1976 WL 30503 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
July 29, 1976

***1** Doctors and dentists serving in the South Carolina National Guard are immune from personal tort liability to a fellow soldier, when the act of malpractice occurred in a military hospital by the physician in the line of his military duty.

Brigadier General James W. Henderson
Deputy Adjutant General

QUESTIONS PRESENTED:

1. What are the personal liabilities of a medical doctor or dentist serving in the South Carolina National Guard for malpractice committed in the line of duty?

2. Will the state provide a legal defense in case a law suit should be filed against a doctor or dentist for malpractice?

CITATION OF AUTHORITIES:

Bailey v. DeQuevedo, 375 F. 2d 72 (3rd Cir. 1967), cert. denied.

Bailey v. Van Buskirk, 345 F. 2d 298 (9th Cir. 1965), cert. denied, 38 U. S. 948, 86 S. Ct. 1205, 16 L. Ed. 2d 210 (1966);

Feres v. United States, 340 U. S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950);

Layne v.United States,413 F. 2d 262 (9th Cir. 1969);

O'Brien v. United States, 192 F. 2d 948 (8th Cir. 1951);

Roach v. Shields, 371 F. Supp. 1392 (E. D. Pa. 1974);

Tirril v. McNamara, 451 F. 2d 579 (9th Cir. 1971);

U. S. v. Carrol, 369 F. 2d. 618 (8th Cir. 1966);

Section 44-137, S. C. Code of Laws (1962), as amended;

Section 1-234.1, S. C. Code of Laws (1962), as amended.

DISCUSSION:

A National Guardsman serves in a dual relationship—at any given time he may be in the exclusive service of the State, or in the dual capacity of serving both the United States and the State government. Therefore, it is necessary to look at both state and federal laws to determine the personal liabilities of Guardsmen acting as medical doctors or dentists.

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Under South Carolina law, Guardsmen are granted immunity from tort liability for malpractice by Section 44-137, S. C. Code of Laws (1962), as amended, which provides, inter alia, that:

> . . . nor shall any officer or enlisted man be liable to a civil action or criminal prosecution for any act done while in the discharge of his military duty when such act is in the line of duty.

While there is no comparable federal statute granting Guardsmen immunity in their role as Army Reservists, a line of federal court decision have in fact reached this result. In Feres v. United States, 340 U. S. 135, 71 S. Ct. 153, 95 L. Ed 152 (1950), the United States Supreme Court held that 'the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.' See, Buckingham v. United States, 394 F. 2d 483 (4th Cir. 1968). The holding of the Feres case was soon extended to apply to reservists. O'Brien v. United States, 192 F 2d 948 (8th Cir. 1951); Layne v. United States, 295 F. 2d 433 (7th Cir. 1961), cert. denied 368 U. S. 990, 82 S. Ct. 605, 7 L. Ed. 2d 527; United States v. Carrol, 369 F. 2d 618 (8th Cir. 1966).

***2** In subsequent cases, the Feres decision has been expanded by the federal courts to provide immunity not only for the Government but also for the army physicians facing malpractice action. Bailey v. Van Buskirk, 345 F. 2d 298 (9th Cir. 1965) cert. denied 383 U. S. 948, 86 S. Ct. 1205, 16 L. Ed 2d 210 (1966); Bailey v. DeQuevedo, 375 F. 2d 72 (3rd Cir. 1967), cert. denied 389 U. S. 923, 88 S. Ct. 247, 19 L. Ed 2d 274 (1967), Roach v. Shields, 371 F. Supp 139 (E. D. Pa. 1974). In Tirril v. McNamara, 451 F. 2d 579 (9th Cir. 1971) the Ninth Circuit Court of Appeals opined that 'an army physician is immunized from tort liability to a fellow soldier when the alleged act of malpractice occurred in a military hospital by the physician in the line of his military duty.' Likewise, the reasoning of these decisions have been applied to hold that reservists are immune from personal liability for injuries inflicted upon fellow reservists. Mattos v. United States, 412 F. 2d 793 (9th Cir. 1969). The decisions granting immunity to physicians for acts committed against fellow soldiers have been based upon a policy judgment required because of the peculiar and special relationship of the soldier to his superiors, the effects of malpractice suits on discipline, the fact that the Army Medical Corps performs a function of command as well as service, and the availability of compensation for injuries within the Army system.

In the event a suit is brought against a doctor or dentist serving with the National Guard, the South Carolina Attorney General's Office will defend the guardsmen in civil or criminal actions for acts done or omitted in good faith in the course of his duties. Section 1-234.1, S. C. Code of Laws (1962).

CONCLUSION:

National Guard physicians and dentists are immune from tort liability to a fellow soldier when the alleged act occurred in a military hospital by the physician in the line of military duty. CAVEAT: No opinion is expressed as to the personal liability of National Guard doctors and dentists in treating persons other than fellow soldiers, e.g., military dependents.

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