Tort Claims against the Federal Government (2019)

Introduction

Historically, the federal and state governments had sovereign immunity, which was the common law concept that no one could sue the king (government). If the state injured a person, the only way for the individual to get compensation under sovereign immunity was to persuade the legislature to pass a special law authorizing such compensation.

After the Civil War, Congress passed federal laws, including the Civil Rights Acts (42 USC 1981, et seq.), which allowed individuals to sue state officials who used state authority to violate the individual's civil rights. Starting in the 1940s, the states and the federal government, responding to the huge legislative burden of private compensation bills and the potential for corruption in private compensation legislation, passed Tort Claims Acts. These acts provided a limited waiver of soverign immunity for negligence claims against the government and its employees. These laws attempt to balance the rights of injured individuals against the need to deliver cost-effective governmental services and the need to protect public officials and employees from individual liability for doing their job. Government officials and employees have to make many unpopular decisions to protect the public health and safety, and they cannot make these decisions if they are worried about liability for themselves or for their governmental employer.

Sovereign Immunity

Sovereign immunity refers to a government's immunity from being sued in its own courts without its consent. This doctrine dates as far back into the English common law as the thirteenth century. The premise of sovereign immunity was that "the king can do no wrong," because his will was the law. If the king acted, it was inherently lawful. Furthermore, there was no court high enough to try a king.

The doctrine made its way into American law when the states adopted the common law from England. Prior to the tort claims acts, which waived the immunity for certain claims, the only way to bring the federal or state government into court as a defendant was to attain its consent. *See* U.S. v. Mitchell, 463 U.S. 206, 212-13 (1983) (citing Paul Bator, et al., The Federal Courts and the Federal System 98 (2d ed. 1973)).

From the ratification of the United States Constitution until the 1985s, there were no exceptions to the sovereign immunity of the federal government. The United States Constitution declared that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9. Therefore, the only way to obtain an enforceable judgment against the federal government was by private bill. This meant that a would-be plaintiff had to petition his or her particular Congressman to introduce a bill allowing a waiver of sovereign immunity for that person's grievance. Congress could then pass that special bill, and the action could proceed in court.

Congress attempted to delegate this claims processing work to the courts. However, the U.S. Supreme Court held that this delegation violated separation of powers. Hayburns Case, 2 U.S. 409 (1792). As the federal government gradually expanded its spheres of influence, more and more private bills were introduced. This situation was not acceptable to Congress because the sheer number of claims meant there was no way to adequately investigate the merits of any claim before voting approving the immunity waiver. This might allow the approval of an otherwise unwarranted claim. The process was also difficult for litigants because of logistical difficulties. As a result, the immunity- waiver process was changed in 1855, when the Court of Claims was established.

The Court of Claims

Congress conferred jurisdiction upon the Court of Federal Claims for "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." Court of Claims Act of 1855, ch. 122, § 1, 10 Stat. 612. Originally, this Court of Claims was an advisory tribunal which would investigate claims made against the government and recommend appropriate action to Congress, which would then appropriate money by private bill. Because the Court of Claims was originally only empowered to issue advisory opinions, it was considered to be a legislative or Article I court. This meant the judges did not receive the constitutional protections of tenure during good behavior and assurance against salary diminution that Article III judges received.

In his State of the Union Message of 1861, President Lincoln recommended that the court be authorized to render final judgments. He declared that it is "as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals." Cong. Globe, 37th Cong., 2d Sess., app. 2 (1862). In 1863 Congress adopted Lincoln's recommendation and the decisions of the court became binding, meaning Congress was no longer required to approve the judgments. Act of March 3, 1863, ch. 92, 12 Stat. 765. Congress granted appellate jurisdiction to the Supreme Court over Court of Claims judgments in 1866. Act of March 17, 1866, *c.* 19, (14 St. 9). *See also* DeGroot v. U.S., 72 U.S. 419 (1866) (Supreme Court hears an appeal from Court of Claims).

Once the Court of Claims was granted power to render final judgments, its status as an Article I court was unsure. The Supreme Court decided in Williams v. United States, 289 U.S. 553 (1933), that the Court of Claims was an Article I court and Congress could therefore reduce the salaries of the judges on that court, which would be constitutionally forbidden for Article III courts.

The Tucker Act

The Tucker Act was passed in 1887. This law was a jurisdictional statute which expanded the scope of claims the Court of Claims could hear, but did not create any new substantive rights. Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980). The Tucker Act did two things: (1) Plaintiffs could seek judgments against the federal government for claims based upon the U.S. Constitution; (2) Circuit courts received concurrent jurisdiction with the Court of Claims for money damage claims of up to $10,000. In 1911, the jurisdiction of the circuit courts was transferred by Congress to the federal district courts.

In the Federal Courts Administration Act of 1992 (P.L. 102-572 § 902), the Court of Claims was renamed the Court of Federal Claims. The court is established under Article I. 28 U.S.C. § 171(a). The bench consists of sixteen judges, appointed by the president for terms of fifteen years. Procedure is in accordance with the Rules of the United States Claims Court, which are derived from the Federal Rules of Civil Procedure. Since 1982, the Court of Appeals for the Federal Circuit has is the route for an appeal from a Court of Federal Claims ruling. 28 U.S.C. § 1295(a)(3).

It has jurisdiction to "render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491. As such, the Court of Federal Claims hears three main types of suits against the government: government contract disputes; Fifth Amendment takings claims; and claims for tax refunds. The Tucker Act waives sovereign immunity for such claims against the federal government. United States v. Mitchell, 463 U.S. 206 (1983). Generally, only money damages are available in a Tucker Act claim. United States v. King, 395 U.S. 1 (1969). The Court of Federal Claims must accept as binding precedent any decision published by the former Court of Claims. West Seattle Gen. Hospital, Inc. v. United States, 1 Cl. Ct. 745 (1983). The Court of Federal Claims lacks jurisdiction under the Tucker Act to hear tort claims against the federal government; such claims must be brought under the Federal Tort Claims Act. Indeed, until the passage of the FTCA, private bill was the continued method for bringing tort claims against the federal government.

The Little Tucker Act

The Little Tucker Act was passed in 1887 and is now codified at 28 U.S.C. § 1346(a)(2). It gives the district courts original jurisdiction, concurrent with the Court of Federal Claims, of any civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. Thus, federal district courts were granted jurisdiction, along with the Court of Federal Claims, over "Tucker Act" suits against the federal government for claims under $10,000, hence the "little" Tucker Act.[United States v. Hohri, 482 U.S. 64 (1987)] Litigants now have an easier time of pursuing Tucker Act claims because they are able to utilize the district courts instead of traveling to Washington, D.C. with witnesses and evidence. Shaw v. Gwatney 795 F.2d 1351 (8th Cir. 1986).

If the claim is brought in a district court, that court sits as if it were the Court of Federal Claims. There is no jury trial and money judgments are generally the only relief available. Furthermore, claims must be for no more than $10,000 and state law plays no part in the case. The plaintiff does have the option of waiving all damages that exceed the

$10,000 cap in order to retain the district court's jurisdiction. Smith v. Orr, 855 F.2d 1544 (C.A.Fed. 1988). The federal rules of procedure are applied. If a claim is erroneously brought in federal district court, the court has the authority to transfer the case to the Court of Federal Claims. 28 U.S.C. § 1406(c). Appeals for Tucker Act claims decided in district court are brought to the United States Court of Appeals for the Federal Circuit, regardless of the which circuit the district court is part of.

Mixed Cases

An interesting scenario not considered in the statute occurred when a mixed case—one which involves multiple issues that are not all appropriate for Court of Claims jurisdiction—presented itself to the Supreme Court. Japanese- American World War II internees and their representatives brought suit against the United States, seeking money damages and declaratory judgment on 22 claims based upon a variety of constitutional violations, torts, and breach of contract and fiduciary duties. The Court held that: (1) language of Federal Courts Improvement Act did not clearly address mixed cases presenting claims under both those statutes; (2) bifurcation of the appeal was an inappropriate means of resolving jurisdictional problem; and (3) the legislative history and Congressional desire for a uniform adjudication of Little Tucker Act claims favored an interpretation that the federal circuit court had exclusive appellate jurisdiction over mixed cases. United States v. Hohri, 482 U.S. 64 (1987).

Current Status of Federal Sovereign Immunity

The government's immunity has subsequently been eroded by the courts, by statute, and by the Constitution itself, which guarantees certain enforceable rights to the individual. Still, there are recognized grounds for preserving immunity, at least in some circumstances. First, the Eleventh Amendment maintains certain immunities for states. Second, governmental decision makers should not be influenced by fear of private tort litigation. Last, it seems illogical for a claim to be brought against the very authority that created that claim.

The modern application of sovereign immunity prevents the federal and state governments from being sued without their consent, not because "the government can do no wrong," but because of the need to protect the public treasury and to protect governmental decision makers from being influenced by the threat of private lawsuits. "The government as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right." Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 704 (1949).

Governmental Liability for Torts

States and the federal government are immune from tort unless they waive soverign immunity through the statutes or through their state constitution. (Louisiana abolished state soverign immuniuty when it revised it's constition in 1974.) These laws waiving immunity provide the only mechanism for suing the federal government for tort damages, and, as discussed later, some types of damages, such as defamation, cannot be recovered against the federal government. As will be discussed, Congress preempted state immunity through the Civil Rights Act after the Civil War, allowing claims for certain torts without the requirement that the state waive its soverign immunity.

Federal Tort Claims Acts (FTCA)

Tort claims acts (TCA) are statutes that waive the government's sovereign immunity from tort liability. These statutes allow courts to exercise jurisdiction over the government in certain cases, thus allowing citizens to seek relief for torts committed by government employees. TCAs remove the need to directly petition the legislature for tort damages with a private bill, making relief from the government much more available.

The FTCA allows recovery "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." It allows people to sue federal government officials for certain actions by waiving the government’s immunity from tort liability.

Courts will strictly construe claims of government waiver of immunity in favor of the government. If a claim is ambiguous, the government will get the benefit of the doubt and retain immunity from liability.

The FTCA was enacted in 1946 to make the federal government liable in suit for the torts of its employees in the same way as a private individual is liable, although with some exceptions. Since there was no federal tort law to apply, the FTCA relies on substantive tort law of the state in which the claim arose. Molzof v. U.S., 502 U.S. 301 (1992). The ramifications of this are that if a particular tort is not recognized in that state, the plaintiff has no case. Midwest Knitting Mills, Inc. v. U.S., 950 F.2d 1295 (7th Cir. 1991).

The FTCA operates under a vicarious liability theory. If a suit is brought against a federal official for a common law tort, the federal government becomes the defendant. The federal official would be dismissed from the suit, and the federal government would be the defendant. Any damages awarded to the plaintiff would be paid by the federal government, not by the federal official. Therefore, the official will not be held accountable personally for damages awarded to the plaintiff, as long as the official was working within his scope of employment. Whether an official was working within the scope of his employment is determined on a case-by- case basis, but will include any normal and routine activities associated with the position he holds.

Process for Filing a Demand and Lawsuit

The district courts have exclusive jurisdiction over actions under the FTCA. Also, the FTCA is the exclusive remedy in any civil case resulting from a tort committed by a federal employee in the course and scope of employment. If suit is brought against the employee rather than the United States, the Attorney General will defend and the suit may be removed to a federal court if it has been commenced in a state court. However, the Attorney General must first certify that the employee was acting within the scope of his employment. Thus, any person who believes he has been injured by a government employee acting within the scope of his official duties will effectively be in litigation with the federal government once the Attorney General's certification of the employee's scope of employment issues. The employee can not be sued in his individual capacity if the government defends the suit.

Counsel must be aware of certain things when advancing a claim under the FTCA. There is no right to a jury trial in actions brought under the federal statute, even if one would have existed in a suit against the employee. 28 U.S.C. § 2402. Also, by forcing the injured party to bring the action against the federal government instead of the individual federal employee, the two-year statute of limitations governing FTCA cases applies regardless of state law. Therefore, the suit may be barred under the FTCA even if the action would have been timely under the state law. This result works an injustice when the plaintiff had no reason to believe that the federal government was involved in the dispute. However, the FTCA's two- year statute of limitations will also apply to allow a claim which would be time- barred under state law. For example, a claim was allowed against the federal government even though the claim had expired under Maryland's one-year statute of limitations. Maryland v. United States, 165 F.2d 869 (4th Cir. 1947).

Importantly, plaintiffs must first file an administrative claim with the appropriate agency before bringing a tort suit under the FTCA. This claim must give the governmental agency enough notice of its nature and basis so that it can begin its own investigation and evaluation, and it must demand payment for a "sum certain." The administrative claim must be filed within two years of the injury. 28 U.S.C. § 2401(b). A plaintiff's failure to first file an administrative claim will result in the claim being dismissed from the court for lack of subject matter jurisdiction. Because subject matter jurisdiction cannot be waived, the requirement to first file with the appropriate agency cannot be waived, Richman v. U.S., 709 F.2d 122 (1st Cir. 1983); nor can jurisdiction be stipulated. Bush v. U.S., 703 F.2d 491 (11th Cir. 1983).

After the administrative claim is filed, the agency must deny it in writing before a suit against the United States can be filed in district court. If the agency does not act upon the claim within six months, the claim is considered to be denied and the plaintiff can then proceed to bring the federal claim in court. 28 U.S.C. § 2675(a). If the administrative claim is denied outright by the agency or denial is presumed because of agency inaction for six months, the litigant has six months to file a tort claim in federal district court. 28 U.S.C. § 2401(b).

Litigants must take special precaution to ensure that the claim proceeds in proper order. To exemplify: A woman was injured on August 10, 1981 from falling into a manhole being worked on by the Veterans Administration (VA). She properly filed the claim with the VA on April 22, 1982. However, she filed an FTCA claim against the United States in federal district court on August 10, 1982. The VA sent her notice of denial of her administrative claim on October 22, 1982. On May 31, 1983, the district court dismissed the suit for lack of subject matter jurisdiction because the plaintiff had filed before receiving notice of denial from the VA. She was allowed to amend her complaint, and filed the amended supplemental complaint on June 13, 1983. The amended complaint was also dismissed for lack of subject matter jurisdiction by the district court. The Fifth Circuit agreed with the dismissal, holding that the claim was now time-barred. Plaintiff had 6 months to file suit in court after the VA denied the administrative claim; April 22, 1983 was therefore the relevant statute of limitations. Plaintiff's amended complaint was filed after this date. Furthermore, the amended complaint could not relate back to the original complaint (August 10, 1982) because the original complaint was prematurely filed and was not valid. Since an amended complaint cannot relate back to a date on which the court had no subject matter jurisdiction, her claim was lost. Reynolds v. U.S., 748 F.2d 291 (5th Cir. 1984).

Notice means the claim must be sufficiently specific to make the government aware of the action so it can prepare to defend itself. Goodman v. U.S., 298 F.3d 1048 (9th Cir. 2002) illustrates this requirement. A man filed an administrative claim against a federal agency for medical malpractice after the death of his wife. The claim was denied, and one day before the six-month time limit expired, he filed suit in federal court. Plaintiff later realized that the proper claim for him to file was a lack of informed consent, not medical malpractice. However, the United States argued that this claim was time-barred because six months had run since the claim was denied by the agency, and he should therefore not be allowed to amend the complaint. The circuit court of appeal decided otherwise, ruling that the administrative claim alleging medical malpractice was broad enough to put the government on notice of the claim for failure to obtain the patient's informed consent for the treatment. The administrative claim is not required to provide more than the minimal details of the factual predicate for the claim to put the government on notice. A full preview of the lawsuit reciting every possible theory of recovery is not required.

Damages

Compensatory damages are the only remedy recoverable under the FTCA. Fitch v. U.S., 513 F.2d 1013 (6th Cir. 1975). The FTCA does not allow courts to issue injunctions against the federal government. Moon v. Takisaki, 501 F.2d 389 (9th Cir. 1974). Punitive damages are expressly forbidden, even if they are allowed under state law. 28 U.S.C. § 2674.

Sovereign immunity bars an award of attorney fees against the federal government unless expressly authorized by statute. Since the FTCA does not expressly authorize attorney fees, they are not recoverable against the federal government under the FTCA. Joe v. U.S., 772 F.2d 1535 (11th Cir. 1985). Because no separate award of attorney fees may be awarded against the federal government, counsel will take payment from the awarded compensatory damages. However, the FTCA limits the amount which may be claimed by counsel from the compensatory damages award. No attorney may receive more than 25% of any compensatory damages or settlement. 28 U.S.C. § 2678.

The FTCA itself does not place a cap on the amount of damages recoverable against the federal government. However, the government's liability is limited in the same way that a private party would be limited under the relevant state law. Therefore, the United States is able to take advantage of any state damage caps on awards for medical malpractice. Carter v. U.S., 982 F.2d 1141 (7th Cir. 1992).

Exceptions to the FTCA

The FTCA does not waive immunity for all torts: major exceptions are carved out in 28 U.S.C. § 2680. These exceptions stipulate that the federal government will not be held liable for the claims against its employees arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. Also not allowed are damages from a quarantine imposed by the federal government. Claims based on intentional actions that are excluded from the FTCA may be brought as *Bivens* actions, if they rise to the level of constitutional violations (constitutional torts).

Products liability claims are not specifically addressed in the FTCA. However, cases that have dealt with questions of federal government liability for defective products generally dispose of such claims on government contractor or discretionary function grounds. For example, in a toxic tort claim against the federal government under the FTCA for neurological problems suffered by an infant allegedly as a result of exposure to roof sealant, the court held, *inter alia*, the claims against the government were barred under either the independent contractor exception or discretionary function exception. Goewey v. U.S., 886 F. Supp. 1268 (S.C. 1995). Strict liability for ultrahazardous activities is not allowed against the federal government under the FTCA. Laird v. Nelms, 406 U.S. 797 (1972).

Perhaps most significantly, § 2680(a) precludes recovery from the government for:

> "[A]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or 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."

This is the discretionary-function exception, and is discussed more fully below.

Discretionary Function Defense

The FTCA (and most state tort claims acts) preserve immunity from tort liability for the discretionary acts of government employees. This discretionary function exception is perhaps the most notable and complex exception to FTCA liability.

A discretionary function is an act involving an exercise of personal judgment. The basis for the discretionary function exception to the FTCA is the legislative branch's desire to prevent judicial second-guessing through tort actions of legislative and administrative decisions grounded in social, economic, and political policy. The federal government retains immunity from tort liability for itself and its employees for the performance or nonperformance of discretionary functions. This immunity is granted when the act in question requires the exercise of judgment in carrying out official duties. Discretionary immunity applies unless a plaintiff can show that a reasonable person in the official's position would have known that the action was illegal or beyond the scope of that official's legal authority. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

U.S. v. Varig Airlines, 467 U.S. 797 (1984) is a major case concerning the discretionary function. Here, the federal government was not held liable in a negligence action. A plane caught fire in midair and although it landed safely, many on board died from asphyxiation. The airline and survivors brought suit against the federal government for negligently certifying that the airplane met the applicable federal safety standards based upon a spot-check which did not include every aspect of safety. The Supreme Court held that the inspection was discretionary, and the government was therefore not liable. The Court did not want to involve itself with policy and the distribution of limited resources, which is how it viewed the safety inspection policy of only checking certain aspects of the plane for safety.

Ministerial Tasks

Immunity from tort liability does not apply if the action was mandated by law or regulation. These acts are not discretionary in nature, but ministerial. Ministerial tasks are those that do not require an official's discretion because they either follow a predetermined plan and cannot be changed, such as following a health department checklist regulation, or they do not involve any special expertise, such as driving a car. If a law or a regulation dictates a government employee’s course of action, that employee will be subject to liability for failure to comply.

Berkovitz v. U.S., 486 U.S. 531 (1988) is an important case on the discretionary function applied to the FTCA, and contrasts with *Varig*. There, a polio vaccine taken by plaintiff's infant son resulted in the child contracting the disease and becoming paralyzed as a result. A unanimous Supreme Court allowed the plaintiffs to recover under the FTCA when the federal government failed to follow its own regulations for approving the polio vaccine. The determination of how to test the polio vaccine was a discretionary function because it involved an element of choice or judgment on the employee's part. For this, the government could not be held liable under the FTCA. Once a regulation was made on how to test the vaccine, employee discretion was taken away and the function became ministerial. Therefore, immunity did not apply because the government has a duty to follow its own regulations.

Because the discretionary exception is meant to shield the government from liability for actions that require judgment according to public policy, the government was not liable in *Varig* but liable in *Berkovitz*. The regulatory scheme in *Varig* gave the agency broad powers to inspect aircraft in a manner it deemed best with the resources the agency possessed. The employee in *Berkovitz*, however, had no discretion to approve a bad batch of polio vaccine.

To further illustrate: A wrongful death suit (tort) was brought against the federal government arising out of the actions of emergency personnel in a national park accident.

The plaintiff alleged that emergency personnel did not properly stabilize the victim, did not properly administer CPR, and did not have the necessary equipment at the rescue site. Properly stabilizing the victim and administering CPR was not a discretionary function, and those claims were allowed under the FTCA. The court said the federal government is not immune from claims which challenge the actual administration of medical care by its employees, when the claims do not concern actions which are the product of judgment driven by consideration of competing policy- based choices. The failure of the emergency workers to have certain equipment on hand was a decision of which park stations should possess certain equipment. Not every park station could have the equipment because it was too expensive. Therefore, it was a discretionary function and the claim was not allowed. The National Park Service's decision as to the stationing of emergency medical technicians at various locations in the park is a protected discretionary function, but the technicians' rendering of medical services is not. Fang v. U.S., 140 F.3d 1238 (9th Cir. 1998).

Contrast this holding of immunity with another case involving a lab worker's exposure to rabies, which caused severe and permanent brain damage. The accident occurred in a state run lab, under the supervision of both a state doctor and a federal (CDC) doctor. The claim against the federal government for failure to warn of the dangers of the experiment fell under the FTCA, and was not a discretionary function. Therefore, the federal government was not immune. Andrulonis v. U.S., 952 F.2d 652 (2nd Cir. 1991)

Intentional Torts under FTCA

The intentional torts of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. 28 U.S.C. § 2680(h). Of these, the assault and battery exemption is of particular importance because the government can often successfully assert this exemption in medical claims where the alleged malpractice can be defined as a battery or assault.

Assault and Battery

This exception to the FTCA was applied in a case where the plaintiff alleged deviant sexual conduct by an Air Force clinical social worker who was treating the plaintiff for "blackouts". The court dismissed the claim by determining that the sexual misconduct constituted assault and sovereign immunity was therefore not waived. Doe v. U.S., 769 F.2d 174 (4th Cir. 1985).

In a Fifth Circuit case, a Naval recruit who alleged that she had contracted a venereal disease from consensual intercourse with an enlisted Naval petty officer sued under the FTCA, alleging fraudulent concealment of the infection by the officer and negligence on the part of the Navy. The court held that the fraudulent concealment of infection claim made the officer's actions a battery, and therefore fell within the intentional tort exception to the FTCA's waiver of sovereign immunity. Additionally, the claims of the Navy's negligence were not sufficiently distinct from the battery claim against the officer, and therefore were also not admissible under the FTCA.[Leleux v. United States, 178 F.3d 750 (5th Cir. 1999)]

In contrast, the assault and battery exception did not apply when there was no intentional wrongful act on the part of a government surgeon in cutting into the plaintiff's right knee when the left knee was supposed to be the one operated on. The court in Lane v. United States, 225 F. Supp. 850 (D.C. Va. 1964) concluded that § 2680(h) was inapplicable because under general tort law, assault must contain an element of intent. Furthermore, the surgeon was negligent, and this negligence should not lose its identity simply because the ultimate injury was the combined result of the negligence and the assault. The plaintiff was allowed to recover damages from the government.

Importantly, the assault or battery must have been committed by the government employee, not by a third party. For example, where an Air Force psychiatrist negligently failed to transmit to a second psychiatrist the history of a mentally ill airman who, as a result, was released and killed his wife, the court said the assault and battery exception was not applicable. The court noted that the assault and battery exception applied only to assault by government agents, not to assault by third parties which the government negligently failed to prevent. Underwood v. U.S., 356 F.2d 92 (5th Cir. 1966).

Defamation

There is an express exception in the FTCA for libel and slander. Congress thus intended to retain sovereign immunity with respect to defamation allegations against federal employees. Government officials, including public health officials, often use publicity, which might include defamation, to change or influence policy. For example, if a health inspector informs the press about a restaurant’s violations, the bad publicity generated might have more impact than any other enforcement measure. The health inspector will generally not be held liable to the restaurant for damages, even if the statements are false.

Military

In a military context, the federal government still retains immunity from liability from suits by servicemen. In the seminal case Feres v. U.S., 340 U.S. 135 (1950), the Supreme Court held that the United States was not liable in tort for the death of a serviceman by fire in the barracks while on active duty, or for the injury or death of servicemen resulting from negligence in medical treatment by Army surgeons. This case established that the FTCA does not waive immunity for injuries to servicemen arising out of, or in the course of, activity incident to military service. Significantly, the *Feres* bar on recovery does not hinge on the military status of the tortfeasor. Rather, the *Feres* doctrine bars all suits on behalf of service members against the federal government based upon service- related injuries. U.S. v. Johnson, 481 U.S. 681 (1987).

The government can be liable under the FTCA when the injury does not arise out of conduct incident to military service. This “incident to service requirement” is examined on a factual, case-by-case basis and will not be reduced to a bright-line test. U.S. v. Shearer, 473 U.S. 52 (1985). Still, it is applied broadly by the courts to bar government tort liability. For example, the *Feres* doctrine barred an active duty serviceman's claim for an injury incurred despite that the serviceman was off duty playing basketball, some of those who treated his injury were civilians, and his alternative legal remedies may have been inadequate. Borden v. Veterans Admin., 41 F.3d 763 (1st Cir. 1994).

Importantly, the *Feres* doctrine only applies to active military personnel. Therefore, claims brought by civilians or civilian dependents of service members are not barred by *Feres*. Mossow By Mossow v. U.S., 987 F.2d 1365 (8th Cir. 1993).

Retired military personnel are also not barred from bringing an FTCA claim by *Feres.* McGowan v. Scoggins, 881 F.2d 615 (9th Cir. 1989). This case presented an FTCA claim brought by a retired Army officer, seeking damages for harm suffered while entering an Air Force Base. The court held that the *Feres* doctrine is inapplicable to a claim filed by someone who is not a member of the armed forces for an injury that was not incident to current military service, or who is not subject to supervision of military personnel.

Members of state National Guard units not in the active federal service are considered employees of the individual state, not of the Federal Government. Therefore, the United States is not held liable under the FTCA for the negligence of nonactivated members of the guard. Williams v. United States, 189 F.2d 607 (10th Cir. 1951).

Law Enforcement Exception

After the United States Supreme Court created a right to sue for constitutional violations - such as intentional torts - in the *Bivens* case, Congress amended the FTCA to allow claims for assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution against an "investigative or law enforcement officer" of the United States. An "investigative or law enforcement officer" was defined as "...any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

The Government Contractor Defense

State tort claims are pre-empted where the plaintiff’s injury is caused by the allegedly defective design of military equipment manufactured by the defendant pursuant to a contract with the federal government. Boyle v United Technologies Corp., 487 U.S. 500 (1988). This case established the government contractor defense to tort liability. The Court reasoned that although state tort law may allow products liability claims against military manufacturers, this is an area of uniquely federal concern, regardless of the lack of federal legislation specifically claiming the immunity the absence. In an effort to determine the scope of this defense, the Court stated that this pre- emption is limited to areas of "significant conflict" between federal policy and state law. For guidance on the extent of "significant conflict", the court applied the discretionary function exception of the FTCA, which is to say that state law will be pre-empted wherever it threatens a discretionary function of the federal government. Here, the design of the allegedly defective product was a military discretionary decision.

In sum, *Boyle* established that state law which imposes liability on a military manufacturer is pre-empted when (1) the US approved reasonable precise product specifications, (2) the equipment conformed to those specifications, and (3) the supplier warned the US of the known dangers of using the equipment.

An important issue is whether the defense applies only to contracts with the military, or whether it can be used by other government contractors. The Supreme Court has employed language hinting that it may apply to all contractors, but has never spoke directly on the issue. *See* Hercules, Inc. v. U.S., 516 U.S. 417, 421 (1996) ("The Government contractor defense . . . shields contractors from tort liability for products manufactured for the Government in accordance with Government specifications, if the contractor warned the United States about any hazards known to the contractor but not to the Government"). The lower federal courts are split on the issue.