Sweet v. United States, No. 00-274C (U.S. Court of Federal Claims, filed May 11, 2000)

UNITED STATES COURT OF FEDERAL CLAIMS

WILLIAM H. SWEET, M.D., Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	)	Case No. 00-274 C

FILED MAY 11 2000

COMPLAINT

As and for his Complaint, plaintiff William H. Sweet, M.D. ("Dr. Sweet") says as follows.

PARTIES AND JURISDICTION

1. The plaintiff, Dr. Sweet, is a retired neurosurgeon. At all times material hereto, he was licensed to practice medicine in the Commonwealth of Massachusetts. For most of his career, and at all times material hereto, Dr. Sweet was on the faculty of the Harvard Medical School and the medical staff of Massachusetts General Hospital; from 1961 to 1977, he was chief of the neurosurgical service at M.G.H. He is a resident of Brookline, Massachusetts.

2. This action is founded on an indemnity agreement (the "MIT Indemnity Agreement") entered into between the Massachusetts Institute of Technology ("MIT"), and the Atomic Energy Commission (the "AEC"), an agency of defendant United States of America duly authorized by act of Congress to bind the United States, and on a second indemnity agreement believed to exist between Associated Universities, Inc. ("AUI") and the AEC (the "Brookhaven Indemnity Agreement"). Under the MIT Indemnity Agreement and, on information and belief, the Brookhaven Indemnity Agreement, Dr. Sweet is entitled to indemnity by the United States from certain liabilities, as discussed more fully below. Dr. Sweet further seeks a declaration that United States is obligated to indemnify him against future claims falling under the Brookhaven and MIT Indemnity Agreements.

3. The Nuclear Regulatory Commission has succeeded to the responsibilities of the AEC under 42 U.S.C. §2210 and under indemnity agreements of the type at issue in this case.

4. This Court has jurisdiction under 28 U.S.C. §1491, in that this action is founded upon an express contract with the United States. This Court has jurisdiction to award declaratory relief under 28 U.S.C. §2201.

FACTS

A. The MIT Indemnity Agreement.

5. In 1958, MIT, a nonprofit educational institution, completed the construction of a research nuclear reactor, known as "MITR-I." The reactor is powered by uranium enriched in the isotope 235. It was constructed with facilities -- including an operating room -- designed to facilitate its use in medical research and treatment.

6. Under the Atomic Energy Act of 1954, as periodically amended and now codified, in part, at 42 U.S.C. §2210, the AEC was authorized to enter into indemnity agreements with persons licensed to operate nuclear reactors. Such agreements were to bind the AEC, and through it the United States, to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from "public liability" resulting from "nuclear incidents."

7. On or about June 9, 1958, the AEC issued to MIT license no. R-37 to possess and operate MITR-I. The license has been in place, subject to periodic amendments, continuously from 1958 to the present. Copies of the license, and amendments through 1962, are attached hereto as Exhibit A.

8. On or about May 25, 1959 the AEC issued to MIT an interim indemnity agreement, a true and correct copy of which is attached as Exhibit B. MIT accepted and signed the interim indemnity agreement on or about August 1, 1959. By it, the AEC agreed to indemnify MIT, and other persons indemnified as their interests may appear, from public liability in excess of $250,000 arising from nuclear incidents, to a limit of $500,000, including the reasonable costs of investigating and settling claims and defending suits for damage. The Interim Indemnity

Agreement recited that it would be superseded in due course by the execution and issuance of a formal indemnity agreement.

9. Subsequently, the AEC issued and MIT accepted Indemnity Agreement No. E-39 (the MIT Indemnity Agreement), a true and correct copy of which is attached as Exhibit C hereto. By the terms of the MIT Indemnity Agreement:

a. The Agreement was effective from 12:01 A.M., June 9, 1958 forward, and superseded the interim indemnity agreement. (Art. 1, §5 and Attachment, Item 4)

b. "The Commission undertakes and agrees to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from public liability." (Art. II, §1)

c. "'Persons indemnified' means the licensee [MIT] and any other person who may be liable for public liability." (Art. I, §4)

d. "'Public liability' means legal liability arising out of or resulting from a nuclear incident," with certain exceptions not here relevant. (Art. I, §5)

e. "'Nuclear incident' means any occurrence or series of occurrences at the location or in the course of transportation causing bodily injury, sickness, disease, death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of the radioactive material," as well as other occurrences not here relevant. (Art. I, §2(a))

f. The "location" means the MIT reactor building and the area immediately around it. (Attachment, Item 3)

10. "Persons indemnified," "public liability," and "nuclear incident" are statutory terms taken from the Atomic Energy Act, and more particularly 42 U.S.C. §§2014 and 2210(c). These terms are used in the MIT Indemnity Agreement consistently with their statutory meanings, and with the purpose and intent of the Atomic Energy Act.

11. On information and belief, MIT has maintained private liability insurance relative to its operation of MITR-I in an amount of at least $250,000, continuously since operations began in 1958 to the present.

B. The Brookhaven Indemnity Agreement.

12. AUI, a nonprofit educational and research institution, operated Brookhaven National Laboratory ("BNL") in Upton, New York from 1947 until 1998. Among the facilities at BNL are the AEC-licensed Brookhaven Graphite Research Reactor, which went into operation in 1950, and two other AEC-licensed reactors. On information and belief, each of these reactors was, like MITR-1, the subject of an indemnity agreement (collectively, the "Brookhaven Indemnity Agreement") between the AEC and AUI, whose terms were substantially similar to those of the MIT Indemnity Agreement.

C. The Heinrich Civil Action.

13. On or about September 21, 1995, Dr. Sweet was named as a defendant in a complaint filed in the United States District Court for the Eastern District of New York. Subsequently, the action was transferred to the District of Massachusetts. The action (herein, the "Heinrich Civil Action") is pending in the United States District Court for the District of Massachusetts as *Evelyn Heinrich, et al. v. William H. Sweet, M.D., et al.,* Civil Action No. 97-CV-12134-WGY. The complaint has been amended several times since the action was filed. A true and correct copy of the Second Amended Complaint is attached as Exhibit D hereto.

14. Recently, the plaintiffs in the Heinrich Civil Action filed a motion for leave to file a Fifth Amended Complaint, a true and correct copy of which is attached as Exhibit E hereto.

15. The Complaint, as amended, in the Heinrich Civil Action, purports to state claims against which, under the MIT Indemnity Agreement and the Brookhaven Indemnity Agreement, the United States is obligated to indemnify Dr. Sweet. More particularly, the Complaint alleges:

a. That on June 14, 1951 Joseph Mayne, a patient of Dr. Sweet's, underwent boron neutron capture therapy ("BNCT") at Brookhaven. BNCT was a treatment for brain

cancer that involved intravenous injection of a boron compound, followed by exposure to neutron radiation at a reactor. (Second Amended Complaint, ¶¶3, 14)

b. That on March 6, 1957 a patient named Walter Carmen Van Dyke underwent BNCT in "an operating nuclear reactor" at Brookhaven. (Id., ¶16)

c. That on January 18, 1961 Dr. Sweet administered BNCT to a patient named George Heinrich at the MITR-I reactor. (Id., ¶9)

d. That on November 13, 1960 a patient of Dr. Sweet's named Eileen Sienkewicz received BNCT at MITR-I. (Id., ¶11)

e. That on April 16, 1961 a patient of Dr. Sweet's named Nassef Joseph received BNCT at MITR-I. (Fifth Amended Complaint, ¶20F)

16. The Complaint further alleges that the administration of BNCT to the plaintiffs' decedents caused those decedents radiation-related injury and death, and that Dr. Sweet and others are liable to their estates and their survivors under a variety of legal theories.

17. The Mayne and Van Dyke claims were dismissed just prior to trial. The Heinrich and Sienkewicz claims were tried in September-October, 1999, and resulted in jury verdicts against Dr. Sweet and against Massachusetts General Hospital for negligence, wrongful death, and punitive damages for wrongful death, as follows:

Plaintiff	Count	Sweet	MGH
Heinrich	Negligence	$250,000	$250,000
	Wrongful Death	$250,000	(Same)
	Death Punitives	$750,000	$1,250,000
Sienkewicz	Negligence	$500,000	Same
	Wrongful Death	$2,000,000	Same
	Death Punitives	$1,000,000	$2,000,000
TOTALS		$4,750,000	$6,250,000

Judgment has not yet entered. Post-trial motions, including motions for judgment as a matter of law and for new trial, are pending.

18. On March 22, 2000, the district court denied plaintiffs' motion to add Nassef Joseph as a plaintiff. The order was expressly without prejudice, however, to the right of Mr. Joseph's representatives to file a separate, related case.

19. Plaintiffs have also alleged that Dr. Sweet participated in a variety of other research projects and therapies involving radiation. In addition to Joseph, for example, the Fifth Amended Complaint asserted claims against Dr. Sweet on behalf of Nicholas Oddo, who was alleged to have been treated at Massachusetts General Hospital in 1953. The Oddo claims were dismissed voluntarily, but (as with the Joseph claims) without prejudice to their being re-filed in a separate action. On information and belief, should patients other than Mayne, Van Dyke, Sienkewicz, and Heinrich assert claims, such claims are or may be subject to indemnity agreements to which the United States is a party, under which it is or may be obligated to indemnify Dr. Sweet..

20. The United States participated in the Heinrich/Sienkewicz proceedings, in that there were claims asserted under the Federal Tort Claims Act. In February, 2000 the court ruled that the FTCA claims would not lie, because the actions complained of were those of independent government contractors.

21. The district court's FTCA ruling did not foreclose a claim for contractual indemnity. In fact, the court also ruled, prior to trial, that the Price-Anderson Act (the Atomic Energy Damages Act, Pub. L. 85-256, Sept. 2, 1957) governed the dispute among the non-governmental parties, and made a preliminary ruling, "intended in no way to bind any subsequent tribunal," that the Brookhaven and MIT Indemnity Agreements cover the BNCT treatments that are the subject of the complaint. Heinrich v. Sweet, 62 F. Supp. 2d 282, 298-99 (D. Mass. 1999).

22. In defending the Mayne, Van Dyke, Heinrich, Sienkewicz and cases, and possibly others in the future, Dr. Sweet has incurred and/or will incur substantial defense costs that the United States is obligated, under the Brookhaven and MIT Indemnity Agreements, to indemnify. Those costs, including attorneys' fees, expert witness fees, and other expenses, have aggregated at least $336,498.96, and continue to accrue

23. In the Mayne, Van Dyke, Heinrich, and Sienkewicz cases, and possibly others in the future, Dr. Sweet may become obligated for substantial damages that the United States is obligated, under the Brookhaven and MIT Indemnity Agreements, to indemnify.

COUNT I: CONTRACTUAL INDEMNITY; MIT INDEMNITY AGREEMENT

24. Dr. Sweet hereby repeats and re-alleges the matters set forth in paragraphs 1 through 23, inclusive, as if fully set forth herein.

25. The United States is liable, under the MIT Indemnity Agreement, to indemnify Dr. Sweet against his costs in defending the Heinrich and Sienkewicz claims, and against any liability he may have on those claims upon the entry of judgment.

26. The United States' failure to indemnify Dr. Sweet under the MIT Indemnity Agreement has caused and continues to cause him great damage.

COUNT II: CONTRACTUAL INDEMNITY; BROOKHAVEN INDEMNITY AGREEMENT

27. Dr. Sweet hereby repeats and re-alleges the matters set forth in paragraphs 1 through 26, inclusive, as if fully set forth herein.

28. The United States is liable, under the Brookhaven Indemnity Agreement, to indemnify Dr. Sweet against his costs in defending the Mayne and Van Dyke claims, and against any liability he may have on those claims upon the entry of judgment.

29. The United States' failure to indemnify Dr. Sweet under the Brookhaven Indemnity Agreement has caused and continues to cause him great damage.

COUNT III: DECLARATORY JUDGMENT

30. Dr. Sweet hereby repeats and re-alleges the matters set forth in paragraphs 1 through 29, inclusive, as if fully set forth herein.

31. The Complaint in the Heinrich Civil Action alleges that patients Mayne, Van Dyke, Heinrich, and Sienkewicz were part of larger series of clinical trials of BNCT using the Brookhav ٦ and MIT reactors, and involving "at least 66 patients." (Second Amended Complaint,

¶2) They have sought, and been denied, class action status, and permission to "notify" "putative class members" of the pendency of the action. There is a very real possibility that other plaintiffs, some or all of whose claims may be subject to the indemnity obligations under the Brookhaven Indemnity Agreement, the MIT Indemnity Agreement, and possible other indemnity agreements, may join in the future or may commence separate actions against Dr. Sweet.

32. An actual controversy has arisen between Dr. Sweet and the United States as to the United States' obligations to indemnify Dr. Sweet against defense costs and potential liability in the case of claims brought by or on behalf of patients and/or their families.

WHEREFOR, Dr. Sweet prays that this Court enter judgment:

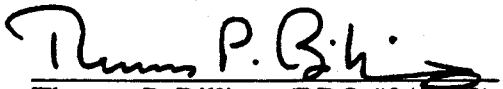
A. Awarding him as damages the amount of his defense costs in the Heinrich Civil Action, in an amount not less than $336,498.96;

B. Awarding him as damages any amount for which he may be, or may become, liable in the Heinrich Civil Action;

C. Declaring the rights and liabilities of the parties under the Brookhaven and MIT Indemnity Agreements, and more particularly, declaring that the United States is obligated to indemnify Dr. Sweet against his defense costs and any potential liability in the case (at least) of any claim brought by or on behalf of any patient who received BNCT at Brookhaven or MIT, and/or their families; and

D. Awarding Dr. Sweet such other and further relief as is lawful and proper.

By its attorneys,



Thomas P. Billings (BBO #043040)
SALLY & FITCH
225 Franklin Street
Boston, Massachusetts 02110
(617) 542-5542

Dated: May 9, 2000

Patel v. Miller & United States, No. 99-cv-3938 (E.D. Pa., filed May 31, 2000)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JYOTIKABEN PATEL and ARUN PATEL, h/w, Plaintiffs	:	
	:	CIVIL ACTION
v.	:	
	:	No. 99-cv-3938
LEE ROY MILLER, and UNITED STATES OF AMERICA, Defendants	:	

COMPLAINT

Plaintiffs, JYOTIKABEN PATEL and ARUN PATEL, husband and wife, for their complaint against defendants LEE ROY MILLER and UNITED STATES OF AMERICA, state as follows:

PARTIES

1. Plaintiffs JYOTIKABEN PATEL and ARUN PATEL are husband and wife and are adult individuals residing within the Eastern District of Pennsylvania at 2828 Egypt Road, Apartment N-103, Audobon, Pennsylvania.

2. Defendant LEE ROY MILLER is an adult individual residing at 5019 Branston Road, Ooltewah, Tennessee.

3. Defendant UNITED STATES OF AMERICA, at all times material hereto, acted by and through its agent, servant, workman and/or employee, defendant MILLER,

who was then and there acting within the scope of his agency, servitude, work and/or employment.

JURISDICTION AND VENUE

4. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through 3 above as though fully set forth at length.

5. Jurisdiction of this matter is premised upon 28 U.S.C. Sections 1346, 1392 and principles of pendent and/or ancillary jurisdiction. Plaintiffs' administrative claim was denied by the appropriate administrative agency on or about May 12, 2000, and a true and correct copy of the notice of denial is attached hereto as Exhibit "A."

6. Venue of this matter is premised upon 28 U.S.C. Section 1402.

FACTS

7. Venue of this matter is premised upon 28 U.S.C. Section 1402.

8. On or about June 3, 1997, plaintiff-wife was operating a 1991 Chevrolet Cavalier owned by plaintiff-husband south on Allendale Road, approaching the intersection of Allendale Road and Keebler Road in the Township of Upper Merion, Montgomery County, Pennsylvania.

9. At the aforesaid place and time, defendant MILLER was operating a rental car north on Allendale Road approaching the intersection of Keebler Road.

10. At the aforesaid place and time, defendant attempted to execute a left-hand turn from the northbound lane of Allendale Road into a private driveway.

11. As defendant did so, he turned suddenly and without warning directly into plaintiffs' motor vehicle.

12. As a result of the aforesaid collision, plaintiff-wife was thrown about violently within her motor vehicle causing her to sustain serious personal injuries more fully set forth below.

13. The aforesaid collision was due solely to the negligence, carelessness and recklessness of defendants, and due in no manner whatsoever to any act or failure to act on the part of plaintiffs.

COUNT I – JYOTIKABEN PATEL v. DEFENDANTS

14. Plaintiff-wife incorporates the allegations of paragraphs 1 through 13 above herein by reference as though fully set forth at length.

15. The negligence, carelessness and/or recklessness of Defendants consisted of the following:

(a) operating motor vehicle at an excessive rate of speed;

(b) operating motor vehicle in excess of the prima facie speed limit;

(c) failing to maintain an adequate lookout for vehicles upon the highway, including the vehicle of Plaintiffs;

(d) failing to operate his motor vehicle in a manner which would enable him to stop within the assured clear distance ahead;

(e) negligently applying the brakes of the motor vehicle;

(f) failing to maintain control of his motor vehicle;

(g) negligent entrustment of a motor vehicle;

(h) failing to maintain the motor vehicle in an adequate state of repair;

(i) disregarding posted warnings and restrictions governing travel on Allendale Road at or near its intersection with Keebler Road, at or near the scene of the accident;

(j) operating his motor vehicle in a manner which violated the statutes and ordinances of the Commonwealth of Pennsylvania;

(k) being otherwise negligent, careless and/or reckless under the circumstances.

16. As a result of the negligence, carelessness and/or recklessness of defendants, jointly and/or severally, plaintiff-wife sustained serious personal injuries including, but not limited to the following: cervical sprain and strain with cervical disc bulging; post-traumatic cephalgia; myofascial pain syndrome; shoulder strain and sprain; thoracic sprain and strain; post-traumatic stress reaction; together with other complications, the full extent of which are not yet known.

17. As a further result of the negligence, carelessness and/or recklessness of the defendants, jointly and/or severally, plaintiff-wife, has incurred and may in the future incur, medical expenses in and about endeavoring to cure herself of the aforesaid injuries.

18. As a further result of the negligence, carelessness and/or recklessness of the defendants, jointly and/or severally, plaintiff-wife has suffered and may in the future suffer, a loss of earnings and earning capacity, some or all of which may be permanent in nature.

19. As a further result of the negligence, carelessness and/or recklessness of defendants, jointly and/or severally, plaintiff-wife has experienced and may in the future

experience pain, suffering, inconvenience, emotional distress and a loss of life's pleasures.

WHEREFORE, Plaintiff, JYOTIKABEN PATEL, demands judgment in her favor, and against Defendants, jointly and/or severally in an amount not in excess of One Hundred and Fifty Thousand ($150,000.00) Dollars, together with such further relief as deemed appropriate by the Court.

COUNT II – ARUN PATEL v. DEFENDANTS

20. Plaintiff-husband incorporates the allegations of paragraphs 1 through 19 above herein by reference as though fully set forth at length.

21. As a consequence of the conduct of defendants as aforementioned, plaintiff-husband has been, and may in the future be, deprived of the society, companionship, services and assistance of his wife, JYOTIKABEN PATEL.

22. As a further result of the conduct of defendants as aforesaid, plaintiff-husband sustained damage to his automobile.

WHEREFORE, Plaintiff, ARUN PATEL, demands judgment in his favor, and against Defendants, jointly and/or severally in an amount not in excess of One Hundred Fifty Thousand ($150,000.00) Dollars, together with such further relief as deemed appropriate by the Court.

SOLOMON, BERSCHLER, WARREN,
SCHATZ & FLOOD, P.C.

BY:_____
JEFFRY S. PEARSON
Attorney for Plaintiffs

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
GENERAL COUNSEL

May 12, 2000

VIA CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Jeffry S. Pearson
Solomon, Berschler, Warren, Shatz & Flood, P.C.
522 Swede Street
Norristown, PA 19401-4834

SUBJECT: Tort Claim No. 144 - Jyotika Patel

Dear Mr. Pearson:

The Nuclear Regulatory Commission (NRC) has considered your administrative claim dated May 8, 1999, presented under the Federal Tort Claims Act, as amended, 28 U.S.C. § 2671 et. seq.. The claim seeks $255,000.00 in damages for your client, Ms. Patel.

The NRC has determined that your administrative claim fails to state a claim upon which relief can be granted. Therefore, your administrative claim is denied.

If you are dissatisfied with the NRC's action on this claim, you may file suit in an appropriate United States District Court not later than six months after the date of mailing of this notification of final denial of your claim. 10 C.F.R. § 14.37 (2000).

Sincerely,

Donald F. Hassell
Assistant General Counsel
for Administration

EXHIBIT "A"