

2001 USARCS CLAIMS TRAINING COURSE

Liability Seminar (Duty, Breach of Duty and Proximate Cause)

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I. INTRODUCTION. In any tort action brought against the United States, apply the basic tort principles of duty, breach of duty, causation, and damages, each of which should be thoroughly investigated before final action on a claim is taken.

II. REFERENCES.

- A. Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680
- B. Military Claims Act (MCA), 10 U.S.C. § 2733
- C. Foreign Claims Act (FCA), 10 U.S.C. § 2734
- D. Army Regulation (AR) 27-20, para. 2-38; para. 3-8a(1)(a);
- E. DA Pam 27-162, § 2-68
- F. FTCA Handbook, Section IIB4

II. DUTY.

A. General.

1. FTCA applies in the United States and its territories. Under FTCA, the United States is liable under circumstances where a private person would be held liable in accordance with the law of the place where the act or omission occurred.

2. The MCA applies, generally, outside of the United States, where the claimant is an inhabitant of the United States at the time of the incident. Under the MCA, liability is evaluated under general principles of law applicable to a private individual in the majority of American jurisdictions

a. To determine if the doctrine of contributory negligence applies, look to the law of the place of the occurrence, whether foreign law or American law.

b. Noncombat activities. Claims arising out of noncombat activities under AR 27-20, subparagraph 3-3a(2) and 3-3b, are not actually tort claims. They require only proof of causation.

3. The FCA applies to tort claims arising outside the United States, its commonwealths,

territories and possessions, where the claimant has been determined to be an inhabitant of a foreign country at the time of the incident. Liability is evaluated using the law of the foreign country.

B. Establishing Duty. Duty must exist by virtue of State law under the private person analogy.

1. The extent of the United States' duty of care under the FTCA is a question determined under State law. Either a State statute or case precedent can impose duty.

2. Since the FTCA waives sovereign immunity only for violations of State law, the United States cannot be held liable under the FTCA for violation of a Federal statute or regulation, or for failure to perform a duty imposed by Federal law. *See, e.g.,* Chen v. United States, 854 F.2d 622 (2d Cir. 1988) (no liability for violation of Federal manual); Wylter v. Korean Air Lines Co., Ltd., 928 F.2d 1167 (D.C. Cir. 1991) (internal government directives that may benefit the public do not necessarily create duties to third persons); FTCA Handbook, Section IIB.4a(1).

C. Public Duty Doctrine.

1. When the United States is sued for torts committed in the course of performing uniquely governmental functions, recovery normally is not allowed even if a State or local government would be liable under like circumstances, unless the action amounts to a State tort.

However, the United States may not take advantage of immunities granted to State, county and municipal government officials. See, e.g., Anderson v. U.S., 55 F.3d 1379 (9th Cir. 1995).

2. Under the "public duty doctrine," as set forth in either State statutory or case law, Government officers and agents are under the duty to protect citizens against various activities such as crimes, contagious diseases, and destruction of property by fire or man-made floods. This duty is owed to the public at large, not to individual citizens. Therefore, a breach of this duty with respect to a specific citizen gives rise to neither a State nor an FTCA cause of action absent some special relationship or the breach of a specific duty owed to a specific individual.

3. To create liability on the part of the United States for an action by one of its officers, the claimant must show either that the officer directly caused an injury to the claimant in particular or that the United States assumed a duty to protect the claimant, thereby creating a special relationship.

4. Decisions construing the FTCA have rarely held the United States liable for breach of a public duty because of the difficulty of establishing the requisite "special relationship" between claimant and a public official, which usually requires a finding of direct contact or privity between them, setting the claimant apart from the general public. FTCA Handbook, Section IIB4a(1)(h). See, e.g., Sheridan v. U.S., 823 F.2d 820 (4th Cir. 1987); *rev'd*, 487 U.S. 392 (1988), *summary judgment granted*, 773 F. Supp. 786 (D.Md. 1991); *aff'd*, 969 F.2d 72 (4th Cir. 1992) (Maryland law imposed no duty on the Federal Government to protect

motorists from the intentional criminal acts of a soldier who randomly shot at passing cars.) Yet in a claim for child abuse based on the failure of a health care provider to diagnose and preclude further injury, a physician-patient relationship may rise to the level of a “special relationship,” thereby creating a duty.

D. Fireman's Rule. Under this State statutory or common law rule, State or local fire and police officers are barred from filing suit for injuries or death sustained in the performance of duty against those whose negligence or lack of care either caused the emergency or increased the risk of harm which led to their injuries or death.

1. The Fireman's Rule is based on the premise that risk of such harm to fire and police officers is inherent in their jobs, that they have assumed that risk, and that they are adequately compensated through a legislatively-established compensation scheme.

2. The rule can be, and has been, applied in FTCA actions to bar claims against the United States by local fire and police personnel who have been harmed by the tortious acts of Government personnel. FTCA Handbook, Section IIB4a(1)(k).

3. The courts have carved out exceptions to the Fireman’s Rule where the fire is intentionally set, or when an “independent actor causes the injury” that is, one independent of the misconduct to which the fireman or policeman has responded. For instance, a traffic officer who stops to issue a parking ticket who is struck by a passing Government driver is not barred from filing suit against the United States.

E. Examples of Other Duties Imposed by State Law.

1. Dram Shop and Social Host Liability. When claimants allege that intoxicated Government employees have caused personal injury or property damage, they may assert liability on the part of the United States based on either a State Dram Shop statute or common law negligence principles.

a. At common law, it is not a tort to either sell or give intoxicating liquor to ordinary, able-bodied adults. Accordingly, in the absence of statute, those injured by an intoxicated person have no cause of action against the party who furnished the intoxicating beverage to the wrongdoer. The usual rationale for this rule is that the drinking of liquor is the proximate cause of the injury--not the furnishing of it.

b. Many States have enacted Dram Shop statutes that impose such liability and provide a remedy for someone injured by the intoxicated person who was served the liquor. In these States, liability under the Dram Shop statutes is directed at State-licensed commercial vendors of alcohol.

c. Because Army clubs and Class Six stores are not licensed by the State as vendors of alcohol, the majority of courts have held that State Dram Shop statutes do not create liability on the part of the United States under the FTCA. See FTCA Handbook, Section IIB4a(1)(d). Additionally, as the FTCA does not impose absolute liability, and because most

Dram Shop acts are statutes generally based on absolute liability, courts follow the Supreme Court's holding in Dalehite, *infra*, and do not apply the statutes to the United States.

d. Some cases qualify the common law rule against imposing liability for furnishing liquor to the extent of giving a right of action against someone who gives or sells alcohol to a person who is in such condition as to be deprived of his willpower or responsibility for his behavior, or to a habitual drunkard.

e. A few Federal courts have held Army clubs liable on this common law negligence principle. However, most States do not recognize this so-called "social host liability." See FTCA Handbook, Section IIB4a(1)(d). Nevertheless, claims officers should be aware that social host liability may extend not only to the Army club system, but also to organization and office parties. It is essential, therefore, to thoroughly investigate the facts in each case and to research applicable State law.

f. In cases arising outside the United States under the MCA, there is no liability created by State statutes, such as Dram Shop Acts. Additionally, because social host liability is the exception rather than the rule in American jurisdictions, it does not apply to overseas claims, whether they involve the Army club system, or an office or organization party.

2. "Good Samaritan" Doctrine and Related Statutes.

a. The United States may be held liable for its employees' negligent failure to act

as well as for their affirmative conduct, but only if the applicable State law would impose a duty to act upon a private person similarly situated.

b. A duty may arise under State law requiring aid or assistance to be rendered to one in need. There are also statutorily- and judicially-created classes of people to whom special protection is owed (persons under arrest, witnesses, school children requiring immunization). FTCA Handbook, Section IIB4a(1)(b)(i).

c. The discretionary function defense may be available in such cases (for instance, if it is within the employee's discretion whether or not to render aid or assistance, as well as the manner of rendering aid or assistance). However, if State law does not impose an affirmative duty to act, such as in rescue cases, then the United States will not be held liable for failure to act even if the Federal agency involved has a statutory responsibility to do so. *See, e.g., Bunting v. U.S.*, 884 F.2d 1143 (9th Cir. 1989) (no duty on part of Coast Guard to go to aid of downed pilot). FTCA Handbook, Section IIB4a(1)(b)(ii).

d. Once the Government assumes a function or service, it is under a duty to carry out the function or service in a non-negligent fashion. FTCA Handbook, Section IIB4a(1)(b). *See, e.g., Huber v. United States*, 838 F.2d 398 (9th Cir. 1988). For example, once the Coast Guard participates in a rescue, it must complete it properly.

e. The "Good Samaritan" Doctrine, based on common law and explained in the Restatement (2d) of Torts 323, states that one who undertakes, gratuitously or for consideration,

to render services to another which he should recognize as necessary for the protection of the other's person or property, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if, by his actions, he increased the risk of harm or caused the other to detrimentally rely on him.

f. Liability under the "Good Samaritan Doctrine" has been limited in most States by the passage of Good Samaritan statutes, which shield those who stop to render aid and assistance from liability for their simple negligence, but not for their gross negligence. The qualified immunity granted by these Good Samaritan Statutes may be applied to the United States under the private person analogy, shielding it from FTCA liability.

3. Premises Liability.

a. At common law, the nature and extent of the duty owed by a landowner to an individual depends on the individual's status as an invitee, a licensee, or a trespasser. State law should be researched before initiating a claims investigation to ascertain whether or not these common law distinctions are still valid.

b. At common law, a landowner usually owes a higher duty to an individual who is invited onto the land or premises, particularly for business purposes (an invitee), than to one who enters without invitation or permission (a trespasser), or to one who enters with the owner's permission but for his own purposes (a licensee). Generally, a licensee is owed a duty to be warned of known dangers only. An invitee is owed a duty of reasonable inspection to find

hidden dangers.

c. In general, landowners are not insurers of the safety of those who enter their land or premises with permission; instead, landowners are under a duty of reasonable care to protect them from dangerous conditions.

d. Landowner liability turns on whether the landowner had actual or merely constructive knowledge of the dangerous condition; this issue is determined by reference to State law.

e. Landowners may raise the defense that the condition causing the harm was "open and obvious" to the claimant, who remains under a common law duty to act reasonably and to look out for his own personal safety. If the facts so indicate, the United States may invoke this defense by using the private person analogy.

f. Trespassers are the third category of persons who may be injured on land. Generally, a landowner owes the trespasser only the duty not to act in a reckless or grossly negligent manner and to avoid creating "hidden traps" for the unwary. There are exceptions to this general rule. Liability may attach if an unposted dangerous condition exists on the land or if the landowner is aware of frequent trespassing but fails to warn known trespassers (examples: the duty to properly mark a dud area, or to warn of an unmarked wire strung across a trail to discourage trespassers if the trail is known to be used by trespassing motorcyclists).

g. If the trespasser is a child of "tender years" as determined by State law, then

some States may hold the landowner liable for failing to take steps to prevent child trespassers from entering the premises, particularly if there is an "attractive nuisance", such as a swimming pool, on the property. FTCA Handbook, Section IIB4a(1)(e).

h. In addition to visiting the scene and interviewing the allegedly responsible parties and the claimants, it is essential in these cases to talk to friends, neighbors, and other members of the community, such as local school officials and students, to determine not only the notoriety of the hazardous condition, but also the frequency with which trespassing had occurred in the past and what steps, if any, had been taken to prevent subsequent trespasses.

i. In appropriate cases, state law should be researched to determine whether or not the State in which the incident occurred has a "recreational use" statute applicable to the United States under the private person analogy. As a general rule, such recreational use statutes immunize landowners, who make their land available without a fee to the general public for the purposes of general recreation.

4. Duty to Occupants of Government Quarters. The Government's duty is similar to that of a landlord under State law, that is, to provide safe habitation. FTCA Handbook, Section IIB4a(1)(f).

a. Frequently, the Federal Government contracts out its responsibility for construction, maintenance, and repair of Government quarters; in such cases, the independent contractor exception applies to shield the United States from FTCA liability.

b. If the injured occupant was a soldier, *Feres* would bar the claim in most cases. *But see*, Elliot by and Through Elliott v. United States, 13 F.3d 1555 (11th Cir. 1994), *vacated for reh'g en banc*, 28 F.3d 1076 (11th Cir.) (*en banc*), *aff'd by an equally divided Court*, 37 F.3d 617 (11th Cir. 1994). Caveat: DOJ takes the position that Elliot has no precedential value because the panel decision was vacated and the *en banc* opinion merely allowed the district court judgment to stand.

5. Duty to Employees of Independent Contractors. As a general rule, there is no duty owed to such employees at common law. However, there are exceptions and, therefore, it is essential to research the applicable State law.

a. For a review of State law, *see* King v. Shelby Rural Electric Cooperative Corp., 502 S.W.2d 659 (Ky. 1973); for a general review, *see* McGarry v. U.S., 370 F.Supp. 525 (D.Nev. 1973) and Kropp v. Douglas Aircraft Co., 329 F.Supp. 447 (E.D. N.Y. 1971); *see also* FTCA Handbook, Section IIB4a(1)(c).

b. Additionally, a duty towards these employees can be imposed by a State statute (such as the Illinois Scaffolding Act), or by the State's adoption of the Restatement (2d) of Torts. *See, e.g.*, McMichael v. U.S. et al., 856 F.2d 1026 (8th Cir. 1988), duty to employees of independent contractor found under Arkansas's adoption of Restatement where the employees were engaged in an inherently dangerous activity at an ammunition plant.

c. A duty can also be created by a self-imposed safety inspection if the inspection is viewed as a duty, not a right. Dickerson, Inc. v. Holloway, 685 F. Supp. 1555 (M.D. Fla. 1987).

F. Responsibility for the Actions of Third Parties. The general rule is that, absent special circumstances, the United States is under no duty to anticipate and prevent the intentional or criminal acts of a third party. *See, e.g.*, Henry v. Merck and Co., Inc., 877 F.2d 1489 (10th Cir. 1989).

1. Exceptions to this general rule include cases in which the third party's tortious act was a reasonably foreseeable natural consequence of a negligent act on the part of a Government employee, for example, leaving a car key in the ignition. FTCA Handbook, Section IIB4a(1)(j).

2. Additionally, the United States may be held liable if it had a special third party relationship creating a duty to the victim, such a psychiatrist's duty to warn a patient's intended victim of the foreseeable risk of harm that patient posed – usually, a specific threat to a specific victim must be made before liability attaches. *See, e.g.*, Brady v. Hopper, 570 F. Supp. 1333 (D. Colo. 1983), *aff'd*, 751 F.2d 329 (10th Cir. 1984).

G. Duty to Report under State Statute. State law may impose a duty on a Government employee to report a criminal act such as child abuse. While failure to make a report is a criminal violation, it does not create civil liability for subsequent foreseeable injury to or death of

the victim. However, liability may exist where a health care provider fails to meet the standard of care by failing to properly diagnose child abuse and protecting the patient. Landeros v. Flood, 551 P.2d 389 (Cal. 1976); *contra*, Krikorian v. Barry, 242 Cal. Rptr. 312 (Cal. App. 1987); Rubinstein v. Baron, 529 A.2d 1061 (N.J. Super., Law Div. 1987). Simmons v. U.S., No. 5:96-CV-258 (E.D.N.C., January 14, 1998).

H. Professional Standards of Care. With respect to the so-called "learned professions," that is, law, medicine, and religion, the only duty a practitioner had at common law was a general one -- to do no harm.

1. Although there may be a State statute which states in general terms that either a national or local standard is to be applied in a particular case, the statute normally does not delineate the specific duty of care which is owed in a particular case.

2. To establish the nature and extent of the duty owed by the United States in cases of professional negligence, one has to refer to the standards of the respective profession rather than to State statute or common law.

3. As generally expressed in most State court decisions, the applicable standard of care is that practiced by a reasonably prudent practitioner with the same or similar qualifications under the same or similar circumstances.

4. Determination of the specific standard in medical malpractice cases is usually

made by reference to medical texts, journal articles, and published medical specialty standards Joint Commission on Accreditation of Healthcare Organizations (JCAHO).

5. The applicable standard may also be determined through the testimony of medical professionals in the same general medical practice (or in the same specialty or subspecialty, as appropriate).

6. Additionally, courts have held that hospital internal regulations are relevant in considering the scope of the duty of care owed by a hospital to a patient -- although the regulations do not create the duty, they may define it. *See, e.g., Keir v. United States*, 853 F.2d 398 (6th Cir. 1988).

III. BREACH OF DUTY.

A. Negligent or Wrongful Act Requirement. The FTCA imposes liability for either negligent or wrongful acts, and some type of malfeasance or nonfeasance is required. Dalehite v. United States, 346 U.S. 15 (1953); Free v. Bland, 369 U.S. 663 (1962); Laird v. Nelms, 406 U.S. 797 (1972).

1. Generally, there is no strict or absolute liability under the FTCA. Dalehite v. United States, 346 U.S. 15 (1953). The Supreme Court has interpreted the statutory language "under the circumstances" to mean something other than "under the same circumstances." Indian Towing Co. v. United States, 350 U.S. 61 (1955). Therefore, to recover from the United States,

a claimant need not point to identical activity by a private individual. *See, e.g., Rayonier Inc. v. United States*, 352 U.S. 315 (1957) (Governmental liability for negligent firefighting), and *Indian Towing, supra* (Governmental liability for improperly operating a channel light).

2. The Supreme Court has interpreted the "law of the place" as referring to the whole law, including the jurisdiction's choice of law principles. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Richards v. United States*, 369 U.S. 1 (1962).

3. Since the FTCA waives sovereign immunity only for violations of State law, the United States cannot be held liable under the FTCA for violation of a Federal statute or regulation, or for failure to perform a duty imposed by Federal law. *See, e.g., Chen v. United States*, 854 F.2d 622 (2d Cir. 1988) (no liability for violation of Federal manual); *Wyler v. Korean Air Lines Co., Ltd.*, 928 F.2d 1167 (D.C. Cir. 1991) (internal government directives that may benefit the public do not necessarily create duties to third persons); FTCA Handbook, Section IIB.4a(1).

4. However, claimants may use the United States' failure to follow its own regulations or SOPs as evidence of a breach of a duty created by State law. For example, failure to follow internal hospital SOPs can be used as evidence of breach of the applicable State standard of medical care.

5. Installation regulations with the force of law may create a mandatory duty, and the United States may be held liable for failure to follow its own regulations. *Dogett v. United*

States, 875 F.2d 684 (9th Cir. 1988). *But see Covington v. U.S.*, 916 F. Supp. 1511 (D. Haw. 1996) (United States could not be held liable for violating its own regulations regarding proper staffing and equipping of lifeguards since the policies, procedures and rules involved were internal communications that did not establish standards of care similar to duly promulgated laws of general application.)

6. Since the liability of the United States is equivalent to that of a private person under State law, common law duties can be greater or broader than those set forth in Government manuals or regulations. *See, e.g., In Re Greenwood Air Crash*, 873 F. Supp. 1257 (S.D. Ind. 1995) (common law duty to control aircraft greater than that set forth in FAA manual); FTCA Handbook, Section IIB4a(1).

B. Ultrahazardous Activities. As a general rule, liability does not arise merely from Federal ownership of an inherently dangerous commodity or Federal engagement in ultrahazardous activity. However, some courts have applied absolute liability in these cases (*e.g., Air crashes* where State law imposed absolute liability on the owner of aircraft, United States v. Praylou, 208 F.2d 291 (4th Cir. 1953), *cert. denied*, 347 U.S. 934 (1954) (note that the withdrawal of the Uniform Aviation Act by the Commissioners on Uniform State Laws and the adoption of other legislation by many States reduces Praylou's significance).

C. Negligence Per Se. Negligence *per se* can arise under State law from a statutory violation or extreme wrongdoing. However, the invocation of negligence *per se* is measured against state law, not local law. Seaberg v. U.S., 448 F.2d 391 (9th Cir. 1971). Examples of

negligence *per se* cases:

1. Approval of a substandard drug, Griffin v. United States, 500 F.2d 1059 (3d Cir. 1974);

2. Using no warning flares at night, Cronenberg v. United States, et al., 123 F. Supp. 693 (E.D. N.C. 1954);

3. Using a spring-loaded gun, Worley v. United States, 119 F. Supp. 719 (D. Ore. 1952);

4. Hitting a bystander when shooting a trespasser, Cerri v. United States, 80 F. Supp. 831 (N.D. Cal. 1948);

5. Failing to warn of submerged tree stumps, Stephens v. United States v. State of Illinois, 472 F. Supp. 998 (C.D. Ill. 1979); and

6. Running a stop sign, Muhammad v. U.S., 366 F. 2d 298 (9th Cir. 1966), *cert. denied*, 386 U.S. 959 (1967); Davenport v. U.S., 241 F. Supp. 792 (D.S.C. 1965).

D. Burden of Proof. At trial, claimants have the burden of proof to establish that the United States breached a duty of care owed to them under State law.

1. During the administrative claim phase, a claimant need only put the United States on sufficient notice to permit inquiry into the underlying facts. Therefore, the United States, and thus an Area Claims Office or a Claims Processing Office, bears the burden to investigate thoroughly the facts of each claim and to determine whether liability exists.

2. Claimant is not under the burden of proof at trial in cases involving negligence *per se*, or the presence of negligence as a matter of law. As stated above, negligence *per se* may arise from a State statutory violation or extreme wrongdoing. FTCA Handbook, Section IIB4a(2)(b).

3. Non-combat activity claims cognizable under the Military Claims Act, 10 U.S.C. § 2733 and AR 27-20, Chapter 3, do not require a breach of duty, i.e., negligence, on the part of the United States; only proximate causation is required to pay such claims.

4. Another exception arises in cases involving the doctrine of *res ipsa loquitur*, wherein “the thing speaks for itself”. This is a rebuttable presumption by which, using circumstantial evidence, the burden of proving a breach is shifted from the plaintiff onto the defendant. The following elements must exist:

a. The defendant had exclusive control of the instrumentality that caused the injury;

b. The incident would not have occurred in the absence of negligence; and

c. The victim committed no contributory negligence.

d. Examples of *res ipsa loquitur* cases include aircraft accidents, explosions and certain medical malpractice cases (for example, the retained sponge cases). See, generally, cases cited in Jayson's "Handling Federal Tort Claims," § 214.02(2); FTCA Handbook § IIB4a(2)(c).

e. Liability under the *res ipsa* doctrine cannot be imposed on multiple tortfeasors in the absence of joint responsibility. FTCA Handbook, Section IIB4a(2)(c).

5. The burden of proof may also shift from the claimant to the United States in cases in which all the witnesses are employees of the United States, e.g., medical malpractice cases. In such cases, the United States cannot take a position during the administrative phase that the claimant has the burden to prove negligence without subjecting its witnesses to questioning by the claimant. Therefore, the burden of proof necessarily shifts to the United States to come forward with an explanation for the claimant's injury.

E. Medical Malpractice Cases.

1. Under common law, medical malpractice liability arose only in the context of the physician/patient relationship. State statutes routinely broaden the scope of potential liability to include nonphysician health care providers such as opticians, pharmacists, midwives, and paramedics. Additionally, State case law has expanded liability to medical settings outside the

traditional health care provider/patient relationship. For example, while not the general rule, liability has been found on the part of a radiologist who found an abnormality on an x-ray film taken as part of a pre-employment physical but who failed to warn the plaintiff about the abnormality. Daly v. United States, 946 F.2d 1467 (9th Cir. 1991) (applying Washington State law).

2. A health care provider is not a guarantor of a good result. A health care provider who exercises reasonable medical judgment under the circumstances is not liable for a breach of his duty of care in the event that subsequent events indicate he made an erroneous diagnosis or other mistake. It is important that a physician's care be judged based upon the facts known at the time, and not upon what is learned later.

3. To establish breach of a medical standard of care, most cases require a written opinion or oral testimony by a qualified medical professional in the same general practice or specialty as the defendant health care provider. Exceptions are cases involving "common knowledge" (such as basic hygiene measures) and *res ipsa loquitur*. A bad result or adverse outcome is not sufficient evidence of breach of the standard of care. However, a bad result in conjunction with poor or missing documentation of appropriate care, or the fact that a health care provider has been decriminalized, could indicate the advisability of a settlement rather than risk an adverse court judgment. *See, e.g., Welsh v. United States*, 844 F.2d 1239 (6th Cir. 1988), finding an adverse presumption against the United States for destruction of critical evidence; Sweet Sisters of Providence in Washington, 881 P.2d 304 (Alaska 1995), negligence *per se* for hospital and health care providers for failing to maintain or to retain nursing records.

4. A difference of medical opinion or practice is not sufficient evidence to establish a breach of the standard of care. Claimant's expert's opinion should be based on appropriate references to medical literature and not merely on what his own practice is in a particular case.

5. During the requisite claimant interview in each case, one should attempt to obtain not only the claimant's version of the facts, but also the claimant's theory of liability and the specific instances which he believes evidence a breach of duty. During the administrative stage, it is not prudent to request that the claimant submit an expert opinion supporting allegations before conducting an initial inquiry into whether there is governmental liability exposure in the case. If an initial investigation by the claims office indicates that a breach of duty occurred, then it is wiser to refrain from requesting such an opinion, sparing the claimant the unnecessary expense. There is no duty to instruct the claimant or his attorney about their case, and no benefit derives from doing so. It may be easier to negotiate reasonable settlement when claimant alleges minor injuries based on one theory of liability but, in fact, the United States is liable for major injuries for the same incident under another theory. As a general matter, however, before taking final denial action, a formal request for an expert opinion in support of the allegations should be prepared and sent to the claimant by certified mail. In some states and affidavit of merit, i.e., an expert opinion, must accompany the complaint at the time suit is filed.

IV. CAUSATION. FTCA Handbook, Section IIB4a(3). Liability exists only where the

negligent or wrongful act or omission causes the damage or injury sustained. The mere existence of a negligent act does not establish liability. FTCA Handbook §IIB4a(3)(a).

A. In terms of causation, a plaintiff must prove both cause-in-fact and proximate cause.

According to Prosser, the term “cause in fact” embraces all things which have so far contributed to the result that without them it would not have occurred. Prosser & Keaton, Law of Torts (5th Edition) § 41 at 265. Ordinarily, plaintiff must establish that “but-for” the defendant’s conduct, the injury would not have occurred.

B. Most jurisdictions have modified the “but-for” test to take into account multiple causes.

The “but-for” test fails to provide an adequate answer to the proximate cause question in cases where two or more causes concur to bring about the injury, and either of the causes alone is sufficient to cause the injury. The classic example of this is that of two fires. See, e.g., Anderson v. Minneapolis, St. P.& S. Ste. M. Ry., 179 N.W. 45, 46 (1920). In multiple cause cases, courts have created the “substantial factor” test, finding liability if the defendant’s conduct was one of the causes of the injury and if it was a material element and “substantial factor” in bringing about the injury. See, e.g., Fussell v. St. Clair, 818 P.2d 295 (Idaho 1991) (held: in an action for medical malpractice when there is evidence of two or more causes that contributed to the damage suffered, for only one of which the doctor is responsible, then any negligence of that doctor was a proximate cause of the injury if it was a substantial factor in bringing about the damage). The “substantial factor” and the “but-for” test bring about the same legal conclusion in a majority of the cases.

C. The “substantial factor” test used in cases involving multiple causes should not be confused with “loss of chance” and “increased risk” cases in the medical malpractice context.

1. Traditional Approach to Causation. The majority of American jurisdictions adhere to the traditional standard of causation known as the “probability” or “more likely than not” standard. This traditional test requires plaintiff to prove injury by a preponderance of the evidence that, "more likely than not," or greater than 50 percent chance, that the injury was caused by a breach of the duty which the defendant owed to the plaintiff. There can be no recovery of damages otherwise. FTCA Handbook, Section IIB4a(3)(a). In medical malpractice cases, this traditional standard precludes recovery by patients whose chances of surviving their pre-existing injuries or diseases (*e.g.* cancer) were 50 percent or less before the allegedly negligent act or omission occurred. See, e.g., Gooding v. University Hospital Building, Inc., 445 So. 2d 1015 (Fla. 1984); Fennel v. Southern Maryland Hospital Center, Inc., et al., 580 A.2d 206 (Md.Ct.App. 1990); Alfonso v. Lund, 783 F.2d 958 (10th Cir. 1986); Simmons v. West Covina Medical Clinic, 260 Cal.Rptr. 772 (Cal.Ct.App. 1989).

2. Loss of Chance. A minority of American jurisdictions has relaxed this traditional test of proximate causation in medical malpractice cases. In those jurisdictions, courts have allowed the plaintiff to prevail upon a showing that there was "some chance of survival" or a "substantial possibility” of survival or improvement in the patient’s condition but for the defendant's breach of the duty of care. This approach relaxes the standard of proof for causation, permitting the claimant to prevail if the evidence shows that the defendant’s conduct destroyed a substantial possibility of his survival. FTCA Handbook, Section IIB4a(3)(b). Typically, in a “loss of

chance” medical malpractice case, the claimant has a precondition or is subject to a risk from a hazard before seeing the defendant doctor. This precondition distinguishes “loss of chance” cases from most personal injury cases where the patient is relatively healthy before the negligence. The “loss of chance” claimant is claiming that the defendant’s negligence increased his risk of harm by hastening or aggravating the effect of the preexisting condition.

3. What Constitutes “Loss of Chance”. There is disagreement among jurisdictions that have adopted “loss of chance” with respect to what percentage of loss constitutes a substantial or appreciable lost chance for which compensation is due. Although some courts have allowed full recovery where the lost chance was as small as 11 percent, there appears to be no consensus on what is a “de minimis” chance and therefore not recoverable. *See, e.g., Jeanes v. Milner*, 428 F.2d 598 (8th Cir. 1970); *Kallenberg v. Beth Israel Hospital*, 357 N.Y.S.2d 508 (N.Y.App.Div. 1974), *aff’d*, 374 N.Y.S.2d 615 (N.Y. 1975).

4. Damages. Among those States that have adopted “loss of chance”, there is a difference with respect to the damages to awarded. In some States, the plaintiff is entitled to recover the full measure of damages suffered; in others, the plaintiff can recover only those damages corresponding to the percentage of the lost chance, for example, a 30 percent loss of chance results in a recovery of 30 percent of the total awardable damages.

5. Separate Injury Approach. Some jurisdictions, unwilling to accept the all-or-nothing traditional approach to causation or the potential for a windfall under the substantial chance doctrine, have recognized “loss of chance” as a separate compensable injury, i.e., these

jurisdictions support the “probability” causation standard, yet recognize loss of chance as the compensable element of damage. Under this approach, the claimant must show that the defendant’s conduct probably caused a reduction in the patient’s chance of survival. Generally, claimant’s recovery under this hybrid theory is limited to the value of his lost chance.

6. Wrongful Death. If a State’s wrongful death statute requires that the negligence caused the death, then any theory of loss of chance is not appropriate under that Statute. *See, e.g., U.S. v. Cumberbatch*, 647 A.2d 1098 (Del. 1994); *Williams v. Bay Hospital, Inc.*, 471 So.2d 626 (Fla. Dist. Ct. App. 1985). *But see Perez v. Las Vegas Medical Center*, 805 P.2d 589 (Nev. 1991).

7. Increased Risk Cases. Increased risk situations arise where the defendant’s conduct causes the plaintiff to incur an increased risk or susceptibility to a physical harm or disease. Increased risk cases are closely related to loss of chance cases. Some courts have recognized increased risk as an element of damages, and by other courts as an independent cause of action. *See, e.g., U.S. v. Anderson*, 669 A.2d 73 (Del. 1995); *Pietrello v. Kalman*, 576 A.2d 474 (Conn. 1990).

8. Torts Branch, DOJ, Monograph, Loss of Chance, August 1997, contains a state-by-state survey of State loss of chance law.