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Medical maze created by the military

Service members lose right to sue, but not retirees, kin

Med-Mal Matters

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In 1961, Joseph Heller introduced the world to the phrase "Catch-22" in his novel by the same name. In that book, Catch-22 was an Army Air Force regulation that defined a bomber pilot as insane if he willingly flew his missions without asking to be relieved, therefore qualifying him to be relieved from flying because only an insane person would not try to be relieved. If the same pilot asked to be relieved, however, he must be sane and therefore had to keep flying.

According to the Collins English Dictionary, the phrase has entered the popular lexicon to define any situation in which a person is frustrated by a paradoxical rule or set of circumstances that precludes any attempt to escape from them. As the *New York Times* recently reported, U.S. active-duty service members all too often experience a Catch-22 of their own when they encounter a sometimes substandard and unaccountable military health-care system.

According to the *Times*, service members are captives of the military medical system, yet when injured by medical negligence they have no legal recourse and virtually no ability to even find out what happened to them. Active-duty service members receive their health care through the military's network of medical centers, hospitals and clinics and they are not free to go outside that system without specific authorization, even if they believe that care within the system is inadequate or even dangerous. When they are injured or killed by poor medical care, however, they or their families have no legal right to challenge their care, or even to learn what went wrong by filing a lawsuit.

By enacting the Federal Tort Claims Act, Congress waived the sovereign immunity of the United States for injury or death caused by the negligence of government employees. In *Feres v. United States*, however, the Supreme Court read a military exception into the statute and held that active-duty service members are barred from recovering for injuries sustained "incident to service."

This formulation arguably makes sense when applied to the conduct of military operations. After all, allowing soldiers to sue their commanders for poor decisions made on the battlefield could certainly prejudice good order and discipline.

One can also extend that logic to combat medical care provided by front-line providers. Indeed, if the so-called Feres Doctrine were limited to these types of uniquely military activities, it would hardly be controversial.

But the Supreme Court has extended the bar to all medical care provided to active-duty service members by any government employee. Civilians, including retirees and family members of active-duty service members can sue the federal government for harm caused by negligent medical care but an active duty soldier cannot, even for an identical injury caused by identical care.

According to the *Times* report, the Feres Doctrine has created a dual system of transparency and accountability for care provided to civilians compared to active-duty military. Very broad federal quality-assurance laws provide a cloak of secrecy to virtually any statement, report or investigation regarding a patient injury for both civilian and active-duty patients alike, but civilians can file a lawsuit and take depositions to ferret out the truth while soldiers cannot.

The *Times* reports that until as late as 2009, the Department of Defense did not even report to the National Practitioner's Databank clinicians who provided negligent care to active-duty patients. After 2009, DOD began reporting negligent injuries to active-duty patients only if the patient died or became disabled, a much higher threshold than the one used for civilian patients. The *Times* points to a broader question of accountability, with evidence that with all patients military hospitals often fail to conduct mandated safety investigations when patients are seriously injured or die and that many health-care providers remain silent about poor care for fear of reprisals. But the discrepancy between the treatment of civilian and active-duty patients is particularly troubling.

Supporters of the federal quality-assurance privilege argue that it is necessary because health-care providers would not tell the truth if they feared a lawsuit. Setting aside the fact that medicine is apparently the only profession that cannot conduct a self-critical review of the harm it causes without a cloak of secrecy, there is no explanation for this cloak where active-duty patients are involved, because there can be no fear of a lawsuit.

But the broader question is why do we treat our soldiers and sailors and airmen so shabbily? We require these service members to receive their medical care from military facilities that generally are not accountable for mistakes, and we deny them compensation for the harms caused by these mistakes.

Meanwhile, a civilian patient in the next room who has the same surgery and the same negligently caused complication has the right to access the civil justice system.

It is time to fix the Feres Catch-22. ■

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