Locum Tenens

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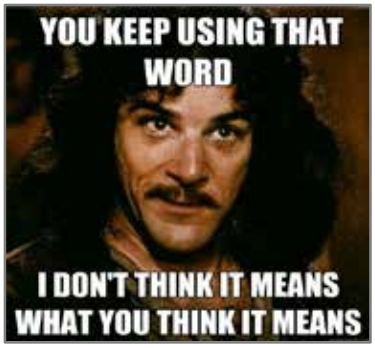
Locum Tenens

Catching up with colleagues, I've often heard: 'I've been with ABC Optometrists for a few years. I locum there on Wednesdays and Saturday mornings.' Except, that's not what 'locum' means.



I am Inigo Montoya...

Locum comes from the Latin: *locum tenens*, meaning 'one holding a place.' In the Middle Ages the Catholic Church provided clergy for churches where there was no priest, and these traveling clergymen were known as *locum tenentes*.

With dire staff shortages in rural hospitals in the US in the 1970's, the term was adopted for doctors who traveled to fill in wherever they were needed. Locums in the US continue to be placed largely by agencies that undertake to provide the right *type* of practitioner, rather than a specific one. It may feel a bit weird for a solo practitioner not to know who is coming to work in their place, but in a large, multi-practitioner franchise practice, it makes perfect sense for an agency to send someone who is familiar with your computer software, your instruments and processes, someone who knows the products from the labs and suppliers that you prefer to deal with. A locum is expected to fit in with current systems and adhere to existing treatment protocols, rather than to contribute to, improve or disrupt them... even if disruption nowadays is supposed to be a good thing.

In the UK, the biggest difference between a locum and a principal practitioner seems to be the depth of administration that they get into. Locums see patients and don't get involved in billing/ claiming, ordering or even dispensing. The college specifically includes locums in many of its documents, reiterating that professionalism and clinical standards are the same, whether the practitioner is permanent or locum.

If you are a solo practitioner, and you're going on leave, how much of what you do would you expect a locum to step into? In other words, how much of your day is spent doing non-clinical work? Perhaps you need to hire an extra staff member to allow you to get back to seeing patients.

On the other hand, loads of business coaches recommend that practitioners dedicate time to working **on** our businesses, not just **in** them. Perhaps you need a locum to take care of the clinical work every now and then so that you can refocus on the business aspects of your practice... and I don't mean admin. A practice needs someone to lead, prioritise, motivate, strategise and build, but it may feel like there isn't enough time.

Bottom line is that a locum fills a vacancy temporarily, perhaps while you're trying to fill the position permanently, or while the principal provider is on leave for any reason. So, what we describe as locum work is often actually part time work. Does it really matter? Well, it matters to me because I'm a logophile (word lover) but more importantly, it may matter to SARS, the CCMA, HPCSA and your professional indemnity insurers. If you are a locum, or make use of the services of one, this information may be of use to you.

The Employment Relationship

In Roman Dutch law, which forms the basis of our common law, the employment contract was a subtype of a contract of lease. It implies a great deal of control over the subject and the relationship it creates has much in common with actual ownership. In our modern law, an 'individual employment contract commences when the parties agree to the essential terms in the contract and the contract complies with the general requirements for a valid contract, namely:

- there must be consensus between the parties,
- both parties must have contractual capacity,
- the rights and duties stipulated in the contract must be possible to perform,
- the rights created and duties assumed must be permitted by law, and
- the formalities, if prescribed, must be adhered to.'

At common law, both parties must have the intention of creating obligations (in this case for the employee to place their labour potential at the disposal and under the control of the employer, in exchange for which the employer remunerates them. However, things have become more complicated than that. Employment can be casual, temporary, permanent or non-standard.

Casual: I once worked for a practice where one partner was on maternity leave and then the other partner's mother took ill. I worked there for a few days and never worked for them again, but would have, had they needed me. An irregular event, sometimes a crisis, often precipitates these employment relationships. Another example: I have a student who does administrative work for me during some holidays, according to her availability and my needs. Locum work could fall into this category.

Temporary: In the first example, had I been asked to work in the place of the partner during her 4 months' maternity leave, my employment would have been temporary. There is a clear beginning and end, where the contract terminates. There is no expectation of future employment. The beginning need not be a date, but can be an event e.g. the birth of her baby.
Most locum work falls into this category.

Permanent: In this, the most common employment relationship, there is an expectation of the relationship continuing indefinitely, with a prescribed manner for each party to end it should they choose to. If you have been with ABC Optometrists for a few years, doing Wednesdays and Saturday mornings, you are permanent, albeit part time.

Non-standard: Contractors, employees of contractors and piece workers. If I reached an agreement with a low vision specialist to come and see low vision patients in my practice whenever necessary, they would be a contractor. How does this differ, you may ask, from what we all call locums? Good question. Read on.

For the Employer

Each party has certain rights and obligations as a result of the agreement reached. These are required of the employer:

1. Ensure employees (locum or not) are registered with the HPCSA.

As regulated healthcare professionals, we are all required to be registered with the HPCSA, which has jurisdiction over us and is tasked with guiding us and protecting the public. In its Generic Ethical Rules (Booklet 2), practitioners are reminded not to share rooms with, or '*employ as professional assistant or locum tenens, or in any other contractual capacity and, in the case of locum tenens for a period not exceeding six months,*' any person not registered (s8.) In fact, to be very clear: '*[O]nly a person who is registered under the Act to practise in independent practice; whose name currently appears on the register kept by the registrar in terms of section 18 of the Act; and who is not suspended from practising his or her profession*' may be employed (s9.1.) That means an employer must ensure that employed professional assistants and locums are appropriately qualified and registered and fit to practice. To check registration, visit the HPCSA website's iRegister.

Council is making an effort to streamline the registration of new practitioners but it is certainly not immediate. Strictly speaking, recently qualified practitioners may only work under supervision until they are registered.

Ask for an academic record that confirms that they have completed their qualification, as well as confirmation from the Dean of the School. During internships and community service periods, the relevant practitioners hold a limited registration and may not be appointed to work independently.

2. Remuneration/ Payment for services rendered

The HPCSA discussed the work relationship, sharing of fees and commission in booklet 7 of their Ethical Guidelines. '*Health care practitioners shall not enter into a contract to work in a particular health establishment or service on the understanding that the health care professional generates a particular amount of revenue for such health establishment or service.*' Turnover targets and remuneration based largely on commission have been considered perverse incentives by the HPCSA and other entities. Overservicing is certainly a risk inherent in this model, but it has been argued that the practice owner is effectively remunerated on a commission basis too, making it difficult to justify a distinction between an employed versus a self-employed practitioner. The counter argument is that the practice owner can balance and offset other aspects of the business to increase income.

Focus is on keeping...	Owner	Employee on Commission	Locum on Commission
Patients satisfied	X	X	
Overheads low	X		
Revenue high	X	X	X

Commission-based salaries are quite common, particularly in professions that rely mostly on professional fees. An hourly remuneration is also common practice, particularly for locums and part-time employees.

Remuneration is defined in paragraph 1of the Fourth Schedule of the *Income Tax Act 58 of 1962* as 'any amount of income which is paid or is payable to any person whether in cash or otherwise and whether or not in respect of services rendered.' In its notes to the interpretation of the Fourth Schedule, SARS lists 3 requirements for the deduction of tax: An *employer (1)* must pay *remuneration (2)* to an *employee (3)*. Tax need not be deducted when

paying a person who carries on an independent trade e.g. a contractor who comes to set up your computer network. A worker is not independent according to the Fourth Schedule of the *Income Tax Act* 58 of 1962 if you...

- instruct, control and supervise them,
- tell them how many hours to work and what their duties are
- expect them to report on work done
- pay them at regular intervals e.g. daily/ weekly/ monthly.

So, if you agree with a handy man to come in for the day to complete an unknown list of jobs; you have him paint your skirting boards, hang your pictures, and sand down your antique table, while you helicopter around him giving direction, is he an employee? No, because this will not be a regular occurrence. If he also does similar work for a property developer every Friday, he is much more likely be their employee. So, the intention of the employer/ employee, the contract between them and the type of work done, does not determine whether the relationship is one of employment or not. So what does? And why does it matter?
If the person is an employee, the employer is required to deduct tax and pay it over to SARS. They also enjoy protection in terms of the *Labour Relations Act* and the *Basic Conditions of Employment Act*. More about that later.

Employers are required to deduct tax from all employees and pay it over to SARS. SARS, the courts, and the South African Institute of Chartered Accountants (SAICA) all recommend deducting if there is any uncertainty about the status of the employee/ contractor. During a ruling in the tax court *(ITC 1787 (67 SATC 142))* Rampai J identified these 4 elementary points summarised by Deneys Reitz attorneys:
'Firstly, the employee is liable to pay employees' tax.
Secondly, the employer has a statutory obligation to deduct the tax.
Thirdly, the general norm is that an independent contractor, in other words a person who earns remuneration by acting autonomously and without

"prescriptive and authoritative" instructions from an employer, is not liable for employees' tax.

Finally an "ambivalent independent contractor", someone who holds himself out as one but is in fact subject to the "prescriptive and authoritative" instructions of another, is liable to pay employees' tax.'

Still, the legal and accounting fraternities agree that some of these Fourth Schedule cases bring more concern than clarity.

How do we decide whether a relationship is that of a principal and agent (contractor) or an employer and employee? The bottom line seems to be whether one is buying the result (i.e. contractor) or the productive capacity (i.e. employee) of the person. Seems simple, yet there is no one factor that places the person in the employee or contractor category with certainty. The extensive 'dominant impression' test derives from common law, and lists (a) near-conclusive, (b) persuasive and (c) resonant indicators for the employer to consider. And yes, it is the employer who must make this distinction, and carefully, because '*an employer who has incorrectly determined that a worker is an independent contractor is liable for the employees' tax that should have been deducted, as well as the concomitant penalties and interest. The employer has the right to recover the tax paid from the employee.*' And good luck with that recovery, I can tell you from expensive experience.

The indicators of the dominant impression include:

Control of manner:

Detailed clinical instructions about the process, instruments, which patent or technology to use etc may be a relevant example. If the right to control is included in the contract, even if it is no exercised, the relationship leans towards one of employment.

Payment regime:

Payment with the reference to a result, e.g. at the end of a project is more likely with contract workers while daily, weekly or monthly payments are common for employees. If you are unhappy with the work of an employee, the sanction is not withholding payment. However, and incomplete or unsatisfactorily completed project may result in non-payment of a contractor.

Personal service:

An employee is contracted to be at the employer's beck and call while a contractor's availability is by agreement. A contractor may choose to substitute a suitable worker instead of coming themselves; they may choose to bring an assistant, none of which should impact the work done and the outcome achieved. If it bothers you that your locum arrives and sees to the clinical needs of every single patient, but spends the rest of the day catching up on personal phone calls, you view them as an employee, not a contractor. Are those patients considered patients of the practice, or of the practitioner. An employee is restricted from building up a personal patient base, but a locum (technically) is not. HPCSA regulations complicate this relationship, e.g. by the emphasis on being available for continuous care of the patient at a known physical address, or the security of the patient records. Still, one could employ an optometrist who specialises in complicated contact lens fittings to locum from time to time when there is sufficient demand. Since the practice itself does not offer the full scope of what is required by these patients, it may (by agreement) consider those patients the locum's patients.

Work or activities that compete with the employer are unacceptable when it's an employee. An employee may even be subject to a restraint of trade after the employment relationship ends. However, a contractor does work for others, even for your competition. At most, they may be subject to a secrecy clause.

Risk: Profit and loss.

Any exposure to risk, or opportunity to profit suggests economic independence, which is consistent with being a contractor. Employees, by the way, rank before contractors in case of insolvency of the employer.

VAT:

Registration (or not) as a VAT vendor is of little value in determining the status of an employee/ contractor. PAYE deducted from a VAT vendor should be from the exclusive amount.

Viability on termination:

Also referred as the economic viability test, this factor can be highly persuasive. A contractor is likely to have another job secured, or have a network of potential employers/ principals. An employed optometrist may take a while to secure a full-time position and may take up locum positions in the interim.

This list is not conclusive. Please click here for more, or better yet, speak to a tax consultant to help you decide what your locum's status is. Despite the detail in these indicia, the courts have rejected this test *(Medical Association of SA v Minister of Health.)*

Besides the common law dominant impression test, SARS and the tax courts have based decisions on tests derived from statute and legal precedent:

- Control test
- Organisational or integration test
- Reality test

The control test was first formulated in the case of *Colonial Mutual Life Assurance Society Ltd v Macdonald* in which De Villiers CJ said:

'...one thing appears to me beyond dispute and that is that the relation of master and servant cannot exist where there is a total absence of the right of

supervising and controlling the workman under the contract; in other words, unless the master not only has the right to prescribe to the workplace what work has to be done but also the manner in which such work has to be done.'

The Fourth Schedule to the *Income Tax Act* now provides for *'a deeming provision that a person shall not carry on a trade independently if the services or duties are required to be...*

- *performed mainly at the premises of the client and – the worker is subject to the* ***control*** *of any other person as to the manner in which the worker's duties are or will be performed, or as to the hours of work...*
- *or the worker is subject to the* ***supervision*** *of any other person as to the manner in which the worker's duties are or will be performed, or as to the hours of work.*

Only 1 of these needs to apply for the person to be deemed an employee. However, *'an independent contractor who employs three or more full-time employees, who are not connected persons in relation to him or her and are engaged in his or her business throughout the particular year of assessment, will be deemed to be carrying on a trade independently.'* So, if a dental practice employs a dentist for 2 months while the dentist attends to his spiritual needs, and the locum dentist brings her own assistant, X-ray technician and sterilisation expert, and those 3 are permanently employed by her, then she is considered a contractor by SARS. Without her entourage, she would have been a temporary employee.

In *SABC v McKenzie*, Myburgh JP said: *'The second [test] is the organisational test: a person is an employee if he is part and parcel of the organisation... whereas the work of an independent contractor, although done for the business, is not integrated into it but only accessory to it.'*

All three these tests have now been rejected by the labour courts in favour of the reality test, first described in *Denel (Pty) Ltd v Gerber* and subsequently confirmed. Effectively, the parties decide on (and stipulate in the contract) the nature of their relationship. Where it is not described, or is disputed, or there is no written contract, the 3 alternative tests are still relied on. An employer would prefer a locum to be a contractor, because then the employer generally escapes liability for any complaints, but don't forget about the presumption in terms of the BCEA and LRA that the locum is an employee. SARS won't.

3. Contract

Legalese for putting things on paper is to 'reduce to writing.' I'm not sure where the 'reduce' really comes from, but it can certainly *reduce* hassles later. As we've seen, the reality test relies on the relationship defined in the contract, so is a good reason to have a contract. The HPCSA requires a written contract of employment, which must be it submitted to Council should it be requested.

Specify the total cost to company, including any benefits such as travel and uniform ances, HPCSA registration or CPD/ conference attendance so that both parties understand the total remuneration package.

4. Status of the employee

Not only is it critically important for the employer to establish whether the locum is an employee or an independent contractor, but also to deduct the appropriate amount of tax. If they are not an employee, keep all the evidence you have used to reach this decision, including provisional tax numbers. Insist on an invoice from them, just like you would any other creditor. Without these, an employer will be held liable for their PAYE, together with penalties and interest.

Responsibilities of the Locum

Legislation and regulations affecting the practice owner/ employer/ principal in this relationship relate to their administrative, accounting, business and financial liability. For the practitioner seeing the patients, however, the focus is on the clinical well-being patients and, where relevant, for their liability in case of a complaint. As practitioners, we are responsible for our patients from taking a history through the examination, diagnosis, discussion of treatment options to dispensing and follow-up care. What happens when one can't do all of that yourself? Where does a locum's responsibility begin and end? Even a written spectacle Rx is open to so much interpretation: The frame selection, the lens design and material choice, different coatings, filters and tints, the manufacture and fitting of the lenses, and then the frame on the patient, the explanation about how to use and care for the spectacles...
Most of our undergrad lives are spent learning to do an eye examination, but patients easily forget your professional care if the spectacles are unsatisfactory. Locums may not be able to see the final products when they are ready, and their reputations rest on work handed over to others to complete, sometimes based on practice policies that they had no part in developing. What if you (as locum) don't agree with practice policies and protocols?

1. Contract

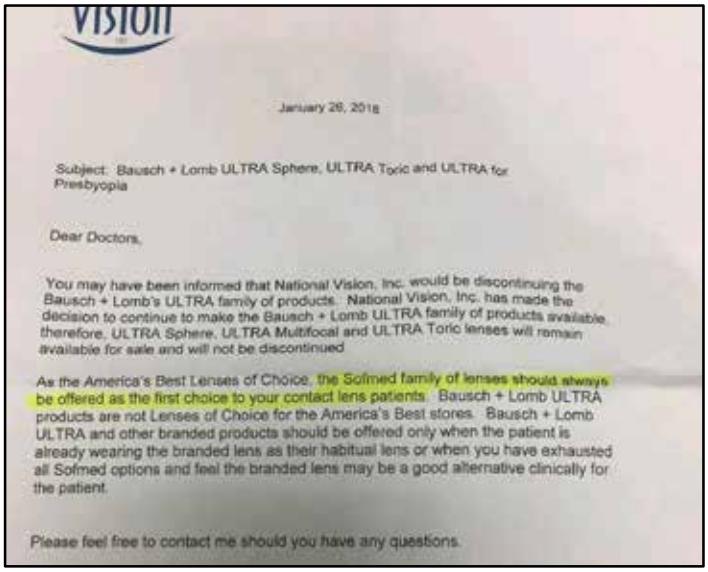
We've already covered section 9 of the HPCSA's general ethical rules which regulated whom a practitioner may employ. Section 18 of the same booklet states that:

(1) A practitioner shall accept a professional appointment or employment from employers approved by the council only in accordance with a written contract of appointment or employment which is drawn up on a basis which is in the interest of the public and the profession.

(2) A written contract of appointment or employment referred to in sub rule (1) shall be made available to the council at its request.

So, while a written employment contract is not required in terms of labour law, the HPCSA requires a written contract of employment, may ask to see it and it shall not be refused, all to ensure that an employed/ contractor practitioner has complete independence and no restrictions to their clinical decisions. If restrictions are not reduced to writing, an employed/ contractor optometrist would find it difficult to convince a hearing or a court that they didn't have the freedom e.g. to order what was in their professional opinion the most appropriate lens for the patient. Such a restriction would be exploitative, and the general ethical guidelines of the HPCSA (section 22) specify that a '*practitioner shall not permit himself or herself to be exploited in any manner.*' Because of this rule, there is the presumption that a practitioner has complete clinical discretion and the employed optometrist may need to prove that this was not the case. In addition, your contract should include:

- the extent to which you participate in pricing, coding and billing (and therefor what you are liable for,)
- remuneration, including commissions and turnover targets. Beware of coercive remuneration e.g. where commission is earned on some products and not on others.
- any restrictions on suppliers or products that may prevent the practitioner from ordering or supplying what is in the patient's interest. It may be as innocuous as 'We don't have an account with them. Is there a product from [insert preferred supplier] that will work?'



VISION

January 26, 2018

Subject: Bausch + Lomb ULTRA Sphere, ULTRA Toric and ULTRA for Presbyopia

Dear Doctors,

You may have been informed that National Vision, Inc. would be discontinuing the Bausch + Lomb's ULTRA family of products. National Vision, Inc. has made the decision to continue to make the Bausch + Lomb ULTRA family of products available, therefore, ULTRA Sphere, ULTRA Multifocal and ULTRA Toric lenses will remain available for sale and will not be discontinued

As the America's Best Lenses of Choice, the Soflmed family of lenses should always be offered as the first choice to your contact lens patients. Bausch + Lomb ULTRA products are not Lenses of Choice for the America's Best stores. Bausch + Lomb ULTRA and other branded products should be offered only when the patient is already wearing the branded lens as their habitual lens or when you have exhausted all Soflmed options and feel the branded lens may be a good alternative clinically for the patient.

Please feel free to contact me should you have any questions.

Due to their temporary nature, locums are not expected to participate in the development of policies and protocols. What if you disagree with what's

going on the practice? What if spectacles are being handed over without fitting, or contact lenses are sold without a recent examination? Does the practice meet the POPIA and HPCSA requirements for record keeping?

There are several examples in the literature of locum pharmacists* who have denied patients emergency contraception on the basis of religious principles (e.g. Muslim or Catholic) when the facility and the regular pharmacist typically would have provided it. In the US, such refusal for personal reasons is allowed in most states, but the pharmacist must inform the patient where treatment can alternatively be sought. In some states, pharmacists are required to declare their position at the time of assuming employment if they intend to refuse specific medications for personal reasons. Washington state is an exception where the court has ruled that pharmacists may not refuse emergency contraception.

The authoring judge referred to the time-sensitive nature of the treatment, but the respondent pharmacy had several other pharmacies within a 5-mile radius that are prepared to provide the treatment. Clearly the judge had a public health message in mind. She had support on digital media where many commented that pharmacists' personal views have no place at work and that patients' health is paramount.

* Pharmacists are not regulated by the HPCSA, but by the SA Pharmaceutical Council.

Public Health?

A court in California has determined that parents may not prevent their children from being immunised on the basis of religion because immunisation is in the public interest. Even pro-immunisation parents are saying that treating children against the parents' wishes is a step too far. Is it different to force a pharmacist to dispense against their religion?

After a pharmacist in Canada refused to supply emergency contraception, their company apologised to the patient, saying that the refusal of emergency contraception by an anti-choice pharmacist (as opposed to pro-life – see what they did there?) was inappropriate. Would we question the same practitioner's religious convictions if they were trying to expose alleged child abuse? We may need to ask ourselves why there is a difference.

The American Pharmacists Association defends the rights of the pharmacist to refuse, to the extent that a provider may, for personal reasons, 'step **out** of the way', but not 'step **in** the way' of the patient. In SA, the MCC allows pharmacists to provide contraception or emergency contraception without Rx, provided they have the required additional training, or refuse to do so for personal reasons.

For a principal optometrist it would be a tough call to refuse CLs to a -6.00D patient who is known to overwear them when she 'pops in,' as they do, just before her driver's license test. Imagine taking that position as a locum and risk alienating a patient of the practice while you're standing in. Yet, I would argue that a locum has to be more clinically conservative, and even more scrupulously ethical exactly because they don't have the luxury of the greater scheme of things.

The *Health Professions Act* does not address the appointment of a locum directly, nor does it indicate whether a locum should be appointed as an employee or an independent contractor. The Department of Labour has recognised that employers may try to avoid their responsibilities in terms of the *Basic Conditions of Employment Act 75 of 1997* (BCEA) and the *Labour Relations Act 65 of 1995* (LRA) and have therefor declared non-standard employees vulnerable. These two Acts have been amended accordingly. In the LRA, for example, s200A now describes the rebuttable presumption that a worker is an employee, rather than a contractor:

(1) Until the contrary is proved, a person, who works for or renders services to any other person, is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:
(a) the manner in which the person works is subject to the control or direction of another person;

(b) the person's hours of work are subject to the control or direction of another person;
(c) in the case of a person who works for an organisation, the person forms part of that organisation;
(d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
(e) the person is economically dependent on the other person for whom he or she works or renders services;
(f) the person is provided with tools of trade or work equipment by the other person; or
(g) the person only works for or renders services to one person.
(2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act.

The purpose of the *Basic Conditions of Employment Act* is the protection of employees. In terms of this Act, employers are required to

- inform their staff of their rights (s30)
- keep records of their hours, work requirements, job description (s31)
- keep records of remuneration, including any deductions, overtime paid or bonuses, as well as length of employment (s33)

An employer with fewer than 5 employees has some administrative leniency, but all employees subject to the BCEA are entitled to benefits such as overtime pay, paid leave, maternity leave, family responsibility leave and sick leave. However, the BCEA does not apply to all employees. Some aspects do not apply to those who...

- Earn above the current earnings threshold of R205433/ year.
- Are commissioned sales staff who choose and work their own hours.
- Work less than 24 hrs/ month for that employer.

Employees have a recourse to the CCMA, contractors do not.

2. Professional Indemnity

Generally speaking*, professional indemnity insurance refers only to a specific practitioner. It certainly is not blanket cover for everyone and anyone working in the practice. Make sure your insurer knows that you locum. Here's why: Timeous notification is an important condition of cover. The moment you realise that a there may be a complaint against you, you must notify your insurers and not attempt to deal with the case yourself. As a locum, you may be unaware of trouble brewing and the practice owner/ principal may already have acted in a way that compromises you. They (and their insurance) are protecting the practice, without necessarily considering the implications to you. The patient decides whether to complain to the HPCSA, or sue. They may bring a suit against the individual practitioner, the practice or the locum. Their attorney, should one be involved, will encourage them to look to the practice owner, an obvious choice if the practice bears their name, but they are also more likely to be a person of means. Nothing stops the patient from naming all three in the suit. If they complain to Council and name the practice owner, the legal department's initial process will look at the named practitioner.

Vicarious liability is a principle according to which an employer can be held liable for the wrongful acts or omissions of an employee, provided the employee was acting within the scope of their employment and not embarking on a frolic of their own. Vicarious liability is a rare exception to the general requirement for proof to establish guilt. It is not necessary to prove that the employer was at fault.

* Some products will extend to cover the practitioner and the practice, but only in so far as the owner/ practitioner is named as respondent. This offers little/ no cover to a locum working in the practice.

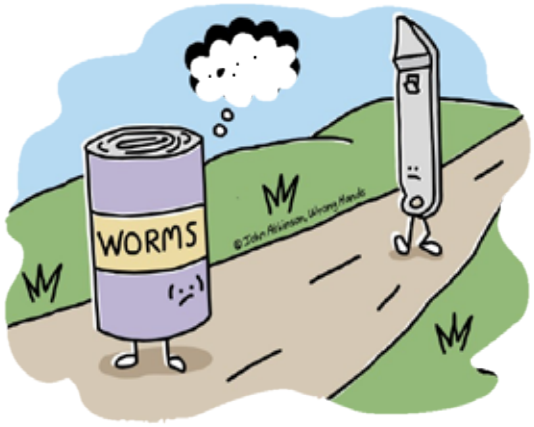
Practitioners can be sued for the wrongful acts or omissions of their staff. A practitioner would, for example, be liable if their billing clerk incorrectly claimed for services not rendered. Mistakes happen, of course, but consistent overclaiming with no benefit to the employee is assumed to be at the instruction of the employer. Should the errant billing clerk be pocketing the balance, however, that would constitute a 'frolic of her own.'

The HPCSA tends to look to the practice owner rather than the practitioner regarding complaints arising out of billing, even if the consulting practitioner is permanently appointed, unless it is clear that the practitioner has influence over the billing and claiming. Changing your work description to 'optometrist and practice manager' on your LinkedIn profile implies that you are indeed assuming those responsibilities, so don't blithely update your profile without clarification or definition in your contract.

Vicarious liability does not mean that the locum or employed optometrist escapes liability. When a complaint is received at Council naming the practice owner, they will be asked to respond. They can identify (with proof) that the employed or locum practitioner should be held responsible. Another recourse is for the owner practitioner to allow the matter to proceed, and recover the costs from the employed or locum practitioner, but bear in mind that the outcome of the matter will be recorded against the named practitioner, and may affect the principal's insurance and ability to practice abroad.

In *NK v Minister of Safety and Security 2005 26 ILJ 1205 (CC)* the principle was that '*damages should not be borne by employers in all circumstances, but only in those circumstances in which it is fair to require them to do so*.' A practice owner would generally not be liable for the wrongful professional acts of locum who acts independently, unless the owner authorised or intentionally participated in the wrongful conduct.

The HPCSA generally holds registered practitioners responsible for their own professional actions, unless the employer has been negligent in appointing someone incompetent, inexperienced or unqualified. Courts, however, will look at the relationship between the two and can hold the employer vicariously responsible. If the relationship is one of contractor/ principal, the principal cannot be held vicariously responsible. It is therefore in the interest of the employer to employ a locum as a contractor. What's more, and I won't open this very squirmy can of worms completely, the locum then assumes responsibility in terms of the *Consumer Protection Act*.



3. Communicate

A locum has to trust others to perform aspects of patient care while they are not there, and continue care that they didn't initiate. It is in the patient's best interest for the locum to ensure that systems are in place for such continued care. The locum must work constructively with colleagues and practitioners within the practice and the referral base to share or take over patients. Even more than in a permanent position, a locum needs to delegate with care, communicate effectively and share information appropriately.

4. Registration

Performing any act that falls within the scope of any profession regulated by the HPCSA is a crime. It's not worth being careless about your registration. Check it on the HPCSA website using iRegister.

Temporary Employment Service/ Agency

If you use a service to assist you with finding a locum, the employment relationship with that service must be determined by reference to the actual working relationship between them, always remembering the presumption of

employment applies. Section 53 of the Code of Good Practice describes a temporary employment service as a person or business who -

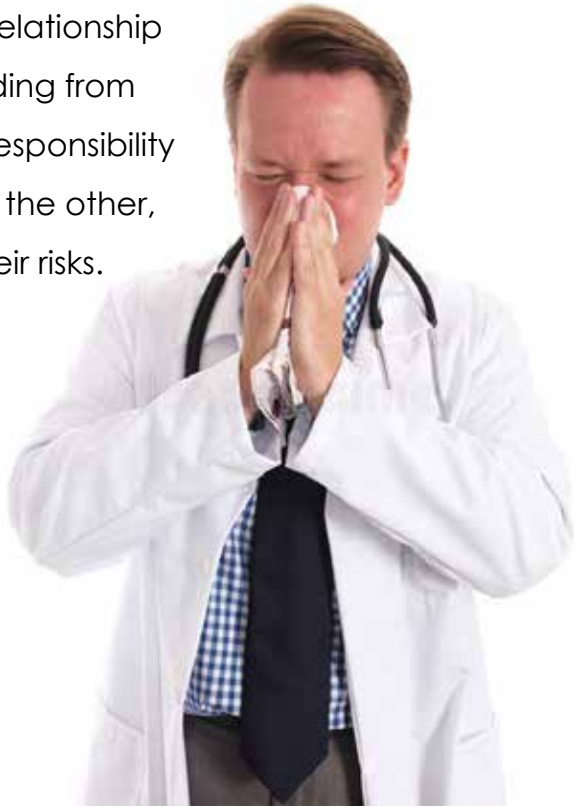
(a) procures or provides employees to perform work or render services for a client; and

(b) remunerates those employees.

In terms of the HPCSA, a practitioner can only be employed by another practitioner, so make sure that you may, in fact, be employed by the agency before you commit. The Health Professions Act s 54A offers one exception. Placement agencies and facilities such as LocumBase, for example, are not an employment service. It is indicative of a service agency/ employment relationship when the employer has an agreement with the agency, rather than the individual practitioner, and the locum's salary is paid to the agency, which in turn remunerates the locum.

Conclusion

Locums allow those of us in permanent positions to travel, learn, rest and recover while the business and clinical care in our practices continue uninterrupted. The Latin instruction to healthcare providers to practice self-care (cura te ipsum) and to protect themselves should include certainty in their contractual obligations and complete freedom to make the best clinical decisions in patient care. Employees (whether locum or temporary) should be clear about the nature of their relationship and the legal obligations that arise. Extending from labour and business on the one hand, to responsibility and substantial liability for patient care on the other, practitioners should know and mediate their risks. Employers must be clear about their responsibilities, and not incorrectly suggest to employees, whether locum, temporary or permanent, that their insurance, tax or risk situation is different to what it is.



Questions

1. The original *locum tenentes* were

a) Travelling Catholic priests

b) Crusaders

c) The king's tax collectors

2. Which statement is true?

a) Locums in the UK do not generally become involved in administrative work relating to the patient or practice.

b) The College of Optometrists has developed a distinct set of clinical protocols for locum optometrists.

c) Locum agencies may not substitute practitioners in the UK.

3. Business coaches often recommend that practitioners work more

a) In their business

b) On their business

c) Outside their business

4. A logophile is someone who...

a) Works as a locum

b) Collects logos

c) Loves words

5. Which is CORRECT? Tom is depressed because he can't find a locum for the weekend. Malu commiserates and over a few... well, many drinks, they agree and reduce to writing that Malu will locum for Tom.

a) Valid contract, provided it is properly signed.

b) Neither party has capacity to act while they are drunk.

c) Valid contract provided the time frame has been specified.

6. Which is CORRECT? Tom remains depressed and locumless until Sylvia offers to work for him on 6/8. Sylvia means 6 August and Tom means June 8.

a) No consensus so no contract.
b) Valid contract – Sylvia should be more careful.
c) Impossible to say whether a contract is created or not.

7. Tom finally appoints a locum (Sven) through an agency but unbeknownst to Tom or the agency, Sven had broken his arm just before they signed the contract and would not be able to work.

a) No contract. The agreement must be possible.
b) Valid contract, unless Tom asked for Sven in particular.
c) Impossible to say whether a contract is created or not.

8. Which statement is NOT correct?

a) Roman Dutch law is the basis of our common law
b) Indigenous law is the basis of our labour law
c) The employment contract is a variation on the contract of lease

9. What type of employment exists in this scenario: Zuku's friends have clubbed in to buy her an introductory course of 6 golf lessons. She employs Zama to work for her on the first Tuesday morning of each month while she completes her course.

a) Casual
b) Temporary
c) Non-standard

10. In the example in question 9, is Zama eligible for paid sick leave?

a) Yes
b) No
c) Only if they have a contract.

11. It is quickly apparent that Zuku loves golf and asks Zama to continue their monthly Tuesday arrangement indefinitely.

a) Casual
b) Temporary
c) Permanent

12. Zama prescribes extended wear coloured contact lenses for a patient, and the patient develops a corneal ulcer. Who is most likely to be held liable by the HPCSA?

a) Zama, as the practitioner.
b) Zuku, as the practice owner.
c) It depends on the wording of the employment contract.

13. Thea, the receptionist at Zuku's practice, claims for RGP lenses instead of the lenses supplied and a case of fraud is opened by the medical aid. Who is presumed liable?

a) Zama, as the practitioner.
b) Zuku, as the practice owner.
c) Thea – she made the mistake.

14. Which statement if WRONG? Vicarious liability is...

a) when the practice owner is liable for the acts of their employee
b) an unusual system in that the practice owner is presumed guilty of knowing of the acts of their employee (as opposed to the usual 'presumed innocent')
c) applies both to employees, piece workers and contractors.

15. Brian offers Carol a job. He uses lenses from his in-house lab exclusively, limiting Carol's choice to the range supplied by that lab.

a) Carol should ask for this restriction of her professional freedom to be specified in her contract.
b) Carol should not accept. This could amounts to exploitation.
c) Both a) and b) are correct.

16. Daniel works for Eva on a Thursday when she lectures binocular vision at the university. Who is responsible for paying Daniel's tax over to SARS?

a) Daniel
b) Eva
c) They should decide between themselves

17. Daniel dilates a patient and occludes the angle, resulting in a complaint at Council. In which circumstances is Eva liable?

a) Never: Daniel is liable for his own clinical acts
b) If Daniel is not registered with the HPCSA
c) If Eva pays for Daniel's professional indemnity insurance

18. Daniel's patient from number 17 is very angry about the pain and anxiety caused by the angle closure attack. He can sue...

a) Daniel and Eva
b) Daniel and his insurers
c) All of the above

19. The employment of an optometrist must be in the form of a written contract in terms of....

a) Basic Conditions of Employment Act (BCEA)
b) The Health Professions Council's Regulations
c) Both the BCEA and the Labour Relations Act (LRA)

20. Which statement is TRUE?

a) Turnover targets are potentially perverse incentives
b) Commission-based salaries are forbidden by the HPCSA
c) Turnover targets and commissions cause overservicing.