

**Opinion No. 33**

**INSANE PERSONS, convalescent leave, sponsor's liability for patient's wrongful acts—MONTANA STATE HOSPITAL, patient's convalescent leave, superintendent of Montana state hospital, liability for wrongful acts of patients—OFFICERS, immunity for official act of discretion—Section 38-104, RCM, 1947—Section 38-503, RCM, 1947—Section 38-506, RCM, 1947**

- Held:**
- 1. The release of a mental patient pursuant to Section 38-506, RCM, 1947, is within the official discretion of the Superintendent of the Montana State Hospital and no liability may be imposed upon such public officer for wrongful acts committed by the incompetent while on convalescent leave.**
  - 2. A private person charged with the custody of a mental patient on convalescent leave is not liable for the wrongful acts of the incompetent unless such conduct could have been reasonably anticipated by the sponsor.**

October 13, 1959

Dr. Robert J. Spratt  
Superintendent  
Montana State Hospital  
Warm Springs, Montana

Dear Dr. Spratt:

You have requested my opinion whether the Superintendent of the Montana State Hospital and/or the mental patient's sponsor are legally responsible for wrongful acts committed by a patient while on convalescent leave from the Hospital.

Section 38-104, RCM, 1947, provides that:

"A superintendent of the state hospital who shall be a competent and qualified physician having had special and advanced training and experience in the treatment and care of mental disorders and diseases and an assistant superintendent, shall be appointed by the governor and approved by the senate . . ."

State ex rel. Dunn v. Ayers, 112 Mont. 120, 113 Pac. (2d) 785 (1941) held that the superintendent of the state hospital and his assistant whose offices are created by the legislature and who exercise governmental powers, are public officers and not merely employees of the state.

Whether a patient committed to the Montana State Hospital is permitted a convalescent leave is discretionary with the superintendent. Section 38-506 provides in part:

"The superintendent of the Montana state hospital shall have the power and it shall be his duty to place on convalescent leave any patient under his control when he believes it to be for the best interest of such patient and society to do so . . ."

A determination that a convalescent leave best serves the public and patient's interests involves an exercise of official discretion. Absent any malice or corruption, a public officer is not liable for reasonable, although erroneous, exercises of official discretion made in the performance of his duties. *Smart v. United States*, 111 F. Supp. 907 (W. D. Okla. 1953); *Emery v. Littlejohn*, 83 Wash. 334, 145 Pac. 423 (1915); *Cappel v. Pierson*, 15 La. App. 524, 132 So. 391 (1931). It is my opinion that a superintendent of the Montana State Hospital, exercising the discretion conferred upon him by statute, is not liable for acts committed by a mental patient released on convalescent leave.

Whether the sponsor is legally responsible for the wrongful acts committed by the patient while on convalescent leave involves somewhat a different question.

Section 38-503 provides:

"A patient of the Montana state hospital may be permitted by the superintendent to leave the institution on convalescent leave and remain in the custody of a parent, relative, legal guardian or other person."

Although not decided by any Montana court, the rule is well settled in the United States that a private person who voluntarily assumes the custody and control of an insane person has a duty to exercise reasonable care in caring for such incompetent and must not be guilty of negligent supervision where it may be foreseen that damage or injury to a third person may result.

It is therefore my opinion that a person charged with the custody of a mental patient on convalescent leave is not liable for the wrongful acts of the incompetent unless such conduct could have been reasonably anticipated by the sponsor.

Very truly yours,  
FORREST H. ANDERSON  
Attorney General