

Are Navy Hospitals Protected By State Law?

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## I. INTRODUCTION

Are Navy hospitals protected by state law? This question is prompted by recent events in the Northeast Florida area. Naval Hospital Jacksonville has been the subject of multiple high-profile medical liability suits.<sup>1</sup> Many of these cases have alleged multi-million dollar damages.<sup>2</sup> This is in spite of comprehensive medical liability reform enacted in the State of Florida in 2003.<sup>3</sup> This leads to the obvious question: Are Federal Government medical facilities in Florida subject to statutory liability limits specified by Florida state law?

In order to analyze this question, we will first consider *Taylor v. United States*.<sup>4</sup> This was an California case from the United States Court of Appeals for the Ninth Circuit.<sup>5</sup> The case involved an allegation of negligent medical care at an Army hospital in California. As we analyze this case, comparisons will be drawn from other cases around the country involving Federal medical facilities operating in the context of their individual forum states' laws. We will then provide recommendations regarding the application of Florida state statutory medical liability limitations to Federal medical facilities in Florida. Finally, we will examine the provocative question of whether military medical facilities in Florida have been targeted for liability suits due to a perception, correct or incorrect, that they are exempt from state statutory liability limits.

## II. STATEMENT OF THE CASE

In *Taylor*, the appellee's husband was a patient with "Lou Gehrig's Disease" or

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<sup>1</sup>Bradley Parsons, *Military Med Mal Becoming a Trend*, FIN. NEWS & DAILY RECORD, Jan. 23, 2006, [http://www.jaxdailyrecord.com/showstory.php?Story\\_id=44424](http://www.jaxdailyrecord.com/showstory.php?Story_id=44424).

<sup>2</sup>*Id.*

amyotrophic lateral sclerosis, a severe, chronic progressive neurological disease.<sup>6</sup> The patient was being treated for pneumonia at Letterman Army Hospital.<sup>7</sup> During the patient's hospitalization, he became disconnected from a mechanical ventilator for unknown reasons.<sup>8</sup> By the time this was discovered, the patient was deprived of oxygen for such an extended period of time that he suffered "severe and irreparable brain damage".<sup>9</sup>

At the original trial, in the United States District Court for the Northern District of California, the only issues were related to damages, since the government stipulated to liability.<sup>10</sup> Mrs. Ida Taylor was awarded a total of \$600,000; \$100,000 for negligent infliction of emotional distress and \$500,000 for loss of consortium.<sup>11</sup> On appeal, the Ninth Circuit found that the damage award should have been limited by California law, in particular the statutory limits imposed by the Medical Injury Compensation Reform Act ("MICRA"), *Cal. Civ. Code* §3333.2.<sup>12</sup> The court rejected arguments by the appellee that the case involved "ordinary negligence" instead of professional negligence; and that the United States was not a "health care provider" under California law because it was not licensed by the state.<sup>13</sup> The Court noted that the State of California did not have the power to require licensing of federal physicians and health care providers.<sup>14</sup> The United States, under the Supremacy Clause (*U.S. Const. Art. IV, cl.2*) deemed the hospital and staff fit to provide health care in California, and to hold that the

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<sup>3</sup>Robert E. Cline & Carl J. Pepine, *Medical Malpractice Crisis – Florida's Recent Experience*, 109 CIRCULATION 2936 (2004).

<sup>4</sup>Taylor v. United States, 821 F.2d 1428 (9th Cir. 1987).

<sup>5</sup>*Id.*

<sup>6</sup>*Id.* at 1430.

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>Taylor, 821 F.2d at 1430.

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>*Id.* at 1431.

statute limiting damages did not apply would contravene the provisions of FTCA, the Court concluded.<sup>15</sup> When the Ninth Circuit incorporated the provisions of MICRA within the Federal Tort Claims Act, 28 U.S.C.S. § 2674<sup>16</sup>, the Court reversed and remanded with instructions to reduce the noneconomic damage award to \$250,000.<sup>17</sup>

### III. ANALYSIS

#### 1. *State Laws Limiting Medical Liability and FTCA*

Under the provisions of the Federal Tort Claims Act (“FTCA”), the government “shall be liable...in the same manner and to the same extent as a private individual under like circumstances...” 28 U.S.C. § 2674.<sup>18</sup> The determination of liability is measured “in accordance with the law of the place where the [negligent] act or omission occurred.” 28 U.S.C. § 1346.<sup>19</sup> The Ninth Circuit reasoned that since the negligent act occurred in California, the Federal Government’s liability is determined by California law.

MICRA was enacted in California in 1975.<sup>20</sup> The law provides in pertinent part:

(a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic damages to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.

(b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars. (\$250,000).<sup>21</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> Taylor, 821 F.2d at 1431.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> 28 U.S.C. § 2674.

<sup>19</sup> 28 U.S.C. § 1346.

It seems straightforward to argue that since the Federal Government shall be liable in the same manner and the same extent as a private individual under like circumstances, and the measure of liability is in accordance with the law of the place where the negligent act occurred, then state law should apply in such cases. There is an abundance of case law from around country which supports this reasoning.

*Carter v. United States*<sup>22</sup> involved the United States as defendant in a medical liability case, being sued under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 2671 *et seq.*<sup>23</sup> The question before the court was whether the United States is protected by Indiana Code § 16-9.5-2-2, which provides a \$500,000 limitation on medical liability awards to “qualified health care providers” in Indiana.<sup>24</sup> The United States Court of Appeals for the Seventh Circuit affirmed the dismissal holding that the value of the veterans’ benefits received by the injured patient and his wife exceeded the possible recovery for malpractice under Indiana law.

In *Lozada v. United States*, the Court found that the Hospital-Medical Liability Act, Neb. Rev. Stat. § 44-2825(1), which provided for a statutory cap on damages from a health care provider in Nebraska, applied to a case of professional medical negligence by Air Force physicians and medical personnel which occurred in Nebraska.<sup>25</sup> This case concerned

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<sup>20</sup>CAL. CIV. CODE § 3333.2 (1975).

<sup>21</sup>*Id.*

<sup>22</sup>*Carter v. United States*, 982 F.2d 1141 (7th Cir. 1992).

<sup>23</sup>*Id.*, citing 28 U.S.C. §§ 2671 *et seq.*

<sup>24</sup>*Id.* at 1143 (citing IND. CODE § 16-9.5-2-2).

<sup>25</sup>*Lozada v. United States*, 974 F.2d 986 (8th Cir. 1992).

<sup>26</sup>*Id.*

<sup>27</sup>*Id.* at 988.

<sup>28</sup>*Id.*

<sup>29</sup>*Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986).

<sup>30</sup>*Id.* at 417.

<sup>31</sup>*Id.*

<sup>32</sup>*Starns v. United States*, 923 F.2d 34 (4th Cir. 1991).

<sup>33</sup>*Fetter v. United States*, 649 F. Supp. 1097 (D. Cal. 1986).

injuries incurred during childbirth.<sup>26</sup> The court rejected arguments by the plaintiff that the Air Force Hospital was not a “qualified health care provider” under Neb. Rev. Stat. § 44-2821(4) and § 44-2824, since it failed to file proof of financial responsibility or pay surcharges imposed by the state’s excess liability fund.<sup>27</sup> The Court noted as in previous cases that FTCA 28 U.S.C.A. § 2674 provides the rule of government liability “in the same manner and the same extent as a private individual under like circumstances” and the rule of liability to be determined “in accordance with the law of the place where the negligent acts or omissions occurred.”<sup>28</sup>

In *Lucas v. United States*, the Court found that the Texas statutory cap on damages from a health care provider applied to federally operated hospitals under the FTCA.<sup>29</sup> Similarly to *Lozada*, the plaintiff argued that the government hospital was not a “hospital” or a “health care provider” within the meaning of the Texas statute.<sup>30</sup> The Court again rejected this argument in an analogous fashion to *Lozada*, noting that the government’s liability flowed from the FTCA and not the Texas statute.<sup>31</sup>

Many other cases have had similar outcomes. *Starns v. United States* applied Virginia’s statutory limitation on damages to a judgment in a medical liability suit against the United States under the FTCA.<sup>32</sup> *Fetter v. United States* is another California case which rejected plaintiff’s arguments that military physicians were not within the definition of “health care providers” under MICRA.<sup>33</sup> In *Garcia v. United States*, 697 F. Supp. 1570, the court noted that the Colorado statute (*Colo. Rev. Stat. § 13-21-102.5(3)*) which limits damages in medical liability cases, applies to actions against the Federal Government under FTCA.<sup>34</sup> Similarly, the Louisiana statute (*La. Rev. Stat. § 40:1299.42(B)(1)*) was found to limit the liability of the Federal Government under FTCA in medical liability cases in *Kennedy v. United States*, 750 F.

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<sup>34</sup>*Garcia v. United States*, 697 F. Supp. 1570 (D. Colo. 1988) (citing COLO. REV. STAT. § 13-21-102.5(3) which limits damages in medical liability cases.)

Supp. 206.<sup>35</sup> In *Carter v. United States*, the Maryland cap on noneconomic damages was found to apply in a medical malpractice action against the United States.<sup>36</sup> Interestingly, the alleged incident of malpractice occurred in Maryland and the case was brought in district court in Illinois.<sup>37</sup>

One must look to the unusual case of *Cheromiah v. United States*, in order to find an instance where the state law does not apply in medical malpractice cases against the United States.<sup>38</sup> In this case, members of the Acoma Tribe in New Mexico filed a medical malpractice action against the United States under FTCA for alleged medical negligence in a Federal hospital situated on tribal land.<sup>39</sup> The plaintiffs' son died of a bacterial infection after being treated by emergency room personnel at Acoma Canocito Laguna Hospital ("ACL hospital"), a hospital operated by Indian Health Services, a United States Government agency.<sup>40</sup> The court ruled that the New Mexico statute limiting liability in medical malpractice did not apply to the defendant federal government hospital since the hospital was located on Acoma tribal land, and "Acoma tribal law controlled."<sup>41</sup> The court reasoned as follows:

Plaintiffs' argument that the law of the Acoma Tribe controls in this case is simple and direct and based entirely on the text of [the FTCA] as follows: [T]he statutory text provides that the United States shall be liable 'in accordance with the law of the place where the act or omission occurred;' the medical malpractice alleged in this case occurred within the boundaries of the Acoma Tribe, on tribal lands; therefore, pursuant to the plain language of the text, the law of the tribe controls in this case.<sup>42</sup>

This case has been widely criticized. In *LaFramboise v. United States*

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<sup>35</sup>Kennedy v. United States, 750 F. Supp. 206 (D. La. 1990).

<sup>36</sup>Carter v. United States, 333 F.3d 791 (7th Cir. 2003).

<sup>37</sup>*Id.*

<sup>38</sup>Cheromiah v. United States, 55 F. Supp. 2d 1295 (D.N.M. 1999).

<sup>39</sup>*Id.* at 1297.

<sup>40</sup>*Id.*

<sup>41</sup>*Id.* at 1302.

<sup>42</sup>*Id.*

the plaintiff was treated for a head injury at a hospital located on the Turtle Mountain Indian Reservation in Belcourt, North Dakota.<sup>43</sup> Plaintiff alleged permanent severe injuries from allegedly negligent treatment of the head injury.<sup>44</sup> The court noted that the FTCA puts forth the concept of “the law of the place” as follows:

...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. 28 U.S.C. § 1346(b)(1).<sup>45</sup>

The United States contended that the “law of the place” refers to North Dakota, and that North Dakota law applied.<sup>46</sup> Plaintiff attempted to assert that Indian tribal law applied, in order to avoid the provisions of a North Dakota statute (*N.D. Cent. Code § 28-01-46*) which provides for the dismissal of any medical liability claim where the plaintiff fails to provide an expert affidavit within three months of filing the lawsuit.<sup>47</sup> The court granted summary judgment in favor of the United States, reasoning that:

Since the FTCA’s enactment in 1948, the ‘law of the place’ has meant the law of the state where the negligent act or omission occurred...[t]his same approach has been used when the negligent act or omission occurred on Indian land located within a state...in light of the overwhelming case law favoring the application of state law, as well as the use of that approach by the Eighth Circuit, this Court will look to the application of North Dakota law for claims arising under the FTCA.<sup>48</sup>

We have so far established that there is a large body of *persuasive* precedent favoring the concept of state-imposed medical liability caps applying to Federal medical facilities operating in the forum state. Our task now is to look to the 11<sup>th</sup> Circuit for any *mandatory* precedent in this regard.

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<sup>43</sup> LaFramboise v. United States, 329 F. Supp. 2d 1054 (D.N.D. 2004).

<sup>44</sup> *Id.* at 1055.

<sup>45</sup> *Id.* (citing 28 U.S.C. § 1346(b)(1)).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1057 (citing N.D. Cent. Code § 28-01-46).

## 2. Florida Law and FTCA

Although there does not appear to be an 11<sup>th</sup> Circuit case exactly on point, *Scheib v. Florida Sanitarium and Benevolent Association* (759 F.2d 859) provides some guidance in this area.<sup>49</sup> In *Scheib*, the appellant in a medical liability case sought to overturn the order of the United States District Court for the Middle District of Florida, which reduced the damages payable under FTCA by setoff provided for by state law, namely *Fla. Stat. Ann. § 768.50*.<sup>50</sup>

768.50. Collateral sources of indemnity.

(1) In any action for damages for personal injury or wrongful death, whether in tort or in contract, arising out of the rendition of professional services by a health care provider in which liability is admitted or is determined by the trier of fact and damages are awarded to compensate the claimant for losses sustained, the court shall reduce the amount of such award by the total of all amounts paid to the claimant from all collateral sources which are available to him...<sup>51</sup>

The court affirmed the district court's ruling, again referring to the FTCA provision that the Federal government may be held liable only "to the same extent as a private individual under like circumstances."<sup>52</sup> The court also embraced the concept of "the law of the place" as enunciated in *LaFramboise*.<sup>53</sup> The court noted that "state law cannot expand the Government's liability beyond that which could flow from an analogous private activity."<sup>54</sup> Most importantly for our purposes, the court concluded that "[t]he limitation of the Government's liability under the [FTCA] to the same extent as a private party applies to any [state] limitation on damages."<sup>55</sup>

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<sup>48</sup>LaFramboise, 329 F. Supp. 2d 1054, at 1056.

<sup>49</sup>*Scheib v. Florida Sanitarium and Benevolent Ass'n.*, 759 F.2d 859 (11th Cir. 1985).

<sup>50</sup>*Id.* at 862 (citing FLA. STAT. ANN. § 768.50, the collateral source rule.)

<sup>51</sup>*Id.*

<sup>52</sup>*Id.* at 863.

<sup>53</sup>*Id.* at 864.

<sup>54</sup>*Id.*

<sup>55</sup>*Id.*

<sup>56</sup>Cline & Pepine, 109 CIRCULATION 2936 (2004).

<sup>57</sup>*Id.*

(emphasis added).

### 3. *Florida's Comprehensive Medical Liability Legislation*

Florida passed comprehensive medical liability reform legislation in August of 2003.<sup>56</sup> This legislation was prompted in part by skyrocketing liability insurance rates for physicians in the state, the decreasing availability of such coverage, and the expressed desire of many physicians to leave the state due to liability expenses and concerns.<sup>57</sup> The legislation includes a cap on noneconomic damages of \$500,000 which is increased to \$1,000,000 in cases of “death, paralysis or other serious complications.”<sup>58</sup> Importantly, emergency room cases have a lower cap of \$150,000 with a similar provision to increase to \$300,000 in some cases. The pertinent parts of the statute are as follows:

766.118 Determination of noneconomic damages.

(2) LIMITATION ON NONECONOMIC DAMAGES FOR NEGLIGENCE OF PRACTITIONERS.

(a) With respect to a cause of action for personal injury or wrongful death arising from medical negligence of practitioners, regardless of the number of such practitioner defendants, noneconomic damages shall not exceed \$500,000 per claimant. No practitioner shall be liable for more than \$500,000 in noneconomic damages, regardless of the number of claimants.

(b) Notwithstanding paragraph (a), if the negligence resulted in a permanent vegetative state or death, the total noneconomic damages recoverable from all practitioners, regardless of the number of claimants, under this paragraph shall not exceed \$1 million.

...(3) LIMITATION ON NONECONOMIC DAMAGES FOR NEGLIGENCE OF NONPRACTITIONER DEFENDANTS.

(a) ...shall not exceed \$750,000 per claimant...if the negligence resulted in a permanent vegetative state or death...\$1.5 million...

...(4) LIMITATION ON NONECONOMIC DAMAGES OF PRACTITIONERS PROVIDING EMERGENCY SERVICES AND CARE.

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<sup>58</sup> *Id.*

(a) regardless of the number of such practitioner defendants, noneconomic damages shall not exceed \$150,000 per claimant.<sup>59</sup>

Hospitals are included in the category of “nonpractitioner defendants”.

We will now turn to a survey of cases from Naval Hospital Jacksonville where the allegations of malpractice stem from incidents occurring after August 2003, when comprehensive tort reform was enacted in Florida.

#### ***4.Recent Naval Hospital Jacksonville Cases***

*Alcorn v. United States* is a case currently in litigation, involving allegations of improper care by Naval Hospital Jacksonville during childbirth. The plaintiffs are claiming \$150 million in damages. When the Alcorns’ son was born in May 2005, he allegedly suffered severe neurological injuries from lack of oxygen during birth.<sup>60</sup>

*Backman v. United States* involves allegations of the use of “unsterile instruments” during an umbilical hernia repair surgery on August 30, 2006.<sup>61</sup> The plaintiff is claiming \$5 million in damages.<sup>62</sup>

*Hugaboom v. United States* involves allegation of delay in diagnosis of bacterial meningitis in a 7-month old boy who died on February 4, 2004.<sup>63</sup> The child “had been to the

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<sup>59</sup>FLA. STAT. 766.118 (2003).

<sup>60</sup>Grayson Kamm, *Naval Hospital Jacksonville Sued for \$150Million*, FIRST COAST NEWS, Feb. 8, 2007, <http://www.firstcoastnews.com/news/breaking/news-article.aspx?storyid=75514>.

<sup>61</sup>Jackelyn Barnard, *Woman Claims Naval Hospital Used Dirty Instruments*, FIRST COAST NEWS, Nov. 28, 2006, <http://www.firstcoastnews.com/news/local/news-article.aspx?storyid=70028>.

<sup>62</sup>*Id.*

<sup>63</sup>Katie Wiltrout, *Parents Sue Jacksonville Naval Hospital Over Baby’s Death*, VIRGINIAN-PILOT, Dec. 8, 2005.

<sup>64</sup>*Id.*

<sup>65</sup>*Id.*

emergency room [at NHJ] three times over a period of four days.<sup>64</sup> The Hugabooms are suing NHJ for \$15 million.<sup>65</sup> In June of 2007, plaintiffs settled with the Navy for \$900,000.<sup>66</sup>

*Shantz v. United States* is almost identical to *Hugaboom*.<sup>67</sup> Here the allegations are that a three-month old child was seen at NHJ emergency room, given Tylenol for a fever and died of bacterial meningitis the next day, June 29<sup>th</sup>, 2005.<sup>68</sup> The Shantz' are also claiming \$15 million in damages.<sup>69</sup>

*Coaile v. United States* concerns allegations of delay in diagnosis of a brain aneurysm.<sup>70</sup> Achibal Coaile alleges that his wife Rosario had an aneurysm which NHJ doctors failed to diagnose.<sup>71</sup> Instead, "she was given pain medication for her headaches and told to go home. Days later she died."<sup>72</sup> Plaintiff is claiming \$17 million damages.<sup>73</sup>

*Lloyd v. United States* involves the case of Wanda Lloyd who was taken to the NHJ emergency room on December 24<sup>th</sup>, 2003 complaining of chest pains. She died three days later allegedly from an undiagnosed thoracic aneurysm.<sup>74</sup> Plaintiff settled for \$1.5 million in mediation.<sup>75</sup>

It is interesting to note that several similar cases involving incidents prior to August 2003 have settled or reached verdicts of multimillions. For example, in *Rodriguez v. United States*, a cerebral palsy case resulted in a judgment for the plaintiffs of \$60.9 million.<sup>76</sup> *Turner v. United*

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<sup>66</sup>Paul Pinkham, *Naval Hospital Suit Settled*, FLA. TIMES-UNION, July 5, 2007.

<sup>67</sup>William H. McMichael, *Malpractice Claimed in Baby's Death*, NAVY TIMES, June 12, 2006.

<sup>68</sup>*Id.*

<sup>69</sup>*Id.*

<sup>70</sup>Eddie Farah, *Man Sues Naval Hospital After Wife's Death*,

<http://jacksonville.injuryboard.com/medical-malpractice/man-sues-naval-hosp-after-wif>

<sup>71</sup>*Id.*

<sup>72</sup>*Id.*

<sup>73</sup>*Id.*

<sup>74</sup>Paul Pinkham, *Doctor Admitted Mistake in Naval Hospital Case*, FLA. TIMES-UNION, Dec. 20, 2005.

<sup>75</sup>*Id.*

*States* involved an asthmatic child who suffered neurologic injury including blindness after lapsing into a coma during emergency treatment for a severe asthma attack. The judgment for the plaintiffs in this case was \$5.9 million.<sup>77</sup>

### ***5. Florida, the FTCA, the “Law of the Place” and “Like Circumstances”***

Under F.S. 766.118, hospitals in the State of Florida have the dual limit of liability for noneconomic damages of \$750,000/\$1.5million.<sup>78</sup> Under the “like circumstances” prong of the FTCA, one would expect that military hospitals in the State of Florida would be held to the same degree of liability as a private hospital in “like circumstances”. Additionally, the “law of the place” prong of the FTCA places any Federal hospital situated in the State of Florida under the laws of the State of Florida regarding their liability in medical malpractice cases.

## **IV. COMMENTARY**

Based on the above considerations, there is abundant *persuasive* precedent that state statutory limits on medical liability apply to Federal hospitals and health care providers. In many of the cases in Section II, plaintiffs have attempted to argue that Federal hospitals and health care providers are not subject to state law since they are not licensed by the state and are not under the administration of the forum state. As we have seen, the courts have consistently rejected such arguments, noting that the United States, under the Supremacy Clause (*U.S. Const. Art. IV, cl.2*)

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<sup>76</sup>*Id.*

<sup>77</sup>*Id.*

<sup>78</sup>FLA. STAT. 766.118 (2003).

can deem a hospital or medical practitioner fit to practice in the forum state. It is important to note that the FTCA compares the liability of a Federal entity “in the same manner and the same extent as a private individual under like circumstances” and the rule of liability to be determined “in accordance with the law of the place where the negligent acts or omissions occurred.” The consensus appears to be that when considering a “private individual under like circumstances”, the private individual would not be in like circumstances unless he/she had already satisfied the licensing and/or administrative provisions of the forum state.

In *Scheib*, the 11<sup>th</sup> Circuit also embraced the concept of “the law of the place” as enunciated in *LaFramboise*.<sup>79</sup> The court concluded that, in Florida “[t]he limitation of the Government’s liability under the [FTCA] to the same extent as a private party applies to any [state] limitation on damages.”<sup>80</sup>

It is a mystery why the “law of the place” and “like circumstances” arguments have not been applied to the NHJ cases which involve incidents occurring after August 2003. It is of interest to note that two of the cases settled, one for \$900,000 and one for \$1.5 million. Under the “law of the place” and “like circumstances” the maximum amount of noneconomic damage liability NHJ could have would be \$1.5 million. It is unknown how much of each settlement consists of noneconomic damages. However, at mediation, if plaintiff knows the maximum noneconomic damages are \$1.5 million, this would be thought to temper negotiation demands to a great extent. The other cases allege damages ranging from \$5 million to \$150 million. It

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<sup>79</sup>*Scheib*, 759 F.2d 859 at 864.

<sup>80</sup>*Id.*

appears obvious that either 1) the plaintiffs in these cases are unaware of the concepts in this article; or 2) the plaintiffs *are* aware and hope the defendant United States does not find out.

It seems reasonable that if the United States negotiates settlements in any of these cases from after August, 2003, they should do so from the position and expectation that noneconomic damages cannot exceed \$1.5 million. Additionally, if any of these cases go to trial and noneconomic damages exceed \$1.5 million, the FTCA concepts of “law of the place” and “like circumstances” could form the basis of an appeal.

Interestingly, Federal law limits attorney contingency fees in such cases to 25 percent of the amount recovered.<sup>81</sup> Perhaps it would be ironic or cold comfort to the plaintiffs’ attorneys that they could assert the “law of the place” and “like circumstances” in order to apply state law to their contingency fee allowance.

When Florida enacted comprehensive medical liability reform in 2003, it was the result of an unprecedented grassroots effort by thousands of physicians. The final product was felt by many to have been “watered down” by political wrangling. Be that as it may, one may argue that it would be manifestly unjust for the provisions of this law to not apply to *all* doctors and hospitals in the state of Florida.

The circumstances of the plaintiffs in the NHJ cases are certainly tragic. The question is whether it is just for these plaintiffs to be entitled to a greater potential recovery than other plaintiffs who are patients at civilian hospitals and medical facilities.

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<sup>81</sup>Bradley Parsons, *Military Med Mal Becoming a Trend*, JACKSONVILLE’S FIN. NEWS AND DAILY RECORD, Jan. 23, 2006.

