UNDERSTANDING CHAPTER 163

U.S. Service Members' Military Medical Malpractice Claims

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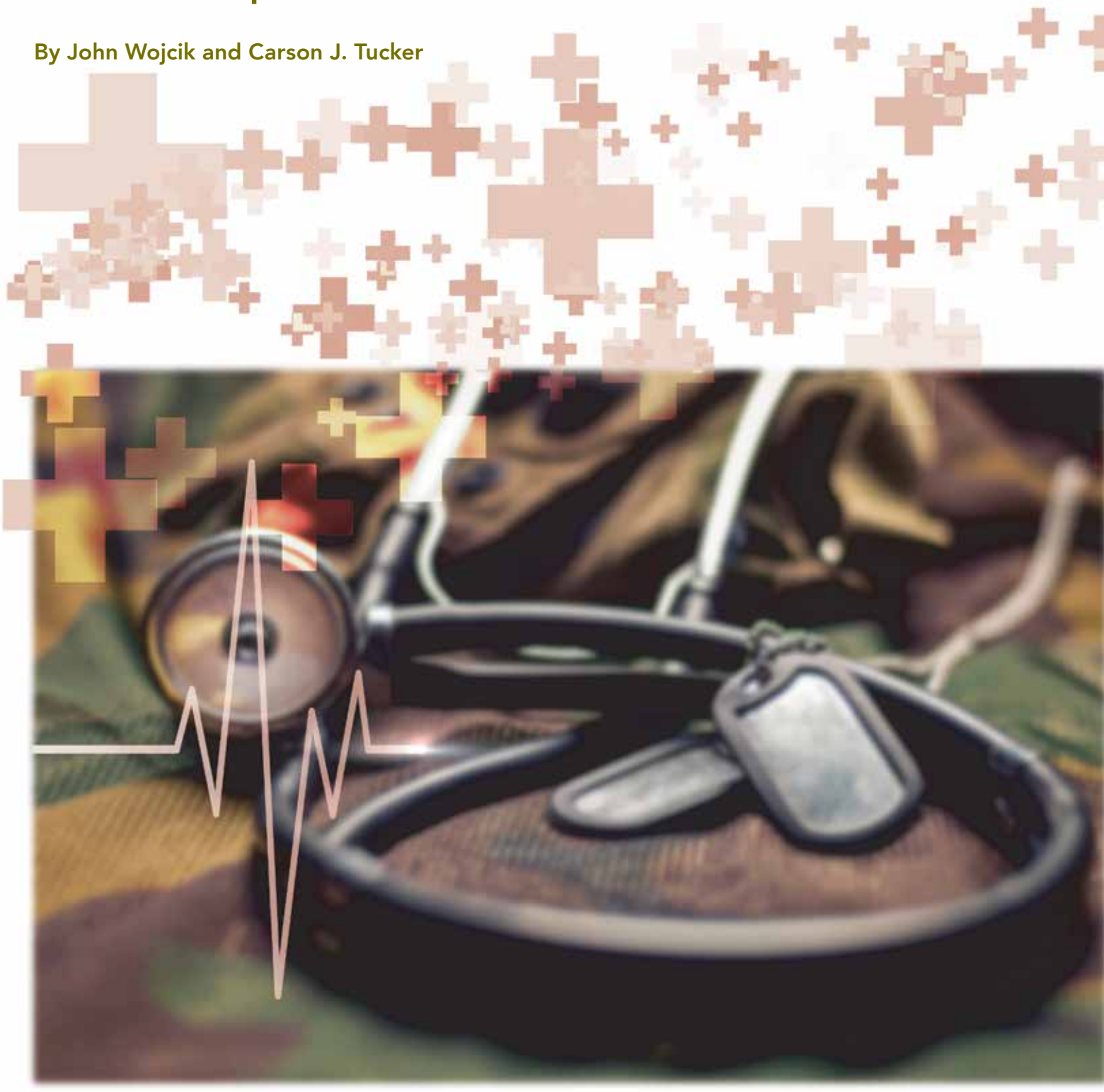

AT A GLANCE

With more than 600,000 veterans living in Michigan and 200,000 veterans nationwide leaving active duty each year, many practitioners may have clients who will file military medical malpractice claims under a 2019 federal law.

Military service members represent less than one percent of the U.S. population. However, this group is unique in the American workforce. Service members are deployed in high-risk environments at home and abroad. Since 9/11, military personnel have continuously served in dangerous, dynamic, and unpredictable conditions in multiple theaters of operation. When active-duty service members need medical attention, they are treated by physicians and nurses who either wear a military uniform or are employed by the U.S. Department of Defense (DOD) as civilian federal employees or contractors.

These military professionals and DOD personnel provide the full range of medical, dental, and optical care to service members and their immediate family members. While the DOD is proud of its providers, they are not perfect and do make mistakes. What happens when something goes wrong, causing injury to a service member?

Until recently, service members were not permitted to pursue malpractice claims against the U.S. government or its employees or contractors. A 70-year-old rule known as the Feres Doctrine prevented service members from filing claims against the government for injuries incurred "incident to service."[1] However, in December 2019, Congress enacted sweeping changes to the federal tort claims statutes, significantly weakening the Feres Doctrine's sovereign immunity protections. The new statute, known as Chapter 163,[2] allows service members to file claims against the federal government for malpractice caused by medical providers who work in some capacity for the DOD. The law went into effect at the start of 2020, yet its existence is relatively unknown even among the legal community that advocates for veterans. This article serves as a primer for Chapter 163 claims and explains how practitioners can help veterans navigate the new claims process.

The Feres Doctrine: 70 years of barred claims

In 1945, U.S. Army aviation mechanic Arthur Jefferson suffered complications related to his gallbladder[3] and sought treatment at the military hospital at Fort Belvoir, Virginia. The chief surgeon at the hospital, an Army officer, removed Jefferson's gallbladder. After the surgery, Jefferson complained of constant abdominal pain. About eight months later, he went to Johns Hopkins Medical Center; there, a surgeon removed a towel that measured 30 inches long by 18 inches wide stamped "Medical Department U.S. Army." The Army surgeon had left the towel in his abdomen.[4]

Jefferson filed suit, claiming the Army surgeon had been negligent and that negligence caused his injuries. The district court noted the case "present[ed] another new, difficult and unprecedented question," drawing attention to whether the relatively new Federal Tort Claims Act (FTCA)[5] authorized military service members to recover damages caused by the alleged negligence of an Army surgeon. The district court ruled it did not and the U.S. Court of Appeals for the Fourth Circuit affirmed.[6]

The doctrine of sovereign immunity protected the United States from such claims and Congress had not created an exception to this immunity. The FTCA, enacted in 1946, "was designed primarily to remove the sovereign immunity of the United States from suits in tort."[7] Although the FTCA allowed certain lawsuits to be brought against the United States, it barred suits by service members for injuries "arising out of or in the course of activity incident to service."[8] Jefferson's case was dismissed because he received medical care incident to his military service at the time of his alleged injury.[9]

In *Feres v United States*, the U.S. Supreme Court consolidated Jefferson's case with two others to address whether the FTCA applied to personal injury claims filed by service members against the federal government — Rudolph Feres, who died in a barracks fire, and Dudley Griggs, who died from a poorly performed brain surgery. The Court "conclude[d] that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of, or are in the course of, activity incident to service."[10] This came to be known as the Feres Doctrine.

For more than 70 years, the Feres Doctrine prevented U.S. service members from suing the federal government for injuries incurred during their service regardless of the cause of the injury. Courts reasoned that permitting FTCA claims would allow service members to receive double recovery for the same damages because of their ability to receive compensation for service-connected disabilities. The DOD and Department of Veterans Affairs (VA) already have a program for compensating service members for service-connected injuries and resulting disabilities. This program is not unlike civilian workers' compensation, Social Security disability, and disability insurance.

The courts also reasoned that allowing service members to sue their commanding officers and other federal officials for injuries sustained during combat or training would impede the ability of the military to function because every leadership decision could be challenged in court. The rationale was that military leaders needed to lead their troops in completing

their primary mission without distraction from burdensome litigation associated with injury claims, including giving depositions for court cases.

Filing claims as civilians under FTCA

While uniformed service members were prohibited from filing tort claims against the federal government, the FTCA allows civilians to file such claims.[11] The process includes completing a Standard Form 95 (SF 95): Claim for Damage, Injury, or Death[12] and submitting it to the claims office for the proper branch of service within two years of the incident that caused the injury. Once the claims office receives the SF 95, it investigates the claim's veracity within the unit or organization involved, determines whether the government is liable, and, if so, calculates the amount payable to the injured party. Disputes regarding the agency's final decision are appealable to the Federal Court of Claims, where the case can then be litigated.

Immediate relatives of service members (dependents) can receive the same medical care as their sponsor service member in U.S. military treatment facilities and other military locations around the world. When a DOD provider commits medical malpractice, the dependents can file claims[13] via the tort claims procedures under the Military Claims Act (MCA).[14] Dependent medical malpractice claims are also initiated by filing an SF 95 and require a demand for a certain sum and a description of the medical malpractice. MCA claims must also be filed within two years of the incident.

The Feres Doctrine takes a day off

If a DOD provider commits medical malpractice on the dependent of a service member, the dependent can maintain a claim for damages and even have the case litigated in federal court. But for the last seven decades, the Feres Doctrine jurisdictionally prevented service members from seeking the same remedy.

Over the past several years, there has been a groundswell of activism and support for allowing military personnel to file claims for medical malpractice injuries on their own behalf. Perhaps the two most vocal proponents of allowing those claims are Andrew Popper and Natalie Khawam.

Popper, an attorney and former member of the Judge Advocate General's (JAG) Corps, has written extensively on the disparities in and the failures of the antiquated application of the Feres Doctrine's ban on military medical malpractice claims.[15] Popper argued that military personnel pledged to protect and defend the same system that denied them the ability to seek compensation for injuries caused by negligently performed medical procedures.[16]

In 2019, Khawam, a medical malpractice attorney in Florida, answered a call from Richard Stayskal, a former Army Special Forces soldier. Stayskal had been diagnosed with terminal cancer by a civilian physician after he was discharged from active duty. When she took the case, Khawam learned that DOD medical providers at Fort Bragg during Stayskal's active-duty service in 2017 had misdiagnosed the cancer as pneumonia — a mistake that could have impacted the soldier's odds of surviving.[17]

Khawam reached out to lawmakers and implored Congress to make a statutory change to the Feres Doctrine. That same year, U.S. Rep. Jackie Speier, D–Calif., introduced a bill to end the Feres Doctrine and allow service members to file medical malpractice claims against the federal government. The Medical Malpractice Claims Act (MMCA or Chapter 163) was included in the 2020 National Defense Authorization Act, signed into law in December 2019, and took effect on January 1, 2020. That same day, Khawam helped Stayskal file a $5 million claim against the federal government for the medical malpractice that he claims occurred at Fort Bragg during his active-duty service in 2017[18] — in 2020, Chapter 163 let service members file claims going back three years, which allowed Stayskal to file his 2017 claim.

The MMCA: What it says

Military medical malpractice claims are now subject to the same two-year statute of limitations found in the FTCA.[19] To maintain a viable claim, the service member claimant must allege that:

- The claim was caused by the negligence, wrongful act, or omission of a Department of Defense health care provider acting within the scope of his or her employment;
- The service member was serving in a federal duty status at the time of the incident;
- The incident occurred in a military medical treatment facility;
- The claim is filed within the two-year statute of limitations; and
- The claim is substantiated as prescribed in regulations enacted by the Secretary of Defense.[20]

While the statute does not allow direct payment of attorney fees by the DOD, it does allow attorneys to collect up to 20 percent of the claim proceeds for services rendered.[21] The entire statute for filing Chapter 163 claims is rather short and lacks specificity.

The MMCA: What it doesn't say

While the MMCA provides only the bare necessities of how the new claims process will work, it tasked the Secretary of Defense to fill in the rest of the details by creating a new

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set of regulations and adopting an interim final rule.[22] The Secretary of Defense needs to identify the tort "standards of negligence" using what practitioners call the "uniform standards" consistent with a majority of states. This is similar to what is currently used for FTCA claims, although FTCA liability for medical malpractice is generally controlled by state law in the jurisdiction in which the claim is brought.[23] At this time, it is unknown what elements will need to be shown by claimants when they file an SF 95 or whether the Secretary of Defense will require claimants to include affidavits of merit from licensed medical providers.

An exception exists for service members who suffer medical malpractice-related injuries while deployed in combat operations or treated in a troop clinic. These service members will not be able to file claims under Chapter 163; they can only file claims if the treatment occurred in a "covered medical treatment facility" which includes military hospitals, ambulatory care centers, and some overseas military treatment facilities.[24] Generally, reservists injured due to malpractice while serving on active duty or in a federal duty status during a military drill can also maintain a claim unless they fall under the combat operations or troop clinic exceptions noted above.[25]

Whether the Secretary of Defense will allow any type of negotiations for MMCA claims is uncertain. In cases where military dependents file malpractice claims under the FTCA, claims officers are permitted to engage directly with claimants and counsel and make offers at various stages of the process. Except for Chapter 163 claims, the actual process the DOD will use to accept, process, negotiate, and settle claims has not been established. The Secretary of Defense is required to file its draft administrative rules in the Federal Register, which will allow for a brief public comment period before they can be adopted as part of the Code of Federal Regulations.

Also unknown are the requirements for proof of duty, breach of duty, causation, or guidance on how damages will be calculated.[26] While FTCA cases are appealable within the federal court system, Chapter 163 claims are not. Also, the statute does not address whether claimants may engage in discovery with the claims office of the branch of service or the medical staff who treated the claimant.

Another area that has not been fleshed out is whether there is an offset requirement. For example, when military dependents receive awards for medical malpractice claims, the government reduces those awards in relation to other federal benefits they are entitled to receive to prevent double recoveries. While Chapter 163 is silent concerning the government's ability to offset a service member's malpractice award, we should expect the final rules to impose similar limitations. Ultimately, these decisions will be made by the Secretary of Defense.

What does this mean for practitioners?

While less than one percent of U.S. citizens currently serve in the military, more than 200,000 service members leave active-duty service every year, and some of them will choose to live in Michigan. Additionally, more than 1.1 million service members make up the U.S. reserve military forces, some of whom are also Michigan residents. Michigan also has more than 11,000 National Guard members. Chapter 163 applies equally to active-duty personnel and reservists injured while serving in a federal duty status; that includes drill weekends, annual training, and any other training on an active-duty base. With more than 600,000 veterans living in the state,[27] it's likely that many Michigan practitioners will have clients or potential clients within the two-year window who will file military medical malpractice claims.

Conclusion

Health care is provided to service members and their families while they are in the military and transitioning to veteran

status. Under Chapter 163 of the recently adopted MMCA, procedures for filing medical malpractice claims on behalf of current and former military service members within the law's two-year statute of limitations have changed. Given the number of current and former service members in Michigan who may have potential claims, practitioners should be aware of coverage under the MMCA and the general procedures for bringing claims. ■

The views presented are those of the authors and do not necessarily represent the views of the U.S. Department of Defense or its components.

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ENDNOTES

1. *Feres v United States*, 340 US 135, 136–37; 71 S Ct 153; 95 L Ed 152, 156 (1950).
2. 10 USC 2733(a).
3. *Jefferson v United States*, 77 F Supp 706 (D Md, 1948).
4. *Id.* at 708.
5. *Id.* at 710, 28 USC 1346(b) and 28 USC 2671 *et seq.*
6. *Jefferson v United States*, 178 F 2d 518, 520 (CA 4, 1949).
7. *Richards v United States*, 369 US 1, 6; 82 S Ct 585; 7 L Ed 2d 492 (1962). See also *Levin v United States*, 568 US 503, 506; 133 S Ct 1224; 185 L Ed 2d 343 (2013).
8. *Feres v United States*, 340 US at 146.
9. *Id.*
10. *Id.*
11. 28 USC 1346 and 28 USC 2671.
12. VA Form 95, US Dep't of Veterans Affairs (2007), available at <https://www.va.gov/OGC/docs/SF-95.pdf> [https://perma.cc/4NEJ-6NND]. All websites cited in this article were accessed April 17, 2021.
13. 10 USC 1089.
14. 10 USC 2131–2137, and see also 32 CFR Subpart C.
15. Popper, *Rethinking* Feres*: Granting Access to Justice for Service Members*, 60 Boston College L R 1493 (2019), available at <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3784&context=bclr> [https://perma.cc/7KHP-8PL6].
16. *Id.* at 1495.
17. Kime, *Got a military medical malpractice claim? Here's how to file*, Military Times (January 10, 2020), available at <https://www.militarytimes.com/pay-benefits/2020/01/10/got-a-military-medical-malpractice-claim-heres-how-to-file/> [https://perma.cc/WRV9-ENCU].
18. *Id.*
19. 10 USC 2733a.
20. 10 USC 2733a(b)(1–6).
21. 10 USC 2733a(g)(1).
22. 10 USC 2733a(f).
23. 10 USC 2733a(f)(2)(B) and *Cleveland v United States*, 457 F3d 397, 403 (CA 5, 2006) (noting that "[s]tate substantive law applies in suits brought under the FTCA").
24. 10 USC 2733a(i)(1), *citing* 10 USC 1073d(b, c, and d).
25. 10 USC 2733a(i)(3).
26. *Id.*
27. *Percentage of Veterans by State (2017)*, accessible through *Reports*, Nat'l Center for Veterans Analysis and Statistics, US Dep't of Veterans Affairs <https://www.va.gov/vetdata/Report.asp> [https://perma.cc/ZWU5-52K9].