



U.S. Supreme Court to hear *Castaneda* case

Oakland litigator Conal Doyle and Public Justice hope to make clear that no federal employee may violate the Constitution without consequence.

BY ADELE P. KIMMEL

The U.S. Supreme Court has decided to hear the *Castaneda* case, Public Justice's lawsuit over the medical neglect, penile amputation and death of immigration detainee, Francisco Cas-



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taneda. The issue, to be argued before the court by Oakland litigator Conal Doyle, is whether federal Public Health Service (PHS) officials may be sued for damages for violating the Constitution or whether

the people they injure or kill can only sue the United States government under the Federal Tort Claims Act (FTCA). The case is critically important to preserving access to justice because suits against the United States under the FTCA provide significantly narrower remedies than suits against individuals alleging constitutional violations.

Lawsuits under the FTCA borrow state damages caps, bar punitive damages and ban jury trials. In contrast,

suits against individual government officials for constitutional violations – called “*Bivens* actions,” based on the Supreme Court’s 1971 decision in *Bivens v. Six Unknown Agents* – have no caps on compensatory damages, allow punitive damages and provide jury trials.

The federal government’s position in the *Castaneda* case is that, no matter how outrageously the PHS defendants may have acted, only the federal government can be sued. A ruling by the federal district court in Los Angeles and a unanimous decision by the U.S. Court of Appeals for the Ninth Circuit, however, rejected the PHS defendants’ claim of immunity and held that PHS officials, like all other federal employees, may be sued for violating people’s constitutional rights. In the court of appeals’ words, the PHS defendants “provided no explanation for why Congress would want to provide these persons with the privilege, shared with no other federal employees, to *violate the Constitution* without consequence.” (*Castaneda v. United States*, (9th Cir. 2008) 546 F.3d 682, 698 (emphasis in original).)

Given the shameful history of the Tuskegee Syphilis Study conducted by the PHS, there are strong reasons for ensuring that PHS medical personnel are not singled out for “special immunity” from lawsuits alleging constitutional violations.

The Tuskegee Syphilis Study

From 1932 to 1972, the PHS conducted a study in Tuskegee, Alabama, on 399 black men in the late stages of syphilis. These men, most of whom were illiterate sharecroppers, did not know they had syphilis. Nor did they know that the PHS would not treat their disease and would, instead, use them as human guinea pigs to see whether syphilis killed blacks and whites differently. The PHS told the men that they had “bad blood” and gave them free medical exams, meals and burial insurance. The data was to come from their autopsies. “As I see it,” one doctor said, “we have no further interest in these patients until they die.” James H. Jones, *Bad Blood: The Tuskegee Syphilis Experiment* (New York: Free Press 1993).



The Tuskegee Syphilis Study was unethical and scientifically useless. In 1997, President Bill Clinton publicly apologized for what our government did to these men and their families. “Medical people are supposed to help when we need care,” he said. “The United States government did something that was wrong – deeply, profoundly, morally wrong.” With a litany of legislative reforms in tow, the President vowed that such a travesty “can never be allowed to happen again.”

Well, “never” will not last long if the Supreme Court holds that PHS officials have special immunity from lawsuits charging them with constitutional violations. Like the PHS officials who performed the Tuskegee Syphilis Study, the PHS employees responsible for Francisco Castaneda’s medical care ignored their pledge to heal and repair and did something that was profoundly and morally wrong. And they are trying to avoid answering for their conduct in court. The Supreme Court’s decision in *Castaneda* will tell us whether PHS officials will get the immunity they’re seeking or whether, like all other federal medical personnel, they will be answerable for violating people’s constitutional right to adequate medical care.

Beyond cruel and unusual

What happened to Francisco Castaneda while he was detained in the custody of U.S. Immigration and Customs Enforcement (ICE) should not have happened. And it should never happen to anyone again.

The U.S. Division of Immigration Health Services refused to give Mr. Castaneda a biopsy to rule out penile cancer, despite clear orders to do so by his treating provider – a PHS employee – 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, the federal district court in Los Angeles described the conduct of government doctors as “beyond cruel and unusual.” (*Castaneda v. United States* (C.D. Cal 2008) 538 F. Supp. 2d 1279, 1298.) 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. In a 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.

(*Castaneda*, 538 F. Supp. 2d at 1298 n.16.)

The court also rejected the PHS 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.” (*Ibid.*) 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.

(*Id.* at 1295.)

In April 2008, soon after the district court’s decision, the United States admitted medical negligence causing Mr. Castaneda’s death. The United States has not, however, admitted damages or liability for any of the other claims pending against it or its employees.

Statutes at issue and their historical context

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* (1971) 403 U.S. 388. *Bivens* created a 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 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 (1970) 42 U.S.C. § 233(a). The statute states in pertinent part:

DEFENSE OF CERTAIN MALPRACTICE AND NEGLIGENCE ACTS

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. (Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, § 223(a), codified at 42 U.S.C. § 233(a) (1970) (emphasis added).)

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. (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).) 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.

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* (1976) 429 U.S. 97, the seminal case establishing the right of prisoners to bring medical neglect claims under the Eighth Amendment's cruel and unusual punishment clause.

In 1980, the Supreme Court decided *Carlson v. Green* (1980) 446 U.S. 14, the lynchpin of the Ninth Circuit's analysis in *Castaneda*. *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" that militate against a *Bivens* remedy. (*Carlson*, 446 U.S. at 18-19.)

In 1988, Congress passed the Federal Employees Liability Reform and Tort Compensation Act of 1988 (LRTCA), Pub. L. No. 100-694 (1988), to add an express exclusivity provision to the FTCA and to make clear that *Bivens* actions for constitutional torts are preserved. 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." (28 U.S.C. § 2679(b)(1).) 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." (28 U.S.C. § 2679(b)(2)(A).) 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." (*Castaneda*, 546 F.3d at 695.)

According to the defendants in *Castaneda*, despite the 1988 amendment to the FTCA expressly preserving *Bivens* claims against all federal employees, PHS employees enjoy absolute immunity from suit under § 233(a) of the PHS Act. In their view, 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. Since the enactment of § 233(a) in 1970, every published decision before *Castaneda*, including the Second Circuit's decision in *Cuoco v. Moritsugu* (2d Cir. 2000) 222 F.3d 99 had held that PHS employees are immune from *Bivens* claims under § 233(a). Those decisions ignored the FTCA's express preservation of *Bivens* claims against all federal employees.

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.



The District Court's "statutory trail" analysis

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: *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 pre-empt *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. (546 F.3d at 689-92.) The Ninth Circuit also considered the historical context of the statute and legislative history to support its conclusion. (*Id.* at 692-95.)

The U.S. Supreme Court

There is currently a split between the Second and Ninth Circuits on the issue of whether PHS officials may be sued for constitutional violations, and the Supreme Court granted review of the Ninth Circuit's decision in *Castaneda* on September 30, 2009. The case will likely be argued in February 2010.

The Court will now decide whether the *Castaneda* family can pursue constitutional claims against the PHS doctors that purposefully denied Mr. *Castaneda* a routine biopsy to rule out cancer. And the families of the Tuskegee Syphilis Study's victims will be watching.

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