

TORT DEFENSE FUND:  
DEPARTMENT OF CORRECTIONS:  
PHYSICIANS:

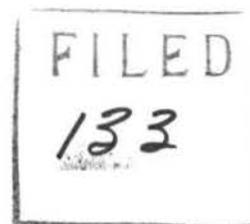
Interns and resident physicians  
of the University of Missouri  
Medical Center who provide medi-  
cal services on an irregular basis

without further compensation under the supervision and direction  
of the Medical Director of the Missouri Department of Corrections  
are "employees" or "agents" of the Missouri Department of Correc-  
tions as those terms are used in Section 105.710 (Senate Bill No.  
428, 76th General Assembly), and those interns and resident phy-  
sicians are included for coverage under the Missouri Tort Defense  
Fund.

OPINION NO. 133

May 3, 1973

Mr. George M. Camp, Director  
Missouri Department of Corrections  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Camp:

This opinion has been prepared in response to a recent  
request by your predecessor, William G. Miller. The question  
presented is as follows:

"Does the Tort Defense Fund, Section 105.  
710, include physicians, who perform volun-  
tary medical services, under the supervision  
of the Medical Director of the Department  
of Corrections, at the State Penitentiary?"

In explaining this question the opinion request further  
states:

"The State Penitentiary has an excellent  
medical facility. However, medical services  
to inmates are severely hampered by a lack  
of medical personnel. There is a group of  
interns and resident physicians at the Med-  
ical Center, University of Missouri, who  
are interested in performing services at the  
penitentiary hospital. These services would  
be without compensation on an irregular ba-  
sis. However, all services would be under  
the direction of the Medical Director of the  
Department of Corrections. The physicians

Mr. George M. Camp

desire to be advised whether their services would include them under the Tort Defense Fund."

Section 105.710 (Senate Bill No. 428, 76th General Assembly), provides:

"As part of the compensation to be paid to the director of the department of corrections, the director of the department of public health and welfare, the director of the division of health, the director of the division of welfare, the curators and regents of public institutions of higher education which award baccalaureate degrees, the director of the division of mental diseases and other officers, employees and agents of the department of corrections, the division of health, the division of welfare, and the division of mental diseases the comptroller is authorized to pay from the Tort Defense Fund, which is hereby created, all final judgments awarded in courts of competent jurisdiction to any claimant against the aforesaid officers, employees, and agents, for acts arising out of and performed in connection with their official duties in behalf of the state. Payment shall be limited to a maximum of one hundred thousand dollars for all claims, arising out of the same act except that no payment shall be made for any claim which arises because of or in connection with the operation of a motor vehicle either privately or publicly owned."

Under this statute, interns and resident physicians of the University of Missouri Medical Center who perform voluntary medical services under the supervision of the Medical Director of the Department of Corrections at the Missouri State Penitentiary would be eligible to receive the benefits granted in Section 105.710, RSMo, if they can be considered "employees" or "agents" of the Department of Corrections.

In Opinion No. 136, issued by this office on April 4, 1973, to Mr. Bert Shulimson, Director, Missouri Division of Welfare, this office concluded that "volunteers working with the Missouri Division of Welfare at regular hours, on specific assignments, under full time supervision of regular employees of the Division of Welfare would be . . . included for coverage under the Missouri

Mr. George M. Camp

Tort Defense fund." That conclusion was reached because those volunteers were found to be included within the class of "employees" of the Division of Welfare as that language is used in Section 105.710, RSMo. That opinion relied on the cases of Bollman v. Kark Rendering Plant, 418 S.W.2d 39 (Mo. 1967); Dean v. Young and Sears, Roebuck & Company, 396 S.W.2d 549 (Mo. 1965); Madsen v. Lawrence, 366 S.W.2d 413 (Mo. 1963); State ex rel. Maryland Casualty Co. v. Hughes, 164 S.W.2d 274 (Mo. 1942); and Trianon Hotel Co. v. Keitel, 169 S.W.2d 891 (Mo. 1943), to establish that the status of master and servant or employer and employee is defined by the presence of varied criteria, the most important of which is the right of the master or employer to control and direct the physical activities and conduct of the servant or employee in the performance of the services being rendered. Because the activities of the volunteers were supervised by regular employees of the Division of Welfare during the performance of the volunteers' services, the volunteers were considered "employees" of the Missouri Division of Welfare within the meaning of Section 105.710, RSMo.

This factor of control or right to control the conduct of interns and resident physicians is apparently present in the proposed relationship described in the opinion request. While the interns and the resident physicians will provide services without compensation on an irregular basis, the opinion request indicates that the services rendered would be under the direction and supervision of the Medical Director of the Department of Corrections. In Bollman v. Kark Rendering Plant, supra, the relationship in question was one existing between a father and son where the son assisted his father in the father's business on an irregular basis and without compensation. There the Missouri Supreme Court found that the relationship was one of employer and employee because the father had the right to control and did control his son's physical activities and conduct in the performance of his services. The court found this determinative of the employer-employee relationship even though the son worked for the father occasionally and actually received no wages for his work. Likewise, in the situation indicated in this opinion request, the fact that the services rendered by interns and resident physicians will be under the supervision and direction of the Medical Director of the Department of Corrections is sufficient to establish the employer-employee relationship even though the interns and resident physicians perform services on an irregular basis without other compensation.

The nature of medical services rendered by physicians and surgeons, however, would seem inherently to require an exercise of discretion and judgment on the part of the physician or surgeon

Mr. George M. Camp

rendering this service. Thus the question arises of whether interns and physicians rendering medical services under the direction and supervision of another physician are subject to sufficient control to acquire the status of servant or employee under the control or right to control test. This aspect of services rendered by the medical profession has been held not to preclude a physician or surgeon from occupying the status of an employee or agent. In Noren v. American School of Osteopathy, 223 Mo.App. 278, 2 S.W.2d 215 (St.L.Ct.App. 1928), a student of osteopathy was held to be the agent or servant of the school and the school's instructing osteopath. There the court stated ". . . where, as in the case here . . . the one physician retains control of the other . . . there is sufficient reason for holding that the relation of principal and agent does exist. . . ." (2 S.W.2d at 221). Likewise, physicians have been held to occupy the status of employee or agent in similar cases. Phillips v. St. Louis & S.F.R. Co., 211 Mo. 419, 111 S.W. 109 (1908); Smith v. Mallinckrodt Chemical Works, 212 Mo.App. 158, 251 S.W. 155 (St.L.Ct.App. 1923). Thus a physician or surgeon rendering medical services who is subject to the control and supervision of a superior, is not prevented from being the agent or employee of the superior by the nature of the services he renders.

Section 216.090, RSMo 1969 requires: "The director shall provide adequate medical treatment and adequate hospital facilities for all inmates in the institutions under his control." This duty to provide adequate medical treatment is satisfied by the services rendered by the Medical Director of the Department of Corrections. The opinion request states that this duty will be further performed by services rendered by interns and resident physicians of the University of Missouri Medical Center working under the supervision and direction of the Medical Director of the Missouri Department of Corrections. It is the opinion of this office that in this situation the interns and resident physicians of the University of Missouri Medical Center working under the direction and supervision of the Medical Director of the Department of Corrections to provide medical services to inmates are "employees" or "agents" within the meaning of Section 105.710, RSMo 1969, as amended 1972. Therefore, these interns and resident physicians enjoy the benefits given "employees" or "agents" of the Missouri Department of Corrections by that statute.

#### CONCLUSION

Therefore, it is the opinion of this office that interns and resident physicians of the University of Missouri Medical Center who provide medical services on an irregular basis without further compensation under the supervision and direction of

Mr. George M. Camp

the Medical Director of the Missouri Department of Corrections are "employees" or "agents" of the Missouri Department of Corrections as those terms are used in Section 105.710 (Senate Bill No. 428, 76th General Assembly), and that those interns and resident physicians are included for coverage under the Missouri Tort Defense Fund.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Stephen D. Hoyne.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a prominent initial "J" and a long, sweeping underline.

JOHN C. DANFORTH  
Attorney General