Commentary

The Doctor in Claims for Work Injuries and Ill Health – Legal Pitfalls

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Abstract

Occupational health work is currently undertaken by the specialist and the non-specialist physician alike. The work scope can vary from medical assessments of individual workers to health risk assessment at the workplace. The scope of the latter will include evaluation of exposures, hazards, risks and its management to control these risks. Much of the case law governing legal disputes over industrial safety and health have involved the employers. Over the years, the actions brought forth by workers have resulted in a formidable volume of case law based on statutes and on the common law of negligence in tort. Disputes over the assessment of workers' health or workplace health risks to the extent that it is a failure to discharge a reasonable standard of care, may result in the doctor being a defendant. Measures to prevent these legal pitfalls include communication with employers about the causative link of the illness suffered to workplace factors and the clarity of contractual obligations undertaken with regard to workplace health risk assessment.

Ann Acad Med Singapore 2009;38:727-32

Key words: Duty of care, Mesothelioma, Occupational asthma, Standard of care, Tort

Introduction

Work can affect health. Workplace exposures to hazards can harm workers either through accidents leading to injury, or through the development of occupational illnesses.

Health can affect work. A negligent fitness to work examination can render a doctor vulnerable to claims for personal injury. A failure to recognise and to warn of a susceptibility to harm, rendering the realisation of the risk of harm is potentially litigable conduct.

The uncontrolled diabetic patient with hypoglycaemia working at heights, who then falls to his death during one such episode, is an example.[1] Hypoglycaemia is an iatrogenic risk associated with diabetes treatment, particularly when insulin and/or insulin secretagogues are used. Failure to warn the diabetic worker and to discuss this susceptibility may be potentially blameworthy.

Perhaps less orthodox than the usual clinical care setting is the work of the occupational health agency contracted to provide advice and management of workplace hazards. The work may consist chiefly of workplace assessment and design of work procedures. Reliance on such advice by employers which turn out to be inept or negligent could also be a source of litigation.

Work Injury Compensation Act

Workers who are harmed as a result of work exposures, either through accidents or occupational diseases, are entitled to compensation under the Work Injury Compensation Act (WICA).[2] This is relatively convenient and straightforward since there is little attribution of blame. Factors related to genetic susceptibility or lifestyles, such as smoking, are not relevant in the consideration for claim eligibility under WICA.

Compensation under WICA for some may not be the preferred route especially if the compensation in monetary terms is perceived to be not commensurate with the suffering, harm and resultant disability.

Limitations of WICA

One constraint of claims under WICA is time limitations. An employee's incapacity commencing more than the period specified in the third column of the Second Schedule opposite the disease after the employee ceases employment would have no merit for compensation.[2] Thus, if a person were to suffer from cataracts from exposure to the glare

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of, or rays from, molten glass or molten or red-hot metal under Second Schedule 5, he has a right to claim provided that the cataracts developed no later than 12 months upon cessation of employment.

This can obviously give rise to problems for occupational diseases with a long latency such as mesothelioma or asbestos related lung cancers. In fact, the natural history of mesothelioma suggests an average latency period of 34 years, and legal approaches to its causation based on epidemiology concludes that the disease occurring within 10 years of exposure may be excluded as causal from the particular exposure.[3]

Another area of contention is the employee's timing of knowledge or awareness that his condition might have arisen from work. Such knowledge, if acquired at a time beyond the limitation period might still disentitle him to a WICA claim. Alternatively, another interpretation would be that the time limitation period starts clocking only after the employee was made aware that his condition was potentially compensable from his employer. While this has been the interpretation of the law in a civil litigation, governed by the statute of limitations, its interpretation viz a viz statutory claim under work injury compensation is unclear.[4]

Pursuing a Civil Claim

The alternative route to compensation is for the worker to bring a claim in a civil court, usually through the tort law of negligence.

In Ng Chan Teng v Keppel Singmarine Dockyard,[5] the worker's right forearm was crushed in a work injury which necessitated an amputation. The claim through the civil court was determined at S$646,653 for the 70% liability attributed to the employer-tortfeasor. Even had the latest and most favourable terms of the WICA been applied, the compensation would have been capped at a maximum of S$180,000 with a possible 25% addition in the case of permanent disability.

In order for the worker to succeed in his tort claim in negligence, he must establish that the tortfeasor (wrongdoer) owed him a duty of care, was in breach of that duty, as a result of which he suffered the harm arising from this breach.[6]

Exposures at work resulting in harm to workers have been the subject of numerous civil litigation. Notable among these in recent times include mesothelioma, caused by asbestos exposure. Cases related to mental stress,[7] silica exposure and pneumoconiosis,[8,9] mineral oil exposure and scrotal cancer,[10] brick dust and dermatitis,[11] have also made their debut in the legal arena, where employees have made claims against their employers for causing adverse health effects through negligent exposures to harmful substances at work.

Thus far, the defendants in work injuries and ill health have been mainly employers. Doctors, those with responsibilities for the health of the workers, or those with a broad remit for workplace occupational health, have been confined largely to a spectator role.

This can change with time. The occupational physician, or the company doctor, as he is sometimes called, being invited to defend herself in a claim though very much unheard of, is a distinct possibility.

The Doctor as a Defendant in Workers' Medical Assessments

Example 1: A Reported Case of Fatality due to Occupational Asthma, Ministry of Manpower Singapore, OSH Alert September 2006

A 52-year-old manager of a furniture factory died of an acute asthmatic attack when he was exposed to diisocyanate vapour at work. The vapour was emitted during the spray painting process carried outside the factory by his wife. The deceased had a previous history of acute asthmatic attack triggered by exposure to diisocyanate from spray painting.

Example 1 did not involve any compensation, as the victim himself was the owner of the enterprise. But it is entirely plausible for an employee-victim's estate similarly situated, to consider pressing a claim if the conditions for a tort claim are met. Isocyanate exposure is one of the most common occupational asthmatogens.[12]

A failure of disclosure of the link between work exposure and asthma to the worker and its potential fatal consequences and allowing the worker to continue with the work is potentially negligent conduct. The employers are more likely than not, and with good reason too, to define the responsibility of medical diagnosis, as the focal point for action and as strictly being the doctors' job. If successful, this could easily seal the status of doctors as the defendants and tortfeasors.

When this happens, can the doctor claim that such knowledge be considered only within the purview of a specialist occupational physician and that her job is only to treat the asthma? This argument may be persuasive for the general practitioner providing a very limited service of care. However, for medical firms offering a bulk contracted service of clinical care to the business for all the workers, such an argument may fail. Most certainly, for a said occupational health agency, a higher expectation is reasonable and ought to have been met.

Example 2: Stress At Work: The Legal Minefield

Walker versus Northumberland CC [1995] 1 All ER 737[7]

Walker is probably the first successful claim of its kind for work related mental stress to be heard by the High Court

in the United Kingdom. The claimant was a social services manager who had been forced, owing to local authority funding shortages, to take on a far higher volume of work than he could cope with. He suffered several weeks of being unable to work owing to stress-related illness, but when he returned to work the local authority made little or no effort to improve his situation. The claimant then suffered another long period of illness, and was eventually dismissed by his employer. The High Court awarded the claimant substantial damages for wrongful dismissal.

In *Walker*, the court noted that, in spite of his 'very considerable reserves of character and resilience' what broke the claimant was, among other things, 'the mounting but quite uncontrollable workload' and 'a feeling of frustrated helplessness because he found himself in a deteriorating situation which he was powerless to control'.

The idea that employers can be made legally liable for causing stress to the employees may strike some as incomprehensible. Some may even view this as part of an undesirable trend and tendency to cast blame and to catch compensation. After all, what is there to prevent the worker from resigning? However, resigning, worthy and admirable it may be as an act of self preservation, was, for obvious reasons of public interest, not an argument pursued by the court. Public interest dictates that employers must have a proactive duty to provide a system of work that is mentally and physically safe.

Subsequent to *Walker* were, however, many failed claims for work related stress. Merits for such claims are decided on various key principles, such as the foreseeability of risk, the offer and application of remedial measures, the willingness or reluctance of workers to accept such measures, for example, a possible demotion and diminution of work responsibilities.

This admits the rule of *volenti non fit injuria*. Consent to, and voluntary assumption of, a known risk by the claimant may be cited as a defense by employers and physicians alike. However, the nature of an employment relationship, characterised by unequal bargaining positions, would tend to make the courts scrutinise very closely whether there was indeed true consent to the voluntary assumption of risk.

Example 3: A Singapore Case of Work-related Mental Stress

Mental stress and illness caused by work can have profoundly tragic consequences. Consider the Land Transport Authority of Singapore case of 2003.[13] The protagonist was working as the senior engineer for the Land Transport Authority at the Nicoll Highway MRT station in 2003. He was, according to his wife, suffering from stress materially contributed by work. The psychiatrist, much to his credit, recommended leave as well as a transfer away from the site where the deceased was working. The latter was turned down by the company. The stress at work proved intolerable. He suffered from depression and subsequently killed his son before falling to his own death in what was billed by the media as a murder-suicide case.

It would not take a great leap of imagination to picture the violence of the engineer in Example 3 being directed at someone else; say the unsympathetic or disobliging supervisor. It cannot be difficult to imagine his doctor being filled with a sense of chilling disquiet. Her professional management of such cases, peripheral though it may be, since she cannot be held responsible for a toxic workplace, would no doubt be subject to a fine tooth comb. The consequences might be worth speculating, considering the legal landscape in *Tarasoff*.

While perhaps trite law in that no legal duty arises to prevent a person from harm to a third party or even self harm, exceptions to this have been recognised in therapeutic relationships.

In *Tarasoff versus Regents of the University of California*, the Court held that … "*when a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim... "*[14] Thus, depending on the findings of his mental state, a duty of care may have arisen to the intended victim of harm, even though this duty may be no more than a duty to warn.

In *Tarasoff*, an Indian graduate student in California fell into a depression after his unrequited love for Ms Tarasoff. He sought treatment at the University Health Service where he disclosed his intention to kill Ms Tarasoff, which he finally did. The *Tarasoff* rule, as it was later known and entrenched into popular usage, imposes a duty on mental health practitioners to protect third parties who are threatened with bodily harm by the patient.

The rule has had its own fair share of controversies, including the problems of predicting violence, and conflicts of interest between the intended victim and the patient.

The court sought to allay some of the concerns stating that they did not require therapists to render a perfect performance, "but only to exercise that reasonable degree of skilled care ordinarily possessed by members of their profession under similar circumstances." Proof, aided by hindsight, is insufficient to establish negligence. In the Tarasoff case, the therapist did accurately predict the student's danger of violence. As to the latter concern, the court response was… "*The protective privilege ends where the public peril begins*".

Stress and the Legal Lessons for Doctors

The legal guidelines formulated for work related stress by Hale LJ in the Court of Appeal of Barber versus Somerset County Council (2004) found much resonance with the House of Lords when the case was sent up on conjoined appeal.[15] Two of the conjoined appeals involved school teachers, one of whom was Mr Barber. The third was an administrative assistant and the fourth worked as a raw materials operative in a factory.

Hale LJ also mentioned in her judgment that an employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability. To trigger a duty of care, the employer must have the reasonable foreseeability that the employee is under stress. However, she also took pains to state that the employer is under no obligation to "make searching inquiries of the employee or seek permission to make further inquiries of his medical advisers" about his stress condition.

Employees, because of ambition, or other reasons, such as stigma, may choose to conceal their problems successfully from their employers and yet choose to unload them to their physicians. In such cases, the troubled employee must be encouraged to discuss their situation with the employer. Consent should be sought from the worker before his medical difficulties are to be discussed at length with the employers, who cannot then disclaim any knowledge of the stress problems of the worker. The courts have been willing to recognise that the 'nature of mental illness' makes it 'harder (for the employer) to foresee than physical injury'.[15]

The Doctor as the Defendant in Negligent Workplace Assessments

Example 4: Thompson versus Smith Ship repairers (North Shields) Limited (1984) 1 QB[16]

Thompson[16] is often considered to be the landmark case that presaged the Noise at Work regulations. In Thompson, 6 ship repair workers in 1983 successfully won their claims for compensation for noise induced deafness against their employers, whom the courts felt had breached in their duty in not providing hearing protection.

Notwithstanding the protection afforded by the subsequent work regulations following *Thompson*, 7 workers attempted a claim for noise induced deafness in *Parkes versus Merdian*,[17] this time against the employers for exposure which though, below the statutory limit of 90 dBA at that time, was nevertheless above 85 dBA, enough for harm to have occurred in the claimants, and therefore allegedly negligent. The judgment delivered in 2007 exonerated the employers.

In a 126 page judgment which could also have rivalled any medical textbook chapter on the subject of noise induced deafness, the court took great pains to consider the totality of evidence. Among these was the reluctance to impose latter day standards on historical exposures, the merits of the audiogram findings and the putative disabilities alleged, including the possible interaction with presbyacusis, as well as the monitoring done by hygienists and safety officers on the ground.

Example 5: Fairchild (suing on her own behalf) etc. versus Glenhaven Funeral Services Ltd and others etc 2002 UK House of Lords[18]

The case of *Fairchild* reflects a development in law peculiar and unique to such industrial settings, over the issue of mesothelioma causation, dealing with a series of employment asbestos risks over the same employee's worklife, but with different employers. That these exposures in the distant past were excessive were never in dispute. Note the witness statement in *Fairchild*, where Mr. Fox, one of the deceased, was described as being covered with asbestos dust while working as a lagger.

The asbestos litigation saga in *Fairchild* followed by the flood of claims, were set in motion by events in a much earlier era. It is estimated that historical exposures will continue to result in mesothelioma deaths peaking at around 2450 per year by the year 2011 to 2015 in the United Kingdom.[19] This is consistent with the known biological facts of latency in such illnesses. The link between asbestos and mesothelioma was firmly established only in 1960, but the courts were willing to find negligence over events prior to this date. The employers were deemed guilty of 'culpable foreseeability' based on various regulations published before this date already prescient on warnings about the danger.

Perhaps this also has to do with the feeling that employers knowingly concealed the dangers of unprotected asbestos exposure from their workers for decades in, to use the highly charged language of Koenig et al,[20] their 'cold-blooded business decision making.

Lessons from Thompson, Parkes and Fairchild

Taken together, the 3 cases are particularly instructive to physicians with responsibilities for care to such workers.

Physical injury, in particular if it occurs in clusters within the same workplace, or same type of industries, should usually put employers and physicians on notice that workplace agents may be instrumental in the aetiology.

Exposure standards are acknowledged to be protective of the majority of, but not all, workers so exposed.[21] Standard setting, as they are sometimes referred to, also takes into account commercial costs, interests and compliance. With time, these standards can and do become more stringent.[22]

Present Day Pitfalls for the Occupational Physicians Performing Workplace Health Risk Assessments

Exposures today for known harmful environmental agents are likely to be different. They will be subject to regulation, and required to be lower and less frequent. They will have to be measured and the risks have to be assessed.[23]

In all likelihood, such risk assessments may have to be made with contractors skilled in such work. It is not unusual for such risk assessments to be undertaken by an occupational health team. Each team member, the physician providing clinical care, the hygienist performing environmental hazard assessments, the safety officer responsible for safety and health conduct of operations and the toxicologist for laboratory analysis, among others, will have core expertise to contribute to the protection of the workers' health.

This is where multiple vulnerabilities along the risk control chain, as well as the details of the risk assessment will come under close scrutiny in the event of a claim. Was the personal protective equipment of the correct kind? How was the environmental monitoring conducted? Was it of an acceptable standard? Was the sampling frequency adequate for validity? What efforts of control were made? What went into the design of the work procedures? Which were the areas for which the occupational health agency should be held accountable? The quality of the advice, and the extent and qualifications with which it was adopted will be scrutinised.

Whether standards and competence are met are findings of fact which will assuredly be a fertile field for debate among the specialists. Occupational physicians, if they are leading or assuming accountability for the occupational health agency team, must ensure that the quality of work is acceptable.

Constraints of cost that might hamper the quality and quantity of work have to be resisted. Arguments based on cost and burden to employers had better be used with judicious caution, and certainly should not be used to front the gates of legal defense.[17] The limitations of their findings, for example noise mapping surveys, dust and fiber count in the air, have to be recognised and made known, in particular if these findings are to be relied upon to ascertain working conditions or success of cleanup efforts.

In *Parkes*, the failure to provide health education, or more plainly, warning to use ear plugs, was taken as a negligent act. One of the authors, Lee, is at least personally acquainted with an occupational health practice tasked with the design of a hearing conservation programme, routinely advising workers of the risk of hearing loss. They also routinely obtained the signature of the workers to acknowledge the receipt of such advice.

The exceptional vulnerability of the injured worker, notwithstanding the employer and his advisors having met the required exposure standard for environmental protection, alone on its own, seldom finds favour as a legal defense against negligence.

As understood from *Parkes*, the law is not willing to deny justice to the minority, as long as their harm is foreseen, and further reasonable measures can, and ought to, be taken to protect them.

The Standard of Care as Applied to Workplace Assessments

The standard of care as defined in occupational health settings such as workplace exposure is referenced against the statutes in workplace acts. However, the requirement that employers, so far as is reasonably practicable, are to ensure the safety and health of all at work may prove to be a fertile field for contention.

When doctors are dragged into the fray, whether a test similar to that developed for clinical therapeutic care setting, as in *Bolam versus Friern Hospital Committee*,[24] will be accepted by the courts, remains to be seen. *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.

The work of the occupational physician, depending on the circumstances, is different in that it may require inter-phase with key personnel from industrial hygiene, toxicology and other allied fields.

Codes of practice, analogous to clinical practice guidelines for clinicians, as an additional source for standards, will no doubt have their day in court, either as shield or sword.[25]

As a shield in the argument by defendants that code standards are met where they are indeed met, or as a sword, in the argument by claimants seeking cause and blame for their not having been met, these codes, which include those for noise control and dust control at work places, are usually published as good practice guidelines by regulatory bodies.[26,27]

Conclusions

The manner of medical practice today has changed. Many are medical firms with heavy capitalisation doing considerable occupational health work. Being insured and having resources for compensation might just be an additional reason heightening the risk of being named as

a defendant in a claim.

In clinical care, physicians must be especially mindful and be ready to engage with both workers and their employers about the impact of work on their health and vice versa, especially if there is a causative link.

Disputes over workplace health risk assessments, to the extent that it constitutes a failure to discharge a reasonable standard of care, may result in the doctor being a defendant. Careful documentation, clarity of contractual obligations, and a clear assignment of roles and accountability are extremely important. The agreed scope of service with the employer and the kind of expertise on offer has to be clearly specified.

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