

October 14, 1968

Dr. W. C. Davison
Roaring Gap
North Carolina

Dear Dave:

This is a transcript of the conference mentioned in Dr. Stead's letter of October 9th. It contains an enormous amount of information, but Dr. Forgotson covers the legal question rather completely. It boils down to the fact that there have been no problems with insurance carriers, but there are two very troublesome suits on the records. Both arose from complaints from the health professions (nurses, hospital administrators, physicians) rather than from patients.

In one, a physician was sued for using non-licensed foreign physicians to assist him in giving anesthesia. In another an assistant and his physician employer were sued for practicing medicine without a license. In both the penalty was light, but the threat remains. I agree with your opinions wholeheartedly, and feel certain that society will soon demand legal clarification. Meanwhile we are moving ahead!

Thanks for your continued interest. The physician's assistant with Ernest Furgurson is working out beautifully. Fergie has employed him permanently!

With best regards.

Very truly yours,

E. Harvey Estes, Jr., M.D.
Professor and Chairman

EHE:lf

Enclosure

THE DUKE ENDOWMENT
1500 NORTH CAROLINA NATIONAL BANK BUILDING
CHARLOTTE, NORTH CAROLINA 28202

HOSPITAL AND CHILD CARE SECTIONS
WILBURT C. DAVISON, M.D.
CONSULTANT ON MEDICAL EDUCATION

(704) 376-0291
PLEASE REPLY TO:
ROARING GAP, N. C. 28668

October 7, 1968

Dr. Eugene A. Stead
Duke University Medical Center
Durham, North Carolina 27706

Dear Gene:

As you will see from the postscript in the enclosed Xerox of my letter to Ed Bryson, your splendid program of physician's assistants, as well as The Duke Endowment Clinical Scholarships have raised some questions about the legality. I am quite sure that your physician's assistants and my externs are perfectly legal as far as the insurance companies are concerned, but I should appreciate your advice.

With best wishes, I am

Yours sincerely,

W. C. Davison
W. C. Davison

mc

Dictated 10/4/68

919
363-2650

THE DUKE ENDOWMENT
1500 NORTH CAROLINA NATIONAL BANK BUILDING
CHARLOTTE, NORTH CAROLINA 28202

HOSPITAL AND CHILD CARE SECTIONS
WILBURY C. DAVISON, M.D.
CONSULTANT ON MEDICAL EDUCATION

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PLEASE REPLY TO:
ROARING GAP, N. C. 28668

September 30, 1968

Professor E. C. Bryson
Law Building
Duke University
West Campus
Durham, North Carolina 27706

Dear Ed:

I enclose an article from the American Medical Association entitled "Employment of Medical Students as Externs." For the life of me, I cannot see Mr. Bergen's reasoning. I have marked the margin in several places which I think are open to question.

The reason that I am greatly concerned about externs is that The Duke Endowment furnishes 70 clinical scholarships for two months during the summer or at any free time the student may have.

These two months may be spent with a licensed general practitioner in the ^{licensed} country or may be spent in the hospital where they are under the supervision of a ^{a community} staff physician or surgeon.

These clinical scholarships furnish the student with \$300 per month for his expenses, and they are rated by the tax authorities as scholarships and not as "payment for services."

Barnes Woodhall, during his fourth year at The Hopkins, was an extern at the Bayview Hospital in Baltimore performing the same duties as an intern who had been graduated from medical school.

I spent my third year as an extern in the Radcliffe Infirmary under Sir William Osler performing the same duties as the other two members of the house staff who were graduated from medical school.

I have explored the question of student, extern and intern liability with all of the insurance companies I know, and the answer is that I, as a licensed physician with medical liability insurance, assume all liability for students, interns and nurses under my direction. So far there has never been any difficulty, and I am sure there will not be any.

I have had a rising senior medical student from Duke as an assistant at Roaring Gap each summer for the past twenty years. While I am away, Dr. Everett Taylor,

Professor E. C. Bryson

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a Duke graduate of 1955, and Dr. Jack Ashley, a UNC medical graduate of the same year, who practice in Sparta eleven miles away, assume all medical liability for the student assistant who holds sick call at Roaring Gap and carries on the duties as any intern would in a teaching hospital.

I enclose a copy of my letter on this question to the Phillips Insurance Agency and also Mr. Blanchard's reply. I have had similar replies from other insurance companies that sell professional liability insurance.

x I should greatly appreciate your candid opinion of this program, which has been
x a highly successful training program for the students concerned. All of them that I
x have had at Roaring Gap, and the same is true of the 70 others supported by The Duke
x Endowment clinical scholarships, have told me that they learned more practical
x medicine during these periods of two months each than they did in similar times in
the medical schools, in which the diagnosis and treatment are all worked out by a
resident or a member of the staff, and the student rarely, if ever, is called upon to
make any decisions.

I also understand that I scratched your car during the traffic jam in front of the Union during the rainstorm on December 10 last year and that you would not let my secretary notify my automobile insurance agent to repay you. I certainly appreciate the courtesy but feel guilty that you would not allow yourself to be reimbursed.

I apologize for this long letter, but this article in the AMA Journal has caused some confusion about the liability of medical students in their own teaching hospitals, as well as in other hospitals where they may be serving as externs and responsible to a staff member.

With best wishes, I am

Yours sincerely,

W. C. Davison

mc

Dictated 9/27/68

Professor E. C. Bryson

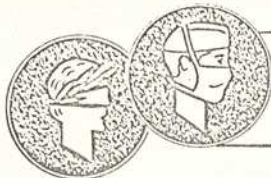
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P. S. Even as indicated in Mr. Bergen's article on externs and also in Mr. Blanchard's letter that a medical student, extern, intern, resident, nurse, or one of Gene Stead's "physician's assistants" can be sued, what lawyer would sue them because none of them has any money and the insured physician under whom they were working would defend them?

I understand that Duke Hospital has recently employed one or more British anesthetists who do not have a U.S. License. Would Duke Hospital be sued like the California hospital mentioned in Mr. Bergen's article?

W. C. D.



LAW AND MEDICINE

Employment of Medical Students as Externs

A substantial number of medical students, while attending medical schools, have been and are being employed on a part-time basis for work which is not a part of their formal educational program. Medical students so employed are sometimes called "externs."

The Committee on Medicolegal Problems of the American Medical Association is greatly concerned with the legal implications of such employment. These implications involve not only the medical students themselves, but also the medical schools they attend, the hospitals where they are employed, and the physicians on the staffs of those hospitals. The following analysis of these legal implications has been made at the request of that Committee.

Status of the Medical Student

In the eyes of the law, a medical student is no different from any unlicensed layman. The law does not prohibit a hospital from employing him, but he may be employed only in a nonprofessional capacity, as in the case of a layman. He may lawfully be employed as a ward boy, an orderly, a messenger, a clerk, a bookkeeper, or in any similar position in which an unlicensed layman might be employed by the hospital.

Although a medical student may have acquired a substantial amount of medical knowledge, he is not legally authorized to practice medicine. He may not lawfully undertake the diagnosis of a patient's condition. He may not lawfully prescribe or administer any treatment for any illness or injury. Accordingly, he cannot lawfully be employed by a hospital to perform such services.

A medical student employed as an "extern" has a different status from that of an intern. The intern, even though he may not be a licensed physician, has limited legal authority to engage in certain medical practices, under the direction and supervision of licensed physicians, as a part of a formally organized and approved educational program. This authority is either expressly granted by statute or

derived from the interpretation of the law by the courts or administrative agencies. It does not extend to "externs."

Statutory Authorization

In some states, medical students are permitted by law to acquire certain clinical experience during their medical studies by assignment, under responsible direction and supervision of licensed physicians, to certain clinical duties in hospitals associated with their medical schools. These assignments are authorized as a part of the formal educational program of the medical school. Regardless of whether the student is compensated for the performance of these duties, his legal status is different from that of the "extern."

In theory, at least, it would be possible to enact a statute which would permit medical students to perform medical duties in hospitals apart from any formal educational program. To justify a legislative change of this nature, however, it would be necessary to establish factually certain factors.

Unless it can be clearly shown that the medical student would benefit from this experience, in respect to his future career as a licensed physician, a change in the law would not be warranted. The mere fact that medical students may need a source of income would not be sufficient justification.

It would also be essential to establish that an adequate system to assure proper direction and supervision by licensed physicians could be maintained. This would be essential if the experience of the medical students as "externs" were to have any educational value. It would also be essential to prevent any deterioration in the quality of medical care in the hospitals. Supposed economic benefit to hospitals from the employment of "externs" would not be justification for changes in the existing laws.

Risks for Students and Medical Schools

So far, there have been no serious legal consequences from the employment of medical students as "externs." There are, however, potential legal risks of rather great significance if "externs" are, in fact, engaging in diagnosis and treatment.

Prepared by the AMA Law Department.
Reprint requests to Law Department, American Medical Association,
535 N Dearborn St, Chicago 60610.

The risks are, perhaps, greatest for the medical students themselves. It is possible, at least, that a medical student might be charged with the criminal offense of practicing medicine without a license by reason of the activities he engages in as an "extern." If convicted, he might face a fine or imprisonment, or both. The conviction might also be a basis for a subsequent denial of a license to practice medicine.

If a patient is injured as a result of the activities of an "extern" an award of damages is quite possible. It is not likely that he would be held liable merely because he was not licensed to practice medicine, but he would probably be held to the same standard of care as a licensed physician. Moreover, if it were established that the liability arose out of the illegal practice of medicine, it might not be covered by the usual insurance policy available to students.

For medical schools, the greatest risk may be injury to reputation. Publicity about criminal prosecutions or damage suits against students who are charged with engaging in the unlawful practice of medicine is not likely to be advantageous for the school. If it could be established that the school knew or should have known that students employed as "externs" were engaged in the practice of medicine and that it did nothing to stop this activity by its students, the school might face a criminal charge of aiding and abetting the students in the illegal practice of medicine.

The possibility of liability on the part of the medical school in a damage suit for injury to a patient is more remote. It would be difficult to develop a theory under which the medical school would be responsible for injuries caused by the negligence of a medical student while employed as an "extern" at an unaffiliated hospital.

Risks for Hospitals and Staff Physicians

A more direct risk is faced by hospitals which employ "externs." If illegal practice of medicine is established, the hospital would certainly be open to a charge of aiding and abetting, if it did not face a direct charge of engaging in the illegal practice of medicine through its employees.

There is also a very real possibility that an injured patient might recover damages from a hospital if the injury resulted from the negligence of an "extern." Unless protected by governmental or charitable immunity, a hospital is legally answerable for the negligence of any of its employees. This vicarious liability extends to employee physicians, interns, residents, nurses, technicians, and orderlies. It would also extend to "externs," and the risk would be substantial if the externs were engaging in the practice of medicine. If a patient treated by an "extern" should suffer adverse effects, it might be difficult to convince a jury that the "extern's" lack of knowledge and experience was not a causative factor. Moreover, the hospital's liability insurance might not extend to liability arising from unlawful acts.

No less important are the legal risks to physicians on the staff of the hospital which employs "externs." If a physician permits a medical student to furnish medical care to his patient in circumstances which establish a violation of

the Medical Practice Act of his state, he may well face a criminal charge of aiding and abetting the illegal practice of medicine. This action might also afford a basis for the suspension or revocation of the physician's license.

On this question, a California decision (*Magit vs Board of Medical Examiners of the State of California*, 366 P2d 816, 1961) is of considerable interest. In this case, a physician who owned and operated a hospital employed three foreign physicians to administer anesthetics. Although these physicians were highly competent in the administration of anesthetics, they were not licensed to practice medicine in the state. Even though these foreign physicians administered anesthetics only under the direction and supervision of a licensed physician, the California Supreme Court held that they were violating the Medical Practice Act. By permitting them to do so, the physician who owned and operated the hospital was guilty of unprofessional conduct, the court said.

The Board of Medical Examiners revoked the license of the physician who owned and operated the hospital for permitting the employment of the unlicensed foreign physicians. The court, however, felt that this penalty was too harsh. It returned the case to the Board, saying that probation or suspension of the license would be a more appropriate remedy.

Although a physician is not usually legally responsible for injuries to his patients caused by the negligence of hospital employees in the performance of routine hospital duties, he may be held accountable if he knows that care of the patients will be delegated to persons not legally or professionally qualified to perform them. If medical services are being performed by medical students in his hospital, a physician on the staff can hardly disclaim knowledge of this fact. If the medical students are performing duties which can lawfully be performed only by a licensed physician, a resident, or an intern, the staff physician may be on notice that his patients are receiving care from unqualified persons. A suit against a physician in these circumstances might be rather difficult to defend. More, there might also be a question as to whether the physician was covered under his liability insurance if the patient's injury was caused by the illegal practice of medicine by the medical student employed as an "extern" in the hospital.

Conclusions

Although there have been no unfortunate incidents arising out of the employment of medical students as "externs," as yet, the risks are present and deserve careful consideration. All physicians, medical schools, hospitals, and medical students would be well advised to review prevailing practices for the purpose of eliminating these risks.

If experience as an "extern" would be beneficial to medical students in improving their medical education, appropriate statutory changes should be sought. If not, such employment, which is of doubtful legality, should be eliminated.—RICHARD P. BERGEN.

September 17, 1968

Mr. Gurney Blanchard
Phillips Insurance Agency
313 Wachovia Building
Durham, North Carolina 27701

Dear Mr. Blanchard:

X I would appreciate it if you could let me know whether the Lumbermen's Mutual Casualty Company physicians, surgeons, and dentists professional liability insurance Policy No. 8LL257085 which I carry will cover the acts of my assistants. Each year I have a senior medical student helping me take care of the health of the people in Roaring Gap, and although no question has ever arisen in regard to the student's or my liability, I should appreciate it if you would let me know your interpretation of the policy.

This program was started many years ago and is continued with several other physicians and hospitals during the summer by The Duke Endowment Clinical Scholarships for rising juniors and seniors of Duke, University of North Carolina, Bowman Gray, and the Medical College of South Carolina. These students work with physicians or in hospitals in the same way as my senior medical student works with me at Roaring Gap.

Thanking you for your cooperation, I am

Yours sincerely,

W. C. Davison

PHILLIPS INSURANCE AGENCY, INC.

GURNEY R. BLANCHARD G. ROGER BLANCHARD

313 WACHOVIA BANK BLDG.

DURHAM, N. C. 27701

PHONE: 688-1756

September 18, 1968.

Dr. W.C. Davison
Box 34
Roaring Gap, N. C.

Dear Dr. Davison:

Re: Physicians Liability

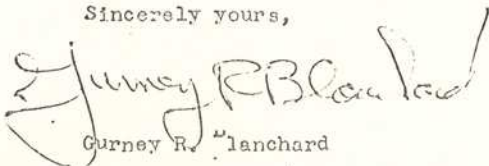
X Your policy reads: "to pay on your behalf all sums which you are legally obligated to pay, because of injury arising out of malpractice, error or mistake etc. committed by you or by any person for whose acts or omissions you are legally responsible, except as a member of a partnership.

It does not cover any liability of others assumed by you under any contract or agreement.

This, to me, means that your liability would be covered as far as acts of the student is concerned. If the student was also sued, the policy would not defend his suit, nor would it pay anything for him.

The company will not write malpractice insurance on medical students.

Sincerely yours,


Gurney R. Blanchard

October 25, 1968

Dr. W. C. Davison
Roaring Gap
North Carolina 28668

Dear Dave:

Thank you very much for your letter of October 22nd. Amos Johnson was invited to the conference but has written that he will be out of the state and unable to attend.

I received a call a few nights ago from Ed Hoover, the President of the Davison Society, who stated that he had just received a call from Clem Lucas at UNC to the effect that the Duke Endowment Clinical Scholarships were to be eliminated, and that the funds thus freed might be used to support the clinic which you mentioned in your letter. I assured him that I knew of no such plan, and that I seriously doubted that there was any validity to the statement. I do not know where the rumor started.

The clinic is a one night a week voluntary clinic, operated by the medical students with the help of faculty from both Duke and UNC. The clinic operates in the evening, one evening a week, and sees patients who live in the immediate neighborhood of the clinic, and who are certified as needing medical care by the members of the Community Neighborhood Council. The clinic began with a group of Duke and UNC students who carried out camp physical examinations in the same area this summer. The students requested and obtained endorsement from the Dupham-Orange Medical Society for their efforts, and Dr. James Bryan of UNC and I were appointed as advisors for the Medical Society, along with Arthur London, and Hubert Patterson, who represent the practicing physicians in Durham and Chapel Hill. Thus this is a student effort, with appointed advisors by the Medical Society. Several faculty members from the two schools attend each clinic so that they can act as supervisors, sign prescriptions, etc. These physicians of course assume the legal responsibility for the decisions made.

To my knowledge, Bill Demaria has not had anything to do with the clinic, nor has any other member of the faculty in a direct fashion. I am a bit puzzled as to why Clem requested a revision of the Clinical Scholarship Program. This would seem to be entirely unnecessary and undesirable. The clinic operates only one night a week, and they already have more volunteer manpower that they can use. They do need some minor funding for expendable supplies, but these needs can be met by a grant of several hundred dollars a year. It would appear that some of the student group are seeking major financial support before they know exactly where they are going. I am reasonably sure that they can get all the help they need through one or more of the federal poverty programs.

Dr. W. C. Davison

October 25, 1968

With respect to the Duke Endowment Clinical Scholarships, there are encouraging signs for the future. Several of our admissions committee teams have reported to me that there is a decided trend among the very bright medical students now applying for medical school. These students are no longer expressing an interest in research in the laboratory, but are expressing an interest in community medicine, and in delivering medical care to those who need it. Many of these students already have very excellent records in laboratory areas, but they seem ready to give this up as irrelevant, and to move back to care of the patient as their primary goal. I would predict that the popularity of the Duke Endowment Clinical Scholarships will increase over the next few years, and that it will become a more and more meaningful portion of our total effort to get people back into community practice. I would like to discuss this with you further at the time of the alumni meetings in November.

Thank you again for your letter and your continued support.

With best personal regards.

Very truly yours,

E. Harvey Estes, Jr., M.D.
Professor and Chairman

EHE:fm

File
Davison

THE DUKE ENDOWMENT
1500 NORTH CAROLINA NATIONAL BANK BUILDING
CHARLOTTE, NORTH CAROLINA 28202

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WILBURT C. DAVISON, M.D.
CONSULTANT ON MEDICAL EDUCATION

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ROARING GAP, N. C. 28668

October 22, 1968

Dr. E. Harvey Estes, Jr.
Chairman
Community Health Sciences
Duke University Medical Center
Durham, North Carolina 27706

Dear Harvey:

Many thanks for your letter of October 14 and for sending me a transcript of the conference mentioned in Gene Stead's letter of October 9.

Amos Johnson phoned me last week that the Council on Medical Education and Hospitals of the AMA had revised their definition of the liability of "externs and physician's assistants" and is sending me the material which I shall send to you when I receive it.

I suggest that you invite Amos Johnson (Garland, North Carolina) to the conference on October 28 and 29, especially for the discussion on October 29. Unfortunately, I shall be in New York on those days and cannot attend the conference.

Clement Lucas, a senior at the University of North Carolina School of Medicine, phoned me that you and DeMaria were operating a clinic in East Durham at which the medical students were working, and he suggested that we revise The Duke Endowment Clinical Scholarships to provide for this program. I should appreciate it if you would let me know more about it and who is in charge of that program so that I can discuss it with the Hospital Committee of The Duke Endowment.

I am glad that Ernest Furgurson has employed the physician's assistant permanently. As the insurance company pointed out, Dr. Furgurson's liability insurance will protect both of them.

Dr. E. Harvey Estes, Jr.
Page 2
October 22, 1968

With best wishes, I am

Yours sincerely,



W. C. Davison

mc

Dictated 10/21/68

