eliminates any doubt that the military medical personnel covered by §1089(a) are personally immune from malpractice liability."

Not Difficult Decision

Calling the government's interpretation "strained," the court said that the "choice between these alternative readings of §1089(e) is not difficult to make."

In particular, it found Levin's interpretation "far more compatible with the text and purpose of the federal legislation."

The court explained that when the FTCA was originally enacted, it permitted individual tortfeasors to be sued alongside the government. "In time," the court said, "Congress enacted a series of agency-specific statutes designed to shield precisely drawn classes of employees from the threat of personal liability."

Like the Gonzalez Act, these "[t]argeted immunity statutes … shielded medical personnel employed by specific agencies," and contained a provision similar to Section 1089(e).

However, Congress "depart[ed] from the [] agency-specific approach" when it enacted the Federal Employees Liability Reform and Tort Compensation Act, which "[s]hield[ed] all federal employees from personal liability without regard to agency affiliation or line of work."

Notably, however, the Liability Reform Act did not repeal the Gonzalez Act or any other targeted immunity statute. But under the government's interpretation, "the Liability Reform Act would displace much of the Gonzalez Act," the court said.

Not only does this seem contrary to Congress's refusal to repeal the Gonzalez Act, it is actually counter to the position taken by the government in *United States v. Smith*, 499 U.S. 160 (1991), the court said.

There, the government specifically argued that the Liability Reform Act did not effectively repeal the Gonzalez Act because the Gonzalez Act allowed malpractice suits against the government if the doctor's actions were intentional. Accordingly, not only is Levin's approach supported by the "ordinary meaning" of Section 1089(e), "[u]nder Levin's reading … , the Gonzalez Act does just what the Government said that legislation did in briefing *Smith*," the court said.

Court Not Opening Wide Door

Although an important decision for those pursuing medical malpractice claims relating to care provided by military doctors, Sisk emphasized that "the intentional tort exception remains in place outside of the narrow personnel covered under the Gonzalez Act."

Moreover, even as to military doctors Sisk said that the court's holding may be quite narrow.

"It's unlikely that the door is open for other intentional torts not related to medical torts," such as a sexual assault committed by a military doctor while treating a patient.

Not only does the Gonzalez Act require that the negligent or wrongful act be done "in the performance of medical, dental, or related health care functions" for the federal government to be liable, but the court's opinion "leaves untouched the [FTCA's] requirement that the act be done within the scope of [the tortfeasor's] employment," Sisk said.

Moreover, "for every other person employed by the federal government, a sexual assault claim against the government is barred" by the FTCA's intentional tort exception, Sisk added. It's not clear "why a sexual assault claim against a military recruit is any different than a sexual assault claim against a military doctor."

Court Taking Note?

Beyond the court's narrow holding, Josh Blackman, an assistant professor at the South Texas College of Law, Houston, told BNA March 4 that "[t]he Supreme Court, Chief Justice Roberts in particular, has taken note of

the government's inability to explain why [its] position has changed, save for a difference of policy."

In particular, Blackman pointed to an exchange between Roberts and Assistant Solicitor General Joseph R. Palmore earlier this term during oral arguments in *US Airways Inc. v. McCutchen* (81 U.S.L.W. 3297), in which Roberts suggested that the government was being disingenuous when it said that the government's position had change upon closer reflection: "It wasn't further reflection. We have a new Secretary now under a new administration, right," Roberts asked. "I think it would be more candid for your office to tell us when there is a change in position, that it's not based on further reflection of the Secretary. … We are seeing a lot of that lately."

Blackman said that this is an important consideration because "[w]hen the government changes its position during the course of litigation, it frustrates the reliance interests of private parties."

In fact, Blackman noted that during oral arguments in *Kiobel v. Royal Dutch Petroleum Co.* (81 U.S.L.W. 3131), Roberts told Solicitor General Donald B. Verrilli Jr. that "whatever deference you are entitled to is compromised by the fact that your predecessors took a different position."

While Sisk acknowledged that the government's change in position put it in "an awkward position," he said that "all administrations see things somewhat differently."

Although clear that the government was not acting "nefariously" in changing its position here, Sisk said that the government will need to be prepared in the future to "explain why it had a compelling reason for making the change."

Indeed, he pointed out that during oral arguments, while questioning the government's attorney about the change in position from *Smith*, Justice Kennedy quipped, "I know you would have been disappointed if we didn't ask you about this."

For More Information

Full text at http://pub.bna.com/lw/111351US.pdf and 81 U.S.L.W. 4160.

ISSN 1522-4317