

1977 S.C. Op. Atty. Gen. 200 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-267, 1977 WL 28851

Office of the Attorney General

State of South Carolina

Opinion No. 77-267

August 23, 1977

*1 A speech pathologist or audiologist employed by a State agency could be personally liable in a malpractice case for his own negligence; however, the public agency would be protected from any such malpractice claim under the defense of sovereign immunity.

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AUTHORITIES

Code of Laws of South Carolina, 1976, Sections 40–67–20, (c) & (e) and Section 40–67–40;
[Davis v. Wilson](#), 265 N.C. 139, 143 S.E.2d 107 (1965);

[Crawford v. Davis](#), 136 S.C. 95, 134 S.E. 247 (1926);

[Brooks v. One Motor Bus](#), 190 S.C. 379, 3 S.E.2d 42 (1939);

[Graham v. Charleston County School District](#), 262 S.C. 314, 204 S.E.2d 384 (1974);

61 Am.Jur.2d Physicians, Surgeons, Etc., §§ 162, 171;

70 C.J.S. Physicians and Surgeons, § 54;

Vol. 31A, Words and Phrases, p. 148;

Webster's Third New International Dictionary (1964).

You have presented the question of whether or not a speech pathologist or audiologist employed by a State agency would be personally liable in a potential malpractice lawsuit. An extensive examination of this subject has revealed no reported case law directly on point, and communications with the American Speech and Hearing Association in Washington, D.C., confirms this fact. However, an analysis of legal theories results in a valid answer to the question raised.

Although the position of audiologist/speech pathologist cannot be paralleled exactly to the position of a physician or surgeon, enough similarities exist to make a valid application of medical malpractice rules to the audiologist/pathologist.

Webster's Third New International Dictionary defines “pathology” as “the study of abnormality, especially the study of diseases,” and “audiology” as “the branch of science dealing with hearing.” Volume 31A Words and Phrases p. 148, refers to pathology as a “branch of medicine.”

Section 40–67–20(c) of the Code of Laws of South Carolina, 1976, defines a speech pathologist as “any person who evaluates, tests, examines, treats or counsels persons regarding speech or language disorders.” Section 40–67–20(e) of the 1976 Code defines audiologist as “any person holding a Masters' Degree or Doctors' Degree in audiology.” Section 40–67–40 requires an individual to be licensed before practicing speech pathology/audiology.

In contrast, the Code Sections defining the qualifications of a physician are more extensive and require much more training before licensing. In spite of these differences, audiology and pathology are considered “sciences” and, as noted before, often referred to as part of medicine. Audiologist/pathologists, like physicians and surgeons, have their professions closely regulated by law and all are required to periodically renew their licenses. Furthermore, all these professionals deal with diagnosis and treatment of humans, and all demand a degree of professional care and skill in order to produce the most favorable results. Based on these important similarities it is logical to assume that the rules of medical malpractice will be applicable to the specific question of determining an audiologist/pathologist's malpractice liability.

QUESTION I

***2** Can malpractice suits be brought against an audiologist/pathologist personally or will the suit be against the State Agency when the alleged malpractice occurs while the audiologist/pathologist is performing as an agency employee?

By applying the rules governing medical malpractice liability, it is probable that the audiologist/pathologist, and not the public agency by which he is employed, will be potentially liable for the result of any alleged malpractice. Generally, physicians engaged in the practice of their profession are regarded as independent contractors. [Davis v. Wilson, 265 N.C. 139, 143 S.E.2d 107 \(1965\)](#). The agencies employing the physicians are considered “go-betweens” whose only duty is to act in good faith and reasonable care in the selection of the physician. See 61 Am.Jur.2d, Physicians, Surgeons, Etc., §§ 162, 171.

If this reasoning is applied to the pathologist/audiologist, the public agency's duty is to provide a competent practitioner for the patient. Any malpractice complaints arising from the services rendered would be the personal responsibility of the audiologist/pathologist. See [Crawford v. Davis, 136 S.C. 95, 134 S.E. 247 \(1926\)](#). It should be noted that the public agency would be able to avail itself of the defense of sovereign immunity, absent a statutory waiver, and the public agency would thereby be protected from lawsuits arising out of its failure to choose a competent practitioner to treat the patient. See [Brooks v. One Motor Bus, 190 S.C. 379, 3 S.E.2d 42 \(1939\)](#); [Graham v. Charleston County School Board, 262 S.C. 314, 204 S.E.2d 334 \(1974\)](#).

QUESTION II

Who is liable for malpractice suits arising out of the service rendered by a student clinician under the supervision of a speech pathologist/audiologist faculty member?

Again applying the rules of medical malpractice, the audiologist/pathologist in charge of the student clinician's performance is liable in the malpractice suit. According to 61 Am.Jur.2d, Physicians, Surgeons, Etc., § 162, a physician must exercise due care in selecting his assistants, and under the master-servant principle the physician may be liable for the injuries caused by assistants working under his control. 70 C.J.S., Physicians and Surgeons, § 54, reiterates this doctrine by declaring a physician “responsible for an injury done to a patient through the want of proper skill and care in his assistant, and through the want and proper skill and care in his apprentice.” Furthermore, the student is not subject to the “independent contract” theory that relieves the employing agency from responsibility for any liability for the malpractice of licensed professionals, other than that arising out of the selection of these persons. In other words, the employing corporation will be responsible for the negligence of student interns. See 61 Am.Jur.2d, Physicians, Surgeons, Etc. § 171. It therefore appears that the agency and the instructing audiologist/pathologist initially are jointly liable for the malpractice of a student clinician. The audiologist/pathologist responsible for the student is the professional to whom the instruction and supervision of the particular student is delegated. It must be noted again that where the employing agency is a public agency, the defense of sovereign immunity would apply absent a statute to the

contrary, and such defense would be a complete bar to the student malpractice action. See Brooks and Graham, *supra*. This leaves the individual professional individually liable for the negligence of his student trainees.

*3 In conclusion, although there have been no reported cases to date in which professional malpractice liability has been imposed on a speech pathologist/audiologist, such a liability is a potential consequence of offering professional services to the general public. The rules governing malpractice of physicians and surgeons would logically apply to lawsuits brought against audiologist/pathologists.

Under the rules of medical malpractice liability, the professional himself would be liable for his own malpractice, and the public institution would be protected from any negligence in selecting this professional under the defense of sovereign immunity. The professional pathologist/audiologist would also be responsible for injuries attributable to student technicians operating under his control and direction. Likewise any action against the public agency for injuries caused by students would be barred by sovereign immunity.

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