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Litigating Medical Neglect Cases on Behalf of Immigrant Detainees: The Impact of the Ninth Circuit's Decision in *Castaneda v. Henneford*

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Introduction

What civil trial lawyer wants to: (a) invest hundreds and hundreds of hours, and possibly a hundred thousand dollars, to represent a client who is in the United States illegally and may have a criminal record; and (b) sue a defendant who is entitled to numerous complex and powerful liability defenses? The answer to this clearly rhetorical question is: not many. However, litigating medical neglect cases on behalf of immigrant detainees offers an opportunity for plaintiffs' trial lawyers to do interesting, challenging, and rewarding work.

A recent decision from the U.S. Court of Appeals for the Ninth Circuit has removed significant obstacles to litigating these cases. In *Castaneda v. Henneford*, the Ninth Circuit rejected the federal government's argument that the Federal Tort Claims Act—which caps damages at \$250,000 under California law and allows no jury trial—makes a lawsuit against the United States the exclusive remedy for unconstitutional conduct by government doctors and other Public Health Service (PHS) officials.¹ Instead, the court held that PHS officials can be sued for violating immigrant detainees' constitutional right to adequate medical care.² The practical ramifications of the *Castaneda* decision are enormous and make it much easier for plaintiffs' attorneys handling these kinds of cases to recover significant damages for their clients.

Moreover, the egregious medical neglect suffered by many immigrant detainees is a largely untapped resource of cases that should be brought. Immigration detention is our nation's fastest growing form of incarceration. Since the tragic events of September 11, the number of immigrant detainees over the course of each year has *tripled*, but the amount that the federal government spends on detainee health care hasn't quite *doubled*. The result is that detainees are dying or suffering serious injuries. But little is being done to help them. Immigrant detainees have less access to lawyers than convicted murderers in maximum security prisons. And the detainees who are sick are "locked in a world of slow care, poor care and no care, with panic and coverups among employees watching it happen," according to a Washington Post investigation.³

The case of Francisco Castaneda—a former immigrant detainee who had his penis amputated and ultimately died from penile cancer that was left untreated and undiagnosed during his 11 months in detention—illustrates everything that is wrong with our country's health care system for detainees. It also demonstrates why more plaintiffs' trial lawyers should represent immigrant detainees who are the victims of egregious medical neglect.

Beyond Cruel and Unusual

In *Castaneda v. United States*, the U.S. Division of Immigration Health Services refused to give immigrant detainee Francisco Castaneda a biopsy to rule out penile cancer, despite clear orders to do so by the detainee's treating provider and several private doctors chosen by the government to evaluate him. When Mr. Castaneda was ultimately released, 11 months after a PHS physician assistant recommended a biopsy "ASAP," it was too late. His cancer had spread. Mr. Castaneda's penis was amputated on Valentine's Day 2007, and he died a slow and painful death over the next year, ultimately succumbing on February 16, 2008.

On March 11, 2008, a district court in Los Angeles described the conduct of government doctors as “beyond cruel and unusual.”⁴ Like many precedent-setting cases, *Castaneda*’s impact likely derives, at least in part, from a set of facts that may be unrivaled in the history of Eighth Amendment jurisprudence.⁵ In a chilling footnote at the end of its opinion, the district court characterized the defendants’ conduct as follows:

After all, Plaintiff has submitted powerful evidence that Defendants knew Castaneda needed a biopsy to rule out cancer, falsely stated that his doctors called the biopsy “elective”, and let him suffer in extreme pain for almost one year while telling him to be “patient” and treating him with Ibuprofen, antihistamines, and extra pairs of boxer shorts. Everyone knows cancer is often deadly. Everyone knows that early diagnosis and treatment often saves lives. Everyone knows that if you deny someone the opportunity for an early diagnosis and treatment, you may be—literally—killing the person. Defendants’ own records bespeak of conduct that transcends negligence by miles. It bespeaks of conduct that, if true, should be taught to every law student as conduct for which the moniker “cruel” is inadequate.⁶

The court also rejected the “Defendants’ attempt to sidestep responsibility for what appears to be, if the evidence holds up, one of the most, if not the most, egregious Eighth Amendment violations the Court has ever encountered.”⁷ In denouncing the defendants’ argument that the case amounted to nothing more than alleged malpractice, the court observed:

[F]rom the first time Castaneda presented with a suspicious lesion in March 2006 through his release in February 2007, the care afforded him by Defendants can be characterized by one word: nothing. The evidence that Plaintiff has already produced at this early stage in the litigation is more thorough and compelling than the complete evidence compiled in some meritorious Eighth Amendment actions.”⁸

The court also recognized the likelihood of a punitive damages award:

[T]he evidence that Plaintiff has presented thus far—through Defendants’ own records—suggests a strong case for punitive damages because it shows that Defendants’ behavior was both callous and misleading. The evidence suggests that they refused Castaneda’s request for a biopsy despite their knowledge that several medical specialists suspected cancer and “strongly recommended” a biopsy to rule out that possibility. Worse, the evidence suggests that not only did the individual Public Health Service Defendants ignore doctor recommendations to provide Castaneda with a simple procedure, they may also have lied about those recommendations.⁹

A Landmark Civil Rights Decision

Mr. Castaneda’s “Kafkaesque nightmare”¹⁰ prompted widespread international media attention, including coverage in every major U.S. newspaper and television stories on Univision, Telemundo, and the CBS news magazine *60 Minutes*. Perhaps overshadowed by the sensational factual setting of the case is an unprecedented legal decision that has changed the landscape of civil rights litigation against physicians and other medical personnel employed by the federal government.

In 1971, the Supreme Court issued one of the most significant civil rights decisions of the twentieth century, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.¹¹ *Bivens* created a civil rights cause of action for constitutional violations by federal officials, similar to the remedies already available against state and local officials under 42 U.S.C. § 1983. Under *Bivens*, federal employees may be held liable for money damages in their individual capacity. Unlike a claim against the United States under the Federal Tort Claims Act (FTCA), *Bivens* claims permit a jury trial and punitive damages and are not subject to the vagaries of the state law where the claim arose.

Six months before *Bivens* was decided, Congress passed the Public Health Service Act, 42 U.S.C. § 233(a), which purported to provide absolute immunity from suit for PHS employees. The statute states in pertinent part:

DEFENSE OF CERTAIN MALPRACTICE AND NEGLIGENCE ACTS¹²

Sec. 233. (a) The remedy against the United States provided by sections 1346(b) and 2672 of Title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of Title 28, for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, *shall be exclusive of any other civil action or proceeding* by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.¹³

According to the Defendants in *Castaneda*, PHS employees enjoy absolute immunity from suit under this statutory provision and all claims arising from their conduct must be brought against the United States under the FTCA. However, the FTCA does not permit *constitutional* claims against the United States and would effectively extinguish those claims. There is ample case law to support the Defendants' argument. Since the enactment of § 233(a) in 1970, every published decision, including a Second Circuit opinion, had erroneously held that PHS employees are immune from *Bivens* claims under § 233(a).¹⁴

Based on distinct, but consistent, analyses of § 233(a) that are far more thorough than those done in any previous case, both the U.S. District Court for the Central District of California and the Ninth Circuit held in *Castaneda* that § 233(a) permits *Bivens* claims against PHS employees. There is currently a split between the Second and Ninth Circuits on this issue, and the Defendants will likely seek review by the U.S. Supreme Court. As explained below, the Ninth Circuit's more thorough and compelling analysis of § 233(a) will likely survive Supreme Court scrutiny and become the law of the land.

Practical Ramifications

The practical significance of the *Castaneda* decision is enormous. If Mr. Castaneda were limited to an action against the United States under the FTCA, his claim would arguably be governed by MICRA, California's medical malpractice "tort reform" statute. Under MICRA, his heirs would be limited to a total of \$250,000 in noneconomic damages and would not be entitled to a jury trial, punitive damages, or pre-death pain and suffering under California's survival statute.¹⁵

In contrast, the *Bivens* claims have no cap on noneconomic damages, and a jury trial and punitive damages are available. Under the federal survival rule, Mr. Castaneda's estate is also entitled to pre-death pain and suffering.¹⁶

In *Castaneda*, the Ninth Circuit recognized that the effects of *Bivens* "preemption" would be felt hardest in those states that have enacted "medical malpractice tort reform," and that this would not serve the goal of promoting uniform application of federal rights. In the court's words:

Reacting to a "crisis" in medical malpractice insurance costs and availability, many states in the mid-1980s began to enact legislative changes designed both to deter frivolous lawsuits and to limit the size of damage awards even in meritorious ones....[T]wenty-three states have placed statutory limits on non-economic damages, many limiting medical malpractice awards in particular. Statutory damage caps for malpractice can range from \$250,000 to \$1.25 million.¹⁷

Castaneda will likely have the biggest impact on plaintiffs who happen to suffer constitutional violations in “tort reform” states because they will no longer be subject to damages caps. However, this assumes that the medical neglect rises to the level of a constitutional violation, which typically means proving “deliberate indifference” on the part of the medical providers.¹⁸

In non-tort reform states, it may be sensible to forego the availability of a jury trial and punitive damages that *Bivens* claims provide and simply litigate against the United States under the FTCA. There are several advantages to this approach: (1) the plaintiff only has to prove medical negligence, not deliberate indifference; (2) there is a guaranteed collectible defendant, the United States; (3) the plaintiff does not have to spend the resources or time litigating and briefing interlocutory immunity appeals (involving both absolute and qualified immunity) that come with constitutional claims; and (4) the plaintiff will obtain a much faster and more economical (bench) trial.

Historical Context of the Public Health Service Act

The Public Health Service Act was one act in a series intended to provide immunity to government employees. Most, like § 233(a), concern federal medical personnel.¹⁹ All of these statutes contain language almost identical to § 233(a), purporting to make the FTCA the “exclusive remedy” for claims against the specified employees. Although the Ninth Circuit’s decision in *Castaneda* was limited to the Public Health Service Act, it follows logically that the same analysis would apply to all of these immunity statutes, permitting *Bivens* claims against those classes of federal employees.

At the time most of these statutes were enacted, *Bivens* had not been decided. Therefore, there was no private right of action to sue federal employees for constitutional violations. Moreover, it was not until 1976 that the Supreme Court decided *Estelle v. Gamble*, the seminal case establishing the right of prisoners to bring medical neglect claims under the Eighth Amendment’s cruel and unusual punishment clause.²⁰

In 1980, the Supreme Court decided *Carlson v. Green*, the lynchpin of the Ninth Circuit’s analysis in *Castaneda*.²¹ *Carlson* established a federal prisoner’s right to bring a *Bivens* claim for medical neglect under the Eighth Amendment, but also recognized an exception to this general rule. Under *Carlson*, a *Bivens* remedy will not lie when an alternative remedy is both “explicitly declared to be a substitute” and is “viewed as equally effective,” or in the presence of “special factors” which militate against a direct recovery remedy.²²

In 1988, Congress passed the Federal Employees Liability Reform and Tort Compensation Act of 1988 (LRTCA) to add an express exclusivity provision to the FTCA and to make clear that *Bivens* actions for constitutional torts are preserved.²³ The LRTCA expanded § 2679(b) of the FTCA, which previously made the FTCA the exclusive remedy for injury resulting from a federal employee’s operation of a motor vehicle, to encompass any “injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.”²⁴ Because the FTCA substitutes the United States as the defendant in place of employees acting within the scope of their official duties, the LRTCA acts as a general grant of immunity to government employees for all official acts.

However, the LRTCA clarified that the FTCA’s general immunity “does not extend or apply to a civil action against an employee of the Government... which is brought for a violation of the Constitution of the United States.”²⁵ Thus, Congress made explicit what had previously been implicit when the Supreme Court decided *Carlson*: “[C]onstitutional claims are outside the purview of the Federal Tort Claims Act.”²⁶

The District Court’s “Statutory Trail” Analysis in *Castaneda*

The district court in *Castaneda* held that the Public Health Service Act does not provide immunity to PHS employees based on an analysis of the plain language of § 233(a). The court recognized that statutory construction principles require an analysis of the provisions of the entire law when determining a statute’s plain meaning. The court therefore followed § 233(a)’s statutory trail and examined the cited FTCA provisions, as well as the statutory provisions cited by the FTCA provisions referenced in § 233(a).

Following that statutory trail, the district court concluded that § 233(a) incorporated by reference § 2679, which specifically states that FTCA’s exclusive remedy does not apply to *Bivens* actions. Thus, far from evincing an intent to make the FTCA the exclusive remedy for *Bivens* actions, Congress, through the LRTCA, intended the exact opposite—to specifically preserve the right to bring *Bivens* actions against all federal employees.

The Ninth Circuit’s Analysis in *Castaneda*: *Carlson* Controls

The Ninth Circuit affirmed the district court’s ruling in *Castaneda*, but on different grounds. Rather than addressing the district court’s analysis of § 233(a)’s “statutory trail,” the Ninth Circuit applied the *Carlson* test to § 233(a) and considered whether: (1) Congress provided an alternative remedy that is “explicitly declared to be a substitute for” *Bivens* (rather than a complement to it); and (2) Congress viewed that remedy as “equally effective” to preempt *Bivens*.

The Ninth Circuit held that Congress did not explicitly declare § 233(a) as a substitute and that the FTCA remedy is not “equally as effective” as a *Bivens* claim.²⁷ The Ninth Circuit also considered the historical context of the statute and legislative history to support its conclusion.²⁸

The U.S. Supreme Court

After failing to get *en banc* review by the Ninth Circuit, the Defendants in *Castaneda* are now deciding whether to seek Supreme Court review. It is uncertain whether the Court will grant the likely petition for *certiorari*. However, if the Court decides to review *Castaneda*, it is clear that it will have two separate and compelling avenues for affirming and recognizing Congress’s intent to preserve *Bivens* claims against PHS employees. Even the Court’s “originalists” should appreciate the district court’s plain language analysis, should they decline to consider § 233(a)’s legislative history and historical context.

Moreover, the Ninth Circuit’s analysis of § 233(a) is far more compelling than the Second Circuit’s contrary analysis. The Second Circuit did not perform a proper analysis of *Carlson*’s two-part test; did not recognize the distinction between a run-of-the mill medical negligence claim and a constitutional violation; and did not address the effect of the LRTCA, which specifically exempts *Bivens* claims from the FTCA’s exclusivity provision.

As a result, if the Supreme Court ultimately addresses the issue of whether PHS employees enjoy absolute immunity from *Bivens* claims, there are strong reasons for believing that it will permit plaintiffs to proceed with their claims for Eighth Amendment violations.

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¹ *Castaneda v. Henneford*, 546 F.3d 682 (9th Cir. Oct. 2, 2008). The plaintiffs are represented by Conal Doyle, Willoughby Doyle LLP; Adele P. Kimmel, Public Justice, P.C.; and Thomas M. Dempsey, Dempsey Law Corporation.

² *Castaneda v. Henneford*, 546 F.3d at 701-02.

³ *The Washington Post*, May 11, 2008, p. A1, "Careless Detention: The Medical Treatment of Immigrants".

⁴ *Castaneda v. U.S.*, 538 F. Supp. 2d 1279, 1298 (C.D. Cal 2008).

⁵ Mr. Castaneda was a civil detainee, thus his claim was rooted in the Fifth Amendment's due process clause, not the Eighth Amendment's prohibition on cruel and unusual punishment. *See Bell v. Wolfish*, 441 U.S. 520, 536-37 & n. 16 (1979). In this case, however, that formal distinction is irrelevant: "With regard to medical needs, the due process clause imposes, at a minimum, the same duty the Eighth Amendment imposes." *Gibson v. County of Washoe, Nev.*, 290 F.3d 1175, 1187 (9th Cir. 2002). For ease of reference, this paper will describe the claims at issue in terms of the Eighth Amendment.

⁶ *Castaneda*, 538 F. Supp. 2d at 1298 n.16. Procedurally, the court was ruling on the defendants' Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, which permits the court to go outside the four corners of the complaint and consider evidence. In response to the motion, the plaintiff attached 33 exhibits of the defendants' official medical records, which documented verbatim the allegations of the complaint.

⁷ *Id.* at 1295.

⁸ *Id.*

⁹ *Id.* at 1297.

¹⁰ *Castaneda*, 546 F.3d at 694 n.12.

¹¹ 403 U.S. 388 (1971).

¹² It is interesting to note that § 233(a)'s heading in Title 42 of the U.S. Code is "Exclusiveness of remedy," but the heading in the Statutes at Large is "Defense of Certain Malpractice and Negligence Acts." *Compare* Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, § 223(a), *with* 42 U.S.C. § 233(a)(1970), *and* 42 U.S.C. § 233(a)(2003). Where the language of a statute does not appear in the U.S. Code precisely as it was printed in the Statutes at Large, courts must defer to the Statutes at Large. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993). *Castaneda* is the first case to consider the actual title of the Public Health Service Act.

¹³ 42 U.S.C. § 233(a) (emphasis added).

¹⁴ *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000). Several district courts came to the same conclusion, following *Cuoco* without substantive independent analysis.

¹⁵ CAL. CIV. CODE § 3333.2.

¹⁶ *See Garcia v. Whitehead*, 961 F. Supp. 230 (C.D. Cal. 1997) (holding that the federal survival rule applies to civil rights claims under § 1983, and the cause of action survives plaintiff's death, including claims for pain and suffering).

¹⁷ *Castaneda*, 546 F.3d at 691 (internal citations omitted).

¹⁸ *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

¹⁹ See, e.g., 10 U.S.C. § 1089(a) (immunity for military medical personnel); 22 U.S.C. § 2702 (immunity for State Department medical personnel); 38 U.S.C. § 4116 (immunity for Veterans' Administration medical personnel).

²⁰ 429 U.S. 97 (1976).

²¹ 446 U.S. 14 (1980).

²² *Castaneda*, 546 F.3d at 687-88.

²³ Pub. L. No. 100-694 (1988).

²⁴ 28 U.S.C. § 2679(b)(1).

²⁵ § 2679(b)(2)(A).

²⁶ *Castaneda*, 546 F.3d at 695.

²⁷ *Id.* at 689-92.

²⁸ *Id.* at 692-95.