The law, negligence and sick doctors

Doctors often come to work when they are too unwell to care for patients adequately. Should a negligent error occur, sickness provides no legal defence. Doctors and trusts must recognize this and take appropriate action.

Patient care is very dependent on the doctors who provide that care. Doctors often feel obliged to work when unwell and, as a result of their sickness, may provide substandard care. This article addresses some issues related to this perception of obligation by means of a survey of 95 hospital doctors of varying grades. The legal position is explained, clarifying that sickness or exhaustion do not provide mitigation in a claim of negligence against a doctor.

Survey of doctors' experience of working while unwell

A total of 95 hospital doctors of varying specialities and seniority at a single UK teaching hospital were approached and all completed an anonymous questionnaire about working when unwell. Of these, 28 were consultants, 22 middle grades (registrars, staff grades and clinical fellows), 40 senior house officers (SHOs) or foundation doctors (at the start of the F2 year or very end of their F1 year) and five did not state their grade. The questions asked are listed in *Figure 1*.

As anticipated, most (82) of the 95 doctors had come into work at least once when unwell. Of more relevance to the issue under discussion, 35 (36.8%) doctors had worked when they were so unwell that they either felt unsafe or that they would provide care that was below a reasonable standard. The reasons given for working in these circumstances are shown in *Table 1*. It is worrying to note that three SHOs had experienced overt pressure from senior doctors to work while seriously unwell. Middle grades were the most likely to have come to work when feeling unsafe (11; 50%), possibly because of the added concern of missing training opportunities although this was only cited as a reason by one registrar.

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Have you ever come into work when unwell?

Have you ever come into work when feeling so unwell that you felt unsafe or concerned that your work may be below a reasonable standard?

If so, did you feel obliged to come to work and why did you feel obliged?

If you have not been off sick, would you feel able to take time off if:

a. you were unwell but felt safe to work?

b. you felt your medical judgement would be impaired?

Would you view exhaustion as a reason to call in sick if sufficiently severe?

Do you think there is an atmosphere in medicine which puts pressure on doctors to work when they are too unwell to do so?

If so, has the reduction in hours made this better or worse?

Are you aware of any doctor (yourself or a colleague) being coerced into working when that doctor felt too unwell to work?

Were you aware that sickness and exhaustion are no defence to a negligence claim?

Figure 1. Questions posed to doctors.

Of the doctors in the survey 62 (64.4%) would not feel able to take a day off if unwell but they felt safe to work. Eight stated that it would depend on their commitments and the availability of colleagues to cover. Although 73 (76.4%) stated they would feel able to take sick leave if they were so unwell as to feel unsafe or would provide a sub-standard service, alarmingly, 18 stated they would feel unable to take a day off under these circumstances. A further four stated that it would depend on the availability of cover.

Severe overwork or exhaustion was considered a valid reason to call in sick by 45 (47.4%) of the respondents, although notably fewer SHOs and foundation doctors (14; 35%) than middle grades (12; 54.5%) or consultants (15; 53.6%) found this an acceptable reason for absence from work. The consultants who felt that exhaustion was not a reason to be off work made comments to the effect that such issues should be addressed before they reached the point of such severity, whereas the more junior doctors' comments

Table 1. Reasons given in answer to question 3: why the doctor felt obliged to work when so unwell as to be unsafe or to perform below a reasonable standard (35 doctors had worked under these circumstances and some doctors gave more than one reason)

Reason given	Consultants	Middle grades	Senior house officers/ foundation doctors	Unstated grade	Total
No-one available to cover	4	8	6	1	19
Concern of burdening colleagues	6	5	6	2	19
Sense of duty or responsibility	2	0	1	1	4
Missed training opportunities	0	1	0	1	2
Feared of being thought to be 'slack'	0	0	2	0	2
Overt pressure from seniors	0	0	3	1	4
Guilt at leaving juniors unsupervised	0	0	1	0	1

included that they were 'supposed to be able to cope with the workload' and a fear that they would appear 'pathetic' to their colleagues.

Seventy five doctors (78.9%) thought there was a definite atmosphere in medicine which put pressure on doctors to work when unwell. This opinion was held most strongly by the lower grades (31 (77.5%) of SHOs or foundation doctors and 19 (86.4%) middle grades compared with 20 (71.4%) of consultants). Fifty two doctors expressed an opinion regarding the effect of the shift system. Of these, nearly half (22; 42.3%) felt the shift system and reduction in hours had made this pressure worse (as there are fewer doctors available), 17 (32.7%) felt that it was better and 13 (25%) felt that there was no change.

A total of 25 respondents (26.3%) were aware of a doctor (themselves or a colleague) who had been coerced into working when they felt too unwell to so do. Although this is concerning, it is interesting to compare this to the 75 who perceived an atmosphere of pressure to work when sick. The large discrepancy in these two figures would suggest that the pressure to work when sick is either largely a misperception or originates from doctors themselves (as a result of guilt at loading work onto colleagues, for example) rather than their managers or seniors.

Finally, the doctors were asked whether they were aware before the questionnaire that sickness and exhaustion provide no legal defence to a charge of negligence. Overall 60 (63.2%) answered that they were. As one may expect, a larger proportion of consultants (24; 85.7%) than middle grades (8; 36.4%) were aware of this. However, 25 (62.5%) of SHOs and foundation doctors answered this question in the affirmative. This may reflect an increasing awareness of medicolegal issues and possibly more teaching on such subjects at medical school and in SHO and foundation teaching programmes. It should be noted, however, that over 30% of doctors answered no to this question and therefore may have felt they could rely on their sickness as a reason for underperformance should they make a negligent error.

Of the 60 doctors who were aware that sickness is no legal defence to negligence, 21 (35%) had worked when so ill as to feel unsafe or below a reasonable standard and eight (13.3%) would still feel unable to take sick leave in those circumstances. A further four (6.7%) felt they could only not come to work if there was sufficient cover, despite the fact they judged themselves to be unsafe or unable to work to a reasonable standard.

Discussion

This survey confirms that doctors will come to work when unwell: this is not surprising as most of the working population (whatever their job) will have gone to work with some degree of sickness. The key, especially when the job involves the care of others, is being aware of when one is unsafe as a result of illness and acting on this. Alarmingly, a proportion of doctors will still work when too unwell to do their job adequately. Aside from practical and moral issues, by coming to work and being involved in patient management, the sick doctor has undertaken a duty of care to any patient he/she treats. If harm occurs to that patient as a result of the doctor's sickness then the doctor is potentially open to charges of negligence.

The law may have sympathy with sick doctors but it places more importance on the patient's right to a reasonable standard of care. This was made clear by a famous case in the 1960s. Three men became unwell with copious vomiting and attended an accident and emergency department [Barnett *v* Chelsea and Kensington Hospital Management Committee 1969]. Unfortunately, the casualty officer was unwell and when contacted by the nurse initially assessing the patients he replied 'Well, I am vomiting myself…Tell them to go home and go to bed and call in their own doctors…' Although the hospital had a clear duty of care to the three men as the emergency department was open and staffed, the doctor had also undertaken a duty of care by giving advice. The three men left the hospital and one died several hours later from arsenic poisoning.

The judge found that the casualty officer was negligent and had failed in his duty of care. Although the doctor's own sickness was not the key point in the case, the judge expressed some sympathy for the doctor by stating that '[i]t is unfortunate that he was himself at the time a tired and unwell doctor…' but this did not affect the judge's finding. The ultimate claim for negligence failed, however, on the basis that the death was likely to have occurred even if the patient had been seen and admitted.

The fact that any negligence may be an occasional lapse and that the doctor would normally provide good care is no defence (Brazier, 2003). However, the employing trust will almost always be vicariously liable for the negligence of its employee doctors, provided they are acting in the course of their employment [Cassidy *v* Ministry of Health 1951] so it will be the trust that is liable in court and financially for any damages awarded (this will not apply to GPs and those in private practice).

Although negligence proceedings will still be very distressing for the doctor concerned, vicarious liability provides some reassurance for doctors exhausted by working the hours which they are required to work by the trust. However, the doctor who chooses to stay beyond his/her contracted hours (for example, for a daytime operating list when working night shifts) may well not be able to depend on vicarious liability, although this has yet to be tested.

Doctors do and will get sick during their working lives. It is part of their professional responsibility to ensure that patients do not suffer as a result. The General Medical Council's *Good Medical Practice* (2006) dictates that a doctor registered with the General Medical Council must make the care of the patient his first concern. This must take priority over any feelings of coercion to work when unsafe or feelings (for example) of guilt of adding to the workload of colleagues. Doctors must also recognize and work within the limits of their competence (General Medical Council, 2006). Sickness and tiredness undoubtedly affect competence and doctors are obliged to consider this. Therefore in order to protect their patients from harm and themselves from litigation, the individual doctor must make a careful decision when unwell or exhausted as to whether it is necessary to call in sick – it is his/her duty to refrain from work if too unwell to provide reasonable care.

Conversely, there is no obligation on the part of a sick doctor to fulfil clinical duties: the trust has a legal duty to ensure that safe systems are in place to cover sick leave. Two doctors in the survey stated that they felt a sick doctor was better than no doctor. This is a dangerous concept when that sickness is severe enough to threaten patient safety and such a position has no legal or regulatory support.

Conclusions

Seniors and hospital managers have a responsibility to promote an atmosphere in which it is acceptable to be off sick when this is appropriate. Expecting doctors (explicitly or by not providing adequate cover) to work when too sick to do so leaves doctors and trusts exposed to negligence claims and their patients exposed to harm. BJHM

The author would like to thank all the doctors who openly described their experiences and opinions in the questionnaire.
Conflict of interest: none.

Barnett v Chelsea and Kensington Hospital Management Committee [1969] 1 QB 428
Brazier M (2003) *Medicine, Patients and the Law.* 3rd edn. Penguin, London: 157
Cassidy v Ministry of Health [1951] 1 All ER 574
General Medical Council (2006) *Good Medical Practice.* General Medical Council, London (www.gmc-uk.org/guidance/good_medical_practice/duties_of_a_doctor.asp accessed 29 August 2007)

KEY POINTS

- A sick doctor is not better than no doctor.
- Sickness is not a legal defence for negligence.
- Doctors must take responsibility for not working when they are too unwell to provide adequate care.
- Trusts must not pressurize doctors into working when unsafe and must provide adequate cover arrangements.

Dawkins tackles unreason

It was no surprise that I was completely on Richard Dawkins' side as he went after water dowsers, astrologers, and a variety of other psychic peddlers in Channel 4's *The enemies of reason* (13 August). But I do agree with the various television critics the following day, whose turn of phrase underlined what was wrong with the programme. Fish and barrels (in two newspaper), sledgehammers and nuts, lambs and slaughter, the obvious observation that the people he was confronting were 'bonkers': to quote the *Times*' Andrew Billen, 'If Oxford University's Professor for the Public Understanding of Science could not humiliate this lot, there would be something wrong. There wasn't and he did.' Billen's excellent suggestion was that Dawkins should be making a 13-part series on natural selection rather than gunning for intellectual inferiors caught in a media spotlight. I mean, is it worth anybody's time at all to discuss the spiritual 'rockness' of a rock?

Disappointingly, there was little of the evidence on which Dawkins laid such emphasis. Too much was conversational interchange, in which the challenged psychics and mumbo-jumblers made all too easy excuses, which were variations on 'science can't explain everything'. Neil Spencer, the *Observer*'s astrologer (I find it difficult to write that phrase without gagging), simply copped out with 'It's a deep dark mystery'. It's far less than that; it is sheer nonsense that the position in the sky of Saturn or any other planet can have any effect at all on a baby emerging from its mother's womb. There are far more important things to get upset about than belief in that sort of thing, such as much of complementary and alternative medicine, which Dawkins is tackling in a second programme. I hope that programme contains a real examination of evidence, rather than the usual soundbite disagreements and Dawkins' slightly bemused expression as he watches people stroking aura fields.

The best section of *The enemies of reason* was the randomized double-blind trial of water dowsing at a psychics fair. Dowsers were asked to spot which of six boxes contained a bottle of water, and did no better than chance. Some appeared quite shocked that they had not succeeded, but all those interviewed afterwards soon found reasons for why the experiment was invalid. We should have had more of this, although I don't suppose the dowsers would have changed their minds.

As Dawkins said, a large source of superstition is the human failure 'to accept that things just happen': how readily can an intelligent, affluent, middle-class professor understand how somebody who is less well endowed views the world? It doesn't mean we should think those views are, citing postmodernism, correct; but it perhaps gives us the answer that it will take more than just a few television programmes to set things right.

Dawkins' book *The God Delusion* is currently the fourth best-selling book on Amazon, but overall books on astrology, spirituality and the like outsell science books by three to one. I couldn't find a review of *The enemies of reason* in the *Daily Mail*, but it did have a two-page extract from a book written by a blind psychic. BJHM

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