

The Scope of an Employer's Liability for Negligence Caused by 'Locum' Medical Practitioners

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ABSTRACT

'Locum' medical practitioners are usually employed to relieve the regular and permanent medical practitioner on leave or due to shortage of staff. Many GP (General Practitioner) clinics opening for long hours deputise services to locums, who usually have permanent employment elsewhere but are employed temporarily at these clinics. Locums tend to be appointed without thought to the legal consequences that may ensue. Hence, when things go wrong in the course of treatment, it is important to establish whether the 'locum' is an employee or an independent contractor. The patient's interests would be protected if the locum is classified as 'an employee' as the GP clinic would be liable for any actions made by their employees. However, GP clinics would prefer to categorise locums as independent contractors as they would then not be liable for any legal consequences that may arise from any negligent acts traced back to the locum. This is considered not to be fair and just as the GP clinics have economically benefitted from the locums, and therefore, they should undertake the consequences as well. Considering the host of legal repercussions that may ensue, there is a need for clear policies and guidelines on the legal position of locums working in GP clinics.

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INTRODUCTION

Many GP (General Practitioner) clinics opening for long hours deputise services to locums, who usually have permanent employment elsewhere but are employed

temporarily at these clinics to offer their clinical services. Most of the time, locums are appointed by these GP clinics without any thought given to the legal consequences of the appointment. In particular, when things go wrong, the GP clinics are seen as potential defendants worthy of suing financially, as compared to the appointed locum. Further, since the GP clinics have economically benefitted from the acts of the locums, they should undertake the burden and responsibility when things go wrong. This is due to the fact that the locum advances the economic interests of these clinics, thus, the employers of these clinics should be made to bear the corresponding losses. Further, as an organisation, the clinics can easily distribute the losses they suffer. Nevertheless, the position of the locums has not been entirely clear as to whether they are employed as employees or independent contractors when working in these clinics.

Definition of 'Locum'

A locum is a person who temporarily fulfils the duties of another (Wikipedia, n. d). The word 'locum' is short for the Latin phrase, *locum tenens*, which means 'one holding a place' (Jaganathan, 2008). The abbreviated term 'locum' is common in Australia, Canada, Ireland, Malaysia, Singapore, New Zealand, South Africa and the United Kingdom, whereas in the United States, the full-length term, '*locum tenens*', is preferred. The phrase *locum tenens* was commonly used in the middle ages when the Catholic Church provided clergy to

parishes where there was no priest available and these travelling clergy were called *locum tenens*, or the placeholders for the churches they served (Slabbert & Pienaar, 2013). Subsequently, the term 'locum' started to be used for those who were filling the gap internally within an organisation (McCreedy, 2009). The term also began to be used by medical practitioners who were employed to relieve and act as a substitute for the regular and permanent medical practitioner who was on leave or when healthcare providers were short of staff (Thornton, 2010). Locums today are in demand particularly in General Practitioner (GP) clinics that offer their services for long hours and require staff to be relieved constantly.

Employer's Liability under the Doctrine of Vicarious Liability

Vicarious liability is a doctrine introduced under the common law, which imposes liability upon a party for a wrong committed by another, despite the fact that the party who is vicariously liable may not have been at fault (Stickley, 2013, p. 455). This doctrine is a form of strict, secondary liability that arises under the common-law doctrine of agency, namely, *respondeat superior*, the responsibility of the superior for the acts of their subordinate (Wikipidea, n. d). Therefore, the superior such as an employer, bears liability for the actionable conduct of a subordinate such as an employee because of the relationship that exists between the two parties (Garner, 2009). This is also based on the common-law theory that the

master should be held responsible for the wrongful or negligent acts of his servants as reiterated by *Lord Justice Holt in Middleton v Fowler [1969] 1 Salk 282*, that no master is chargeable with the acts of his servant, but when he acts in the execution of the authority given by his master then the act of the servant is the act of the master.

Further, Lord Mansfield stated in *Ackworth v Kemp [1778] Dougl. 42*, that for all civil purposes the act of the sheriff's bailiff is the act of the sheriff. Thus, the doctrine of vicarious liability imposes liability on employers for the torts committed by his employees who are acting in the course of employment. The relationship is naturally that of employment between master and servant or employer and employee and also between principal and agent. In other words, employers are vicariously liable for the torts that are committed by their employees in the course of employment (Talib, 2010, p.368). Consequently, healthcare providers as employers would be vicariously liable for the acts and conduct of their employees such as doctors, nurses and medical attendants provided that they are categorised as employees acting in the course of employment (Fox, 2007). In other words, hospitals and clinics can be held to be vicariously liable for the negligence of their staff provided that it can be shown that the particular staff was employed by the hospital or clinic at the time of the alleged negligence and that the negligence occurred within the scope of the staff's employment with the hospital or the clinic (*Cassidy v Ministry of Health [1954] 2 QB 66*). Similarly, the

doctor who employs a locum as an employee can be held liable for the unlawful or unprofessional acts of the locum (Slabbert & Pienaar, 2013).

The main justification for imposing liability on employers for the fault of their employees is the fact that the employer has bigger and deeper pockets (Tharmaseelan, 2010). Employers are usually large institutions with ample resources to procure insurance and absorb legal costs. They are also able to allocate their losses by increasing the price of their goods and services (Jones, 2002, p. 419). Thus, it is not unreasonable to expect the employer to pay for damages resulting from acts performed by employees (Tharmaseelan, 2010). As Lord Millet stated in the case of *Lister v Hesley Hall Ltd [2002] 1 AC 215*,

“Vicarious liability is a species of strict liability ... It is not premised on any culpable act or omission on the part of the employer; an employer who is not personally at fault is made legally answerable for the fault of his employee. It is best understood as a loss distribution device.” (Yang, 2012)

In a way, vicarious liability encourages accident prevention by pressuring employers to ensure that their employees act with regard to the safety of others. By making the employer liable for the act of the employee through the doctrine of vicarious liability, the employer has a financial interest in encouraging his employees to take care of the safety of others. If the employer

is careless in selecting an employee who is by nature negligent, he must accept responsibility for the acts of that negligent employee (Jones, 2008, p. 606). This is because he has set in motion a chain of events which finally culminated in the negligent act of the employee. Further, since employers profit from activities of their employees, they should be made to bear the corresponding losses.

Categorisation of ‘Locum’ as an Employee or an Independent Contractor

Categorising a locum as either an employee or an independent contractor is significant as the legal consequences following each type of appointment differ. Thus, before liability can be imposed on the employer for the tort committed by the locum under the doctrine of vicarious liability, it must be shown that the locum, as an employee, has committed a tort in the course of his employment (Stickley, 2013, p. 462). Consequently, it is crucial to determine the existence of an employment relationship between the employer and the locum as the doctrine of vicarious liability arises from employing an employee under a contract of service and not from employing an independent contractor under a contract for services (Bettle, 1987). Although the distinction between an employee and an independent contractor may seem to be obvious, in certain circumstances the distinction may not be so clear cut. Undeniably, the demarcation between the two has caused the courts great difficulty.

The courts have traditionally applied ‘the control test’ to distinguish between employees and independent contractors. The control test was established in the case of *Yewen v Noakes (1880) 6 QBD 530*, in which Bramwell LJ stated that “a servant is a person subject to the command of his master as to the manner in which he shall do his work” (p. 532). Thus, unlike an independent contractor, an employee can be told by his employer not only what work to do, but also how to do it (*Collins v Hertfordshire County Council [1947] KB 598*). However, this test does not mean that the employer had in fact controlled the employee for every second of his working day, but that he had the right to do so. However, this test became impossible to apply as many employees became more skilful, to the extent of being more skilful than their employers. As the labour market is flooded with more and more skilled workers, the criterion of ‘control’ is no longer adequate to be made the sole indicator for establishing the employer-employee relationship as employers are less able to control their employees on the manner in which they perform their work. The current judicial trend is that no single test is sufficient to distinguish between employees and independent contractors. Instead, the question has to be answered by taking into account a number of factors in each case.

The courts, through a series of judicial cases, have employed the control test, the business integration test (*Stevenson, Jordan and Harrison Ltd v MacDonald [1952] 1 TLR 101*), the economic reality test and the multi-factorial approach (Deakin,

Johnston & Markesinis, 2007, p. 580). The 'multi-factorial' test was introduced in the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497*, in which the courts examine all the facts of the particular case instead of using just one conclusive factor for all cases. The courts consider factors such as whether the employee performing the services provided his own equipment, whether he hired his own helpers, what degree of financial risks he took, what degree of responsibility for investment and management he had, his connection with the business, the parties' agreement, the regularity and nature of the work and methods of payment. How much weight is attached to each factor depends on each case. If on balance the multiple factors point towards one type of relationship, then the courts will accept it even if the parties themselves have given a different label to their relationship (Jones, 2002, p. 423).

The 'close-connection test' has also been introduced to distinguish between employees and independent contractors by the courts in *Lister v Hesley Hall Ltd [2002] 1 AC 215*, which focussed on whether the employee's act was closely connected to his employment and if it would be fair and just to hold the employer vicariously liable. An employer "will be liable even for acts which he has not authorised, provided that they are so connected with acts which he has authorised that they may rightly be regarded as modes" (paragraph 20, *per* Lord Steyn). This test allows a broader interpretation of vicarious liability in which the courts

will examine the circumstances of the case by taking into account (i) what tasks the employee was employed to do; (ii) whether the act committed by the employee that is deemed to be wrongful was part of the employee's normal duties or reasonably incidental in performance of an authorised act; (iii) if there is expressed or implied authority; (iv) if the risk of liability for the particular act of the employee was created by the employer's business (Tharmaseelan, 2010).

Implications of Being Categorised as an Employee or an Independent Contractor

The employer is only liable for the acts of his employees and not of independent contractors as the employers do not control the manner in which the contractors perform their jobs (Ipp, Cane, Sheldon, & Macintosh, 2002). Generally, independent contractors are responsible for their own actions and any wrongdoing cannot be imputed to the entity that hired them (Prosser, Wade, & Schwartz, 2010). Lord Bridge in *D & F Estates Ltd v Church Commissioners for England [1989] AC 177*, clearly stated that "it is trite law that the employer of an independent contractor is, in general, not liable for the negligence or other torts committed by the contractor in the course of the execution of the work" (p. 208). As the doctrine of vicarious liability arises from the employer-employee relationship, it must be shown that a tort has been committed by the employee acting in the course of his employment if liability

was to be imposed on the employer (*Balfour Trustees Ltd v Peterson* [2001] IRLR 758).

The term used to describe the relationship between the employer and the person being delegated the work is not determinative as the courts will look into various factors before determining whether the person is an employee or an independent contractor. However, although in principle an employer may not be vicariously liable for loss or injury caused by an independent contractor, the employer may be personally liable if the conduct of the independent contractor constitutes a breach of a non-delegable duty (*Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16). The duty is said to be non-delegable because it cannot be discharged merely by delegating the task to a competent person. The employer may still be liable if the duty is not properly performed. (*McDermid v Nash Dredging Ltd* [1987] AC 906). In other words, the person who owes the non-delegable duty cannot acquit himself by exercising reasonable care in entrusting the work to a reputable contractor but must actually assure that it is done and done carefully (Fleming, 2011). Therefore, it is a personal duty that will be breached if the task in question is performed negligently by another person. Brennan CJ stated in *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, that

“...if the defendant is under a personal duty of care owed to the plaintiff and engages an independent contractor to discharge it, a negligent failure by the independent contractor to discharge

the duty leaves the defendant liable for its breach. The defendant’s liability is not a vicarious liability for the independent contractor’s negligence but liability for the defendant’s failure to discharge his own duty.”

However, as the existence of a non-delegable duty depends on the nature of the relationship between the plaintiff and the defendant, it is not possible to define exhaustively the circumstances in which it may occur. As a result, the courts will decide on case-to-case basis and will not hesitate to impose a non-delegable duty in new situations in the interests of justice. Nevertheless, the concept of a non-delegable duty of care has been said to have developed in a not entirely satisfactory and principled way, resulting in some uncertainty about the circumstances that will give rise to the duty (*Jones v Bartlett* (2000) 176 ALR 137).

Judicial Decisions on Negligence Claims against ‘Locum’ Medical Practitioners

The case of *Liau Mui Mui v Dr Venkat Krishnan* [1999] 1 MLJU 207, discusses directly on the issue of liability of locum medical practitioners. Liau, the defendant was a proprietor of Klinik Wanita-Wanita, which held a hospital licence. A locum doctor, Dr Ramachandran, was employed by the defendant and performed a Dilatation and Curettage (D & C) procedure on the plaintiff, which resulted in the perforation of the uterus and severe injuries to the rectum and small intestines. The court

found the locum doctor negligent. The defendant was found vicariously liable for the negligence of the locum because the locum was employed on a full-time basis and was authorised to use the clinic and instruments. Evidence revealed that the locum doctor was authorised to do the D & C procedure on patients except on the defendant's patients and the plaintiff was found not to be listed among the defendant's personal patients. Further, patients make direct payment to the clinic and not to the locum. The locum was paid a fixed sum of RM150 to RM200 per day and did not have any share in the profits made by the clinic. As the defendant held a hospital licence, the defendant's clinic was treated as a hospital and the doctrine of non-delegable duty applied. The court accepted the views of Denning LJ in *Cassidy v Ministry of Health [1954] 2 QB 66*, in which his Lordship stated that

“...the hospital authorities are responsible for the whole of their staff, not only for the nurses and doctors, but also for the anaesthetists and the surgeons. It does not matter whether they are permanent or temporary, resident or visiting, whole time or part time. The hospital authorities are responsible for all of them. The reason is because even if they are not servants, they are agents of the hospital to give the treatment. The only exception is the case of consultants and anaesthetists

selected and employed by the patient himself.”

Thus, the court in *Liau* held that, from the facts of the case, it was evident that the plaintiff had not selected nor employed Dr Ramachandran to treat her and it was clear that Dr Ramachandran was employed by the clinic as a full-time employee. Therefore, the defendant clinic was wholly liable for the acts of Dr Ramachandran as an employee under the workings of the doctrine of vicarious liability,

The court in *Liau* further distinguished a Canadian case of *Rothwell v Raes (1988) 54 D.L.R. 193*. The case of *Rothwell* concerned an infant plaintiff who received immunisation doses of a multi-purpose vaccine (also known as quadrigen) to protect him from diphtheria, pertussis (whooping cough), tetanus and poliomyelitis. The vaccine was administered in the office of the defendant's family practitioner, Dr Raes, although two of the three shots were given by another doctor, Dr Hall, who served from time to time as his *locum tenens*. After the third shot, the infant plaintiff developed an abnormality known as post pertussis encephalitis, which can produce severe brain damage. The infant plaintiff later became blind, almost deaf and severely retarded both physically and mentally. His condition was unlikely to improve and required constant care. The parents sued both Dr Hall and Dr Raes for negligence in failing to warn of the material risks inherent in such vaccination. The courts found both of them not negligent either in recommending the vaccination or in

failing to warn of possible damaging effect as it was at the time of practice considered to be a vaccination with rare possibility of harmful consequences. On the issue on whether Dr Raes could be vicariously liable for the actions of his locum, Dr Hall, the court discussed the facts regarding the employment relationship between Dr Hall and Dr Raes. Evidence showed that Dr Hall, as a locum, was an independent contractor and was not in an employer-employee relationship with Dr Raes. Dr Hall did not make any payments with respect to expenses for office use or the secretary and kept no records of her own to indicate the professional relationship with Dr Raes. Dr Hall was free to see her own patients and was entitled to receive 50% of the gross earning that she had generated. Thus, Dr Hall was considered to be an independent contractor and Dr Raes could not be held vicariously liable for any fault, if any, on the part of Dr Hall. The court further compared Dr Hall's employment against Dr Kennedy's employment in the case of *Kennedy v CNA Ass'ce Co (1978) 88 D.L.R. (3d) 592*. In this case, Dr Kennedy was a retired dentist employed to administer anaesthetics in the dental surgery owned by Dr Stiles and Dr Harris. Linden J. found that Dr Kennedy was controlled with respect to the 'when' and the 'where' although not on the 'how' of executing his work. The court also found that it was apparent that Dr Kennedy was part of the practice of his employers and not in practice for himself. Consequently, he was "an employee and not an independent contractor, however, skilled he may be."

From the cases discussed above, it can be seen that in determining whether the locum medical practitioner doctor was to be considered an employee or an independent contractor would depend on many factors such as the employment agreement, the control and power the employer had over the employee, the method of salary payment and the prerogative of the patient in selecting the particular doctor for treatment. However, with new economic conditions in the labour market, these factors will not be exhaustive and it can be expected for the workings of the doctrine of vicarious liability to develop in congruence with new employer-employee relationships through future judicial cases.

Guidelines for the Practice of 'Locum' in Malaysia

There is no specific legislation governing the issues on the practice of locums in Malaysia. However, the Ministry of Health has introduced Guidelines for the Practice of Locum in 2006 and further amended them in 2010 (Ministry of Health, 2010). The guidelines have been prepared in accordance with the Medical Act 1971 and Civil Servants (Conduct and Discipline) Regulations 1993. Any registered medical doctor (Guidelines 2010, provision 3.2.2) with at least one year's experience after obtaining full registration (provision 4.1.1) may practise as locum provided that the locum work is carried out after office hours, on public holidays, weekends, holidays or during annual study leave (provision 3.3.1). However, before practising as locum, the

medical officer must adhere to the following principles:

- a) The work of locum can only be practised at licensed healthcare facilities and registered dental clinics. The requirements under the Private Healthcare Facilities Act 1998 (Act 586) need to be strictly adhered to if the locum work is conducted at a private facility (provision 3.3.1);
- b) The medical officer practising the work of locum must abide by the Code of Professional Conduct given by the Malaysian Medical Council and the Malaysian Dental Council (provision 3.5.1);
- c) An application to practise as a locum must be sent to the Head of Department to procure written permission. The medical officer must abide by the rules in the Civil Servants (Conduct and Discipline) Regulations 1993. Pursuant to Regulation 5 of the Public Officers (Conduct and Discipline) Act 1993, the Head of Department may authorise officers to carry out work as a locum. However, to facilitate the process, all applications must have Appendix 1 filled in and shall be made by the Chairman of the Unit for assistance and recommendations. Nevertheless, this approval can be terminated by the Head of the Department at any time without having to give any reason (provision 3.1.1);
- d) The premise which employed the locum must be responsible for any post-operative care that is required by the affected patient (provision 4.1.3);
- e) The medical officer practising as locum will not be given additional insurance coverage by the Government in the event of any medico-legal issues arising in the course of practising as locum. Therefore, medical officers who wish to practise as a locum must procure their own insurance coverage for their own protection in the event that medico-legal issues arise from the practice of locum (provision 4.1.4);
- f) Locum work cannot be performed while the medical officer is required to carry out official duties or is on call (provision 4.2.1);
- g) Locum work cannot be practised at hospitals/clinics which the medical officer has vested personal shares in and all earnings procured from the practice of locum need to be disclosed to the Inland Revenue Board (provision 4.2.2).

The Importance of Insurance Coverage and Clear Contractual Provisions

As can be seen from the guidelines above, medical officers who wish to practise as locums have to take their own insurance coverage for protection in the event that they are sued in court. They may ultimately be held to be individually responsible for any negligent acts and without proper insurance coverage, they would face a lot of difficulty in paying compensation if they are found to be liable. Purchasing insurance policies that will cover their circumstances in practice

as locums would help to indemnify them for claims that may be made against them and also for the legal costs of defending the claim (Fox, 2007). If the locum is found to be an employee of the clinic, then the employer may be held to be vicariously liable and will thus be liable to compensate the injured victim for all the loss suffered. Thus, for a start, the contractual provisions that spell out the nature of the relationship between the locum and the employer are of utmost importance. If there is no contract stipulating whether the locum is an employee or an independent contractor, matters can be rather complicated in the event a dispute arises (Slabbert & Pienaar, 2013). Nevertheless, even if the contract of employment stipulates that the locum is an independent contractor but other provisions in the contract are inconsistent with the status of the locum as an independent contractor, then the court may decide the locum to be an employee. Factors such as whether the locum (1) is an integral part of the employer's clinic; (2) is paid a fix amount of salary or has a share in the profits; (3) is free to carry out work for more than one employer at a time; (4) is entitled to sick leave, annual leave and if the salary is tax deductible (Staunton & Chiarella 2013, p. 129); (5) is employed for specific tasks or a series of tasks and maintains a high level of discretion as to how the work is performed (Wilson, 2011) and (5) is doing work subjected to the coordinated control of the employer as to the 'where, when and how' of the work (Fleming, 2011, p. 438). In the event that the locum is categorised

as an employee, then the employer needs to be liable for all financial consequences that result from the negligent acts. The employer can be indemnified by the employee either through a contractual claim for indemnity under the employment contract or a right under the right to contribution under section 10(1)(c) of the Civil Law Act 1956:

Where damage is suffered by any person as a result of a tort (whether a crime or not) - any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought (Section 10(1)(c)).

Thus, the effect of Section 10(1)(c) is that the employer is allowed to claim compensation from his negligent employee but the employee cannot claim contribution from the employer (Talib, 2010, p. 390).

CONCLUSION

It is imperative that healthcare providers including GP clinics ensure that as far as practicable, the way in which they conduct their operations does not put the health and safety of any members of the public

at risk. From the patient's point of view, GP clinics should not allow their staff to treat patients and at the same time be unwilling to accept responsibility for their wrongdoings. This goes against the notion of justice and fairness that holds that a person who employs others to advance his own economic interests should rightly be placed under a corresponding liability for losses incurred in the course of the enterprise. Employers are, after all, in a strategic position to reduce accidents by efficient organisation and supervision of their staff (Fleming, 2011, p. 438). GP clinics should not be allowed to abdicate their responsibility simply because they reserve no control or discretion over the execution of work carried out at their premise. If the work contracted for is inherently dangerous and the employer has to provide a safe system of work for employees, the employer should remain at all times responsible and such duties cannot be delegated even to a reputable contractor (Carbone, 2011). Since the employer derives benefit from the service of his employees, it is only right that he accepts any burden accruing from it as well. Therefore, to protect themselves, employers have to ensure that they are fully insured against all such events. Undeniably, the principle of vicarious liability rests on the fundamental premise that compared to anyone else, the employer is the best person to manage the risks of his own business enterprise and prevent wrongdoing from occurring to others.

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