

Using Federal Torts Claims Act to Help Veterans and Military Families Impacted by Medical Negligence

BY DAN LAIRD, M.D., ESQ.

The morning of Saturday, July 28, 1945, was unusually foggy in New York City. Twenty-year-old Betty Lou Oliver's blue eyes sparkled with excitement. It was her final day of work as an elevator operator at the Empire State Building. The country was in the final days of World War II and Oliver was delighted to be returning to her home in Norfolk, Virginia. She was planning to reunite with her husband who was serving in the Navy.¹

That same foggy morning, Lt. Colonel William Smith, a U.S. Military Academy graduate and experienced pilot, departed Bedford Field in Massachusetts in a B-25 Mitchell bomber. Smith was en route to La Guardia Field where he was on official U.S. Army business. By the time Smith reached New York, the gloomy haze had thickened. His visibility was poor. Despite an advisement not to attempt landing at La Guardia Field, Smith proceeded through air space over downtown Manhattan. As he approached the Chrysler Building, he veered off course and became disoriented. Smith was flying the plane directly toward the Empire State Building.²

Oliver brought elevator car number six to a halt on the 79th floor. She glanced at her watch – 9:55 a.m. – only five minutes until her coffee break. As she opened the door to let a passenger exit the elevator, an explosion shook the building. The U.S. Army airplane had slammed into the 79th floor of the Empire State Building.³



A B-25 Mitchell bomber crashed into the 79th floor of the Empire State Building on July 28, 1945.

Traveling at 250 miles per hour, the 12-ton plane crashed through the offices of the Catholic War Relief Services. Fuel tanks ignited. The strut of the plane's landing gear slammed through the back wall of the building and came to rest on the Waldorf Building next door. One of the plane's white-hot engines broke through a wall and crashed through the roof of a nearby sculptor's studio.⁴ The other engine slid diagonally toward the elevators and plunged into the shaft of elevator number six. The impact lodged the counterweight into the brake rails and sliced through several braided steel cables that suspended the elevator. Car number six, with Oliver inside, violently plunged 79 floors toward the basement.⁵

In the days that followed that horrible crash, investigators determined that 14 people had died, including 11 in the building and all three people onboard the aircraft. Miraculously, Oliver survived her plunge through the elevator shaft. She sustained life-threatening injuries including a fractured neck, back, and pelvis.⁶

The tragic nature of the disaster was made even worse when the victims and the families of the deceased realized they had no legal recourse. The tortfeasor was not a private entity. With rare exception, the U.S. government was immune from liability.

Federal Tort Claims Act Becomes Law

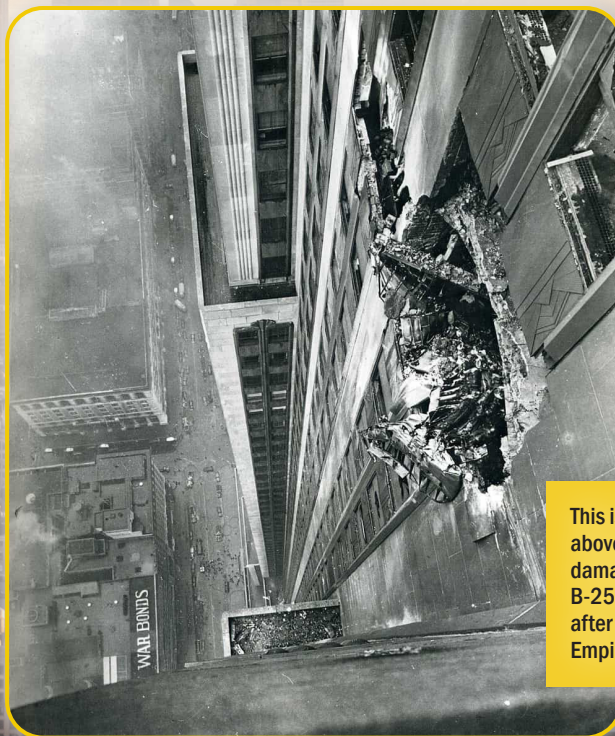
Based on the English common law doctrine of sovereign immunity, the U.S. government has historically been immune from liability when government employees or agents cause injury or death to private citizens. However, that changed following the 1945 Empire State Building airplane accident. Approximately one year after the crash, Congress enacted the Federal Tort Claims Act (FTCA), 28 U.S. Code § 2674. The FTCA provides that "The United States shall be liable ... in the same manner and to the same extent as a private individual under like circumstances ..."

The FTCA is a powerful tool with which Nevada veterans and active-duty military families, injured by medical malpractice,

can prosecute professional negligence claims against the federal government. There are several medical facilities in Nevada that come under the purview of the FTCA. Ioannis A. Lougaris was a respected Reno attorney who lobbied to fund the first Veterans Administration (VA) hospital in Nevada in the 1930s. The Ioannis A. Lougaris VA Medical Center in Reno is Nevada's oldest VA hospital. Nevada's largest VA hospital is the North Las Vegas VA Medical Center. Named in honor of the 23rd governor of Nevada, the Michael O'Callaghan Military Medical Center is located on Nellis Air Force Base. Additionally, there are numerous VA clinics and other FTCA-deemed facilities located throughout the state, including those in Carson City, Elko, Ely, and Winnemucca. Border towns in Nevada such as Jackpot, Mesquite, and West Wendover are serviced by federal VA facilities in adjacent states but fall under the authority of the FTCA.

Prosecuting a case through the FTCA has several procedural differences between both state district courts and federal court. In an FTCA case, providers of health care are not individual defendants. Rather, the defendant is the United States of America. Through an administrative process, the U.S. government is given an opportunity to investigate its own agency and settle the case before the case may be filed in federal court.

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This is a view from above showing the damage caused by a B-25 Mitchell bomber after it crashed into the Empire State Building.

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The FTCA Administrative Process

The administrative process must be exhausted before the case can be filed in federal court. To initiate the administrative process, the claimant, or their attorney, files Standard Form 95 (SF-95) with the government. The SF-95 can be located online, www.gsa.gov/system/files/SF95-07a.pdf. Pursuant to 28 U.S. Code § 2401(b), the SF-95 must be submitted to “the appropriate Federal Agency within two years after such claim accrues” For claims against VA hospitals, the SF-95 is submitted to the Department of Veterans Affairs. For claims against active-duty military hospitals, the claim is submitted to the appropriate military branch headquarters. It is the practice of some FTCA attorneys to file the SF-95 in duplicate, via FEDEX, to both the local health care facility and the headquarters of the governmental agency involved.

It is imperative that when filing the SF-95, a “sum certain” dollar amount is written on the SF-95 in the indicated box. The “sum certain” is the maximum amount that can be awarded by the U.S. Treasury to the claimant and cannot be increased, no matter what is uncovered during formal discovery. Therefore, many FTCA attorneys believe that it is prudent to overestimate the sum certain by a substantial amount. It is also essential that the SF-95 be signed by either the claimant or their attorney.

The FTCA Litigation Process

Once a claimant or their attorney has filed an SF-95, one of three things will happen. The first (and most uncommon)

is that the government investigates the claim, determines that its agency was negligent, and offers the claimant a settlement. The second possibility is that the government investigates the claim, determines that its agency was not negligent, and denies the claim. Once the government denies the claim, the claimant has six months from the date of the denial letter to file a lawsuit in federal court. The third possibility (and most common) is that the SF-95 is filed but after six months have passed, the government has not made a decision on the claim, one way or the other. Once this happens, the claimant has the option of filing a lawsuit in federal

court. Alternatively, the claimant can wait for the government to finish its investigation. The FTCA statute of limitations is tolled during the government’s investigation and there is no time limit on how long the government can investigate a claim.

Once a claimant has the legal authority to file a medical malpractice lawsuit in federal court, the process is similar to that followed in state court. The Federal Rules of Civil Procedure apply. However, the federal court applies Nevada substantive law to determine whether there is professional negligence. The federal judge or magistrate is the trier of fact; there is no jury trial. Statutory caps on noneconomic damages pursuant to NRS 41A.035, as recently amended, apply.

FTCA Pitfalls

There are several pitfalls that attorneys should be careful to avoid when prosecuting FTCA claims, including the following. First, VA medical

While the families/dependents of active-duty personnel could bring their own claims, active-duty personnel themselves could not sue under the FTCA.



Betty Lou Oliver (left) was an elevator operator at the Empire State Building on July 28, 1945. Oliver was in an elevator at time of the crash and survived a fall from the 79th floor.

centers, active-duty military hospitals, and community clinics utilize a wide variety of staffing models. Physicians, nurses, aides, and other personnel may not be government employees. It is important to determine whether the health care providers involved in the case were independent contractors or employees. In some situations, independent contractors need to be sued in state court.

Second, the statute of limitations for FTCA claims is two years after the claim “accrues.” Accrual is a term of art and is similar to, but not exactly the same as, the discovery prong of Nevada’s professional negligence statute of limitation, NRS 41A.97. There is a body of federal case law addressing this issue of when an FTCA claim accrues.⁷

Third, the FTCA sets a cap on attorney fees. Attorney fees are 20 percent of the recovered amount if the case settles in the administrative phase. Attorney fees are 25 percent of the recovery if the case settles after a lawsuit is filed. These fees are considered by most FTCA attorneys to be non-waivable. The FTCA also explicitly prohibits punitive damages.

Fourth, as mentioned above, medical malpractice cases prosecuted through the Federal Tort Claims Act apply Nevada substantive law. This process includes the

requirement that an expert affidavit be filed with the complaint, pursuant to NRS 41A.071. While the SF-95 claim form can be filed without an affidavit or declaration of merit in the administrative phase, the affidavit or declaration of merit requirement is mandatory when filing a lawsuit in federal court. The Ninth Circuit Court of Appeals has explicitly held that such an affidavit is mandatory under Nevada law.⁸

Finally, a legal principle called the Feres Doctrine has traditionally barred active-duty military personnel from suing for medical malpractice under the FTCA.⁹ While the families/dependents of active-duty personnel could bring their own claims, active-duty personnel themselves could not sue under the FTCA. Recently, the National Defense Authorization Act was enacted. The act provides a limited exception to the Feres Doctrine and allows members of the uniformed services to submit claims when injuries are caused by Department of Defense health care providers in certain military medical treatment facilities. This administrative process is separate from the FTCA.¹⁰

Summary

It is not clear whether Oliver, the young elevator operator, or any of the other victims of the 1945 Empire State Building airplane crash ever sued the U.S. for their injuries. Nevertheless, nearly 80 years after its enactment, FTCA remains an important mechanism through which veterans and active-duty military families can achieve justice when injured by government medical negligence.

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ENDNOTES:

1. Arthur Weingarten, *The Sky is Falling*, (1977).
2. *Id.* at 185-198
3. *Id.* at 221-224
4. James Barron, "Flaming Horror on the 79th Floor; 50 Years Ago Today, in the Fog, a Plane Hit the World's Tallest Building," *The New York Times* (July 28, 1995).
5. Weingarten, *supra* note 1, at 185-249.
6. Sanja Atwal, "How an Elevator Attendant Survived a 1,000-ft Fall Down the Empire State Building," *Guinness World Records* (October 23, 2023).
7. *United States v. Kubrick*, 444 U.S. 111 (1979)
8. *Nickelson v. United States*, No. 3:13-CV-00493-LRH-WGC, 2014 U.S. Dist. LEXIS 63152 (D. Nev. May 6, 2014)
9. *Feres v. United States*, 340 U.S. 135 (1950)
10. Medical Malpractice Claims by Members of the Uniformed Services, 87 Fed. Reg. 52446 (August 26, 2022)



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