

DATE: 03-11-91

CITATION: VAOPGCPREC 37-91
Vet. Aff. Op. Gen. Couns. Prec. **37-91**

TEXT:

SUBJECT: Responsibility to Return Competent Patients to the Hospital.

(This opinion, previously issued as Opinion of the General Counsel 11-76, dated February 5, 1976, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

To: District Counsel, Cleveland, OH

QUESTION PRESENTED:

What is the responsibility and possible liability of a hospital to return a veteran patient who has left the hospital grounds without permission to visit a nearby establishment, and who has become intoxicated and caused such a disturbance that the hospital has been called by the proprietor who requested that VA personnel be sent to return the patient to the hospital?

COMMENTS:

The hospital advises that there have been problems with patients leaving the hospital grounds (AWOL) and visiting nearby establishments which serve intoxicating beverages. While there, they create disturbances which cause the proprietor to request that VA personnel be sent to return the patients to the hospital. In the past, a VA Hospital Police Officer, or a member of the nursing service, has been sent to bring the patient back to the hospital. Recently, questions have been raised as to the legal implications of complying with these requests. These questions are as follows:

1. Is this a violation of a patient's rights?
2. What responsibility does the Veterans Administration have in returning the patient to the hospital?
3. If the patient should damage property, does the VA have any responsibility?
4. If the patient is injured, is the VA responsible?

5. If, while leaving or returning to the VA hospital, the patient is struck and injured by a motorist, does the VA have any responsibility?

6. If the patient caused injury to the person, or property of a third party, is VA responsible?

7. Are the VA employees who have been sent out protected from tort liability in performing their duties such as outlined above?

Our comments and conclusions are based upon the assumption that the patients referred to are competent and mental illness is not involved. It is a basic human right under the laws of the State and the United States that a person be permitted to come and go as he or she chooses. This liberty to go where you please may be interfered with legally under certain special circumstances, such as in the case of persons who are mentally ill, or who are suspected or convicted of having committed a crime. Accordingly, as long as the VA Hospital Police Officers or other employees perform this task of bringing these patients back into the hospital with the consent of the patient, there would be no violation of the patient's rights. On the other hand, if physical force were to be used, under the circumstances outlines, it is our opinion that the patient's right would, in fact be violated. These actions amount to an assault and battery or false imprisonment, both of which are actionable.

Prior to March 16, 1974, when P.L. 93-253 was enacted, the United States had never consented to suits for damages based upon assault, battery, or false imprisonment. On or after that date, however, such suits are possible (see 28 U.S.C. § 2680(h)), and damages can be awarded to plaintiffs who can prove that their rights have been violated by "investigative or law enforcement officers of the United States" empowered to make arrests. If VA Hospital Police Officers coming within this definition had the authority to make arrests off VA premises, such arresting actions might come within the purview of this law. However, we do not believe the provisions of 38 U.S.C. § 218(a)(3) give VA Hospital Police Officers arrest authority off VA property. Accordingly, the provisions of P.L. 93-253 do not appear to be applicable in the factual situation which is here involved.

Notwithstanding the above, we realize the medical care activities of the VA are not always limited to VA premises. For example, there is specific authority for "home health services" which involves treatment of a patient at home. Moreover, it is an accepted practice to accompany patients to various activities that take place off VA premises, such as to bowling alleys, ball games, shopping centers, and even when visiting relatives, where such is considered to be of therapeutic value to the veteran. In other words, medical care, in the broad sense of the term, can be provided under some circumstances by the VA off the actual station grounds. Of course, where a patient is committed to the VA, it is not unusual that the VA is asked to pick up a patient from some other location for delivery to the

VA facility. Furthermore, we would also acknowledge that the VA may have some medical care obligation to assist a patient, even though not committed, back to the hospital when inebriated and in need of some help in getting back to the VA.

Under the circumstances set forth above, it is conceivable that an attendant, nurse, or even a VA Hospital Police Officer might be asked to assist in providing some protective restraint or assistance to a patient. Where this occurs, we believe the individual involved (including a VA Hospital Police Officer) would be considered to be a part of the supporting medical care team, and would be afforded the personal immunity protection provided in 38 U.S.C. § 4116. Subsection (a) of that section has the effect of requiring an individual who is injured because of the negligent action of DM & S medical care personnel, including supporting personnel, to sue the government rather than the employee personally. Subsection (e) of such section 4116 also provides that if, for some reason the injured party does not have a remedy against the government, and ultimately recovers from the DM & S employee for damages caused while being furnished medical care and treatment, the Administrator may hold the employee harmless by paying the judgment. Some additional protection might also be provided under the so-called doctrine of official immunity recognized in the case of Barr v. Matteo, 360 U.S. 564, where the courts have held, in essence, that Federal officials acting in the scope of their employment engaged in discretionary acts cannot be held liable for negligence arising therefrom.

Based on our assumption that the patients are competent and not under commitment, we are not cognizant of any law that would impose liability or responsibility on the VA for their torts resulting in injury or damage to the person or property of the third party. Nor are we aware of any law which would impose any liability on the VA for injuries suffered by the patients due to the tortious acts of third parties.

HELD:

1. The patient's rights are violated if force is used or the patient is returned to the hospital against his will.
2. Unless the patient is incompetent or under commitment to the hospital there is no duty or responsibility upon the hospital to return the veteran patient.
3. The VA is not liable for damages caused by a patient to the property of others.
4. The VA has no liability or responsibility to the patient for injuries suffered by the patient as the result of the negligent act of a third party.
5. The VA would not be liable for injuries suffered by the patient while off the hospital premises in crossing the street or in any other manner not caused by a

VA employee. (However, if any action can be taken to alleviate a dangerous condition, needless to say, such action should be taken.)

6. The VA would not be liable for injuries caused to a third party by the negligent act of the veteran.

7. While suit could be brought against the government for acts of assault, battery, false imprisonment, or false arrest by any investigative or law enforcement officer of the United States who is empowered by the law to make arrests, and while personal liability from such a suit would be protected under the provisions of P.L. 93-253, such provisions are not applicable under the circumstances described since a VA Hospital Police Officer is not empowered to make arrests off VA premises. Only where the arrest took place on VA premises would the foregoing come into operation.

8. Where a VA Hospital Police Officer is acting in a capacity which can be considered to make him a member of the medical care team and is sued by the patient, the personal liability immunity provisions of 38 U.S.C. § 4116 would be for consideration.

VETERANS ADMINISTRATION GENERAL COUNSEL
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