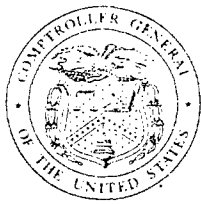


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S. Irwin



DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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FILE: B-114839

DATE: January 25, 1979

MATTER OF: Governor of Canal Zone Government - ~~Authority~~ under
~~2 Canal Zone Code § 271~~ to indemnify Government
physician for damages paid in connection with
DIGEST: malpractice suit brought against him in his personal
capacity.

1. Section 271, title 2, of Canal Zone Code does not authorize Governor of Canal Zone Government to indemnify Government physician for damages paid in connection with malpractice suit brought against him in his personal capacity for acts occurring in Republic of Panama. *D**
2. Pursuant to 28 U.S.C. § 2680(k), Federal Tort Claims Act does not apply to claims arising in foreign countries, thereby exposing to personal liability Government medical personnel who perform negligent acts in foreign countries, or under other circumstances not cognizable under the Act.
3. *The absence of* Absent specific protective legislation authorizing heads of Government agencies to hold harmless or provide liability insurance for medical personnel for negligent acts arising out of the performance of their official duties in a foreign country, these employees (including medical personnel of the Canal Zone Government) are subject to personal liability for such acts. *⓪*

AGC 00356

This is in response to a request from the Governor of the Canal Zone Government that we furnish an advisory opinion on whether the Governor of the Canal Zone is authorized, by section 271 of title 2 of the Canal Zone Code, as amended, 88 Stat. 1973 (1975), to indemnify a physician for damages paid by (him) (whether pursuant to judgment or settlement) in connection with a malpractice suit arising out of his employment with the Canal Zone Government. For the reasons set forth below, we believe that the Governor is not so authorized.

Panama Canal Zone Bank

A civil action was filed in the United States District Court for the District of the Canal Zone against a physician employed by the Canal Zone Government (an independent agency of the United States Government), alleging negligence in providing medical treatment and seeking \$15,000 in damages against the physician in his personal capacity. Neither the United States nor the

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Decision

Canal Zone Government was named as a party to this action. The acts cited by the plaintiff as negligent were conceded to have been performed by the defendant within the scope of his employment with the Canal Zone Government.

The Governor believes that his authority under section 271 of the Canal Zone Code is broad enough to permit settlement of the type of claim discussed. He takes the position that:

"* * * a loss of property mentioned in the statute can be construed to include the damages paid by a physician in connection with a malpractice suit arising out of his employment with the Canal Zone Government."

We assume that the alleged malpractice occurred in the Republic of Panama, and not within the Canal Zone, as the provisions of section 271 apply only to torts committed by Canal Zone Government employees in the Republic of Panama. *Clark*

Section 271 of the Canal Zone Code states as follows:

"§ 271. Claims arising from civil government.

"(a) The Governor, or his designee, may adjust and pay claims for injury to, or loss of, property or personal injury or death arising from the activities of the Canal Zone Government.

"(b) An award made to a claimant pursuant to this section shall be payable out of any moneys appropriated for or made available to the Canal Zone Government. The acceptance by the claimant of the award shall be final and conclusive on the claimant, and shall constitute a complete release by him of his claim against the United States and against any employee of the United States acting in the course of his employment who is involved in the matter giving rise to the claim, except that the Governor may make an interim partial award for humanitarian or compassionate reasons in a sum not exceeding \$1,000.

"(c) This section does not apply to tort claims cognizable under section 1346(b) or 2672 of Title 28, United States Code. Amended Jan. 2, 1975, Pub. L. 93-610, § 2, 88 Stat. 1973."

We find, from a study of the legislative history of this provision, that section 271 originally authorized the Canal Zone Government to settle only property damage claims arising out of the tortious acts of government employees committed in the Republic of Panama, but this authority was extended by the 1975 amendment to include claims for personal injury or death. As a result of this amendment, section 271 now provides settlement authority for tort claims arising in the Republic of Panama parallel to the authority available under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 et seq., for settling similar claims arising in the Canal Zone or in the United States. S. Rep. No. 93-1398, 93d Cong., 2d Sess. 2 (1974).

The FTCA waives the immunity of the United States Government from liability for the negligent acts of government employees acting within the scope of their employment, 28 U.S.C. § 2672, but does not generally provide an exclusive remedy immunizing the government employee from personal liability for his tortious acts. Government medical personnel have frequently been held personally liable for actions arising out of their official medical duties, see, e.g., Henderson v. Bluemink, 511 F.2d 399 (D.C. Cir. 1974); Jackson v. Kelly, 557 F.2d 735 (10th Cir. 1977); but see, Martinez v. Schrock, 537 F.2d 765 (3d Cir.), cert. denied, 430 U.S. 920 (1977).

Decisions such as these led to the enactment in recent years of legislation making the FTCA the exclusive remedy in malpractice actions against Government medical personnel. See, e.g., 38 U.S.C. § 4116, 79 Stat. 1154 (1966) (medical personnel of the Veterans Administration); 42 U.S.C. § 233(a), 84 Stat. 1870 (1970) (Public Health Service); 22 U.S.C. § 817(a), 90 Stat. 823 (1976) (State Department); 10 U.S.C. § 1089(a), 90 Stat. 1985 (1976) (Department of Defense, Central Intelligence Agency, National Aeronautics and Space Administration).

By its terms, the FTCA does not apply to claims arising in foreign countries, 28 U.S.C. § 2680(k), thereby exposing to personal liability government medical personnel who perform negligent acts which occur in foreign countries, or under other circumstances not cognizable under the FTCA. Here again, specific protective legislation has been enacted which authorizes the heads of specified departments or agencies to hold harmless or provide liability insurance for medical personnel for negligent acts arising out of

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the performance of their official duties. See, e.g., 10 U.S.C. § 1089(f); 22 U.S.C. § 817(f); 42 U.S.C. § 233(f); and 32 U.S.C. § 334, 90 Stat. 1986 (1977) (Medical personnel of the National Guard in training activities, and when operating as part of the United States armed forces.)

No such legislation has been enacted with respect to medical personnel employed by the Canal Zone Government, however, and absent this protective legislation, they may be held personally liable in civil damages for malpractice which occurs in the Republic of Panama.

As noted on page 2, *supra*, the Governor believes that section 271 authorizes him to settle claims other than torts, including the instant claim for reimbursement for monies paid as a result of personal civil liability. Even assuming, *arguendo*, that section 271 has such broad applicability, payment could not be made where the loss that is the subject of the claim was caused, in whole or in part, by the negligent acts of the claimant. Compare, Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. § 241(c)(3) (1976).

legislative protection

Nothing in the legislative history of section 271 evidences an intent that this provision be used to indemnify government employees for damages paid by them for judgments rendered or settlements reached in malpractice claims brought against them in their personal capacity. On the contrary, section 271 clearly extends only to claims against the Canal Zone or United States Governments arising from the tortious activities of the Canal Zone Government, and not to claims against employees whose acts caused the injury or death. See, S. Rep. No. 93-1398, *supra*, 1-3.


Where neither the Canal Zone nor the United States Government is a party to the civil action at issue, no judgment or order of the court can be issued or enforced against the

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United States, Cf., 44 Comp. Gen. 86 (1964); B-164879, December 5, 1973. Similarly, [payment by a government employee in settlement of a malpractice claim brought solely against him in his personal capacity creates no liability on the part of the government to reimburse him for such payment.] Absent specific authorization for the Government to assume liability or to indemnify individuals for payment of such claims against them, [payment or reimbursement by the Government under these circumstances would constitute an unauthorized expenditure of public funds.] (3)

For these reasons, funds appropriated to carry out the functions of the Canal Zone Government should not be used pursuant to 2 C.Z.C. § 271 to indemnify or reimburse physicians who pay damages resulting from a judgment or settlement of a medical malpractice suit brought against them personally for negligent acts committed within the scope of their Government employment.

The administrative problems created by this lack of authority were the principal reasons why legislation holding harmless or providing liability insurance for other Government medical personnel was provided by the Congress, according to the legislative history of the Acts cited above. We believe that similar action by the Congress will be necessary to protect physicians sued for malpractice in their individual capacities in the Canal Zone.


Deputy Comptroller General
of the United States