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SOUTHERN DISTRICT OF IA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

BROOKE HARRINGTON, as Personal Representative of the Estate of Gaylord William Thayer, Deceased, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	*	4-00-CV-90486 FINDINGS OF FACT CONCLUSIONS OF LAW AND JUDGMENT

On August 29, 2000, Brooke Harrington, as Personal Representative of the Estate of Gaylord William Thayer, deceased, filed a Complaint against the United States and employees of the Veterans Administration pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§1346(b) and 2674. Upon filing by the government of its Notice of Substitution and Certification of Scope of Employment regarding the individual defendants, the Court substituted the United States and dismissed the individual defendants as parties.

Trial on the contested factual and legal issues between the parties was held on May 28-31 and June 3-4, 2002. At the close of the evidence, the Court ordered that a transcript be prepared and that the parties submit proposed Findings of Fact and Conclusions of Law after the trial transcript was available. The Court subsequently ordered the parties to submit post-trial documents by July 22, 2002. Upon motion by the government, this date was extended by the Court to July 31, 2002. Both parties have now submitted proposed Findings of Fact and Conclusions of Law. The Court considers this matter submitted.

Exhibit # 90.

FINDINGS OF FACT

I. FACTUAL BACKGROUND

A. Gaylord Thayer and Family

1. Stipulation. Prior to trial, the Court approved the Stipulation of the parties as to facts which are true and undisputed:

A. Gaylord William ("Bill") Thayer was born on June 7, 1947.

B. Bill Thayer died in the secured psychiatric unit, Ward 85B, of the Veterans Administration ("VA") Hospital in Knoxville, Iowa in the evening of June 2, 1999.

C. Bill Thayer voluntarily admitted himself into the VA Hospital on June 1, 1999, after being admitted on "emergency hold" on May 29, 1999.

D. Bill Thayer was hospitalized nine times at the Veterans Affairs hospital in Knoxville, Iowa between 1970 and his last admission on May 29, 1999.

E. All alleged acts or omissions of VA personnel concerning the care of Bill Thayer prior to his death were taken within the scope of their employment as employees of the VA and ultimately as employees of the United States government.

F. Parties making claims in this matter are the Estate of Bill Thayer and Bill Thayer's daughters. The daughters are Brooke Harrington, born October 13, 1975, Holly Thayer, born December 19, 1977 and Marissa Thayer, born January 9, 1980.

G. Bill Thayer was a decorated, totally-disabled Vietnam combat veteran. The reason for his disability was schizophrenia related to combat. At his death, his disability earnings were $1,989.00 a month.

H. Bill Thayer's burial expenses were $5,829.11.

2. Gaylord William Thayer (referred to by his family and others at trial as "Bill Thayer"), served his country as a soldier in Vietnam. On March 13, 1968, during a combat assignment, he stepped on a land mine. During his lengthy hospitalization and rehabilitation, he was diagnosed by U.S. Army physicians as suffering from schizophrenia. His mental illness was exacerbated by a "mental breakdown" during an artillery demonstration after he returned to duty.

3. Following his discharge from the U.S. Army, Mr. Thayer worked at various jobs including the VA Hospital in Knoxville, Iowa. In 1991, he was determined to have a 100% service-connected disability and he retained this VA status to the time of his death.

4. Mr. Thayer was married to Judy Thayer (now Judy Winterbottom) from February 17, 1974 to May, 1999, a few weeks before Mr. Thayer's death. Mr. Thayer had three daughters and, at the time of his death, he had five grandchildren. Marissa Thayer was pregnant at the time of his death.

5. At the time of trial each of the daughters had two children: Marissa Thayer (Sammy, age 7, and Brandon, age 2), Holly Thayer (Haley, age 8 and Trey, age 4) and Brooke Harrington (Celine, age 7 and Gannon, age 5).

6. Both Brooke Harrington and Holly Thayer have significant health problems. Mrs. Harrington is being treated for kidney disease and is unable to work due to her health. Holly Thayer is taking medication for asthma (Accolate, 2 inhalers and Nebulizer), gastric reflux (Nexium) and depression. Her treatment for depression started after and is related to her father's death.

7. When Mr. Thayer's children had children, he developed close relationships with them as well and assisted his children with their care. Two of his daughters were mothers at an early age and he would take them to school and take care of grandchildren during school hours. The father

of Marissa Thayer's son, Sammy, was a truck driver and was away from home for extended periods of time. Mr. Thayer spent more time with Sammy than his father. Holly Thayer's children did not have a father living with them and she testified that Mr. Thayer served as a father-figure.

8. All three of Mr. Thayer's children now live in the Des Moines, Iowa area. Brooke Harrington lived in Texas from 1992 to 1995, from May 1999 to June 1999 and from August 1999 to February 2002. While in Texas, she maintained regular contact with her parents. Marissa Thayer lived in Allerton, Iowa and Mr. and Mrs. Thayer moved to southern Iowa to be closer to her. In early 2002 she moved to Altoona, Iowa. Mr. Thayer would see his daughters living in Iowa at least 2-3 times a week. After he separated from his wife in 1997, he visited them even more frequently.

9. Mr. Thayer provided financial support to his daughters up to the time of his death. He paid bills for car insurance, utilities, rent and car repairs; bought clothing, groceries and necessities; guaranteed educational expenses and made cash gifts.

10. Financial support would vary from month to month and Mr. Thayer attempted to equalize his assistance between the children. During the twelve (12) months before his death, Mr. Thayer provided approximately $10,000 in financial support. This amount includes a car purchase. Mrs. Winterbottom estimated that Mr. Thayer would spend $600 - $700 a month on the children when none of them were living with him.

11. The Thayer children have had and continue to have financial needs. All of them are single mothers with children. (Brooke Harrington is married, but separated). While Marissa Thayer is working regularly as a certified nurse assistant, she is living paycheck to paycheck. She is separated from the father of her children. Holly Thayer has in the past worked as a cashier and a

housekeeper and has started a job, but has had long periods of unemployment and has had difficulty staying employed. Until she started her new job, which pays $7.50 an hour, she was living on $426.00 in government assistance. Brooke Harrington has had some twenty-one (21) different jobs in the last 10-11 years and is currently unable to work. The Thayer daughters will have a continuing need for financial support in the future.

B. Mr. Thayer's Psychiatric History

12. Mr. Thayer was hospitalized multiple times during his life at the Department of Veteran Affairs Hospital (hereinafter "VA Hospital") in Knoxville, Iowa. Mr. Thayer was hospitalized at various times over 30 years at the VA Hospital. Mr. Thayer was never observed during his hospitalizations to be violent towards himself, patients, or VA Hospital staff.

13. Between November 12, 1997, and December 1, 1997, Mr. Thayer was hospitalized under Dr. David Bethel's care. When Mr. Thayer was discharged in 1997, he was placed on 5 milligrams of Olanzapine a day, 50 milligrams of Trazodone at bedtime, and 2 milligrams of Artane a day.

14. Mr. Thayer discontinued his medications as early as March 1998 when Dr. Bruce Sieleni saw him as an outpatient. Dr. Sieleni tried to convince Mr. Thayer to resume taking his medications and to undergo regular psychiatric treatment. It was reported that Mr. Thayer was becoming more paranoid and preoccupied with matters during this time. Mr. Thayer decided not to continue his treatment at the VA Hospital.

15. Mr. Thayer was a cigarette smoker. When he was off of his medication and he became symptomatic, his smoking would increase significantly.

16. Dr. Kim saw Mr. Thayer on March 24, 1999, as a walk-in patient. Mr. Thayer was excitable, marginally cooperative, had pressured speech, and an unkempt appearance. His

speech was disorganized, incoherent, and he had loose personal associations. He was not on medication.

C. Mr. Thayer's Final Hospitalization

17. Mr. Thayer was hospitalized at the VA Hospital in Knoxvillle, Iowa from 3:22 a.m. on May 29, 1999 until his death there on the evening of June 2, 1999. The admitting diagnosis was chronic paranoid schizophrenia, acute exacerbation. Although his admission was technically involuntary (later changed to voluntary), he was found on the grounds of the hospital by VA police. The part of the VA hospital where Mr. Thayer spent his last hospitalization was the secured psychiatric unit Ward 85B.

18. The admission notes indicate that Mr. Thayer stated he had heard babies moaning because they were being drowned by "them". He further said that if he had to, he would get a gun and kill "them."

19. On the day of his admission, Mr. Thayer became loud and abusive, knocked food off his tray and refused to take offered anti-psychotic medications. The VA police had to be called to gain his cooperation.

20. Mr. Thayer was restarted on medications which had been prescribed for him during his previous hospitalization on November 12 to December 1, 1997. Mr. Thayer was prescribed 1 milligram of Ativan PRN as needed for agitation, anxiety; 5 milligrams of Haldol PRN for paranoia; 5 milligrams of Olanzapine at bedtime; 2 milligrams of Artane at bedtime; and 50 milligrams of Trazadone at bedtime.

21. On Mr. Thayer's admission to Ward 85B, his cigarettes were confiscated. (Exh. 26, p. 1049). He was never provided a smoking patch.

22. The symptoms of schizophrenia are often divided into positive and negative symptoms. Positive symptoms are hallucinations, disorganized thinking and speech, and delusions; negative symptoms are communication, decreased affect, avolition and apathy.

23. Olanzapine is a typical anti-psychotic drug and a first line approach to treatment of schizophrenia. It addresses hallucinations, delusions, and it has sedating qualities. Olanzapine is an anti-psychotic drug which addresses both positive and negative symptoms. Olanzapine generally does not have any effect on positive symptoms of schizophrenia for one week, regardless of dosage.

24. Haldol has been in existence much longer that Olanzapine. It is an as-needed medication, which is common practice in psychiatry. Haldol addresses the positive symptoms in schizophrenia. It is much more effective on the symptoms of hallucinations and delusions. It takes three weeks for Haldol to decrease hallucinations, disorientation, and delusional thoughts substantially; however, it is still used for short-term behavior control and sedation.

25. Trihexphenidyl or Artane was prescribed to prevent extrapyramidal side effects such as Parkinson's disease-like symptoms of rigidity and tremor, dystonic reactions, *i.e.* skeletal muscle contraction, and echokinesia in which the patient is too restless to sit still and rocks back and forth or paces the ward.

26. Trazadone was prescribed for sleep.

27. On May 31, two days after Mr. Thayer's admission, on May 29, he got into a heated argument with a nurse, who again called the VA police.

28. On June 1, the day before his death, nurse manager Debra Gaffney felt that Mr. Thayer was extremely psychotic, and the most angry she had ever seen him in multiple hospitalizations spanning years, and that his medications needed to be increased.

29. On that same day, his treating psychiatrist, Dr. Kim, on seeing Mr. Thayer for the first time, described him as "very agitated and delusional" in the afternoon.

30. Two medication notes on June 1 show that Mr. Thayer's agitation was increasing. An evening chart entry by ward nurse Jeanenne Davis showed that he "remains delusional" just before bedtime on June 1.

31. Against this backdrop of severe mental illness, the VA did not provide a psychiatrist to see Mr. Thayer until the fourth day of his admission, when Dr. Kim saw him on the afternoon of June 1. Dr. Kim was not informed of the nurses' observations and opinions on the severity of Mr. Thayer's illness and agitation and the need to increase medication. There are but a few, shallow medical chart references to the observations, and none of the observations of nurse Gaffney or nurse assistant See appear in the chart.

32. On June 2, the day of Mr. Thayer's death, Mr. Thayer signed a voluntary admission form and agreed to be compliant with his medications.

33. That same day, Dr. Kim discontinued Mr. Thayer's prescriptions of Olanzapine, Ativan, and Artane; increased the dosage of Trazadone from 50 to 100 milligrams, prescribed 1 milligram of Benztropine twice a day and an injection of 150 milligrams of Haldol Decanoate.

34. Neither of the as-needed medications, lorazepam and haldol, were given from 2:30 p.m. on June 1 to the time of Mr. Thayer's death on June 2.

35. That evening, two significant observations were made by nursing personnel. First, nurse assistant Ralph See observed that Mr. Thayer appeared more delusional and seemed more sick than he had been earlier in the hospitalization. Second, nurse Davis observed that he was paranoid, restless and delusional, leading up to a request by Mr. Thayer to be taken outside for a

cigarette. Davis denied the request and did not offer Mr. Thayer a nicotine patch, or a "PRN" (as-needed) medication. Thereafter, Mr. Thayer avoided eye contact with her.

D. The Restraint of Mr. Thayer

36. Nurse Davis estimated that her interaction with Mr. Thayer about his request for a cigarette occurred at 8:00 p.m. or after on June 2. Ms. Davis performed some tasks for other patients, then went off the ward to the "Sure-Med," which is a one-minute walk from where she was in the ward. An incident then began in Ms. Davis' absence, at a time she estimated to be 8:30 - 9:00 p.m.

37. The incident began when Mr. Thayer got up from a table in the day room of the ward, and went over to a locked cabinet where patient cigarettes are kept. He began shaking the lock on the cabinet, and nurse assistant See came over to Mr. Thayer and asked him what he was doing. Mr. Thayer elbowed Mr. See in the ribs, and a physical altercation began.

38. Another nursing assistant, Roy Riseley, came to assist Mr. See but Mr. Thayer, using his open hand, hit Mr. Riseley below the throat and pushed him back.

39. After viewing the assault on the two nursing assistants, a patient, Mel Bolt, who tried to subdue Mr. Thayer, was struck and thrown on the floor by Mr. Thayer.

40. Mr. See then unsuccessfully tried to get a hold of both of Thayer's arms from behind to sit Thayer down or escort him to the restraint room.

41. Mr. See instructed patient Bolt to call for help as he and Mr. Riseley tried to subdue Mr. Thayer. Mr. Riseley and Mr. See tried to restrain Mr. Thayer by grabbing his arms and Mr. Thayer continued to resist.

42. Mr. Thayer got up on his hands and knees with Messrs. See and Riseley on the floor trying to hold his arms. Mr. Riseley was lying on his side holding Mr. Thayer's left arm. Mr.

See was on the floor, to the right side of Mr. Thayer. Mr. See had locked his right arm under Mr. Thayer's right arm and leaned across Mr. Thayer's upper right back and grabbed Mr. Thayer's left shoulder. Mr. See's upper body was on Mr. Thayer's shoulders and he was rocked by Mr. Thayer's bucking so that Mr. See was temporarily on Mr. Thayer's shoulders and head. Mr. See laid on Mr. Thayer in this position around one minute.

43. Hospital employees, Margaret Carlson and George Mosley came from other floors to assist with the "take down." Mr. Mosley went to retrieve the restraints and brought the wrong ones. Mr. Risely had to go get the right ones.

44. In the meantime, Nurse Jeannene Davis, who was at the Sure-Med getting medications, responded to the call, returned to the day room, and called for additional assistance. She was not on the floor when the incident began.

45. After, Ms. Davis called for assistance, she laid across Mr. Thayer's lower back. Davis positioned herself on Mr. Thayer's low back and Mr. See was already on his upper back. Mr. See and Ms. Davis concede that they remained on Mr. Thayer's back for as much as two minutes. Mr. See got off of Mr. Thayer's body when Mr. Riseley threw the restraints down.

46. After Mr. Riseley retrieved the restraints, Margaret Carlson and Roy Riseley placed wrist restraints on Mr. Thayer with Mr. See's assistance. Messrs. Riseley and See placed the wrist restraints on Mr. Thayer's right arm. Once the wrist restraints had been placed on Mr. Thayer, Mr. Mosley who had held Mr. Thayer's legs during the application of the wrist cuffs, assisted Mr. Riseley in placing the ankle restraints on Mr. Thayer.

47. As soon as the restraints were applied, Ms. Davis got off of Mr. Thayer.

48. During the takedown and restraint of Mr. Thayer, he never made any sounds. No one had said anything to Mr. Thayer since Mr. See's first question near the locked cabinet. No one checked his breathing, and no one spoke to him.

49. At some time between the time the restraints were applied and the employees raised Mr. Thayer up from the prone position, he went limp and stopped breathing.

50. Nurse Davis and nurse assistant See began CPR, and nurse assistant Carlson summoned emergency medical personnel. Mr. Thayer could not be revived and Dr. Samaroo Jaipaul pronounced him dead at 9:05 or 10:05 p.m., depending on which chart entry is believed.

51. Nurse assistant See was nominally in charge of the restraint incident, but did little to direct it. VA policy required nurse Davis to take charge of the incident once she arrived, but she failed to do so. The government's restraint expert characterized the incident as an "all-out brawl."

52. The first hospital record of the incident by involved personnel was done by nurse Davis at 2:28 a.m. on June 3, over four hours after Mr. Thayer's death. At trial, Ms. Davis disclaimed her chart entry of the point at which Mr. Thayer went limp.

53. The hospital itself was not satisfied with the initial charting, and directed a non-participant, nurse manager Gaffney, to construct and insert a detailed chart note from hearsay notes of a non-clinician about the incident on June 17 or about 15 days after the incident.

54. Nurse Gaffney's note was later removed from the chart without her knowledge, and the government offered no explanation at trial as to why or how this was done. This series of charting events was unprecedented in the experience of VA personnel who testified about it at trial.

II. The Standards of Care and Their Breach

A. Medication and Psychiatric Treatment

55. The professionally accepted initial dosage of Olanzapine is five to ten milligrams (5-10 mg.) daily. The general practice is to begin prescribing the drug at the initial level and to gradually increase it over a period of time to a target dose of ten to twenty milligrams (10-20 mg.). This is to permit the observation of the patient's response to the drug and including whether the patient's condition is coming under control and whether the patient is having any adverse side effects from the medication. After several days, the dosage is generally increased by increments as needed.

56. Studies underlying the recommended dosage show that daily dosages of ten and fifteen milligrams per day were effective, while lesser dosages were not. The defense pharmacology expert, Dr. Perry, acknowledged both that patients should not be maintained on an initial five milligram dose of Olanzapine if their response is inadequate, and that an oral anti-psychotic such as Olanzapine or haldol should be continued when starting a long-acting anti-psychotic such as haldol decanoate.

57. All medication experts who testified agreed that the as-needed short-term anti-psychotic medications Mr. Thayer received, oral lorazepam and haldol, could be effective in appropriate dosages. These drugs are effective when lorazepam is given at six-eight milligrams per day, in combination with haldol of ten milligrams per day. See J. Battaglia, Haloperidol, Lorazepam Or Both For Psychotic Agitation, 15 American Journal of Emergency Medicine 335 (1997); S. Bienick, Double-Blind Study of Lorazepam Versus The Combination of Haloperidol and Lorazepam In Managing Agitation, 18 Pharmacotherapy 57 (1998)).

58. All experts who testified on this subject also agreed that the only drugs which Mr. Thayer received during his hospitalization having the potential to control his agitation were oral olanzapine, lorazepam and haldol.

59. Dr. Perry admits that when Dr. Kim decided to prescribe a long-term haldol decanoate shot on June 2, he should have prescribed or continued an oral anti-psychotic such as haldol or olanzapine. Dr. Perry likewise believes that Mr. Thayer's agitation observed by nurse Davis on the evening of June 2 should have caused her to give him oral haldol.

60. Plaintiff's psychiatry expert, Dr. Frank, and pharmacology expert Dr. Rosenberg, also believe that Mr. Thayer received inadequate anti-psychotic medications on June 1 and 2, which violated the standard of care for treatment of an acutely ill schizophrenic patient.

61. The Court agrees with Drs. Perry, Frank and Rosenberg that Mr. Thayer did not receive levels of anti-psychotic medications which were consistent with applicable standards of care.

62. Plaintiff's psychiatric expert, Dr. Frank, testified that the 72-hour delay in Dr. Kim seeing Mr. Thayer violated the standard of care applicable to a VA Hospital psychiatric unit. At the time of Mr. Thayer's death, the VA had planned to make a psychiatrist available in Knoxville within 24 hours of a psychiatric admission, to improve patient assessment.

63. The defense did not contend that it was proper to fail to provide a psychiatrist to see Mr. Thayer until 72 hours after admission. Dr. Frank, herself a former VA psychiatrist agrees that the failure to timely provide a psychiatrist violated the standard of care.

64. The Court agrees. Mr. Thayer did not receive timely psychiatric treatment consistent with the standard of care, and accordingly did not receive the necessary medication.

65. Nurses should share their concerns with physicians about matters which affect patient care. Every practitioner who testified about this issue stated that the nursing personnel should, under applicable professional standards, pass along to physicians concerns they have regarding a patient's level of illness and the need to increase medication.

66. It is undisputed that nurse manager Gaffney, nurse Davis and nurse assistant See did not communicate their observations on June 1 and 2 about Mr. Thayer's level of agitation and illness to a physician. All testimony received, including that of the VA's own associate director in charge of nursing, Christine Gregory, on this topic supports the fact that this failure violated the standard of nursing care.

67. The Court agrees. It further agrees with the testimony of Dr. Frank that this failure of communication among the members of the treatment team resulted in a failure of appropriate treatment.

B. Restraint and Restraint Training

68. There are several excellent in-depth systems of restraint training which have been available on a nationwide basis for the last twenty years. Detailed manuals regarding two of those systems, the Mandt system and the VA's own system, are in evidence.

69. The VA has had trainers available to present its training system for many years, and in fact conducted such training at the VA Hospitals in Iowa City, Iowa and Topeka, Kansas.

70. No such training was provided to personnel at the VA Hospital in Knoxville prior to Mr. Thayer's death.

71. The Mandt training system and the VA's own system require a day or two of training initially, with annual refresher training a day or more in length. Both systems have a lengthy, hands-on component requiring trainees to demonstrate their restraint skills on other trainees, sometimes on a mat.

72. None of this hands-on type of training, and none of the annual in-depth refresher training, occurred at the VA Hospital in Knoxville prior to Mr. Thayer's death. The head of psychiatry of the VA Hospital at Knoxville admitted at trial that his staff's restraint training was not adequate.

73. The actual restraints used in the June 2 incident had not been used by ward personnel for at least several years. Ward personnel were not routinely shown how to use the restraints, and nurse Davis had never applied them before the incident.

74. Plaintiff's restraint expert, Randall Hines, and Defendant's restraint expert, Richard Reed, agreed on the need for the in-depth restraint training to be given to all practitioners in locked psychiatric wards. The type of training they recommended is reflected in their training materials.

75. Regarding the standards applicable to the actual restraint of Mr. Thayer, both parties relied on the VA's own policies. A training tape for restraint used at the VA Hospital in Knoxville before this incident incorporates concepts from the written policies.

Standards established by the policies include:

a. Restraint has the potential to produce serious physical harm, and potential well-being is to be protected during restraint.

b. The least restrictive measures are to be used during restraint.

c. Restraints should be used only after lesser restrictive measures have proven ineffective.

d. Restraints may only be used to ensure the physical safety of patients, residents, and others.

e. If restraints are used, the patient must be monitored to ensure they do not adversely affect the patient's physical and mental status.

f. Sufficient nursing staff must be present before restraints are applied.

g. Nursing staff must assess less restrictive measures, use restraint only as a last resort and document the justification for restraint.

h. The senior nurse must take charge of a restraint incident when a psychiatrist is not present.

76. Whether one prefers the VA system, the Mandt system or some other established system of restraint training, none of them were employed at the VA Hospital in Knoxville before Mr. Thayer's death when they should have been.

77. Training maximizes effective, organized action among the restrainers, and minimizes the stresses and duration of restraint. Stresses from restraint short of those necessary to asphyxiate can cause hyperactivity and catecholamine (adrenaline) release, which can stop the heart from beating.

78. In this case, poorly-trained VA personnel failed to properly restrain Mr. Thayer in the following ways. (Trans. pp. 359-361; 430).

a. Failing to assess Mr. Thayer and the situation before taking immediate action;

b. Beginning the restraint with only two VA personnel present;

c. Quickly getting next to Mr. Thayer. where he could strike them;

d. Letting the incident descend into an "all-out brawl";

e. Failing to use de-escalating techniques;

f. Failing to establish who was leading the incident, resulting in a failure to act in a coordinated way and to minimize duration of the incident;

g. Failing to monitor Mr. Thayer's breathing and color, to ensure his physical safety; and

h. Using techniques, including compressing Mr. Thayer's chest, which created a high risk of injury.

79. The VA's associate director in charge of nurses admitted that "confusion" among the personnel who restrained Mr. Thayer violated VA policy. (Trans. pp. 832-833). Plaintiff's restraint and psychiatry experts testified that the eight listed failures by VA personnel violated applicable standard of care, including the VA's own standards. (Trans. pp. 361, 430). The Court agrees that the standard of care in this area was not met.

III. Causation

80. For the reasons stated in the following paragraphs, the Court finds that both the negligent psychiatric care of Mr. Thayer and the failure to properly train hospital employees to execute a restraint in a professional manner contributed to Mr. Thayer's death.

A. Negligent Psychiatric Care

81. It is inadvisable to completely cut off an acutely ill, agitated, hospitalized, mental patient from all effective anti-psychotic medication. No defense expert argued otherwise.

82. Had Nurse Davis administered oral haldol when she observed Mr. Thayer's agitation of the evening of June 2, and had olanzapine been increased to ten milligrams on June 1 as dictated by Mr. Thayer's continuing illness and agitation, Dr. Perry, the defense's own expert, thinks it is possible that Mr. Thayer would not have become very agitated on June 2, and the fatal incident would not have occurred.

83. Plaintiff's experts, Dr. Frank and Dr. Rosenberg, also believe that it is probable that Mr. Thayer would have had no agitation, or lesser agitation, and his condition would not have resulted in the fatal incident, had he been given proper medication.

84. These opinions are supported by the fact that anti-psychotic medications did control Mr. Thayer's agitation when they were given, and that he had never been violent before.

85. They are further buttressed by the admission of the VA head of psychiatry that the lack of medications and the absence of a nicotine patch could explain Mr. Thayer's agitation on June 2.

86. Dr. Frank testified that the VA Hospital's failure to provide a psychiatrist to Mr. Thayer in a timely fashion adversely affected the level of anti-psychotic medication he received.

87. Had he received proper medication in the last 24 hours of his life, it is more probable than not that the fatal restraint incident would never have occurred.

B. Inadequate Restraint Training and Unprofessional Restraint

88. The parties advanced two different theories on the immediate cause of Mr. Thayer's death: asphyxiation and cardiac arrhythmia. Based on both the expert and witness testimony, the Court finds that it is highly probable that Mr. Thayer's death resulted from a cardiac arrhythmia, and not asphyxiation.

89. While a finding of death by asphyxiation would lead to an almost certain conclusion that the VA employees' unprofessional restraint caused Mr. Thayer's death, the Court believes that its finding of likely death by cardiac arrhythmia does not preclude a finding that the employees' unprofessional restraint was a contributory cause.

90. The testimony given by the employees who restrained Mr. Thayer is fairly consistent in asserting that Mr. Thayer continued to resist even after they were on top of him and that they were not on top of him together while he was in the prone position for more than two minutes.

91. The only evidence that tends to contradict the account of Mr. Thayer continuing to resist and remain conscious after Nurse Davis had gotten off his back was a chart entry by Nurse Davis that she disavowed at trial.

92. The Court finds that it is unlikely that the employees remained on top of Mr. Thayer long enough to cause asphyxiation.

93. Mr. Thayer had an abnormal heart. It was markedly enlarged and after review of the slides of the heart, there was fibrosis or scar tissue in both ventricles of the heart which is also an abnormal finding. Mr. Thayer had perivascular and interstitial fibrosis based on the slides of heart tissue under a microscope. Mr. Thayer suffered from hypertrophy. Based on a table in the article, "Heart Weight, The Weight of the Normal Human Heart," by Pearl M. Zeek, M.D., Mr. Thayer's heart should have weighed 318 grams plus or minus 40 grams; Mr. Thayer's heart weighed 433 grams.

94. Hypertrophy is associated with an increased risk of sudden death and it is four times greater for those who experience this condition to suddenly die.

95. Dr. Fishbein, one of the defense's medical experts, opined that Mr. Thayer did not die as a result of traumatic compression asphyxia. If Mr. Thayer had succumbed to asphyxia, the heart would have continued to beat for as long as ten to fifteen minutes and someone would have felt a pulse even though Mr. Thayer would have been unconscious. Also, once CPR was instituted and the respirations were supported, Mr. Thayer should have survived if he was experiencing asphyxia.

96. Dr. Fishbein opined that Mr. Thayer suddenly died of a cardiac arrhythmia because Mr. Thayer went suddenly limp; his color changed quickly; and when people tried to measure a pulse, he had no pulse.

97. Dr. Wetli, the defense's pathology expert, opined that there is no evidence to support any contention of traumatic compression asphyxia of any form. The autopsy does not reveal any signs of asphyxia. Mr. Thayer's death was not caused by traumatic compression asphyxia because if a person is fighting violently, to asphyxiate him would require complete immobilization of the chest for several minutes, and/or occlusion of the upper airway, which

would result in some type of injury or small hemorrhages or petechiae. The bruising on the back documented in the autopsy report does not indicate an asphyxial death because where the pressure was placed, in the mid-portion of the back, does not affect the sides of the chest; it would not affect the intercostal muscles, nor would it affect the diaphragm so the compression could not have hurt Mr. Thayer or prevented him from breathing. There is no confirmatory evidence in Mr. Thayer's autopsy report nor the history regarding Mr. Thayer's death which indicates that Mr. Thayer's death was a result of an asphyxial mechanism.

98. Dr. Wetli opines that Mr. Thayer died of a cardiac arrhythmia. Dr. Wetli noted that before Mr. Thayer died he was moving the entire time during the takedown and restraint, lost consciousness, then turned blue. The suddenness of the total event coupled with the sudden loss of purposeful activity is typical of a cardiac death.

99. Asphyxia means to die of oxygen deprivation. The sequence of events for asphyxia is : breathing stops; after two minutes a person loses consciousness; after the brain shuts down-then the drive to breathe, which is controlled by the brain, ceases; the person turns blue; and then the heart stops to beat. In the classic asphyxia model, the heart will beat for 5, 10, 15 minutes after a person stops breathing. Traumatic Compression Asphyxia happens when a person's chest, abdomen, and diaphragm are so completely compressed that there can not be any movement of the mechanical apparatus that allows air in and out of the lungs, this will result in asphyxiation because there is no air going in and out of the lung which prevents the exchange of gases.

100. Dr. Neuman, another medical expert who testified for the Defendant, opined that Mr. Thayer did not asphyxiate on June 2, 1999. Mr. Thayer did not die as a result of asphyxiation because of the sequence of his death. Based on the records Dr. Neuman reviewed, Mr. Thayer's death did not fall into a pattern of asphyxia. None of the non-specific findings associated with

asphyxia were present during Mr. Thayer's autopsy. There are non-specific findings associated with an asphyxial death. They are: petechial hemorrhages; congestion or edema in the lungs; cyanosis; fludity of the blood. Three of the four VA nursing staff who could observe Mr. Thayer after he was restrained testified that Mr. Thayer continued to struggle after everyone got off of him, and that when Mr. Thayer was picked up by staff, that he suddenly went limp-that is not asphyxia.

101. Dr. Neuman opined that the sequence of death for Mr. Thayer fit the pattern of a primary lethal cardiac arrhythmia. The sequence of events associated with a sudden lethal arrhythmia is: the heart stops beating or loss of pulse, loss of consciousness, and cessation of breathing and turning blue, all within an extremely short period of time.

102. The most common cause of death due to primary lethal cardiac arrhythmia is evidence of heart disease which includes coronary artery disease, old scars from prior heart attacks, old scars in general from an injury to the heart, and an enlarged heart. Mr. Thayer had scarring in his heart, fibrosis, but more importantly, he had an enlarged heart which is the No. 2 reason for sudden cardiac deaths.

103. Placing an individual in a prone position improves oxygenation. There is no evidence that pressing on the stomach or that placing the patient in the prone position interferes with oxygenation.

104. Drs. Wetli opined that Mr. Thayer had a sudden lethal cardiac arrhythmia due to a build up of metabolic acidosis which caused the heart to lose its ability to contract and when there was a release of catecholamines the heart came to a standstill. The release of catecholamines or adrenalin can be an irritant to the heart and can cause it to fibrillate or have acidosis and cause it to stop. This type of response can occur before actual physical exertion; emotional responses can

trigger it. Dr. Wetli opined that release of catecholamines and build up of other acids started before the struggle ensued with Mr. Thayer. Emotional stress can be sufficient to precipitate the release of catecholamines. The catecholamines had been released before Mr. Thayer jumped up and began pulling on the padlock.

105. Dr. Fishbein opined that the agitation Mr. Thayer experienced on June 2, 1999, resulted in his sudden death. He also opined that the catecholamine release probably happened before Mr. Thayer began shaking the cabinet.

106. Dr. Garrity could not determine what caused Mr. Thayer's neck injuries. He stated that by themselves they were not specific and did not relate to the cause of death. Dr. Neuman opined that the shaking of the cabinet by Mr. Thayer or the struggle were not significant causal factors in Mr. Thayer's sudden death.

107. Mr. Thayer's autopsy did not establish a clear-cut cause of death. Dr. Garrity determined the cause of death based on the history accompanying the body and the circumstances surrounding the death.

108. All experts but one who testified on the cause of death agreed that the restraint incident and its attendant stresses killed Mr. Thayer.

109. The one expert who does not concede this point, Dr. Neuman, stated that the restraint may have been "the straw that broke the camel's back" in the chain of events leading to the death.

110. The 1998 Chan article which Dr. Neuman co-authored opines that the likely causes of death of individuals in restraint include the very causes cited by the other experts, physiologic stress, hyperactivity and catechol hyperstimulation. See 19 American Journal of Forensic Medicine and Pathology 201, 205 (1998).

111. The Court agrees with Plaintiff's psychiatry expert, Dr. Frank, that the undue duration and stress of the restraint caused by inappropriate restraint measures caused Mr. Thayer's death.

112. Improper training and the improper restraint methods worked together in bringing about this tragic result.

IV. Damages

113. Both parties presented expert testimony on the damages incurred by Mr. Thayer, his daughters, and his estate; however, in several instances the Court finds that both experts made unwarranted economic and demographic assumptions. Thus, the Court finds damages of $192,115.94, based on its own calculations that are explained in the following paragraphs, adopting some of the experts' analysis, but not all.[1]

A. Mr. Thayer's Life Expectancy and its Effect on Damage Calculations

114. Mr. Thayer was about to turn 52 at the time of his death. According to the Defendant's economist, Dr. Peter Mattila, and a demographic table provided by the Plaintiff, Mr. Thayer could expect to live approximately 25 years if he was an average male.

115. The Defendant's experts testified that Mr. Thayer had a decreased life expectancy by 15 years because he was a schizophrenic, a smoker, and had hypertrophy. The Court has considered all factors as well as age in determining Mr. Thayer's probable life expectancy and has adopted the views of the Defendant's experts on this issue.

116. The parties differed on how to use demographic data in calculating the effect on Mr. Thayer's life expectancy on future damages. Dr. Mattila argued that the Court should accept a calculation using a probability of life table based on the percentage of 52 year old men who are alive in each succeeding year; however, Dr. Mattila never explained in his report or his

[1] See table in Appendix for calculations.

testimony how or if he incorporated the probability of life table into the calculations in his report assuming a lower life expectancy. The Plaintiff's economist, Dr. Newkirk, asserted that the Court should simply calculate future damages based on the assumption that Mr. Thayer would have lived to the age of 77. Dr. Newkirk argued in his testimony against using a probability of life table, stating that "I don't know anyone who is 80 percent alive and 20 percent dead."

117. The Court finds that the application of a probability of life table is appropriate. Every day economic decisions in the free market are made which discount amounts for the probability that an event will or will not occur. Unfortunately, the probability of one living in a given year in the future is one such event. If the Court were to simply assume an age that Mr. Thayer was going to pass away, regardless of that age, the Court would still be making a probability determination about Mr. Thayer's probability of living in each future year, just a cruder one. The Court would assume that there is a 100% chance of Mr. Thayer living until the chosen age, and then a 0% chance of Mr. Thayer living after that.

118. In order to adjust the probability of life table for the evidence that Mr. Thayer's life expectancy was not that of an average 52 year old man, the Court added fifteen years to Mr. Thayer's age to compensate for the expectation that Mr. Thayer's ailments would have taken fifteen years off of his life expectancy. While this may not precisely match the slope of decreasing probability of life for Mr. Thayer, it is no less precise than many of the other estimates and assumptions that are typically made calculating his damages, including the assumption that his life expectancy is only ten years. It is certainly more precise than Dr. Mattila's method, which was to simply lop off the amounts calculated after the age resulting from lower life expectancy. This is double counting in the Defendants' favor, since Dr. Mattila was already discounting Mr. Thayer's probability of being alive in the earlier years before his

expected death, but not discounting Mr. Thayer's probability of not remaining alive in the years after his expected death.

B. Applicable Interest Rates

119. In order to calculate the value of damages due to loss of income and support in the future, the future income from damages must be discounted, such that if the money was awarded now, it could be invested in the safest possible investment, United States Treasury bonds, and yield the income that was lost on the future date it was expected. Both economists chose an interest rate based on a calculation of average interest rates over a period of dating back to the early 1950's in Dr. Mattila's case, and the early 1970's in Dr. Newkirk's case. Both economists chose a single interest rate, based on a security of a certain length. In Dr. Newkirk's case, he chose a 3-month Treasury bill, in Dr. Mattila's case, a three-year Treasury bond.

120. The Court finds that in order to estimate the amount of money necessary to yield future income over the course of several years in the safest possible manner, using a single interest rate based on a Treasury security of a single term-length is too imprecise. Someone investing money today in order to secure income ten years from now would not buy a 3-month security or a three-year security, because the purchase of a short-term security fails to account for a change in market interest rates that could occur after the security's term expires. Likewise, the safest investment to secure income one year from now is not a three-year security, because a change in prevailing market interest rates could change the value of the security when it is needed, before its term expires. The safest investment to provide income one year from now is a one year Treasury security, the safest investment to provide income five years from now is a five year Treasury security, and so on. Consequently, the Court discounted income for any given future

year according to the interest rate offered for a Treasury bond available on August 15, 2002 whose term expires in the given year.

C. The Assumed Rate of Inflation

121. Both economists calculated an inflation rate based on economic data going back over 50 years in the case of Dr. Mattila and over thirty years in the case of Dr. Newkirk. The Court finds that calculating an expected inflation rate based on the radically different economic conditions of the 1950's, 1960's, and 1970's is a seriously flawed technique. Since the United States Treasury issues securities that take inflation into account, a comparison of those securities with regular treasury securities yields what the prevailing market expectation is in the coming years, 1.554%. The Court finds this method of calculating the expected inflation rate more likely to accurate.

122. Dr. Mattila assumed an hourly rate of $5.15 in calculating the value of lost child care services that Mr. Thayer would have provided, based on the minimum wage, while Dr. Newkirk assumed $5.25 an hour. On the other hand, Dr. Mattila assumed a higher rate of increase in the value of those lost services in future years. Dr. Mattila based this on a 4.38% average rate of increase of average weekly earnings between 1953-2000. Unfortunately, the Court, upon reviewing the rate of change in average weekly earnings, finds that there is no certain rate of increase or decrease in those earnings in real dollars. Consequently, the Court finds that the use of the expected rate of inflation, calculated above, is adequate in calculating the value of lost child care services provided by Mr. Thayer. On the other hand, given the high cost of child care, the Court finds that even Dr. Newkirk's use of $5.25 is a conservative assumption and it adopts that figure.

D. Loss of Financial Support

123. Code of Iowa § 613.15 also allows the administrator to recover, on behalf of the three children, loss of financial support due to Mr. Thayer's premature death. The government refers the Court to *Gail v. Clark*, 410 N.W.2d 662 (Iowa 1987) to support its argument that financial support is not recoverable. While the Court in *Gail* states that parental consortium does not include "monetary support," the case involved only consortium and the Court was defining what evidence is included within the scope of that category of loss. Loss of "services" and loss of "support" are separate and distinct elements of damages. *Iowa-Des Moines Nat. Bank v. Schwerman Trucking Co.*, 288 N.W.2d 198, 203 (Iowa 1980) ; *Adams v. Deur*, 173 N.W.2d 100, 107 (Iowa 1969). In fact, the Iowa Supreme Court has stated on several occasions that adult children may collect for loss of support. See *Iowa-Des Moines Nat. Bank v. Schwerman Trucking Co.* at 204 ("Adult children can recover loss of services and support."); *see also Nelson v. Ludovissy*, 368 N.W. 2d 141 (Iowa 1985); *Audobon-Exira Ready Mix, Inc. v. Illinois Central Gulf R.R.*, 335 N.W. 2d 148 (Iowa 1983); *Schmitt v. Jenkins Truck Lines, Inc.*, 170 N.W.2d 632, 664-5 (Iowa 1969).

124. Damages for loss of financial support must be reduced to present value and are limited in time unless the evidence shows an extended need for financial support.

125. Both economists operated under the assumption that Mr. Thayer would have provided an average of $425 a month to his daughters. Under the evidence, this number is conservative as witnesses testified, without contradiction, that the level of support was significantly higher. The Court finds that this is a reasonable estimate of their level of support.

126. Dr. Mattila assumed that Mr. Thayer's support for his daughters would stop as each daughter reached the age of 30. The Court finds no basis for that assumption. All three of Mr. Thayer's daughters are single mothers of young children who have difficulty maintaining steady

employment. The Court finds that Mr. Thayer would have continued to support each of his daughters until they reached the age of 35. Based on the economic assumptions discussed above, the Court finds the present value of the support Mr. Thayer would have provided for his daughters had he lived is $53,114.10.

E. Loss of Parental Services and Consortium

127. Before his death, Mr. Thayer provided child care services for his daughters Holly and Marissa. Dr. Mattila estimates that Mr. Thayer devoted 450 hours a year to this, while Dr. Newkirk estimates 650. Dr. Mattila also estimates a 20% annual reduction in child care for each daughter as each one of their children enters adolescence. When both of Holly Thayer's children are in adolescence the reduction is 40%. Based on the testimony of Mr. Thayer's daughters, the Court finds that Mr. Thayer devoted 600 hours a year to the care of his four grandchildren living in Iowa at the time of his death; however, the Court adopts Dr. Mattila's method for estimating a decrease in hours as Mr. Thayer's grandchildren grew older. Based on the economic assumptions discussed above, the Court finds the present value of Mr. Thayer's child care services to his daughters is $27,203.94.

128. The Plaintiffs also made a claim for the loss of intangible parental consortium, such as emotional support and guidance. Both at trial and in their briefs filed with the Court, the Defendant's attorneys argued that this intangible parental support had no value because of the personal failures of Mr. Thayer's daughters. The Court found this argument insensitive at best and offensive at worst. The Court seriously doubts that anyone, including the Defendant's attorneys, would want their own personal failures to somehow devalue their relationship with their parents. This would seem to contradict our society's ethic of personal responsibility.

Moreover, to value the parental relationships of the rich more than the poor would directly violate this Court's oath to do equal justice to both. *See* 28 U.S.C. § 453.

129. Valuing a parent's relationship with their child is an impossible and unenviable task. The reality is that no amount of money will adequately compensate Mr. Thayer's daughters for their loss; however, the Court cannot award a limitless amount of money in these cases. The Court does find that the intangible value of Mr. Thayer to his daughters is, at absolute minimum, higher than his economic value. Consequently, the Court awards $100,000 for intangible parental consortium.

F. Lost Accumulation

130. The Thayer Estate is entitled to recover the present value of assets he would reasonably be expected to save and accumulate between the time of his untimely death and the end of his natural life expectancy. *Iowa Des Moines Nat'l Bank.*; *Schmitt* at 660. Dr. Mattila estimated that Mr. Thayer would have saved 2.5% a year while providing financial support to his daughters, and 5% thereafter. Dr. Newkirk assumes a 5% rate of savings throughout. Given Mr. Thayer's limited history of savings and low income, the Court finds that Dr. Mattila's assumptions about Mr. Thayer's likely future savings are more reasonable. Thus, the Court calculates the present value of what Mr. Thayer would have accumulated for his estate is $8014.02.

G. Interest on Funeral Expenses

131. Interest on prematurely incurred reasonable funeral expenses, not to exceed the reasonable cost of the funeral expenses, is recoverable. *Schmitt*. Since a person would incur funeral and burial expenses at the end of his or her natural life expectancy, interest is calculated for the period from the premature death. *Schmitt*; see also *Hurtig v. Bjork*,138 N.W.2d 62

(1965). The funeral expenses were $5,829.11. Since Mr. Thayer's life expectancy was ten years, the Court finds that the Plaintiffs are entitled to the present value of the interest that would accumulate over ten years, at the current rate on a ten year Treasury bond, 4.16%, $2283.88.

H. Pain and Suffering and Pre-Death Loss of Mental and Bodily Function

132. Iowa law treats the decedent as an injured person from the time of the wrongful acts to the time of his death and the Estate may recover damages both for bodily suffering/discomfort and mental suffering/anguish for this period of time. *Schlichte v. Franklin Toy Trucks*, 265 N.W.2d 725, 727 (Iowa 1978); *Schmitt* at 660. *See also Poyzer v. McGraw*, 360 N.W.2d 748 (Iowa 1985); *Holmquist v. Volkswagen of America, Inc.*, 261 N.W.2d 516 (Iowa Ct. App. 1977).

133. Inadequate medication and drug therapy caused Mr. Thayer to be unnecessarily delusional and agitated for a minimum of one (1) hour prior to the fatal incident.

134. The "take-down" and restraint incident itself was protracted and out of control. Mr. Thayer was subjected to extreme physical and mental stress. Even in the absence of asphyxiation Mr. Thayer would have suffered significant fright and anxiety. The restraint was sufficiently violent to leave bruises on Mr. Thayer's back and neck. Anxiety, fear and mental stress would have been heightened by Mr. Thayer's improperly medicated mental state.

135. On the other hand, Mr. Thayer's death was relatively sudden, and a defense medical expert testified that cardiac arrhythmia is not painful. Nevertheless, the stress and agitation incurred by Mr. Thayer in the events leading up to his death, including his restraint, are worthy of some compensation. The Court finds that the Thayer Estate is entitled to a recovery of $1,250.

136. The Thayer Estate is also entitled to recover for loss of full mind and body, also called loss of function, for the period of time from the negligent acts of defendant to the time of his

death. *Schnebly v. Baker*, 217 N.W.2d 708 (Iowa 1974). This is a pre-death element of personal injury to Mr. Thayer. *See Brant v. Bockholt*, 532 N.W.2d 801, 804 (Iowa 1995). The record in this case supports the fact that Mr. Thayer's mental capacity and function were impaired by the negligence of the defendant. The Court, as finder of fact, determines the damages to his Estate for this category of damages are $250.00.

CONCLUSIONS OF LAW

I. Jurisdiction and Venue.

1. This is an action in tort for money damages against the United States under the Federal Tort Claims Act (FTCA). 28 U.S.C. § 2681, *et seq.* The Court has exclusive subject matter jurisdiction over such actions pursuant to 28 U.S.C. § 1346(b)(1).

2. Venue for such actions lies in the district in which either the underlying events occurred or the plaintiff resides. 28 U.S.C. § 1402(b). Plaintiff resides in the Southern District of Iowa and the pertinent events occurred in the district as well.

3. Accordingly, the Court has subject matter jurisdiction to adjudicate this case, and it was properly filed in this district.

II. Actions Under the FTCA In General

4. The FTCA defines and controls this action against the United States. It only permits claims for monetary relief based upon the negligent or wrongful action or omission of a federal employee acting within the scope of his or her federal employment. 28 U.S.C. § 1346(b)(1). Therefore, the United States may not be found liable on a strict liability basis. Also, the United States cannot be ordered to pay punitive damages. 28 U.S.C. § 2674. Unless the Plaintiff can

prove such negligent or wrongful conduct, no judgment may be entered against the United States.

5. The United States is only to be held liable to the extent a similarly situated private individual would be found liable under the law of the place in which the allegedly negligent or wrongful act or omission occurred. 28 U.S.C. §§ 1346(b)(1) and 2674.

6. Therefore, in this action, the Court must apply the law of the State of Iowa relating to the elements of a cause of action in tort, *Molzof v. United States*, 502 U.S. 301, 305 (1992); *Michels v. United States*, 815 F. Supp. 1244, 1255 (S.D. Iowa 1993), *aff'd*, 31 F.3d 686 (8th Cir. 1994) and permissible damages. *Richards v. United States*, 369 U.S. 1, 6-7 (1962).

7. Pre-judgment interest may not be assessed against the United States, 28 U.S.C. § 2674, and post-judgment interest may only be assessed against the United States after an appeal in circumstances permitted by 31 U.S.C. § 1304, which are not presented in this case.

III. Negligence Actions Under Iowa Law in General

8. "[I]n order to prevail on a claim of negligence, the plaintiff must establish that the defendant owed plaintiff a duty of care, the defendant breached that duty, the breach was the actual and proximate cause of the plaintiff's injuries, and plaintiff suffered damages." *Novak Heating and Air Conditioning v. Carrier Corp.*, 622 N.W.2d 495, 497 (Iowa 2001) (citing *Walls v. Jacob North Printing Co.*, 618 N.W.2nd 282, 287, 285 (Iowa 2000).

9. In the context of a medical malpractice claim under Iowa law, "the plaintiff must demonstrate the applicable standard of care, the violation of this standard of care, and a causal relationship between the violation and the harm allegedly suffered by the plaintiff." *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 718 (Iowa 2001), (citing *Kennis v. Mercy Hosp. Med Ctr.*, 491 N.W.2d

161, 165 (Iowa 1992)); *see also, Broderson v. Sioux Valley Memorial Hosp.*, 902 F. Supp. 931, 950 (N.D. Iowa 1995).

10. In *Baker v. United States*, 226 F. Supp 129, 132 (S.D. Iowa 1964), concerning allegations of malpractice made by a psychiatric patient under the FTCA, the court noted, "that the care required of a hospital includes giving such care to a patient as the hospital knew or in the exercise of reasonable care should have known was required. The duty is measured by the degree of care, skill, and diligence customarily exercised by hospitals in the community. A hospital is not an insurer of a patient's safety and is not required to guard against that which a reasonable person under the circumstances would not anticipate."

11. In an action alleging medical malpractice, the elements of the claim generally must be established by expert testimony. 625 N.W.2d at 718.

12. Under the Findings of Fact delineated above, this Court has found that the Defendants had a duty to provide Mr. Thayer a certain standard of care as a psychiatric patient, that the Defendants breached that duty, that the Defendants' breach of that duty was the proximate cause of Mr. Thayer's death, and that Mr. Thayer's estate suffered damages as a result.

IV. Comparative Fault

13. The government did not plead comparative fault in this case. It has suggested at trial, however, that Mr. Thayer's own conduct contributed to the incident which led to his death. Numerous courts in other jurisdictions have held that mental patients cannot be held comparatively negligent in incidents related to their care. *See Cowan v. Diering*, 111 N.J. 451, 545 A.2d (1988); *Cole v. Multnomah County*, 39 Or. App. 211, 592 P.2d 221 (Or. Ct. App. 1979), *review denied*, 286 Or. 449 (1979); *Vistica v. Presbyterian Hospital and Medical Center of San Francisco, Inc.*, 67 Cal. 2d 465, 432 P.2d 193 (1967).

V. Evidentiary Issues

A. Disclosure of Expert Opinions

14. The Defendants objected to the pharmacology and pharmacy expert of the Plaintiff, Dr. Rosenberg. Dr. Rosenberg stated in an opinion letter, dated September 11, 2001, that Mr. Thayer received too little lorazepam and haldol to "control his agitation". (Tab 17 to Plaintiff's Brief in Support of Resistance to Motion in Limine). In his Affidavit of May 5, 2002, Dr. Rosenberg repeated the earlier statement regarding Mr. Thayer's insufficient medication, and further stated, "[h]ad he been given adequate levels of drugs as I have outlined, he never would have had the agitation which he experienced on June 2, 1999. . ." The government maintains the quoted language was a surprise, and was not timely revealed.

15. The Court concludes that the quoted language was fairly inferable from Dr. Rosenberg's earlier opinions. Moreover, the Affidavit itself was timely, given the state of discovery when the Affidavit was provided. Finally, the quoted opinion is cumulative of an almost-identical opinion of Dr. Frank to which there was no objection. The opinion of Dr. Rosenberg at issue is admitted.

16. The Plaintiff objected at trial to testimony of Dr. Perry, first revealed at trial, concerning the testing protocols of the laboratory which tested Mr. Thayer's blood and urine after his death. No excuse was presented for this extremely late revelation of opinion testimony. The testimony on this subject is not admitted.

17. It would not, however, have changed the Court's Findings had it been admitted, given that Mr. Thayer received no effective anti-psychotic drugs in the last 24 hours of his life, and Dr. Perry's admissions that had the drugs been provided, the agitation leading to the final fatal incident may not have occurred.

B. The VA's External Investigations

18. Both in its Motion In Limine and by its trial objections, the Defendant objected to the reports of the Administrative Board of Review, the Collaborative Quality Review and the VA Medical Inspector. The two main bases for objection to the reports were that they are subsequent remedial measures and that the reports are inadmissible hearsay.

19. Throughout the trial, the Court allowed the Plaintiff's to cite witnesses' prior testimony in those reports for impeachment purposes. The Court holds that this prior testimony about prior events is not shielded as a subsequent remedial measure, nor is it hearsay.

20. Aside from the use of these reports for prior testimony, the opinions offered by them were not used by the Court in its finding of facts in this case. Hence, the Defendants' motion to exclude them is moot.

C. *Daubert*

21. The Defendant raised Daubert objections to the testimony of Plaintiff's experts Dr. Garrity, Randall Hines, Dr. Rosenberg and Dr. Newkirk. The Supreme Court has held that expert testimony must be competent and such that it will assist the trier of fact in determining a fact in issue. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591, 113 S. Ct. 2786, 2796 (1993). The Federal Rules of Evidence provide for testimony of experts as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed. R. Evid. 702.

22. The Court did not rely on the expert testimony of Dr. Garrity or Dr. Newkirk in its findings of facts in this case and therefore the Defendants' motion to exclude them pursuant to *Daubert* is moot.

23. The Court holds the admission Mr. Hines' testimony was amply warranted under *Daubert*. Mr. Hines is a college instructor with experience in over 1000 restraint incidents, holds a masters degree in justice administration, and is the co-author of the Mandt training system.

24. Likewise, the Court holds that the admission of Dr. Rosenberg's testimony was warranted as well under *Daubert*. Dr. Rosenberg holds two doctorates, sits on the editorial boards of academic journals in his field, and consults with the Department of Psychiatry at Brooklyn Veterans Administration Hospital in New York. His trial testimony also exhibited his familiarity with relevant scientific literature and support for his opinions based on that literature.

D. Other Evidentiary Issues

25. To the extent that other evidentiary rulings were reserved by the Court and not specifically addressed herein, the objections to evidence are overruled.

VI. Findings- Ultimate Facts

1. The plaintiff has sustained her burden of proof that the defendant was negligent and violated applicable standards of care.

2. Plaintiff has sustained her burden of proof that negligent acts and omissions of defendant were the proximate cause of the death of Bill Thayer and resulting damages to his Estate and children.

3. Plaintiff has sustained her burden of proving that plaintiff is entitled to recover compensatory damages as follows:

A.	Loss of Financial Support	$ 53,1114.10
B.	Loss of Parental Services and Consortium	$127,203.94
C.	Lost Accumulation	$ 8,014.02

D.	Interest on Funeral Expenses	$ 2,283.88
E.	Pre-death pain and suffering	$ 1250.00
F.	Pre-death loss of function	$ 250.00
		$192,115.94

VII. Judgment

1. It is hereby ordered, adjudged and decreed that judgment is entered in favor of the Estate of Gaylord William Thayer and against the United States of America in the amount of $192,115.94.

2. It is further ordered, adjudged and decreed that costs will be calculated by the Clerk of Court and assessed against the defendant.

3. The Court would like to note the fine performance of all four attorneys involved in this matter on behalf of both the Estate of Mr. Thayer and the United States. Both their trial advocacy and written advocacy were exemplars of their profession.

IT IS SO ORDERED.

Dated this ___28th___ day of August, 2002

Robert W. Pratt

ROBERT W. PRATT
U.S. DISTRICT JUDGE

TABLE 1: CALCULATION OF EXPECTED INFLATION RATE

Maturity	TIPS Rate	Bond Rate	Expected Inflation Rate
2007	1.7	3.16	1.46
2008	2.015	3.43	1.415
2009	2.175	3.63	1.455
2010	2.326	3.93	1.604
2011	2.391	4.06	1.669
2012	2.42	4.14	1.72
		Average	1.554

TABLE 2: CALCULATION OF FUTURE CHILD CARE

Year	Children's Ages				Hours of Child Care		
	Haley	Trey	Sam	Brandon	Holly	Marissa	Total
1999	5	1	4		112.5	37.5	150
2000	6	2	5	0	450	150	600
2001	7	3	6	1	450	150	600
2002	8	4	7	2	450	150	600
2003	9	5	8	3	450	150	600
2004	10	6	9	4	450	150	600
2005	11	7	10	5	450	150	600
2006	12	8	11	6	450	150	600
2007	13	9	12	7	360	150	510
2008	14	10	13	8	288	120	408
2009	15	11	14	9	230	96	326
2010	16	12	15	10	184	77	261
2011	17	13	16	11	111	61	172
2012	18	14	17	12	88	49	138
2013	19	15	18	13	71	39	110
2014	20	16	19	14	57	31	88
2015	21	17	20	15	45	25	70
2016	22	18	21	16	0	20	20
2017	23	19	22	17	0	16	16

TABLE 3: FUNERAL EXPENSES

$5829.11*(1.0416)^{10} - 5329.11$ = Interest on funeral expenses over ten years.

$(1/1.0416)^{10}$ = The present value of a dollar ten years from now.

Thus, the present discounted value of interest on funeral expenses is:

$[5829.11*(1.0416)^{10} - 5329.11] * (1/1.0416)^{10} = \$ 2283.88$

TABLE 4: THE DAMAGE CALCULATION

Year	Expected Income	Expected Support	Net Accumulation	Expected Hours of Child Care	Expected Wage	Total Value of Child Care	Total Value- Future Dollars
June-Aug 1999	$ 5,499	$ 1,275	$ 137	150	$ 5.25	$ 787.50	$ 2,199.98
2000	$ 22,744	$ 5,100	$ 569	600	$ 5.25	$ 3,150.00	$ 8,818.60
2001	$ 23,267	$ 5,217	$ 582	600	$ 5.37	$ 3,222.43	$ 9,021.38
2002	$ 23,868	$ 5,352	$ 597	600	$ 5.51	$ 3,305.67	$ 9,254.41
2003	$ 24,239	$ 5,435	$ 606	600	$ 5.60	$ 3,357.04	$ 9,398.23
2004	$ 24,616	$ 5,520	$ 615	600	$ 5.68	$ 3,409.21	$ 9,544.27
2005	$ 24,998	$ 5,605	$ 625	600	$ 5.77	$ 3,462.19	$ 9,692.59
2006	$ 25,387	$ 5,693	$ 635	600	$ 5.86	$ 3,515.99	$ 9,843.21
2007	$ 25,781	$ 5,781	$ 645	510	$ 5.95	$ 3,035.04	$ 9,460.58
2008	$ 26,182	$ 5,871	$ 655	408	$ 6.04	$ 2,465.76	$ 8,991.16
2009	$ 26,589	$ 5,962	$ 665	326	$ 6.14	$ 2,003.26	$ 8,630.07
2010	$ 27,002	$ 6,055	$ 675	261	$ 6.23	$ 1,627.51	$ 8,357.30
2011	$ 27,421	$ 6,149	$ 686	172	$ 6.33	$ 1,088.91	$ 7,923.27
2012	$ 27,848	$ 4,163	$ 919	138	$ 6.43	$ 884.66	$ 5,966.55
2013	$ 28,280	$ 4,228	$ 933	110	$ 6.53	$ 718.73	$ 5,879.59
2014	$ 28,720	$ 2,147	$ 1,178	88	$ 6.63	$ 583.92	$ 3,908.08
2015	$ 29,166	$ 2,180	$ 1,196	70	$ 6.73	$ 474.39	$ 3,850.22
2016	$ 29,619	$ -	$ 1,481	20	$ 6.84	$ 137.65	$ 1,618.61
2017	$ 30,080	$ -	$ 1,504	16	$ 6.94	$ 111.83	$ 1,615.81
2018	$ 30,547		$ 1,527				$ 1,527.35
2019	$ 31,022		$ 1,551				$ 1,551.09
2020	$ 31,504		$ 1,575				$ 1,575.19
2021	$ 31,993		$ 1,600				$ 1,599.67
2022	$ 32,491		$ 1,625				$ 1,624.53
2023	$ 32,995		$ 1,650				$ 1,649.77
2024	$ 33,508		$ 1,675				$ 1,675.41

TABLE 4: THE DAMAGE CALCULATION CONTINUED

Year	Age	Adjusted Age	Probability of Life	Financial Discount	Discounted Value of Support	Discounted Value of Child Care	Discounted Value of Accumulation	Total Present Value
June-Aug 1999	52	67	1	1.0000	$ 1,275.00	$ 787.50	$ 137.48	$ 2,199.98
2000	53	68	0.9740	1.0000	$ 4,967.33	$ 3,068.06	$ 553.81	$ 8,589.20
2001	54	69	0.9330	1.0000	$ 4,867.63	$ 3,006.48	$ 542.69	$ 8,416.80
2002	55	70	0.9177	1.0000	$ 4,911.74	$ 3,033.72	$ 547.61	$ 8,493.08
2003	56	71	0.8872	0.9836	$ 4,743.01	$ 2,929.51	$ 528.80	$ 8,201.32
2004	57	72	0.8553	0.9580	$ 4,522.49	$ 2,793.30	$ 504.21	$ 7,820.01
2005	58	73	0.8219	0.9253	$ 4,263.36	$ 2,633.25	$ 475.32	$ 7,371.93
2006	59	74	0.7872	0.8881	$ 3,979.95	$ 2,458.21	$ 443.73	$ 6,881.88
2007	60	75	0.7512	0.8502	$ 3,691.87	$ 1,938.23	$ 411.61	$ 6,041.72
2008	61	76	0.7139	0.8069	$ 3,382.07	$ 1,420.47	$ 377.07	$ 5,179.61
2009	62	77	0.6755	0.7687	$ 3,095.62	$ 1,040.13	$ 345.13	$ 4,480.88
2010	63	78	0.6359	0.7313	$ 2,815.67	$ 756.85	$ 313.92	$ 3,886.44
2011	64	79	0.5954	0.6965	$ 2,550.10	$ 451.60	$ 284.31	$ 3,286.01
2012	65	80	0.5540	0.6653	$ 1,534.23	$ 326.04	$ 338.68	$ 2,198.95
2013	66	81	0.5118	0.6387	$ 1,381.85	$ 234.93	$ 305.04	$ 1,921.82
2014	67	82	0.4689	0.6132	$ 617.19	$ 167.88	$ 338.55	$ 1,123.62
2015	68	83	0.4255	0.5552	$ 514.99	$ 112.07	$ 282.49	$ 909.54
2016	69	84	0.3817	0.5173	$ -	$ 27.18	$ 292.43	$ 319.61
2017	70	85	0.3377	0.4907	$ -	$ 18.53	$ 249.23	$ 267.76
2018	71	86	0.2937	0.4637	$ -	$ -	$ 208.01	$ 208.01
2019	72	87	0.2497	0.4370	$ -	$ -	$ 169.24	$ 169.24
2020	73	88	0.2057	0.4141	$ -	$ -	$ 134.16	$ 134.16
2021	74	89	0.1617	0.3908	$ -	$ -	$ 101.06	$ 101.06
2022	75	90	0.1177	0.3691	$ -	$ -	$ 70.56	$ 70.56
2023	76	91	0.0737	0.3490	$ -	$ -	$ 42.42	$ 42.42
2024	77	92	0.0297	0.3313	$ -	$ -	$ 16.47	$ 16.47
					$ 53,114.10	$ 27,203.94	$ 8,014.02	$ 88,332.06