IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOSHIA DANIELS BURTON, *et al.,*	*	
Plaintiffs	*	
v.	*	**Civil Action No. 05-2214 (RCL)**
UNITED STATES OF AMERICA	*	
Defendants	*	

PLAINTIFF'S REPLY BRIEF ON CHOICE OF LAW

The government makes one fundamental mistake in its choice of law analysis in this case. It equates "place of the wrong" with "place of the wrongful conduct" under Maryland's choice of law doctrine of *lex loci*. The two are not synonymous. The fact is that Maryland's *lex loci* rule equates "place of the wrong" with "place of the *injury*." Thus, to the extent this Court should look to Maryland's choice of law principles, as the defendant urges, that would result in application of Maryland law.

In a simple car crash or police shooting case, the wrongful conduct and the injury occur in the same jurisdiction, and there is no occasion for the court to differentiate what law applies when the conduct occurs in one state but the injury in another. The Maryland courts, however, uniformly look to the place of the *injury* for the substantive law to apply. *See, e.g., Jones v. Prince George's County*, 541 F.Supp.2d 761 (D. Md. 2008) (in case cited by the government, the wrongful shooting by the police officer and the death of the decedent both occurred in Virginia, and thus under Maryland's choice of law rule, the court applied Virginia law). In the most recent *lex loci* decision by Maryland's highest court, *Erie Ins. Exchange v. Heffernan*, 399 Md. 598,

925 A.2d 636 (2007), the Court of Appeals said that despite the fact that all the parties in the case were from Maryland and their contract was centered there, the tort action between them was governed by the law of the place where the injury occurred, Delaware. The court observed: "The reason that we look to the law of the foreign jurisdiction, in this case, is because of our consistent adherence to the principle of *lex loci delicti,* which requires that we look at the substantive law of the *place of the injury* to resolve the tort aspects of the case." *Id.*, 399 Md. at 627, 925 A.2d at 653 (emphasis added).

In its last choice of law case before *Heffernan,* Maryland's highest court clarified that "place of injury" means the place where the tortious conduct has caused an actual, justiciable injury to the plaintiff or plaintiff's decedent. That case was *Philip Morris Inc. v. Angeletti*, 358 Md. 689, 752 A.2d 200 (2000). The court had a lengthy discussion of the issue, which the plaintiff quotes in full because it makes crystal clear what Maryland's rule is:

> This Court has acknowledged that "the tort doctrine of *lex loci delicti* ... requires a tort action to be governed by the substantive law of the state where the wrong occurred." *Hauch,* 295 Md. at 123, 453 A.2d at 1209 (quoted in *In re Sabin Oral Polio Vaccine Prods. Liab. Litig.*, 774 F.Supp. 952, 954 (D.Md.1991), *aff'd*, 984 F.2d 124 (4th Cir.1993)). *See also Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 511 (4th Cir.1986) (explaining that under Maryland conflict of law jurisprudence, "the law of the place of injury applies. The place of injury is the place where the injury was suffered, not where the wrongful act took place." (Citation omitted)); *Trahan v. E.R. Squibb & Sons, Inc.*, 567 F.Supp. 505, 507 (M.D.Tenn.1983) ("If the tortious act and resulting injury occur in different jurisdictions, the law in Tennessee, as in most jurisdictions, is that the law of the state where injury was *suffered* controls-not the law of the state where the wrongful act took place."); ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW § 133, at 267 (3rd ed. 1977) ("Some acts ... produce impacts across state lines. The orthodox rule, with torts as with crimes, is that when an act operates across a state line its legal character is determined by the law of the place where it first takes harmful effect or produces the result complained of." (Footnotes omitted)).
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> The place of injury is also referred to as the place where the last act required to complete the tort occurred. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (stating that the "place of wrong is the state where the last event necessary to make an actor liable for an alleged tort takes place"); *Farwell,* 902 F.2d at 286 (explaining that, under the doctrine of *lex loci delicti,* "the locus of a tort for choice of law purposes is that

> where the last act required to complete it occurred"); *Alexander v. General Motors Corp.*, 219 Ga.App. 660, 466 S.E.2d 607, 609 (1995) (noting that, under the doctrine of *lex loci delicti*, "in torts of a transitory nature the place of the wrong is the place where the last event occurred necessary *747 to make an actor liable for the alleged tort"), *rev'd on other grounds*, 267 Ga. 339, 478 S.E.2d 123 (1996); Richard W. Bourne, *Modern Maryland Conflicts: Backing into the Twentieth Century One* Hauch *at a Time*, 23 U. BALT. L. REV. 71, 77 (1993) (noting that "in tort cases, Maryland applies *lex loci delicti*, which it construes as **232 meaning the law of the place where the last event giving rise to a right to recovery occurred" (footnotes omitted)); HERBERT F. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWSS § 93, at 263-64 (3d ed. 1949) ("The tort is complete only when the harm takes place, for this is the last event necessary to make the actor liable for the tort.").

358 Md. at 746-747, 752 A.2d at 231-232.

In this case, the simple fact is that the negligent conduct at Walter Reed in the District of Columbia was mere "negligence in the air" until the fateful moment when Samuel Burton collapsed and died on his living room floor in Lutherville, Maryland. The tort was complete and the harm took place in Maryland.

The same flawed analysis by the government occurs in its discussion of *Herbert v. District of Columbia*, 808 A.2d 776 (D.C. 2002), where both the wrongful act and the injury occurred in D.C., and the court correctly applied D.C. law. One reason the court was correct is that the D.C. Wrongful Death Act expressly applies to *injuries* that occur within the District:

> When, *by an injury done or happening within the limits of the District*, the death of a person is caused by the wrongful act, neglect, or default of a person or corporation, and the act, neglect, or default is such as will, if death does not ensue, entitle the person injured, or if the person injured is married or domestic partnered, entitle the spouse or domestic partner, either separately or by joining with the injured person, to maintain an action and recover damages, the person who or corporation that is liable if death does not ensue is liable to an action for damages for the death, notwithstanding the death of the person injured, even though the death is caused under circumstances that constitute a felony.

D.C. Code § 16-2701(a) (emphasis added).

Where the wrongful act occurs in the District, but the injury occurs elsewhere, the Court analyzes the case under the District's governmental interest choice of law principles, which have

consistently held that on an issue of damages for a spouse's loss of consortium, the state with the most interest in applying its law is the state where the marriage was domiciled. This Court so held in the *Long* case[1] and the *Felch* case[2] cited in our opening brief, and the D.C. Court of Appeals so held in the second *Stutsman* case, *Stutsman v. Kaiser Foundation Health Plan*, 546 A.2d 367, 374 (D.C. 1988). To be sure, in *Felch* and *Stutsman*, the application of the law of the state where the marriage was domiciled, Virginia, resulted in extinguishing the plaintiff's consortium claim, since Virginia does not recognize consortium, but a common sense "sauce for the goose, sauce for gander" rule would suggest no principled difference why a defendant in a D.C. case should enjoy the application of a foreign state's law on consortium but a plaintiff should not.

[1] The government completely misses the point of the *Long* case. There, although the *only* connection with Maryland was that the injury took place and the plaintiff resided in Maryland, and although the court applied District of Columbia law to all the other issues, it nonetheless still applied Maryland law to the claim for loss of consortium: "With respect to the loss of consortium claim, the District of Columbia applies the law of the state where the marriage is domiciled. The Court will apply the law of Maryland to this count, including Maryland's cap on noneconomic damages. The marriage relationship exists in Maryland and the alleged injury and damage to the marital relationship, including alleged "loss of consortium, affection, assistance, and conjugal fellowship,' has occurred primarily in Maryland." *Long v. Sears Roebuck & Co*., 877 F. Supp. 8, 13 (D.D.C. 1995) (citations omitted).

[2] The government admits that the United States resides everywhere so its location is of no moment to the case, and yet it cites no law on why the doctor/patient relationship should be the relevant relationship between the parties, as opposed to the marital relationship. *Felch* found the marital relationship the one that was critical to the consortium issue. 562 F. Supp. at 385.

For all of these reasons, the court should apply Maryland law to the issue of damages.

Respectfully submitted,

/s/ Patrick A. Malone

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5, I certify that on this 6th day of March, 2009, a true and exact copy of the foregoing was sent by electronic case filing to:

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/s/ Patrick A. Malone
_____
Patrick A. Malone