Viewpoint

Fitness to Work: Legal Pitfalls

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Abstract

Medical examinations for fitness to work are undertaken by the specialist and the non-specialist occupational physicians alike. An assessment done negligently in such a capacity will expose physicians to legal risks, even if they are not specialist occupational physicians. This is not unlike negligent care given in the traditional therapeutic care setting. Much of the case law governing legal disputes in medical fitness to work assessments depend on the kind of loss that is at stake, that is, whether it is one resulting in economic loss, as in loss of an employment opportunity, or one resulting in personal injury, such as when the doctor negligently fails to diagnose or to communicate a serious medical finding. In the latter, the courts are more likely to find for the injured claimants. One of the ways for doctors to reduce their risk in this area is to establish with prospective employers and employees the ground rules when conducting medical fitness to work examinations.

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Introduction

Occupational physicians, like their clinician colleagues, are not immune to litigation claims. The experience of occupational physicians in litigation is relatively uncommon, compared to their clinician counterparts, where litigation centres mainly on harm from personal injury caused by clinical negligence in the course of treatment. However, the work of the occupational physician, largely legislatively driven, and preventive in nature, (assessment of harmful exposures, health surveillance, disability assessments and compensation), renders them no less vulnerable.

One particular area of vulnerability for the occupational physician is in the context of fitness to work examination, from which negligence can potentially arise or be alleged. Negligence is considered the pre-eminent tort on which claims are litigated.[1]

A tort is an injury resulting from a civil or private wrong. Such injuries include those of a physical and personal nature, economic loss and damage to property.

In order to succeed, tort claimants in negligence must establish a duty of care owed by the defendant to the claimant, breach of that duty and harm resulting from the breach of that duty. All elements must be successfully proven.

Example 1

Baker v. Kaye High Court of Justice, Queen's Bench Division: Robert Owen Q.C. (sitting as a Deputy High Court Judge); [1997] I.R.L.R. 219[2]

In the case of Baker, a job applicant failed to secure a senior appointment with a prestigious employer, based on the medical assessment, which raised the possibility of alcohol related abnormalities. Dr Kaye, the defendant doctor, further advised Mr Baker to seek help from his own general practitioner. Subsequent blood tests by the general practitioner failed to replicate the findings. Mr Baker's claim against Dr Kaye failed, but not on the grounds of an absence of duty of care, but on the grounds that the action of Dr Kaye in his employment advice was within the range of reasonable responses and not negligent.

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Example 2

Kapfunde v. Abbey National PLC and Daniel (1998) 46 BMLR 176 CA[3]

In the case of Kapfunde, the claimant revealed her sickle cell anaemia and past history of chest infection in a health questionnaire as part of a pre-employment medical examination directed by the prospective employer. Dr Daniel in his remit as occupational health advisor had to advise Abbey National whether a higher sickness absence could result. Dr Daniel concluded that this was the case and the applicant was therefore assessed as unsuitable. She failed to obtain employment and sued the prospective employer and the physician, Dr Daniel, claiming a breach of duty of care owed to her directly by the bank, and that the doctor was a servant of the bank, pursuant to a contract of service as opposed to a contract for service. Her claim was dismissed on the basis that the doctor was neither an employee of the bank nor was there any duty of care owed to her by him. Furthermore, the doctor's professional recommendation, which resulted in the loss of an employment opportunity, was deemed to be within the range of reasonable responses and held not to be negligent.

Duty of Care: Comparing Kapfunde to Baker

In determining whether a duty of care exists, the courts will consider the foreseeability of harm, the proximity of the relationship between the parties and whether it is fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other (addendum).[4]

The claims in both cases failed, sharing the common basis that the actions of the doctors were within the "range of reasonable response". Yet the interesting and vexing point for occupational physicians is the rationale for the difference in the decisions over why a duty of care legally arises in one (Baker) and not in the other (Kapfunde).

In *Baker*, Dr Kaye examined the patient, blood was taken for testing and Dr Kaye, with the consent of the job applicant, informed his general practitioner for follow-up care. The relationship was considered sufficiently proximate. In *Kapfunde*, Dr Daniel had no contact with the job applicant. The parties never met, and Dr Daniel's decision was based entirely on a questionnaire response. The court felt unable to find a duty of care.

If the decisions were to be followed, it would then appear that the occupational physician who keeps himself an arm's length from the job applicant examinee will be better protected legally as opposed to another who takes a more active interest and involvement in the pre-employment assessment.

Kapfunde was a later case than *Baker*, and notably, was an appellate court decision (Court of Appeal), senior in its hierarchy and therefore more persuasive in influence compared to the High Court decision of *Baker*. It was mentioned in the judgment of *Kapfunde*, revisiting the case of *Baker*, that whether or not the doctor physically examined the job applicant is not important in deciding whether a duty of care exists. The critical fact that stands out is that the doctor is under instruction from the prospective employer, and the doctor is taken to assume the responsibility of non-negligent advice to the employer and not to the patient who is the subject of the advice.[3]

Foreseeability: Economic Loss v. Personal injury

Kapfunde and *Baker* both involved economic loss for the job applicant-claimant. Where a defendant advises a claimant, and knows that the advice will be relied on by the claimant, and economic loss ensues, then under the *Hedley* principle (addendum), the loss was foreseeable and a duty of care arises.[7]

Perhaps what is unclear here is who the one reliant on the advice is. It could certainly be argued that it is the employer (who is trying to minimise his financial risk) rather than the job applicant, who relies on this advice. In this case, a duty to the job applicant should not arise. Moreover, it is not up to the claimant to decide whether or not at this point to reject or accept the doctor's professional opinion as a condition for accepting the job. Therefore the *Hedley* principle cannot apply.

The approach to tort claims in economic loss is different from personal injury; "*…it is one thing to owe a duty of care to avoid causing injury to the person or property of others. It is quite another to avoid causing others to suffer purely economic loss*" – Lord Bridge.[4] This position is also affirmed in Singapore where "*it is historically shown to be impossible to recover for 'pure' economic loss – i.e., loss which could not be linked to physical damage*".[1]

Kapfunde and *Baker* may well have been decided differently if there were personal injuries involved. Failure to disclose any important discovered medical finding during a fitness to work examination to the job applicant, resulting in physical harm, regardless of at whose behest the examination was carried out, can constitute negligence, arising from a duty of care.

Example 3

Coffee v. McDonnell-Douglas Corporation 503 P2d 1366 Cal 1972[8]

A man applied for a position as a pilot with an aircraft manufacturer. He was required to undergo a physical examination at the corporation's clinic. It included, among other things, a blood test, which indicated a strong probability of a malignancy, but a secretary filed the report in the man's folder and did not report it to the physician. He was hired and several months later his malignancy was discovered. The court agreed with the corporation's position that it had not breached the duty to disclose known results since the results were unknown, but held that when it undertook to examine the man, it did have an obligation to examine him with due care. Even if the physician who carried out the examination was not negligent, the secretary who was an employee of the corporation was negligent, and the corporation was liable for her negligence.

In contrast to *Kapfunde*, the physician in *Coffee*, like the secretary, is an employee of the corporation. Thus, the corporation becomes vicariously responsible for the negligent act committed by the employee. Most legal authorities would also agree that had the clinic been an entity separate from the corporation, the doctor as an employer of the secretary, can also be held for vicarious liability for the carelessness of his staff.

The legal basis of vicarious liability arises from the rather old fashioned but still applicable doctrine of "respondeat superior", which translated briefly from its Latin origin means "let the superior answer". It is most widely applied in employer-employee relationships, the interpretation of which whether it truly exists as a matter of fact can be of vigorous contention between opposing legal parties.

Informing the job applicant is hardly an onerous obligation, of which failure to discharge would have breached fundamental medical ethical norms as well.

In these cases involving personal injury, there is clearly no conflict between the interests of the job applicant and the employer. The doctor has to exercise reasonable skill and care, such a duty imposed on him is "fair, just and reasonable" and deters him from making a careless and shoddy assessment. Such a duty falls precisely within the remit of occupational health.

When Could There be a Potential Conflict?

The objectives and motivations for fitness to work examinations for the doctors, employers and job applicants involved may not necessarily be concordant.

How many of such assessments are motivated by the protection of worker safety and health based on potential harm from workplace factors? Occupational physicians in the purist school would adhere to the notion of fitness based on this. Gainful and meaningful employment in safe and healthy environments must be positive for mental and physical well being.

However, some employers can neither afford, nor be willing, to take the risk of bearing the extra business cost of an employee with medical conditions, which brings us to the next point of commercial motivations for such examinations, as reflected in the advice of "vulnerability" in *Kapfunde*.

Healthcare costs can be substantial. As an example, consider the repatriation of a sick employee from an overseas location to which she has been assigned. Thus, it is not surprising that the pre-employment examinations could be used to minimise the employers' financial risks, (for the same reasons that insurance medical examinations are conducted) among others such as the threat of disruption to its business. How useful it is as a tool for this is debatable but beside the point.

One could also conclude that the employer has been discriminatory in his decision, but only in the non-legal sense of the word. Disability discrimination laws are in place, but can only assist cases tightly circumscribed in its statutory definition of disability. Certainly, sickle cell anaemia does not qualify, nor do many 'stable' medical conditions like hypertension, diabetes and others that do not result in impairment with long term, adverse effect on a person's ability to carry out normal day to day activities.[9]

Should the occupational physician be held to have a legal duty of care when making an assessment based on an economic angle to assist the employer in job applicant selection? In this respect, the answer surely must be no. Only the employer, with all the facts of the case, presumably accurate, can decide on the kind and magnitude of the risk he wants to tolerate. If the skills of the prospective employee are deemed to be valuable and much needed, there is virtually nothing in law to prevent the employer from engaging her, notwithstanding her sickle cell anaemia, or for that matter any number of other medical conditions.

Subject to laws governing discrimination (sex, race, disability, sexual orientation), "*it is still the law that an employer is free to choose who he wishes to employ, and may have quixotic reasons for rejecting apparently worthy candidates*" – Kennedy LJ.[3] Thus, it must be submitted that the decision in not establishing a duty of care for the physician in *Kapfunde* is correct, while that in *Baker*, in

establishing a duty of care, is wrong. To claim that job applicants, but for the assessment made by the occupational physician, would have secured the job would surely imply an exaggeration of his power.

Example 4

McKenzie v. Hawaii Permanente Medical Group Civ. No. 98-00726 DAE Hawaii Supreme Court June10 2002[10]

In the Hawaiian case of McKenzie, it was held that "a physician owes a duty to non patient third parties injured in an automobile accident caused by an adverse reaction to the medication…where the physician has negligently failed to warn the patient that the medication may impair driving ability and where the circumstances are such that the reasonable patient could not have been expected to be aware of the risk without the physician's warning".

A case analogous to *McKenzie* would be that of a third party bystander or colleague claimant who has been harmed by the examinee because of a negligent fitness to work assessment. The injured colleague may have a right of action against the occupational physician. One can only imagine the potential for such cases to occur, e.g., unstable epileptics or uncontrolled diabetics working in hazardous environments. It would appear that the duty of care has been enlarged in the above to include that between the doctor and the injured, who in all likelihood the doctor may never have met. It could be that the duty would be discharged by adequate and timely warning to the examinee who was the direct cause of the harm. Of course, other measures supporting a competent and non-negligent decision of allowing such people to work in the said environments must also be demonstrated.

Standard of Care

Lest occupational physicians be unduly worried, it must be reiterated at this point that the proof of legal negligence is not entirely dictated by adverse outcomes. In the event of a duty of care having been established, the element of breach of duty and causation must still be satisfied.

Central to this in defeating the tort claim is the acceptance of the occupational physician's judgment and decision as reasonable and responsible by the medical peers in the specialty (addendum)[11] and the extent of due care, skill and application of logic by the defendant physician (addendum).[12] That this is so is reaffirmed in the decision of the case of *Gunapathy* by the Court of Appeal, Singapore.[13] One might also be cautioned that in all such fitness to work cases, responsible care ought to include constant and regular reviews in view of changing health status and circumstances.

Lessons for the Occupational Physician

As the above cases illustrate, conducting an assessment of fitness to work may have potential legal implications for the unwary occupational physician. Very often, such examinations are treated as routine. Careful medical risk appraisal, disclosure of medical information that would allow frank and useful discussion with the employers and job applicants and ownership of the ultimate decision must form the basis for clear ground rules made known to all parties involved. Hopefully, this will help to resolve uncertainties and reduce the need for court intervention.

Suggested Ground Rules:

- A competent, transparent and accurately documented medical risk assessment.

This will require that the physician has an appreciation of the demands of the job and the hazards in the working environment and the extent of an impact on colleagues and public safety.

- Rules for disclosure to job applicants.

Any abnormal or suspicious findings discovered at the medical examination must be disclosed to the job applicant. How this can affect the fitness to work forms part of the assessment and ought to be disclosed by the doctor to the job applicant.

- Rules for disclosure to employers.

If employers wish to enforce disclosure of medical information, this should be made clear to job applicants. Consent for such release should be documented. Notwithstanding the debate surrounding the presence or absence of duty of care, consent from the job applicant must always be sought for the release of such information. The confidential nature of such information requires that doctors have an ethical duty respecting its privacy.

- Guidelines from the employer on exclusion based on the presence of medical conditions.

If such guidelines are not available, an interpretation in favour of the job applicant can be made. For example, if the employers are silent on the employment of HIV positive job applicants, then barring other disqualifications, the doctor should be allowed to pass as fit the job applicant and not be obliged to disclose such information.

- How should the doctor respond if he feels that exclusions as directed by the employers are unfair?

He could explain the medical basis for his disagreement with the employers. This ought to be documented in case of

future legal dispute. However, the ultimate decision of selection lies with the employer, who may have to consider economic and other issues as well.

- Rules for Appeal.

Job applicants may sometimes deem decisions on medical grounds to be unfair. How this should be settled is a matter for employers and doctors to decide, in a fair and consistent manner. Medical opinions being varied, it is perhaps not surprising that the job applicant can usually marshal support for his position from other doctors. What is important is for the occupational physician to be able to defend his position in a rational way and ensure that his decision was not perverse. In difficult cases, he should of course seek help from other experienced colleagues, before making his final decision.

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Addendum

The following cases illustrate basic principles that are applied in all tort cases whenever fundamental points in law are raised. This is to ensure certainty and consistency in law. This applies without exception to medical law cases as well.

Duty of Care

Caparo Industries Ltd plc v. Dickman [1990] 2 AC 605; [1990] 2 WLR 358 [1990] 1 All ER.

Caparo orchestrated a successful bid to take over Fidelity, relying on figures prepared for Fidelity's annual audit, which showed a healthy profit. In the end, it was discovered that Fidelity was almost worthless. Caparo tried to sue the auditors (Dickman), but failed in the action. The accounts were produced for the purpose of compliance with the Companies Act and not for the purpose of guiding investment decisions from which a legal duty can be borne. Thus the three stage test developed in this case, viz, foreseeability of harm, proximity of the relationship between the parties and whether it is fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other, determines the scope of duty of care imposed on the defendant in a tort action.

Standard of Care

Bolam v. Friern Hospital Management Committee [1957] 2 ALL ER118

Bolam involved a claimant patient who underwent electroconvulsive therapy and suffered fractures as a result. Were the doctors liable for failing to administer muscle relaxants, a practice not uniformly adopted by all responsible doctors? "A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art". *The claim therefore failed.*

Standard of Care, Causation between Breach and Harm Suffered

Bolitho v. City and Hackney Health Authority [1997] 4 All ER 771

The facts in this case demonstrate the difficulty of causation. There a child had breathing difficulty. By the time the pediatrician attended to the child it was too late. The claimants alleged that had the pediatrician responded in a timely manner and intubated the patient, the injuries would have been averted.

Briefly the House of Lords held legal causation between negligence and harm not to be established because there was evidence that intubation on a child so young carried serious risks, and therefore the pediatrician would not have used it and it would not have been negligent for her to make that decision.

However this case, remarkable as it was for establishing principles determining causation, is also well known for the remarks of Lord Browne-Wilkinson..." the Court is not bound to hold that a defendant escapes liability just because he leads evidence from a number of medical experts… the Court has to be satisfied that the exponents of the body of opinion relied on can demonstrate that such opinion has a logical basis" that influence the thinking of what constitutes a reasonable standard of care.

To some, it represented an attempt by the court to prevent the jettisoning of a legal outcome by the opinions of the medical expert. Thus in a way, it tries to restrain the power of Bolam.

For another case on principle of causation in medical law, refer to Gregg v. Scott.[5]

Dr Khoo James and Another v. Gunapathy d/o Muniandy and another appeal [2002] 2 SLR 414; [2002] SGCourt of Appeal 25

This is a case of a thirty-six-year-old woman left with significant neurological deficits after radiosurgery for a lesion that was thought to be a recurrent brain tumour. There was alleged misdiagnosis and negligence in treatment. Both parties in litigation amassed a stellar cast of expert witnesses to argue their positions. A notable statement in the judgement reads: "We often enough tell doctors not to play god; it seems only fair that, similarly, judges and lawyers should not play at being doctors" *Yong Pung How CJ (delivering the grounds of judgement of the court), on how the courts should not prefer its judgement on medical matters over those of experts.*

Economic Loss

Hedley Byrne & Co v. Heller and Partners [1964] A.C. 465

This is a case of economic loss resulting from wrongful financial advice from a bank about a client's creditworthiness – notoriously difficult to win in England[6] *– being given to the claimants. For such cases to succeed, there must be a special relationship arising where* "it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required…ought to have known that the enquirer was relying on him" *– Lord Reid.*