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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MARILYN BRYANT, individually)
and on behalf of VINCENT JAY)
BRYANT; TOM BRYANT; JOSHUA)
HOMER BRYANT; SONNY BRYANT;)
and TEANCUM BRYANT,)
Plaintiffs,)
vs.)
THE UNITED STATES OF AMERICA;)
and BARBARA FRANC,)
Defendants.)

No. CIV 98-1495 PCT RCB
O R D E R

Currently pending before the court are motions for partial summary judgment filed by Plaintiffs and Defendant United States. Both Plaintiffs and Defendant seek summary judgment on the issue of whether the New Mexico Medical Malpractice Act applies in this case to limit the liability of the United States. The court heard oral argument on June 14, 1999, at which time it took the matter under advisement. Having carefully considered the arguments of both parties, the court now rules.

. . .

1 I. BACKGROUND

2 The facts necessary to rule on the two pending motions
3 are straightforward. Plaintiffs have sued both the United
4 States and Barbara Franc for an incident that occurred at the
5 Northern Navajo Medical Center ("Medical Center") in Shiprock,
6 New Mexico. The Medical Center is a federal hospital operated
7 by the Indian Health Service ("IHS"), which is a division of
8 the Public Health Service ("PHS"), which is a division of the
9 Department of Health and Human Services ("HHS"). Plaintiff
10 Vincent Bryant ("Vincent") entered the Medical Center on
11 October 9, 1997, to have his wisdom teeth extracted. He
12 suffered irreversible brain damage during the dental
13 procedure.

14 Plaintiffs have brought a claim against the United States
15 under the Federal Tort Claims Act ("FTCA") based on the
16 allegedly negligent conduct of N. Whitney James, D.D.S.;
17 Donald C. Thelen; and Dee Hutchison. James, a dentist
18 stationed at the Medical Center, was a federal employee acting
19 as an officer in the Commissioned Corps of PHS. He was the
20 operating oral surgeon during Vincent's dental procedure.
21 Thelen, a pharmacist stationed at the Medical Center, was also
22 a federal employee acting as an officer in the Commissioned
23 Corps of PHS. Hutchison was the Chief Executive Officer of
24 the Medical Center and was a federal employee working for IHS.

25 II. STANDARD OF REVIEW

26 To grant summary judgment, the court must determine that
27 in the record before it there exists "no genuine issue as to
28 any material fact" and, thus, "that the moving party is

1 entitled to judgment as a matter of law." Fed. R. Civ. P.
2 56(c). In determining whether to grant summary judgment, the
3 court will view the facts and inferences from these facts in
4 the light most favorable to the nonmoving party. Matsushita
5 Elec. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct.
6 1348, 1356 (1986).

7 The mere existence of some alleged factual dispute
8 between the parties will not defeat an otherwise properly
9 supported motion for summary judgment; the requirement is that
10 there be no genuine issue of material fact. Anderson v.
11 Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505,
12 2510 (1986). A material fact is any factual dispute that
13 might affect the outcome of the case under the governing
14 substantive law. Id. at 248, 106 S. Ct. at 2510. A factual
15 dispute is genuine if the evidence is such that a reasonable
16 jury could resolve the dispute in favor of the nonmoving
17 party. Id. A party opposing a motion for summary judgment
18 cannot rest upon mere allegations or denials in the pleadings
19 or papers, but instead must set forth specific facts
20 demonstrating a genuine issue for trial. See id. at 250, 106
21 S. Ct. at 2511. Finally, if the nonmoving party's evidence is
22 merely colorable or is not significantly probative, a court
23 may grant summary judgment. See, e.g., California
24 Architectural Build. Prods., Inc. v. Franciscan Ceramics, 818
25 F.2d 1466, 1468 (9th Cir. 1987), cert. denied, 484 U.S. 1006,
26 108 S. Ct. 698 (1988).

27 III. DISCUSSION

28 Both Plaintiffs and the United States move for summary

1 judgment on the issue of whether or not the New Mexico Medical
2 Malpractice Act ("NMMMA") applies in this case to limit the
3 liability of the United States. Under Fed. R. Civ. P. 56(d),
4 the court can grant summary adjudication on such a specific
5 issue because it will narrow the issues remaining for trial.
6 See Fed. R. Civ. P. 56(d); First Nat'l Ins. Co. v. F.D.I.C.,
7 977 F. Supp. 1051, 1055 (S.D. Cal. 1997). Moreover, the
8 applicability of the NMMMA involves questions of law and thus
9 is suitable for decision by the court.

10 In order to determine the NMMMA's applicability, the
11 court must analyze both it and the FTCA.

12 A. The FTCA

13 The FTCA acts as a limited waiver of the United States'
14 sovereign immunity from suits in tort. See Richards v. United
15 States, 369 U.S. 1, 6, 82 S. Ct. 585, 589 (1962). Under the
16 FTCA, the United States is subject to suits for money damages
17 for personal injuries "caused by the negligent or wrongful act
18 or omission of any employee of the Government while acting
19 within the scope of his office or employment, under
20 circumstances where the United States, if a private person,
21 would be liable to the claimant in accordance with the law of
22 the place where the act or omission occurred." 28 U.S.C. §
23 1346(b)(1).

24 According to the FTCA, the United States is liable "in
25 the same manner and to the same extent as a private individual
26 under like circumstances." 28 U.S.C. § 2674; see Richards,
27 369 U.S. at 6, 82 S. Ct. at 589; Bunting v. United States, 884
28 F.2d 1143, 1145 (9th Cir. 1989). The purpose of this "like

1 circumstances" test is to place the injured party in "the same
2 position that would have resulted had the victim been injured
3 by any other similarly-situated private tortfeasor. Hill v.
4 United States, 81 F.3d 118, 121 (10th Cir. 1996), cert.
5 denied, 519 U.S. 810, 117 S. Ct. 56 (1996). The "like
6 circumstances" test does not require a court to find an actual
7 private party under like circumstances as the United States,
8 but rather to analogize to a hypothetical private party that
9 is most reasonably analogous to the United States. See Bush
10 v. Eagle-Picher Indus., 927 F.2d 445, 452 (9th Cir. 1991).

11 In addition to providing a limited waiver of sovereign
12 immunity for the United States to tort actions arising from
13 the negligence of federal employees within the scope of their
14 employment, Congress has granted total immunity to federal
15 employees for torts committed in the course of their
16 employment. See 28 U.S.C. § 2679(b)(1). Therefore, a tort
17 victim's sole remedy lies against the United States. See Kee
18 v. United States, 168 F.3d 1133, 1135 (9th Cir. 1999).

19 B. Applicable Law in Determining United States'
20 Liability

21 The FTCA provides that the United States' liability for
22 the tortious acts of its employees is determined according to
23 "the law of the place where the act or omission occurred." 28
24 U.S.C. § 1346(b)(1). Because Vincent's injury occurred in New
25 Mexico, the court must turn to the law of that state. See
26 Aguilar v. United States, 920 F.2d 1475, 1477 (9th Cir. 1990).

27 Under New Mexico's choice of law rules, the substantive
28 law of New Mexico applies in this case. New Mexico follows

1 the doctrine of *lex loci delicti* with regard to the choice of
2 substantive law in tort actions, applying the law of the state
3 where the wrong took place. See Torres v. State, 894 P.2d
4 386, 390 (N.M. 1995); In re Estate of Gilmore, 946 P.2d 1130,
5 1133 (N.M. Ct. App. 1997). The events here occurred in New
6 Mexico. The parties, in fact, agree that New Mexico tort law
7 applies in determining the liability of the United States
8 under the FTCA. The parties instead disagree over the
9 applicability of one specific portion of New Mexico's tort
10 law, namely the NMMMA.

11 C. The NMMMA

12 The NMMMA limits the amount of monetary damages a
13 plaintiff suing for injury or death resulting from an act of
14 medical malpractice can recover against a qualified health
15 care provider. See N.M. Stat. Ann. § 41-5-6. Under the
16 NMMMA, "[e]xcept for punitive damages and medical care and
17 related benefits, the aggregate dollar amount recoverable by
18 all persons for or arising from any injury or death to a
19 patient as a result of malpractice shall not exceed six
20 hundred thousand dollars (\$600,000) per occurrence." Id.
21 Furthermore, "a health care provider's personal liability is
22 limited to two hundred thousand dollars (\$200,000) for
23 monetary damages and medical care and related benefits," with
24 any amount due above that coming from the state's "patient's
25 compensation fund." Id.

26 The NMMMA defines a "health care provider" to mean "a
27 person, corporation, organization, facility or institution
28 licensed or certified by this state to provide health care or

1 professional services as a doctor of medicine, hospital,
2 outpatient health care facility, doctor of osteopathy,
3 chiropractor, podiatrist, nurse anesthetist or physician's
4 assistant." N.M. Stat. Ann. § 41-5-3(A). To become qualified
5 for the NMMMA's malpractice damages cap, a health care
6 provider must file proof with the state that it is insured by
7 a policy of malpractice liability insurance in the amount of
8 at least \$200,000 and must pay the surcharge assessed on
9 health care providers, which goes to the state's patient's
10 compensation fund. See N.M. Stat. Ann. §§ 41-5-5, 41-5-25.

11 D. Does the NMMMA Cap the Liability of the United
12 States in this Case?

13 The issue on which both sides seek summary judgment is
14 whether the NMMMA applies in this case to limit the liability
15 of the United States for non-economic damages to \$600,000.
16 Plaintiffs argue that under the "like circumstances" test of
17 the FTCA, the most analogous private parties to the United
18 States in this case are a private dentist, a private
19 pharmacist, and a private hospital administrator. Plaintiffs
20 contend that such private parties are not health care
21 providers covered by the NMMMA, and, hence, the United States
22 is not covered by the NMMMA either. In response, the United
23 States argues that in this case it is actually most analogous
24 to a private hospital, which is covered by the NMMMA. The
25 conflicting arguments of the Plaintiffs and the United States
26 raise a question regarding the nature of the FTCA's "like
27 circumstances" test.

28 1. Applicability of State Damage Cap Statutes Under the

1 FTCA

2 Under the FTCA's "like circumstances" test, the United
3 States is liable for tort damages to the same extent as a
4 private person under like circumstances. Because of this
5 provision, courts, including the Ninth Circuit, have found
6 that the FTCA incorporates limits or caps on liability
7 contained in state law. See, e.g. Aguilar v. United States,
8 920 F.2d 1475 (9th Cir. 1990); Taylor v. United States, 821
9 F.2d 1428 (9th Cir. 1987), cert. denied, 485 U.S. 992, 108 S.
10 Ct. 1300 (1988); Nationwide Mut. Ins. Co. v. United States, 3
11 F.3d 1392 (10th Cir. 1993); Carter v. United States, 982 F.2d
12 1141 (7th Cir. 1992); Lozada v. United States, 974 F.2d 986
13 (8th Cir. 1992). For example, in Taylor, the Ninth Circuit
14 held that under the "like circumstances" test the United
15 States was entitled to the protection of California's cap on
16 medical malpractice damages. 821 F.2d at 1430-32.

17 Courts have held that the United States is entitled to
18 the protection of such state statutes capping damages even if
19 it did not strictly comply with all the procedural
20 requirements of the statute. For example, in Taylor, the
21 Ninth Circuit held that the United States was entitled to the
22 protection of the state damages cap even though it was not in
23 strict compliance with the statute's requirement of being
24 licensed with the state. The court found that the United
25 States, by virtue of the Supremacy Clause, had essentially
26 deemed the hospital and its staff in question fit to provide
27 health care services in the state. Taylor, 821 F.2d at 1431-
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1 32. The idea behind such rulings is that the United States is
2 entitled to the protection of such caps on damages so long as
3 it "complied with the objective underlying, although not the
4 literal requirements of, provisions limiting private
5 liability." Nationwide Mut. Ins. Co., 3 F.3d at 1397. This
6 rule is known as the "functional compliance" test. See id. at
7 1396.

8 Although courts have routinely used the functional
9 compliance test to place the United States within the
10 protection of state caps on damages when it did not actually
11 participate in the statutory scheme providing the cap, no
12 court has ever used the test to protect the United States
13 under a state damages cap that applies to private parties not
14 analogous to the United States. For example, under the test,
15 the United States falls under the protection of the NMMMA even
16 if it did not contribute to the patient's compensation fund,
17 so long as it is willing to pay the damages that would
18 normally come out of that fund. See Carter, 982 F.2d at 1143-
19 44. However, even under the functional compliance test, the
20 United States is not protected by the NMMMA if it is not found
21 analogous to a private party included within the definition of
22 a health care provider. See Hill, 81 F.3d at 121.

23 2. Applicability of NMMMA to Private Dentist,
24 Pharmacist, and Hospital Administrator

25 Plaintiffs contend, and the United States does not
26 dispute, that the NMMMA's definition of "health care provider"
27 does not include dentists, pharmacists, or hospital
28 administrators. Although no New Mexico state court has so

1 determined, Plaintiffs argue that the plain terms of the NMMMA
2 demonstrate that such individuals are not covered.¹

3 Although no New Mexico state court decision is on point
4 regarding the applicability of the NMMMA to dentists,
5 pharmacists, and hospital administrators, the court agrees
6 with Plaintiffs that the courts of New Mexico would determine
7 that such individuals are not covered. The plain language of
8 the NMMMA limits the definition of a "health care provider" to
9 doctors of medicine, doctors of osteopathy, chiropractors,
10 podiatrists, nurse anesthetists, physician's assistants, and
11 certain health care facilities. Though listing several types
12 of doctors, the NMMMA makes no mention of doctors of
13 dentistry, pharmacists, or hospital administrators. Had the
14 New Mexico legislature wished to include such individuals,
15 they could have listed them along with the numerous other
16 named health care positions. See generally State of New
17 Mexico ex rel. Clark v. Johnson, 904 P.2d 11, 25 n.6 (N.M.
18 1995) (applying the doctrine of expressio unius est exclusio
19 alterius, which means that the expression of one thing is at
20 the exclusion of another). The New Mexico legislature
21 expressed no intention that the list provided in the NMMMA for
22

23
24 ¹ The only New Mexico state court decision cited by
25 Plaintiffs is Tanuz v. Carlberg, 921 P.2d 309 (N.M. Ct. App.
26 1996). Tanuz involved a dental malpractice claim, but the
27 court of appeals never mentioned the NMMMA. This case
28 provides no support for the argument that dentists are not
health care providers under the NMMMA, as several
possibilities exist as to why the court did not discuss the
NMMMA. For example, the dentist may merely have failed to
contribute to the patient's compensation fund.

1 health care providers was not exhaustive.

2 The United States does not contest such a conclusion in
3 its response to Plaintiffs' motion for partial summary
4 judgment or in its motion for partial summary judgment. The
5 United States instead argues that under the FTCA, it is most
6 reasonably analogous to a private hospital, not a dentist,
7 pharmacist, and/or hospital administrator.

8 3. Under the "Like Circumstances" Test of the FTCA, to
9 Whom is the United States Most Reasonably Analogous

10 The parties present a unique question regarding
11 application of state damage cap statutes under the FTCA: What
12 happens when a state cap on damages would not protect the
13 individual federal employee who was allegedly negligent if he
14 was a private party but would protect the federal facility
15 where the negligence occurred if that facility was a private
16 one? This issue arises because private dentists, pharmacists,
17 and hospital administrators are not covered by the NMMMA, but
18 private hospitals are covered. Accordingly, Plaintiffs
19 maintain that the United States should be placed in the shoes
20 of the three individual tortfeasors and be analogized to a
21 private dentist, pharmacist, and/or hospital administrator,
22 while the United States claims that it should be placed in the
23 shoes of the individual tortfeasors' employer and be
24 analogized to a private hospital.

25 The United States cites several cases for the broad
26 proposition that its waiver of sovereign immunity under the
27 FTCA works like the common law doctrine of respondeat superior
28 liability. See, e.g., Gutierrez De Martinez v. Lamagno, 515

1 U.S. 417, 420, 115 S. Ct. 2227, 2229 (1995) (stating that
2 cases against the United States under the FTCA “unfold much as
3 cases do against other employers who concede respondeat
4 superior liability”). It proceeds to argue that under the
5 doctrine of respondeat superior the employee’s negligence is
6 imputed to the employer and, thus, the employer does not step
7 into the shoes of the employee. Finally, it argues that under
8 New Mexico law a hospital is liable for the negligence of its
9 employees under the doctrine of respondeat superior. See
10 Reynolds v. Swigert, 697 P.2d 504, 507-08 (N.M. Ct. App.
11 1984). Thus, the United States contends that it is most
12 analogous to a private hospital because the individual
13 tortfeasors’ actions took place at the Medical Center, which
14 is a hospital run by IHS.

15 In response to the United States’ argument, Plaintiffs
16 claim that in most cases applying the FTCA’s “like
17 circumstances” test, courts have analogized the United States
18 to a private party that most closely resembled the individual
19 federal employee tortfeasor, not that tortfeasor’s employer.
20 See, e.g., Aguilar, 920 F.2d at 1477. The United States,
21 however, cites FTCA cases where it was held to be in like
22 circumstances with private hospitals. See, e.g., Taylor, 821
23 F.2d at 162.

24 The parties cite only one case on point with the issue
25 presented, Knowles v. United States, 91 F.3d 1147 (8th Cir.
26 1996). In Knowles, the plaintiffs brought an FTCA action
27 against the United States based on the allegedly negligent
28 conduct of several employees, including medical services

1 specialists, at an Air Force base hospital in South Dakota.
2 See id. at 1148-49. South Dakota law caps the malpractice
3 damages recoverable against health care providers, which are
4 defined to include doctors, nurses, and hospitals but not
5 medical services specialists. See id. at 1149-50. The United
6 States argued that its liability based on the conduct of the
7 medical services specialists should still be capped "because
8 hospitals are covered, and the medical services specialists
9 are hospital employees whose negligence will be charged to the
10 hospital." Id. at 1150. The court rejected the United
11 States' argument that it was most reasonably analogous to a
12 private hospital, holding that it instead stood in the shoes
13 of the medical services specialists. Because these employees
14 would not be protected by South Dakota's cap on damages if
15 they were private individuals, the United States was not
16 entitled to the protection of the cap either. See id.

17 The Eighth Circuit's decision supports Plaintiffs'
18 argument that this court should analogize the United States to
19 a dentist, pharmacist, and/or hospital administrator in
20 determining whether it falls within the coverage of the NMMMA.
21 However, reviewing the Eighth Circuit's reasoning and the FTCA
22 itself, this court cannot agree with the decision reached in
23 Knowles.

24 The Eighth Circuit reasoned that because federal
25 employees are immune from suit and because the FTCA states
26 that the United States is liable to the same extent as a
27 "private individual" under like circumstances, the United
28 States must stand in the shoes of the federal employee.

1 Knowles, 91 F.3d at 1150. This court cannot concur with such
2 a reading of the FTCA. Other courts have not read the phrase
3 "private individual" to exclude analogies of the United States
4 to private employers. See, e.g., LaBarge v. Mariposa County,
5 798 F.2d 364, 369 (9th Cir. 1986) (finding that a "private
6 individual in like circumstances" to the United States would
7 be a private employer), cert. denied sub nom. County of
8 Mariposa v. United States, 481 U.S. 1014, 107 S. Ct. 1889
9 (1987). In fact, other language found in the FTCA supports
10 the conclusion that courts should analogize the United States
11 to private individuals and entities that most closely resemble
12 it, not those that most closely resemble the federal
13 tortfeasor employee. See 28 U.S.C. § 1346(b)(1). The FTCA
14 authorizes suits against the United States based on the
15 negligent conduct of its employees "under circumstances where
16 the United States, if a private person, would be liable to the
17 claimant." Id. (emphasis added). The FTCA does not authorize
18 suits against the United States under circumstances where the
19 federal employee, if a private person, would be liable to the
20 claimant. Courts have relied on this language in determining
21 that the FTCA's waiver of sovereign immunity works much like
22 respondeat superior liability. See Wood v. United States, 995
23 F.2d 1122, 1125 (1st Cir. 1993) ("The [FTCA's] waiver enables
24 tort plaintiffs to bring against a special employer, namely
25 the federal government, the same kind of ordinary tort action
26 that plaintiffs often bring against private employers, namely
27 an action claiming that an employee wrongfully hurt the
28 plaintiff and that the employer is liable under the doctrine

1 of respondeat superior"); see also Gutierrez De Martinez, 515
2 U.S. at 420, 115 S. Ct. at 2229 (stating that cases against
3 the United States under the FTCA "unfold much as cases do
4 against other employers who concede respondeat superior
5 liability"); Bunting, 884 F.2d at 1145 (stating that United
6 States is liable under the FTCA for government employee's
7 conduct "under the doctrine of respondeat superior").
8 Therefore, the court finds that the United States stands in
9 the shoes of the private employer of a tortfeasor, not in the
10 shoes of the private tortfeasor.

11 Although the Ninth Circuit has not directly ruled on the
12 issue currently before this court, its decision in Kee v.
13 United States, 168 F.3d 1133 (9th Cir. 1999), provides some
14 indication as to how it would resolve the issue. In Kee, the
15 plaintiffs were injured in an accident involving a car driven
16 by a federal employee. Id. at 1134. After the accident, the
17 plaintiffs signed a standard release with the federal employee
18 in consideration for a \$30,000 settlement. Id. The
19 plaintiffs subsequently brought suit against the United States
20 under the FTCA based on an allegation that the federal
21 employee was negligent in the operation of her vehicle. Id.
22 The United States claimed in a motion for summary judgment
23 that the plaintiffs' release of the federal employee in her
24 personal capacity released the United States from liability
25 because its liability was derivative of that of its employee
26 who was no longer liable due to the release. Id. The
27 district court granted the government's motion, finding that
28 under Arizona law a release of an employee also releases the

1 employer. Id. at 1134-35. The Ninth Circuit reversed,
2 finding that the United States was not discharged from
3 liability under the FTCA based on the employee's release.

4 In reversing the decision of the district court, the
5 Ninth Circuit stated that the lower court had ignored the
6 effect of the FTCA's immunity provision for federal employees.
7 Because of this immunity provision, the Ninth Circuit
8 determined that "the 'like circumstances' provision [of the
9 FTCA] requires the court to determine how Arizona would
10 resolve the case of a private employer being sued for an
11 accident caused by an employee who is immune." Id. at 1135.
12 Specifically, the court held that the issue was whether under
13 Arizona law the "release of an immune employee also releases
14 the employer." Id. The court determined that an employer
15 would not be released under such circumstances and that
16 therefore the United States could be held liable despite the
17 release. See id. at 1136.

18 The court finds the Ninth Circuit's holding in Kee
19 instructive in determining how the circuit would decide the
20 issue raised here of whether to place the United States in the
21 shoes of the employer or the employee in determining the
22 applicability of a damages cap. Had the Ninth Circuit placed
23 the United States in the shoes of the employee in Kee, the
24 United States would not have been liable because, based on the
25 release, the employee would not have been liable. The Ninth
26 Circuit instead placed the United States in the shoes of the
27 employer. Likewise, this court places the United States in
28 the employer's and not the employee's shoes.

1 The court recognizes a potential concern arising from a
2 rule that the United States is liable as the tortfeasor's
3 employer rather than as the tortfeasor. Because of the
4 immunity granted federal employees, gaps in liability could
5 arise unless the United States is placed precisely into the
6 shoes of the federal employee for purposes of liability.²
7 This concern, however, does not persuade the court to stray
8 from the clear language of the FTCA. The Supreme Court has
9 upheld gaps of liability under the FTCA before. See, e.g.,
10 United States v. Smith, 499 U.S. 160, 111 S. Ct. 1180 (1991)
11 (finding neither federal employee nor United States liable
12 because they both fit within exceptions). The court cannot go
13 beyond the language of the FTCA in waiving the United States'
14 sovereign immunity.

15 Accordingly, the court concludes that the United States
16 is liable under the FTCA to the same extent as would be an
17 analogous private employer. This conclusion, however, does
18 not resolve the issue of whether the United States is entitled
19 to the protection of the NMMMA's cap on medical malpractice
20 damages. An issue still remains as to what type of private
21 employer the United States is most analogous to in this case.

22 The United States argues that because Vincent's dental
23

24 ² For example, if in this case James, Thelen, and
25 Hutchison were private employees and thus not immune from
26 suit, Plaintiffs could sue them and not be subject to the
27 NMMMA's cap on damages. Under the FTCA, however, they can
28 only sue the United States. Therefore, unless the United
States stands precisely in the shoes of the federal employees,
Plaintiffs may be left in a worse position under the FTCA than
they would against a private party.

1 procedure took place at a federal hospital run by IHS, the
2 most analogous private employer would be a hospital. In
3 response, however, Plaintiffs contend that because James,
4 Thelen, and Hutchison were not employees of the Medical Center
5 but rather were merely stationed there, a private hospital
6 would not be the most analogous private employer.

7 Because the federal government can never be exactly like
8 a private actor, the court merely must look for the most
9 reasonable analogy. See LaBarge, 798 F.2d at 367. The court
10 finds that the most reasonable analogy in this case is a
11 private hospital. Plaintiffs argue that the three individual
12 tortfeasors here were not employees of the Medical Center;
13 rather James and Thelen were officers in the Commissioned
14 Corps of PHS and Hutchison was a civil service employee of
15 IHS, and all three were merely stationed at the Medical
16 Center, which is operated by IHS. Though recognizing the
17 logic of Plaintiffs' argument, the court does not agree. IHS
18 operates the medical center and is an operating division of
19 PHS. If this were a case where the employees came from a
20 department of the government that had no control over the
21 Medical Center, even remote, the court might find more merit
22 to Plaintiffs' argument. In that case, the government would
23 be acting more as an independent contractor providing
24 professional staff to an independent hospital. But the
25 employees here came from the same department that operates the
26 hospital. See 25 U.S.C. § 1661(b). Although PHS and IHS may
27 staff their hospitals differently than the private sector, a
28 private hospital remains the most reasonable analogy.

1 IV. CONCLUSION

2 The court finds that in this case the United States is
3 most reasonably analogous to a private hospital whose own
4 employees allegedly acted negligently. Because the NMMMA caps
5 damages for medical malpractice claims brought against
6 hospitals, the United States' liability in this case is
7 limited to \$600,000, except for recovery of medical care and
8 related benefits, which are not capped.

9 IT IS ORDERED denying Plaintiffs' Motion for Partial
10 Summary Judgment, filed April 5, 1999 (doc. 37).

11 IT IS ORDERED granting Defendant United States' Partial
12 Motion for Summary Judgment, filed May 5, 1999 (doc. 44).

13 DATED this _____ day of January, 2000.

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Robert C. Broomfield
United States District Judge

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19 Copies to counsel of record

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