

**1999 USARCS CLAIMS TRAINING COURSE**

**Tort Claims Seminar Workshop  
Topic - Employees**

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- II. Overview of the Issues
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I. INTRODUCTION.

II. REFERENCES.

- A. Military Claims Act (MCA), 10 U.S.C. §2733
- B. Federal Tort Claims Act (FTCA), 28 U.S.C. §1346 (b) and 28 U.S.C. §§2671-2680
- C. Army Regulation (AR) 27-20, Claims, Chapters 3 and 4.

III. LEGAL ANALYSIS.

A. Limited Waiver of Sovereign Immunity.

1. The United States may be held liable for damages to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his/her office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. §1346 (b).

2. The United States may be held liable for damage to property, both real and personal, personal injury or death caused by a civilian officer or employee of a military department, acting within the scope of his/her employment, or otherwise incident to the noncombat activities of that military department under regulations prescribed by the Secretary of the military department. 10 U.S.C. §2733.

Enclosure 1

## B. Specific Determinations Needed.

1. Federal law determines who is an "employee" but scope of employment issues under the FTCA are decided by state law of the place where the tort occurred.

a. FTCA defines "employee" as including officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation (28 U.S.C. §2671).

b. The definition of "federal agency" explicitly excludes "any contractor with the United States" (28 U.S.C. §2671).

### 2. Who is a Federal Employee?

a. Independent contractor. If a contractor is not a federal agency then its employees are not federal employees and the United States is not liable for claims arising from the acts of an independent contractor or its employees. This includes NAFI or AAFES contractors or concessionaires.

#### (1) Injury to employees of independent contractor.

(a) When a contract employee files a claim for injuries, conduct a thorough examination to determine whether there was any direct negligence on the part of the United States or its employees.

(b) Scrutinize the terms of the Government contract for language where the contractor agreed to indemnify the United States from claims arising from contract operations.

(c) Research state law to see if a specific duty to the injured employee of the independent contractor has been created by either statute or case law. Also research to see if state or local law creates any defenses such as statutory employer.

(2) Injury to third parties caused by employee of independent contractor.

(a) This question was examined in Logue v. United States, 412 U.S. 521 (1973), where the Supreme Court held that the FTCA adopted the common law distinction between an employer's liability for his/her own employees and the liability (or lack thereof) for the employees of a party with whom he/she contracts for a specified performance. The court held that the "absence of authority in the principal to control the physical conduct of the contractor in performance of the contract" was determinative in concluding that there was no liability accruing to the United States. Thus, the distinction turns on the issues of control and supervision over the day-to-day activities of the individual whose performance is at issue.

(b) Subsequent cases have applied the "strict control" test where the United States exerts day-to-day supervision and control over the "detailed physical performance of contractor", United States v. Orleans, 425 U.S. 807, 814 (1976).

(c) Simply reserving the right to inspect the work product or specify conditions is not enough to establish someone as a federal employee. Nor is the promulgation of detailed federal safety regulations and evaluations considered a sufficient "strict control". The real test is whether the United States maintains detailed control over the primary activity for which it has contracted, not merely the peripheral, administrative acts relating to such activity.

b. Army National Guard (ARNG).

(1) Soldiers of the ARNG are employees of the State unless ordered into the Federal Service, such as during a national emergency or while performing duty under Title 10, U.S. Code. ARNG personnel can perform military duty (1) in an active duty status under the authority of Title 10, U.S. Code; (2) in a full-time National Guard duty or inactive duty training status under the authority of Title 32, U.S. Code or (3) in a State active duty status under the authority of their State code.

(a) When an ARNG soldier performs federal active duty, he or she is under Federal command and control and is paid Federal funds. For claims purposes, that soldier is treated as an Active Army soldier. The National Guard Claims Act (NGCA), 32 U.S.C. 715, does not apply.

(b) When an ARNG soldier performs full-time National Guard Duty or inactive duty training, he or she is under State command and control and is paid from Federal funds. The NGCA does apply, but as explained in subparagraph (3) below, is seldom used.

(c) When an ARNG soldier performs State active duty, he is under State command and control and is paid from State funds. Federal claims statutes do not apply, but State claims statutes may apply.

(2) The ARNG also employs civilians, referred to as technicians and employed under 32 U.S.C. § 709. Technicians are typically, but not always, ARNG soldiers who perform the usual 15 days of annual training (a category of full-time duty) and 48 drills (inactive duty training) per year.

(3) NGCA coverage applies only to ARNG soldiers performing full-time National Guard duty or inactive duty training and to technicians. However, since the NGCA enactment in 1960, Congress has also extended FTCA coverage to these personnel. Thus, since claims arising from the negligent acts or omissions of ARNG soldiers performing full-time National Guard duty or inactive duty training or of technicians will be processed under the FTCA, the NGCA is generally relevant only to claims arising from noncombat activities or outside the United States.

c. In 1968, technicians, who formerly were State employees, were made federal employees. Along with Federal employee status came FTCA coverage. Technicians no longer have any State status, albeit they are hired, fired, and administered by a State official, the Adjutant General, acting as an agent of the Federal government.

d. In 1981, Congress extended FTCA coverage to ARNG soldiers performing full-time National Guard duty or inactive duty training (such as any training or other duty under 32 U.S.C. §§ 316, 502-505). Unlike the technicians who were transferred into federal employees, this extension of coverage did not effect any change to their underlying

status as State military personnel. The 1981 amendment provided coverage for ARNG activities giving rise to claims in these situations:

- (1) Instructing civilians at rifle ranges (32 U.S.C. § 316).
- (2) Attending drill assemblies or participating in exercises or encampments—typically inactive duty training (32 U.S.C. § 502).
- (3) Participating in certain maneuvers—typically two weeks annual training (32 U.S.C. § 503).
- (4) Participating in small arms competitions or attending schools for the ARNG (32 U.S.C. § 504).
- (5) Attending regular service schools (32 U.S.C. § 505).
- (6) Recruiting full-time (32 U.S.C. § 502 (f)).
- (7) Performing Active Guard Reserve (AGR) duties with the State (32 U.S.C. § 502 (f)).
- (8) Federal drug enforcement duty (32 U.S.C. § 502(f)).

e. For an activity to fall under one of the above categories listed in paragraph d above, the State must issue orders or in the case of drills, a unit-training schedule.

(1) The ARNG is often involved, incident to federally-funded training in Title 32 status, in projects that assist State or local Governments or various private organizations, usually youth groups or national military associations. Specific statutory authority for such incident to training assistance is contained in 32 U.S.C. § 508, 10 U.S.C. § 2012, 10 U.S.C. § 2548, and other statutes. Claims arising from such duly authorized projects are cognizable, notwithstanding the fact that a government entity or private organization may derive a benefit. Other projects, particularly those which cannot be supported on an incident to training basis, may be accomplished in a State active duty (SAD) status. Claims arising from SAD missions are exclusively a State responsibility.

(2) The ARNG is involved under 32 U.S.C. § 112 in providing assistance to law enforcement agencies in counterdrug operations. Such support is generally provided in Title 32-duty status (other than training) and claims arising therefrom are cognizable. Separate and apart from 32 U.S.C. § 112, Section 1004 of the 1991 National Defense Authorization Act authorizes assistance, incident to training, to law enforcement agencies in counterdrug operations. Again, such claims arising in Title 32 training status are cognizable. However, where a State employee is actively participating in the operation, investigation must be sufficient to determine whether any claim is a State or Federal responsibility.

(3) Claims based on premises liability at a State-owned or leased armory or training site are generally the State's responsibility. Examples of such claims include an exploding dud, motorcyclist running into wire barriers, person falling into trench dug across a roadway, person falling on an icy stairway or parking lot, or vehicle damage from grass mowing operations.

f. Health Care Provider (HCP). Civilian HCPs at Army military treatment facilities (MTF) are normally not federal employees unless they are Department of the Army civilians.

(1) When a medical malpractice case is filed, the claimant typically presumes that all health care professionals working at the MTF are federal employees, however, such is often not the case with civilian medical personnel that are working at the MTF under a variety of programs or contracts with the United States.

(2) Many Army MTFs contract for HCPs, particularly in the emergency department or obstetrics and gynecology department. Some of these HCPs are supplied by a company that contracts with the MTF while other HCPs contract directly with the MTF. When a medical malpractice claim arises, it is important to acquire all of the contracts and documentation on these individuals, and the company that supplied them. As these HCPs are usually credentialled by the Army facility, the credentialling office as well as the contract office may have a file on them. CAVEAT: Some contract offices/credentialling offices (i) dispose of old contracts when a new one is signed, (ii) dispose of everything after a certain time has elapsed or (iii) dispose of the file on a particular HCP as soon as the provider moves to new employment.



(3) Personal/Nonpersonal services contracts.

(a) Nonpersonal services contracts. Most of the contracts will be nonpersonal services contracts in which the HCPs are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control normally associated with the United States and its' employees. As such, these HCPs must, as part of the contract, provide their own professional liability insurance.

(b) Personal services contracts (PSC). The Department of Defense (DoD) in their January 6, 1995, Instruction 6025.5, entitled "Personal Services Contracting for Health Care Providers", mandated the use of PSCs when "in house sources are insufficient to support the medical mission of the Military Departments or in using sound business judgment it is more efficient to do so." Some contracting offices in an attempt to quickly fill existing HCP vacancies have hired HCPs using the PSC. These contracts make the HCP appear to be a federal employee by stating in the contract that they will be treated like a federal employee and by not requiring them to provide their own professional liability insurance. These contracts also sometimes state that if the HCP were to purchase their own professional liability insurance that it would not be reimbursed by the United States. Thus the HCP does not purchase any liability insurance. The problem then arises as to what to do when a claim is filed and these HCPs are named. The Department of Justice takes a hard line on such contracts. Their view is that these contracts do not expand either the Government's waiver of sovereign immunity or the scope of its FTCA liability and thus their position is that these HCPs are not federal employees unless the "strict control" test is met. See also Wafford v. United States, civ. # 95-1134LEW (N.D. Calif., April 23, 1996).

(c) 10 U.S.C. § 1089 (a) was amended in November 1997 to include a sentence which states that "this subsection shall also apply if the physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) involved is serving under a personal services contract entered into under section 1091 of this title". Thus HCPs under PSCs are now covered but the amendment is not retroactive.

(4) Military-Civilian Health Services Partnership Program. The Partnership Program was created by DOD in 1987. The most common such program allows MTFs to enter into formal agreements (not contracts) whereby HCPs are allowed to use government facilities to treat CHAMPUS eligible patients. Such HCPs are neither federal employees nor technically, a contract employee but they are treated similar to independent contractors as the United States does not exercise day-to-day supervision and control over them.

(5) PRIMUS HCPs. PRIMUS clinics are private, freestanding medical facilities that provide health care to DA beneficiaries under contractual agreements. The HCPs who work at PRIMUS clinics are considered employees of an independent contractor, not federal employees.

(6) Residents in training/borrowed servant. Civilian residents training in United States government MTFs pose the question as to who is responsible for their tortious conduct. The same question is raised when our HCPs are doing their residency in a civilian facility. Whether the borrowing facility will be liable is based on how the state interprets the borrowed or loaned servant doctrine, which purports to shift vicarious liability from the employing or lending master of a negligent servant to the borrowing master. Be aware of what your individual state agency law prescribes.

(7) The FTCA exclusion of contractors from the definition of a Federal agency applies to contractors who provide medical services. There are two basic tests:

(a) The "strict control" test stemming from Logue and Orleans. See also, Wood v. Standard Products Co., Inc., 671 F. 2d 825 (4<sup>th</sup> Cir. 1982).

(b) The "strict control aside from professional judgment" discussed in Lurch v. United States, 719 F. 2d 333 (10<sup>th</sup> Cir. 1983). This case deemed inappropriate the "strict control" test for doctors, who because of their training and ethical obligations, can never be "controlled". But see, Bird v. United States, 949 F. 2d 1079 (10<sup>th</sup> Cir. 1991) where a contract certified registered nurse anesthetist (CRNA) was found to be a federal employee as the CRNA was under the supervision and control of the Government physicians.

g. Volunteers. 31 U.S.C. § 1342 provides that no officer or employee of the United States shall accept voluntary service for the United States or employ personal services in excess of that authorized by law, except in case of emergency involving the safety of human life or the protection of property.

(1) Statutory exceptions who are considered Federal employees for purposes of the FTCA and MCA.

(a) Red Cross Volunteers meeting the criteria set forth in AR40-3, para. 2-42.

(b) Student volunteers, employed pursuant to 5 U.S.C. § 3111(b).

(c) Health care services volunteers, as well as family support programs, educational, housing referral, and other morale, welfare and recreational programs can all be considered federal employees for purposes of the FTCA and MCA, 10 U.S.C. § 1588.

(2) To be deemed a federal employee, the volunteer must be properly accepted by the Federal agency and be performing within the scope of the accepted voluntary services at the time of the incident.

#### C. Scope of Employment Considerations.

1. Under most chapters of AR 27-20, the Government's tort responsibility for employees' acts or omissions arises only when the employees are acting within the scope of their employment. 28 U.S.C. § 2672; 10 U.S.C. § 2733 (a)(3); but see the Nonscope Claims Act, 10 U.S.C. § 2737 and the Foreign Claims Act, 10 U.S.C. § 2734, which are exceptions. Under the FTCA, the question of whether a Federal employee is acting within the scope of employment at the time of an accident so as to make the United States liable in tort is one to be decided by applying the law of the place where the incident occurred. 28 U.S.C. § 1346 (b). Scope of employment under other chapters is determined by Federal law, following FTCA case law. See AR 27-20, paragraph 3-8a (3)(b).

2. Claimant's exclusive remedy is a cause of action against the United States if a Government employee commits a tortious act or omission while acting within the scope of his or her employment. The Department of Justice (DOJ) is responsible for determining whether an employee was acting within the scope of employment sufficient to entitle that person to immunity from personal liability and representation by the United States in any personal action. Certification of scope by the Attorney General is conclusive for removal purposes but reviewable for purposes of substituting the United States as the defendant in place of the individual employee. Gutierrez de Martinez v. Lamagno, 115 S.Ct. 2227 (1995).

3. Line of duty. "Line of duty" as it appears in 28 U.S.C. § 2671, means the scope of employment as determined by the law of the jurisdiction in which the tort occurred. Williams v. United States, 350 U.S. 857 (1955). An "in line of duty" determination for military benefits purposes does not necessarily equal a determination that the soldier was acting within the scope of employment at the time of the incident. However, this military "line of duty" investigation may provide valuable information, thus a copy should be acquired during the investigation of the claim.

4. Frolic and Detour. Scope of employment is presumed when traveling in an official vehicle. The presumption may be rebutted and overcome by showing that employee was engaged in activities clearly unrelated to work. Factors to be considered include the purpose of the detour; whether it had a single or dual purpose; the relationship of the Government employee's activities during the frolic or detour to the official duties; how much time elapsed during the frolic or detour; and whether the Government employee was returning to the authorized route at the time of the accident.

5. TDY Travel. TDY travel by Government employees has been consistently held as within the scope of employment. A scope of employment question arises when a deviation from the stated route or itinerary occurs. Use of a privately owned vehicle (POV) while on TDY raises a factual issue, thus use of a POV for TDY should be specifically authorized by verbal or written authorization of the approving official. TDY travelers should ensure that they don't use rental cars for what could be a frolic and detour.

6. To and From Work. Most State court decisions hold that an employee traveling between home and workplace is not acting within the scope of employment unless: the accident site is on the employer's premises, such as on the installation; or the employee is specifically authorized to use a government owned vehicle (GOV) or POV; or the employee is on official travel and is to be reimbursed; or the employee's use of the GOV or POV is authorized by customary use even though not expressly authorized.

7. Medical Residents. Army medical residents who are receiving training in a civilian hospital are federal employees while in the civilian hospital. Ward v. Children's Orthopedic Hospital, Civ. #90-1419D (W.D. Wash. 1991). The question of whether their performance of duties in the civilian hospital is within the scope of their military employment will depend upon the specific facts of each situation, including the provisions of the contract involved and the provisions of the state law. See, e.g., Palmer v. Flaggman, et. al., 93-CV-163-E (N.D. Tex. 1993).

8. Sexual assaults by HCPs. While, historically, intentional torts were excluded from FTCA coverage, the Gonzalez Act, 10 U.S.C. 1089 (e), carved out an important exception: if the HCP (including an HCP practicing under a PSC) commits an assault or battery while acting within the scope of employment, Federal liability attaches. Government liability may be based on the theories of negligent hiring or credentialing or failure to supervise the HCP properly, if there is a special relationship created between the Government and the injured party.

## 1999 USARCS CLAIMS TRAINING COURSE

### Tort Claims Seminar Workshop Employees

#### Seminar Problem 1

Dr. Smith is a Colonel on active duty stationed at Fort Bragg, North Carolina. He arrived in January 1993. Dr. Smith is assigned to Womack Army Medical Center at Fort Bragg and provides gynecological services at that facility to all eligible patients. Dr. Smith retires from active duty in August 1996 and is immediately hired by Womack as a civilian doctor providing the same type of services to all eligible patients. In August 1997, believing that being a contractor would be more lucrative, Dr. Smith signs a personal services contract to provide the same type of services at Womack. Dr. Smith has never felt the need to purchase professional liability insurance.

In September 1996, three separate claims are filed at the Fort Bragg claims office alleging medical malpractice by Dr. Smith.

Claim Number 1 alleges negligent medical treatment by Dr. Smith during the period June-August 1994.

Claim Number 2 alleges negligent medical treatment by Dr. Smith during the period of September-November 1996.

Claim Number 3 alleges negligent medical treatment by Dr. Smith during the period December 1997.

What are your thoughts as you review these claims and prepare your investigative plans?

1999 USARCS CLAIMS TRAINING COURSE

Tort Claims Seminar Workshop  
Employees  
Seminar Problem 2

Darnall Army Community Hospital at Fort Hood, Texas hired Dr. Jones as a CHAMPUS partner to provide medical care in the Darnall family practice clinic to all eligible patients. A sign posted at the receptionist's desk in the family practice clinic stated that Dr. Jones was a CHAMPUS partner and stated that there was no charge to the patient for medical services provided. Furthermore, the sign stated that it was voluntary for patients to be seen by Dr. Jones. The United States provide Dr. Jones office space, equipment, supplies and support personnel. The United States also guaranteed a steady supply of patients by making appointments for eligible patients to see Dr. Jones just as they did for the military doctors at Darnall.

Ms. Zorro, wife of SFC Zorro, brought their son, Tony, to the family practice clinic at Darnall with complaints of severe pain in his right arm. Ms. Zorro was told that Tony's arm was simply bruised and they were sent home. She was doubtful of Dr. Jones' diagnosis so the next day she took Tony to a civilian hospital where x-rays revealed that Tony had a broken arm. She was very dissatisfied with the care rendered by Dr. Jones and the support personnel working in the clinic. Thus she filed a claim alleging medical malpractice by Dr. Jones and nurses C and D. What are your thoughts as you begin to investigate this claim?

Would your analysis be different if Ms. Zorro had to sign a form for CHAMPUS benefits each time she utilized the services of Dr. Jones?

Would your analysis be different if all of the physicians in the family practice clinic were CHAMPUS partners, but the clinic was run just like all the other clinics at Darnall, some of which were staffed by active duty physicians?

Assume that in addition to her allegations about Dr. Jones and the nurses, she also alleges that the x-rays ordered by Dr. Jones were negligently read by the radiologist. Does that affect your analysis?

Enclosure 3

1999 USARCS CLAIMS TRAINING COURSE

Tort Claims Seminar Workshop  
Employees  
Seminar Problem 3

Dr. Clark was a captain and first year medical resident assigned to Brooke Army Medical Center (BAMC) in San Antonio, Texas. Pursuant to a memorandum of understanding between BAMC and Sister of Charity Hospital in San Antonio, Dr. Clark was actually treating patients at Sisters of Charity Community Hospital as part of this residency. One month into the residency, Mr. Q, a patient at Sister of Charity, alleges that a cast applied to his broken right arm by Dr. Clark was negligently applied causing a nonunion of the broken bones necessitating surgical intervention to correct. Mr. Q is pursuing Sister of Charity Hospital for medical bills, lost wages and pain and suffering. Sister of Charity Hospital believes that BAMC should pay.

How would you resolve these questions? What additional information would you need to know? How does state law come into play? Would the outcome be different if Dr. Clark were a senior third year resident working at Sisters of Charity?



## 1999 USARCS CLAIMS TRAINING COURSE

### Tort Claims Seminar Workshop Employees Seminar Problem 4

Mr. X was a civilian employee at Aberdeen Proving Ground, Maryland. He was on temporary duty (TDY) orders at Fort Belvoir, Virginia to attend a 2 day "Consideration of Others" training seminar. Mr. X was assigned a government owned vehicle (GOV) for the duration of the TDY. After class on day one, Mr. X decided to leave the local area and travel by GOV to Annapolis, Maryland for dinner and possibly see the various ships that were moored on the Annapolis waterfront. Annapolis is 52 miles from Fort Belvoir where Mr. X's temporary living quarters were located. As he approached the downtown Annapolis area, he ran a stoplight and struck Ms. A's vehicle. Ms. A allegedly sustained serious injuries to her back and neck as well as substantial damage to her vintage Yugo. Mr. X was fortunately not injured, the GOV was not damaged and the four empty Bud Light bottles were not broken.

Ms. A filed a claim against the United States for personal injuries and property damage. What are your thoughts as you prepare to investigate this claim? How would state law come into play in resolving this claim?

## 1999 USARCS CLAIMS TRAINING COURSE

### Tort Claims Seminar Workshop Employees Seminar Problem 1 SOLUTION

Dr. Smith's exact employment status must be ascertained. A good starting point would be to request a copy of his credentials file from the credentials office at the local Army hospital. This will permit you to prepare for a comprehensive interview of Dr. Smith and to know whether you need to notify a third party of one or more of the claims.

Claim 1 involves a time period when Dr. Smith was on active duty. By definition, he is an employee of the United States. 28 U.S.C. 2671. Investigation of this claim will require a focus on the scope of employment issue - were Dr. Smith's actions within the scope of his employment? Remember that an active duty service member acting within scope will be in the "line of duty". Absent misconduct by the service member, line of duty is generally presumed. However, being in the line of duty does not compel a finding of scope of employment.

The following questions provide a frame of reference when evaluating whether an individual was acting within the scope of employment: (1) Was the act one that the employee normally performs?; (2) Was the employee acting within the general authority of the employer?; (3) Was the individual acting in furtherance of the employer's business?; and (4) Was the individual's action undertaken, at least in part, for the purpose of serving or benefiting the employer? Remember that state law applies with respect to scope of employment determinations under the FTCA. For claims under the MCA, scope questions are determined by federal law.

Claim 2 raises the issue of Dr. Smith's employment status after his retirement from active duty in August 1996. There are several possible situations which should be explored by the instructor, for example: (1) Dr. Smith is hired as a civilian doctor; (2) Dr. Smith enters into a regular contract with the U.S. to provide medical services at the local Army hospital; (3) Dr. Smith is employed by a company which has entered into a contract with the U.S.; (4) Dr. Smith volunteers his medical services at the local Army hospital. Your investigation will require an analysis of Dr. Smith's acts or omissions during the entire period of time before reaching a conclusion regarding potential U.S. liability for the alleged injury.

Claim 3 presents the issue of Dr. Smith's employment status. Unlike Claim 2, Dr. Smith is not on active duty at all during this time frame. Therefore, you must identify the authority under which he is providing medical services and obtain copies of the documentation of his status. As he is working under a personal services contract (PSC), obtain a copy of the contract. You may need to obtain it from the local contracting office. It may not be at the hospital. Read the PSC to see what, if any, reference it makes to liability for claims or requiring the individual to carry liability insurance. Most PSCs state that the HCP will be treated "like" an employee of the U.S. for FTCA purposes.

Many PSCs also state that the HCP's professional liability insurance will not be paid for the U.S. without ever requiring them to purchase their own. Thus, many HCPs under PSCs have no professional liability insurance. But if an insurance company is involved, make sue to put them on notice of the claim. If he is/was a civilian employee, obtain a copy of his file from the CPO office as it may contain a wealth of information. Your investigation must also consider whether any individual other than Dr. Smith may have responsibility for causing the alleged injury and ascertain whether that individual is an employee of the United States before reaching a conclusion regarding the claim.

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Employees  
Seminar Problem 2  
SOLUTION

This problem address the blend of facts from Carillo and Kramer (copies attached)

The issue in determining who is an employee is governed by who has the day to day control over the actions of the person. There are several other cases cited in the FTCA Handbook which also find CHAMPUS partners are not our employees, however there are at least two which find that they are our employees. The court looks at the issue of day to day control over the actions of the individual - generally, they find that physicians are making independent decisions and exercising independent judgment, therefore, they are more willing to accept the US argument that the CHAMPUS partners are independent contractors. The issue is viewed differently when talking about the actions of a nurse, who is generally not considered to make independent decisions and is, therefore, considered an employee.

Discuss "strict control" versus "strict control aside from professional judgment" tests.

The estoppel argument should be discussed as an issue raised during the seminar.

## 1999 USARCS CLAIMS TRAINING COURSE

### Tort Claims Seminar Workshop Employees Seminar Problem 3

#### SOLUTION

The first step would be to examine the contract or memorandum of understanding between the MTF and the civilian hospital. Does this document clarify who will bear the responsibility for such a claim? If not, does this document clarify who is responsible for supervising the day-to-day activities and training of this resident? Who does the resident report to, if anybody? Is the resident getting evaluated by anyone at the civilian hospital?

Is there a state law governing the concept of borrowed/ loaned servants?

Since the issue of control of the resident is paramount, it would make a difference that the resident is a senior third year resident, as senior residents require less supervision and may be actually training the first year residents.

## 1999 USARCS CLAIMS TRAINING COURSE

### Tort Claims Seminar Workshop Employees Seminar Problem 4

#### SOLUTION

In general, a civilian employee traveling on official business is presumed to be within the scope of employment whether driving a GOV or POV. However, the presumption can be rebutted by showing that the individual mixed personal business with official business. One could argue that there were lots of restaurants in the Fort Belvoir area that could have been suitable for dinner without having to drive 52 miles to Annapolis. Thus the trip was indicative of a personal motivation to see Annapolis disguised with an authorized trip for dinner. The added fact that Annapolis is a known tourist attraction also lends an air of personal motivation to the analysis, making it appear to be more of a frolic. As the accident occurred in Maryland, Maryland State law must be researched on the issue of scope of employment. The fact that Mr. X had been drinking doesn't in and of itself put him outside the scope of employment but is another factor that needs to be examined.