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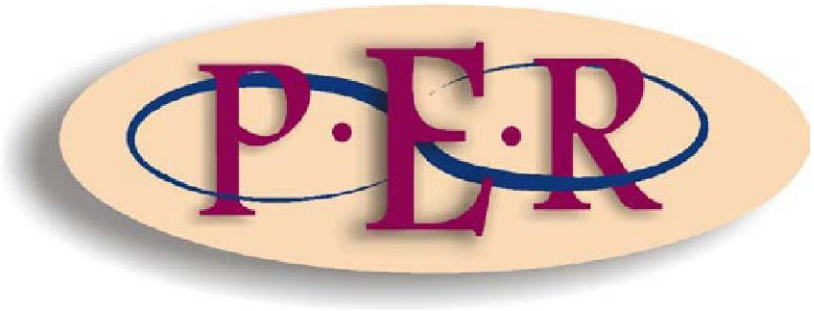
ISSN 1727-3781



2013 VOLUME 16 No 4

http://dx.doi.org/10.4314/pelj.v16i4.3

USING A *LOCUM TENENS* IN A PRIVATE PRACTICE♣

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1 Introduction

The words *locum tenens* originate from Latin meaning "one holding a place".[1] This phrase dates back to the middle ages when the Catholic Church provided clergy to parishes where there was no priest available. These travelling clergy were called *locum tenens*, placeholders for the churches they served. In later years the designation was used by doctors ("principals") who needed a person to temporarily fill their positions, should they not be available for a short period of time. It was only during the 1970s that the term was generally used by medical facilities where there was a shortage of medical doctors.[2] Originally the staffing shortages were largely in sparsely populated areas, as high-income positions in large cities drew doctors away from the rural communities. Today *locum tenentes* are in demand nearly everywhere, whether in a city or a small town, when a doctor is not personally available to practice. Doctors in private practice may make use of a *locum* for several reasons; to take study leave or acquire new skills, to attend foreign or local congresses, or just for vacation leave.

It is not always possible to fill these gaps internally and hence the need for *locums*. Most of the time *locums* are appointed by medical practitioners without thinking of the legal consequences of the appointment. In legal terms when something goes wrong either with a patient or with the practice, it is very important to establish

♣ We are indebted to the anonymous peer reviewers for their valuable comments on an earlier draft of this article.

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1 Jaganathan 2008 *Bulletin* 2601.

2 Applegate 2012 voices.yahoo.com.

whether a *locum* was appointed as an employee or as an independent contractor for the period that he or she has to stand in for the principal.

The focus of this article is only on medical practitioners in a private practice making use of a *locum*. The difference between an employee and an independent contractor is highlighted as well as the legal consequences following each type of appointment. If a *locum* is appointed as an employee, the rights of employees under the *Labour Relations Act*[3] and the *Basic Conditions of Employment Act*[4] could come into play depending on the amount of remuneration the *locum* will receive. A further aspect to take cognisance of when appointing a *locum* as an employee is the possible application of the doctrine of vicarious liability, according to which the medical practitioner himself or herself could be held liable for the unlawful and/or negligent conduct of the *locum*. This danger exists to a lesser extend if a *locum* is appointed as an independent contractor, as vicarious liability will be applicable only if the doctor appointed an incompetent *locum* or where a *locum's* actions caused prejudice to third parties.[5]

Two pro forma contracts that a medical practitioner in private practice appointing a *locum* himself or herself can use are included. These contracts are analysed and recommendations are made to improve the current options to the benefit of both parties. A medical practitioner can also make use of an agency or a temporary employment service to provide the practice with a *locum* for the period he or she will not be available. The legal consequences in this regard are highlighted only to the extent that they overlap with the test of an employee-employer relationship, but on a different level.

Neither of the two pro forma contracts addresses the effect of the *Consumer Protection Act*[6] on the medical profession. This aspect is discussed very briefly,

3 *Labour Relations Act* 66 of 1995 (LRA).
4 *Basic Conditions of Employment Act* 75 of 1997 (BCEA).
5 See *Chartaprops v Silberman* 2009 30 ILJ 497 (SCA).
6 *Consumer Protection Act* 68 of 2008.

mainly to indicate the role of the *locum* in the application of the Act in a medical context and how it should be contractually addressed.

2 The *Health Professions Act* 56 of 1974

The *Health Professions Act* does not address the appointment of a *locum* directly; neither does the Act indicate whether a *locum* should be appointed as an employee or an independent contractor. Section 9 of the Ethical Rules of Conduct for Practitioners registered under the *Health Professions Act*, 1974 determines the following regarding *locums* - without prescribing that the appointment of the *locum* should either be as an employee or as an independent contractor:[7]

> A practitioner shall employ as a 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, only a person –
> (a) who is registered under the Act to practise;
> (b) whose name currently appears on the register kept by the registrar in terms of section 18 of the Act; and
> (c) who is not suspended from practising his or her profession.

Section 18 of the same Rules states that:

> (1) A practitioner shall accept a professional appointment or employment from employers approved by 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.

The Ethical Rules to the Act thus determine that a *locum* cannot be appointed for a period exceeding six months.[8] The *locum* should also be registered as a health practitioner with the Health Professions Council of South Africa (HPCSA) and the contract of appointment should be in writing. If a member of the HPCSA would like to see such a contract of appointment, it should be available. Thus, neither the Act

7 GN R717 in GG 29079 of 4 August 2006 as amended by GN R68 in GG 31825 of 2 February 2009 and GN R654 in GG 33400 of 30 July 2010 (Ethical Rules of Conduct for Practitioners).

8 See also McQuoid-Mason and Dada *A-Z of Medical Law* 259-260.

nor the Ethical Rules prescribes how a *locum* should be appointed; as an employee or an independent contractor.

It is up to the medical practitioner (principal) and the *locum* to determine the contents of the contract of employment. The important reason to distinguish between an employee and an independent contractor is because the law attaches different consequences to either appointment. If a *locum* is appointed as an employee, labour legislation will be applicable to the contract of employment, which will not be the case where an independent contractor is involved.

Case law addressing the appointment of a *locum* by a medical practitioner does not exist, but it is interesting to note that in the "Notice concerning the conditions of employment of dental technicians who are employees"[9] section 1 describes a *locum tenens* as "an employee who is employed to relieve a regular employee or dental technician contractor for any period during which a regular employee or dental technician is absent, on sick or other leave".

Disciplinary action by the HPCSA has been taken against some medical practitioners who allowed unqualified or unregistered persons to act as *locum tenens* (whether appointed as employees or independent contractors), resulting in hefty fines and/or temporary suspension.[10] Medical practitioners should accordingly also take care when appointing *locums* to ensure that they are duly qualified and registered.

If no contract was concluded stipulating whether the *locum* is an employee or an independent contractor, this complicates matters if a dispute arises. In such an instance the courts will fall back on the reality test[11] to determine the position of the

9 BN 13 in GG 35015 of 7 February 2012 (Notice concerning the conditions of employment of dental technicians who are employees).

10 HPCSA Date Unknown www.hpcsa.co.za. What is interesting about the two cases adjudicated by the HPCSA is that the first doctor was fined R20 000 for employing a *locum* while knowing that he was not registered as a medical practitioner. The second doctor was fined R32 500 for issuing unprofessional medical certificates and the employment of a *locum* who was registered for public service only and not for private practice. These sanctions are quite severe if other transgressions and their penalties are compared to it.

11 *Denel (Pty) Ltd v Gerber* 2005 26 ILJ 1256 (LAC).

locum. The reality test is the test currently applied by the courts to determine whether an employee or an independent contractor is involved in a dispute. Previously the courts relied on other common law tests but they proved to be inadequate over time.

3 Employee or independent contractor?

3.1 Common law

The common law views a contract of employment as an ordinary contract between two parties. It further treats a service contract as a subdivision of a contract of lease. In Roman times there were three different contracts of lease namely:

(a) *locatio conductio rei* (the lease of a thing);
(b) *locatio conductio operarum* (lease of work – the contract of employment as we know it today); and
(c) *locatio conductio operis* (the leasing of piece work – an independent contractor today).[12]

Common law defines a contract of employment as an agreement between two parties in terms of which one of the parties (the employee) undertakes to place his or her personal services at the disposal of the other party (the employer) for an indefinite or determined period, in return for a fixed or ascertainable remuneration and which entitles the employer to define the employee's duties and to control the manner in which the employee discharges them.[13] A contract for a certain type of work for a specified time is defined as a reciprocal contract between an employer and an independent contractor.

An individual contract of employment 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

12 Du Plessis, Fouche and Van Wyk *Practical Guide to Labour Law* 11.
13 Grogan *Workplace Law* 29.

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.[14] There can be no legally binding relationship between the parties *qua* employer and employee unless the parties have entered into a valid contract of employment.[15]

It might not be clear whether the contract between the parties is an employer-employee contract or a contract between an employer and an independent contractor. Because of the possibility of such confusion the courts have formulated certain tests in order to ascertain the real relationship between contractual parties. These tests are the control test, the organisational test, and the dominant impression test. The control test was first formulated in the case of *Colonial Mutual Life Assurance Society Ltd v Macdonald*[16] in which Chief Justice De Villiers 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.

This test proved unsatisfactory over time and more tests were identified, like the organisational test. According to this test one has to look at how integrated the person is in the organisation. In *SABC v McKenzie*[17] Myburgh JP said as follows:

> 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.

This test is vague as it is unclear how to determine the extent of integration. The Appellate Division (as it was then known) rejected this test as being too vague.[18]

14 Grogan *Workplace Law* 28-45.
15 *Borg-Warner SA (Pty) Ltd v National Automobile and Allied Worker's Union* 1991 12 ILJ 549 (LAC) 557 G-I.
16 *Colonial Mutual Life Assurance Society Ltd v Macdonald* 1931 AD 412 434-435
17 *SABC v McKenzie* 1999 1 BLLR 1 LAC.
18 *S v AMCA Services* 1962 4 SA 537 (A).

The third test was the dominant impression test. This test relied on various indications to determine whether there is an employer-employee relationship or not. In the case of the *Medical Association of SA v Minister of Health*[19] Zondo AJ said:

> The dominant impression test it seems, entails that one should have regard to all those considerations or indicia which would contribute towards an indication whether the contract is that of service or a contract of work and react to the impression one gets upon consideration of all such indicia… This is still unsatisfactory as is the question of how one decides whether a dismissal is fair or unfair and indeed, whether certain conduct is reasonable or unreasonable.

All three tests have now been rejected by the Courts and are therefore not used anymore. In their place the Labour Court has introduced the "realities test", which, while linked to the previous tests, takes a slightly different approach.

3.2 The reality test

The reality test was first described in the case of *Denel (Pty) Ltd v Gerber*[20] and has since been expanded upon and confirmed in other cases.[21]

If the contract between the medical practitioner and the *locum* stipulates that it is a contract of employment and the *locum* is therefore considered an employee of the principal, the reality test will not be necessary. It will be relevant only if there is either no written contract (or the contract is unlawful in terms of the HPCSA rules) or where the parties dispute their relationship. As stated earlier it is important to determine the basis of the relationship between a practitioner and *locum* as labour laws apply only to employers and employees and not to an independent contractor.

In order to understand the reality test it is necessary to refer to the *Labour Relations Act* 66 of 1996 (LRA) and the *Basic Conditions of Employment Act* 55 of 1998 (BCEA)

19 *Medical Association of SA v Minister of Health* 1997 5 BLLR 562 (LC) 569 F-G
20 *Denel (Pty) Ltd v Gerber* 2005 26 ILJ 1256 (LAC).
21 See *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* 2008 29 ILJ 2234 (LAC).

as well as the "Code of Good Practice: Who is an employee", Notice 1774 of 2006.[22] The Acts and the Code form the basis of the reality test (previously applied as the dominant impression test).

3.2.1 Labour legislation

The LRA defines an employee in section 213 as:

> (a) Any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive any remuneration; and
> (b) Any other person who in any manner assists in carrying on or conducting the business of an employer.

The BCEA defines an employee in the same way.

In 2002 amendments were made to the LRA and the BCEA by adding a provision to each Act creating a rebuttable presumption as to whether a person is an employee or not.[23] In order to prove that a *locum* is an employee of the principal the applicant (either the doctor/*locum*/or third party as the case may be) must demonstrate that:

> (a) the *locum* worked for or rendered services to the person cited in the proceedings as their employer; and
> (b) any one of the seven listed factors in the Acts is present in their relationship (principal and *locum*).

The seven factors are:

> (a) the manner in which the person works is subject to the control or direction of another person;
> (b) the persons 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 the 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;

22 Gen N 1774 of GG 29445 of 1 December 2006 (Code of Good Practice: Who is an employee).
23 Section 200A of the LRA and s 83A of the BCEA; see also s 12 of the Code of Good Practice.

(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.

It is important that the principal and the *locum* appointed by him or her should be clear whether the *locum* is appointed as an employee or as an independent contractor. They should also comply with whichever two of the options they have chosen, in order to avoid the application of the reality test from being applied,[24] as the presumption referred to above applies, regardless of the form of the contract. In other words, merely stating that a *locum* is not an employee or is an independent contractor is not conclusive proof of the status of the *locum*.[25]

The fact that a *locum* satisfies only one of the seven factors does not establish that he or she is in fact an employee. However, the onus then falls on the principal as the employer to lead evidence to prove that the *locum* is not an employee but in actual fact an independent contractor. This is important, as will be indicated when vicarious liability is discussed.

Cognisance should also be taken of the fact that section 200A of the LRA and section 83A of the BCEA apply only to employees earning less than the threshold determined from time to time by the Minister of Labour in terms of section 6(3) of the BCEA. The threshold amount is currently R183 008-00 per annum.[26] This means that a *locum* earning approximately R15 500-00 per month will not have all the rights an ordinary employee has under the BCEA or the LRA.

If a *locum* is appointed as an independent contractor, labour legislation does not apply at all, and the doctrine of vicarious liability becomes applicable only if an incompetent *locum* is appointed or, as stated earlier, the *locum* acts in such a way

24 For an application of the reality test, see *Denel (Pty) Ltd v Gerber* 2005 26 ILJ 1256 (LAC).
25 See alsoss 16 and 17 of the Code of Good Practice.
26 GN R429 in GG 35404 of 1 June 2012 (Determination of earnings threshold).

as to cause prejudice to third parties.[27] The *locum* as an independent contractor is hired solely to provide physician services as a substitute physician for a limited period of time. Whilst assigned office hours may exist, such physicians (independent contractors) exercise their own professional judgement in treating patients.[28] A truly independent contractor:

- will be a registered provisional taxpayer;
- will work his or her own hours;
- runs his or her own business;
- will be free to carry out work for more than one employer at the same time;
- will invoice the employer each month for his or her services and be paid accordingly;
- will not be subject to usual "employment" matters such as the deduction of PAYE or UIF from his or her invoice, will not receive a car allowance, annual leave, sick leave, a 13th cheque etc.[29]

4 Vicarious liability

Vicarious liability is a doctrine of liability without fault, meaning one person is held liable to a third party for the unlawful act of another.[30] In the context of an employment relationship, the employer can be held liable for the unlawful acts of an employee – or the doctor who employs a *locum* as an employee can be held liable for the unlawful or unprofessional acts of the *locum*. This is contrary to the general principle that there can be no liability without fault. Calitz[31] quotes Flemming, who argues that the doctrine is based on policy considerations, the most important of which is "the belief that a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses

27 As Lord Bridge observed in *D & F Estates Ltd v Church Commissioners for England* 1989 AC 177 208: "[I]t is trite law that the employer of an independent contractor is, in general not liable for the negligent or other torts committed by the contractor in the course of the execution of the work".
28 Russel and Thornton 2010 *Proc (Bayl Univ Med Cent)* 315.
29 Israelstam Date Unknown www.labourguide.co.za (1).
30 Calitz 2005 *TSAR* 215.
31 Calitz 2005 *TSAR* 215.

incurred in the course of the enterprise".[32] This is, in other words, a form of strict liability.[33] The requirements for an employer's vicarious liability are as follows:

(a) there must be an employment relationship;
(b) the employee must have acted unlawfully;
(c) the act must have led to a third person suffering damages; and
(d) the act must have taken place within the scope and course of employment.[34]

The requirement that creates the biggest problem is the last - that the employee must have acted within the scope of employment.

Courts in Canada, the United Kingdom and Australia have moved away from a strict interpretation and applied a "close connection" test in order to get more clarity on what "scope of employment" entails.[35]

This trend was followed by the Constitutional Court in South Africa in the case of *NK v Minister of Safety and Security* 2005 26 ILJ 1205 (CC). In this case the Constitutional Court held that the common law doctrine of vicarious liability should be developed to reflect the spirit, purport and objectives of the *Constitution*.[36] The Court further contended that it is not merely a factual matter of whether a certain act falls within the scope of employment, as this would isolate the common law rules from the pervasive normative influence of the *Constitution*.[37] The Court further added that there is also a countervailing principle, namely 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".[38]

The Court deduced that there must be a sufficient link between the acts of the employee and the business of the employer even if the employee does something in

32 Calitz 2005 *TSAR* 215.
33 Manamela 2004 *SA Merc Law* 125.
34 Neethling, Potgieter and Visser *Law of Delict* 373. See also McQuoid-Mason and Dada *A-Z of Medical Law* 433-434.
35 Calitz 2007 *Stell LR* 451.
36 The *Constitution of the Republic of South Africa*, 1996.
37 *NK v Minister of Safety and Security* 2005 26 ILJ 1205 (CC) para 22 (the *NK* case).
38 *NK* case para 21.

his or her own interest. The Court reasoned that this connection contained two elements, namely a factual as well as a legal question, resulting in a mix of fact and law.[39]

The above mentioned case illustrates issues that are worthy of cognisance regarding the relationship between a principal and a *locum*. In other words the close connection test that was formulated in the case of *NK* could also be applied concerning the liability of a doctor for the acts of a *locum* if the *locum* was appointed as an employee. The court in the *NK* case stated that each case must be considered independently and it should be established whether a constitutional right had been infringed; if so the employer would be liable. But the court went further to state that even in cases where no constitutional rights have been violated but the *boni mores* of society have been damaged, an employer may be held liable. Calitz[40] observed the following concerning the *NK* case:

> While it is laudable that the Court did away with a test that is purely factual and acknowledged that it is in the end a policy decision of whether the employer should be held liable, the guidance given how to decide the matter is confusing.[41]

It thus seems a much safer option for a medical practitioner to appoint a *locum* at all times as an independent contractor and never as an employee. If the *locum* is appointed as an employee, the medical practitioner who hired or employed the *locum* may very well be liable for any improper acts or omissions by the *locum*.

39 *NK* case para 45.
40 Calitz 2007 *Stell LR* 462.
41 Calitz 2007 *Stell LR* 462.

5 Examples of contracts for *locums*[42]

There is no prescribed form or specific contract for the appointment of a *locum* that is regulated by the HPCSA, but a person can practise as a *locum* only if he or she is registered in the category "independent practice" in terms of the *Health Professions Act.*[43] The following example is a contract for the appointment of a *locum,* which is available on the website of the South African Medical Association (SAMA) (emphasis added).[44]

AGREEMENT MEDICAL PRACTITIONER & *LOCUM TENENS*

Dr. _____(full name)(hereinafter referred to as "The Doctor")

Of _____practice address)(hereinafter referred to as "The Practice")

and

Dr. _____(full name)(hereinafter referred to as "The *Locum*")

Of _____ (practice or other address)

1. I, the undersigned, _____ a registered *medical practitioner/ specialist (registration number _____) am registered in the following profession _____ (GP, Specialist- …)

2. I undertake to work at the practice as from _____ and including_____.

3. I will be practising full time at the practice daily between _____ and _____

weekends between _____ and _____ thereafter on call.

4. *I understand that **I will work as an employee** of the doctor and will not render the doctor, his partners/ associates or the practice liable for any of my actions whatsoever, arising from my involvement with the practice.

OR

42 See also Strauss *Doctor, Patient and the Law* 79-81 for guidelines for the appointment of a *locum.*

43 Moyo E-mail.

44 SAMA Date Unknown www.samedical.org.

* I understand that **I will work as an independent contractor**, and as such will pay the doctor the amount of R _____ being the rental for premises and the use of equipment, for the time I work as a *locum* in the practice.

5. I am a member of the Medical Protection Society holding full cover for private work and confirm that I will be held individually liable for any legal claims emanating from my actions as a *locum* during the said period.

6. *I will receive as remuneration the amount of R _____ payable monthly/weekly/ daily until termination of the contract. I understand that with tax (PAYE) deduction, the final amount will be R _____ and this will be the full and final settlement of remuneration under this contract.

OR

The amount of R _____ will be payable to me by the doctor for professional services rendered by me, and **being an independent contractor**, I undertake to pay income tax as necessary.

7. I undertake not to practise medicine within a radius of _____ km of the practice for _____ months/years after termination of the contract, except in the capacity of a *locum tenens* for another practice.

8. I shall do no remunerative work outside the practice while this contract is in existence unless the doctor/s has/have consented in writing thereto.

9. I undertake not to disclose any information regarding the patients or the practice.

10. Furthermore, I undertake to leave the consulting rooms and accommodation, if provided, in the same condition in which I found it at the beginning of my term as *locum tenens.*

11. I have disclosed to the practice all material information regarding my registration as a medical professional, my competence and field of practice, including any impairment as provided in section 51 of the Health Professionals Act of 1974.

12. Should this agreement be cancelled by either of the parties, not within a reasonable period of time, the defaulting party can be held liable by the other party for the payment of an amount of R500, 00.

I choose as my *domicilium citandi et executandi* the above mentioned address.

This duly signed at _____ on the _____ day _____ of 20____	
Doctor_____	*Locum tenens*_____
Witness 1_____	Witness 1_____
Witness 2_____	Witness 2_____
* Delete where applicable.	

Section 1 to 3 of the SAMA contract above pose no problem as the *locum* has to indicate if he or she is registered with the HPCSA, and the period for which the appointment will be valid is stipulated: it may not be for more than six months. In clause 4 there is a choice between being appointed as an employee or an independent contractor, but what was said earlier concerning the realities test should be remembered, in that the parties cannot just choose an option and leave it at that. They should make sure that they will pass the realities test should it be necessary to determine the real relationship between the parties. If the employee option is chosen there is a further stipulation: that the doctor, his partners/associates or the practice will not be liable for any actions of the *locum* whatsoever arising from his or her involvement with the practice. This is meant to cover the doctor against being held vicariously liable, as discussed above, yet it is doubtful that a person can purport to waive the rights of third parties to sue the employing doctor on the basis of vicarious liability in this way. It is recommended that the employing doctor should actually take out insurance to cover his or her liability in case of damage claims from patients who are treated by an employed *locum*. Should the employer (the doctor) be responsible for damages caused by the *locum* the recourse he or she has against the *locum* is not addressed at all.

Clause 8 of the contract is a strong indicator of an employment relationship and if the *locum* or principal wants the *locum* to be purely an independent contractor, this clause should not be part of the contract. Lastly, the contract makes no mention of the effect of the *Consumer Protection Act* (discussed below) and the consequences it might have on medical practitioners. To include a clause to this effect might be advisable and in the interest of the *locum* when signing a contract.

The second prototype of a contract is available on the website of LexisNexis. This contract also does not specifically state whether a *locum* is an independent contractor or not.

Medical or dental practitioner acting as *locum tenens*[45]

MEMORANDUM OF AGREEMENT

entered into between: (*name of medical or dental practitioner*)
of (*address*) (hereinafter called "Dr X")
and
(*name of locum tenens*)
having its principal office at (*address*) (hereinafter called "Dr Y")

WHEREAS Dr X is at present carrying on practice as a general medical practitioner (*or* dental practitioner *or* specialist in (*speciality*)) at (*address*);
AND WHEREAS Dr X intends (*or* is obliged) to be absent from the said practice for (*specify period*);
AND WHEREAS Dr Y has agreed to serve Dr X as *locum tenens* in the said practice during the absence of Dr X;
NOW THEREFORE IT IS HEREBY AGREED as follows:

1 Service as *locum tenens*

Dr Y shall serve Dr X as *locum tenens* in Dr X*'s* practice at (*place and address*) for a period of (*specify*) ("the said period").

2 To attend diligently to patients

During the said period Dr Y shall attend diligently to all Dr X*'s* patients in the said practice and in particular shall attend at Dr X*'s* surgery (*or* consulting rooms) at (*address*) during Dr X*'s* usual (*or* advertised) consulting hours (*or specify days and hours*) and shall be on call at all reasonable times for the benefit of Dr X*'s* patients.

3 Remuneration

Dr X shall pay to Dr Y for his services as aforesaid a salary of R..... (.....RAND) per (*specify, for example* month) during the said period (*or specify other*

45 Horak 2004 www.lexisnexis.ac.za.

arrangements for remuneration).

4 Free house

This clause is optional.

5 Travelling expenses

This clause is optional.

6 Purchases on credit

Dr Y shall not in any way pledge the credit of Dr X either in relation to the said practice or otherwise, save that Dr Y may during the said period order on Dr X*'s* account with (*specify suppliers*) such medicines, drugs and other like articles (*specify, if necessary*) as are reasonably required for carrying on the said practice.

7 Liability of *locum tenens* for damages

7.1 Dr Y warrants that he will carry out his duties in terms of this agreement with due skill and care.

7.2 In the event of Dr X becoming liable to pay any sum as damages to any patient or other party in respect of any claim made by such person as a result of, or arising from any act or acts of negligence or misconduct on the part of Dr Y committed in the course of carrying out such duties, Dr Y undertakes to reimburse Dr X the amount of such damages and any reasonable legal costs incurred by him in defending or in connection with any such claim.

7.3 Dr X may compromise any such claim after consultation with Dr Y. The provisions of clause 7.2 hereof shall apply in respect of any sum paid by Dr X in terms of such compromise.

8 Extension of period of agreement

Before the conclusion of the said period, the period of this agreement may be extended by agreement in writing between the parties either for a fixed period or for an indefinite period. In the latter event the agreement shall be terminable on one month's notice in writing given by either party to the other. During any such extended period all the terms and conditions of this agreement shall apply.

9 Non-disclosure of confidential information

Dr Y undertakes that he will not during the period of the agreement or at any time thereafter disclose to any person any professional secrets of Dr X or any information in respect of his patients or practice.

10 Restraint clause

Dr Y undertakes that he will not during the said period or any extended period of this agreement or within a period of 5 (FIVE) years thereafter, either directly or indirectly and either alone or in partnership, carry on practice as a general medical practitioner (*or* dental practitioner *or* specialist in (*speciality*)), or assist directly or indirectly any person to carry on such practice, or be employed by any person carrying on such practice (otherwise than as a specialist as defined by the South African Medical and Dental Council or in the full-time employment of municipal, provincial or government authorities) at any place within a 10 (TEN) kilometre radius of (*place*) save and except with the consent in writing of Dr X, his executors, administrators or assigns of his said practice.

11 Penalty for breach

11.1 If Dr Y shall commit any breach of this agreement and in particular clause 10 hereof, he shall pay to Dr X or his executors, administrators or assigns of his practice for each such breach the sum of R..... (.....RAND) (*Or* the sum of R..... (.....RAND) for each month during which such breach continues).

11.2 Any single act in the exercise of the calling of a medical practitioner (*or* dental practitioner *or* specialist in (*speciality*)) shall be deemed to be a breach within the meaning of this clause.

11.3 The exercise of the remedy provided in clause 11.1 hereof shall not operate to prevent Dr X or his executors, administrators or assigns of his practice from obtaining an interdict restraining Dr Y from committing any breach or apprehended breach of this agreement.

SIGNED at (*place*) on this (*day, month, year*)

Witnesses:

1

2

(*Signatures of witnesses*) (*Signature of Dr X*)

SIGNED at (*place*) on this (*day, month, year*)

Witnesses:
1
2
(*Signatures of witnesses*) (*Signature of Dr Y*)

Although this contract is better than the previous one because of the detailed clauses it still lacks clarity. Clauses 2 and 3 are indications of an employment relationship. Clause 7 addresses the liability of the employer for the unlawful actions of the *locum,* but only as far as recourse is applicable. This means that if the employer (the doctor/principal) is found to be vicariously liable for damages arising from the unlawful actions of the *locum*, he or she could claim back the amount of damages and any reasonable legal costs paid, from the *locum*.

Clause 10, the restraint of trade clause, may never be inserted in a truly independent contractor agreement. It is quite simply unenforceable. This contract also does not address the effect of the *Consumer Protection Act* on the appointment of a *locum*.

6 Temporary employment services or agencies

It must be remembered that *locums* may be appointed for a maximum of only six months, as per the Ethical Guidelines. Many medical practitioners therefore use agencies or temporary employment services to supply them with a *locum* to stand in for him or her for a specific period of time. 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 the context of a principal and a *locum* this means that the employment service or agency will provide a medical practitioner with the services of a *locum* but the agency or temporary employment service will remunerate the *locum* while the medical practitioner pays a fee to the agency or temporary employment service.

If section 56 and 57 of the "Code of Good Practice: Who is an employee? " is applied in this regard to the principal-*locum* relationship, whether or not a *locum* supplied by a temporary employment service is an employee or an independent contractor must be determined by reference to the actual working relationship between them. The relationship between them must be assessed in the light of the normal criteria used to determine the existence of an employment relationship. The presumption of employment is also applicable to persons (and thus also *locums*) engaged by temporary services, if the employees (the *locums)* earn less than the prescribed earnings threshold. If it is found that the *locum* has an employment relationship with the doctor, then for the purposes of the LRA and the BCEA –

(a) the *locum* is an employee of the temporary employment service;
(b) the temporary employment service is the *locum's* employer.[46]

46 Code of Good Practice [57].

Thus the relationship between the agency and the *locum* is usually a Temporary Contract of Employment, and the relationship between the agency and the medical practitioner is a Contract of Service. The termination of the assignment will automatically bring about the termination of the Temporary Contract of Employment, and with each new assignment a new Temporary Contract of Employment is entered into between the *locum* and the agency.[47] Similarly, a new Contract of service is entered into between the agency and the medical practitioner for each new assignment. Thus, there is no employment relationship between the *locum* and the medical practitioner, except perhaps for an "implied" contract of work. The medical practitioner will obviously instruct the *locum* what services are required, how they are to be performed, standards of quality and quantity required, and so on.[48]

7 The *Consumer Protection Act*[49]

The *Consumer Protection Act* 68 of 2008[50] (CPA) applies to every transaction occurring in South Africa involving the supply of goods or services in exchange for consideration[51] unless the transaction is exempted from the application of the Act.[52] For the purposes of the Act a patient is considered a "consumer".[53] A medical practitioner is seen as a "service provider".[54] "Service" in a health context is a consultation with a health practitioner, the medical advice rendered by such a practitioner, or any medical intervention, such as an operation.[55]

47 Israelstam Date Unknown www.labourguide.co.za (2). The word "employee" has in all instances been changed to locum.
48 Israelstam Date Unknown www.labourguide.co.za (2).
49 For a full discussion of the effect of the *Consumer Protection Act* in a medical context, see Slabbert *et al* 2011 *CILSA* 169-203.
50 See also the Regulations (GN R293 in GG 34180 of 1 April 2012 (Regulations to the Consumer Protection Act)).
51 See a definition of "consideration" in s 1 of the *Consumer Protection Act* 68 of 2008 (CPA). It includes money.
52 See s 5(1) of the CPA.
53 A "consumer" is broadly defined in the s 1 of the CPA. See GN 1957 in GG 26774 of 9 September 2004 para 25.
54 See s 1 of the CPA.
55 Slabbert *et al* 2011 *CILSA* 170.

The aim of the Act is to protect and develop the social and economic welfare of consumers, especially vulnerable consumers.[56] If the CPA is in conflict with any other health care legislation, for example the *National Health Act*[57] or the *Health Professions Act*,[58] the Act offering the greater protection to the consumer will apply.[59]

The effect of the CPA is best illustrated by an example Slabbert[60] uses considering the position of a cardiologist who correctly fits a pacemaker into a patient's heart but the pacemaker fails prematurely. Previously the patient had to prove that the premature failure of the pacemaker was the result of negligence on the part of the manufacturer of the pacemaker, even though he or she had no knowledge of the production process. Currently such a patient needs only to prove that the pacemaker failed prematurely and that he or she suffered harm or loss as a result of this.[61] The patient need not institute a claim against the manufacturer of the pacemaker anymore; he or she may now claim damages from anyone in the "supply chain", which includes the cardiologist (and/or for the purposes of this discussion, the *locum*).

This Act thus dramatically changes the legal position that existed prior to the CPA. A consumer had to rely on contractual or alternatively delictual remedies against the manufacturer whose product caused him or her harm, and fault on the part of the manufacturer had to be proved.[62] With the introduction of the CPA a no-fault liability has now been introduced as the plaintiff now needs only to prove that failure of the relevant goods caused harm.[63]

56 See s 3(1) of the CPA.
57 *National Health Act* 61 of 2003.
58 *Health Professions Act* 56 of 1974.
59 Slabbert *et al* 2011 *CILSA* 170.
60 Slabbert "Medical Law in South Africa" 111-114.
61 Section 51(c)(i) of the CPA.
62 Slabbert *et al* 2011 *CILSA* 172. In *Wagner v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 4 SA 285 (SCA) paras 298-300 the Supreme Court of Appeal expressly confirmed the fault requirement for product liability.
63 Section 61 of the CPA.

In the example given by Slabbert, above, of the cardiologist – he becomes a "retailer",[64] and the fitting of the pacemaker falls within the definition of "supply"[65] in the Act. He therefore becomes part of the "supply chain"[66] and can be held liable if something goes wrong. If he or she uses a *locum* the *locum* also becomes part of the supply chain. This aspect should also form part of the contract between a *locum* and a medical practitioner. Consumers may now decide to sue the producer, importer, distributor or retailer, or all of them (which may include the medical practitioner and *locum*). The harm covered by such a claim may be for death, injury or illness or just pure economic loss. A causal link between the defective goods and the harm that resulted will still need to be established on a balance of probabilities but the traditional common law obstacle requiring proof of negligence no longer applies.[67]

The effect of the CPA in a health professions context has not been tested in the courts yet, but by adding a clause regarding the CPA in a contract with the *locum*, the *locum* will know he or she forms part of the supply chain should action arise under the Act.

8 Conclusion

If ever a *locum* is used in a private medical practice, the medical practitioner/s (principal) should ascertain that patients are informed that the *locum* is a substitute of the physician and not an employee, if that is the case. This could be managed by the receptionist when the patient signs a consent form, and it should be noted on the report by the *locum* when he or she actually sees the patient.[68]

There are no reported cases in South Africa concerning the use of a *locum tenens* with regard to malpractice or negligence, but if the number of cases regarding medical negligence is any indication of litiginous climate in which medical

64 See the definition of "retailer" in s 1 of the CPA.
65 See the definition of "supply" in s 1 of the CPA.
66 See the definition of "supply chain" in s 1 of the CPA.
67 Slabbert *et al* 2011 *CILSA* 173.
68 Russel and Thornton 2010 *Proc (Bayl Univ Med Cent)* 315.

practitioners find themselves,[69] it might only be a matter of time before cases involving *locums* go to court.

In all cases it would be better for the practitioner to appoint a *locum* as an independent contractor, because the *locum* himself or herself would then be held liable for the alleged unlawful or unprofessional conduct. An independent contractor would have to face cases of delictual negligence[70] on his or her own whereas the employee is "covered" by vicarious liability. The application of the CPA should also be addressed contractually to the benefit of both the principal and the *locum*.

69 Pepper and Slabbert 2011 *SAJBL* 29-35.

70 It is not in the scope of this article to discuss delictual negligence. In summary, refer to Holmes JA who said in *Kruger v Coetzee* 1966 2 SA 428 (A) 430 the following: "For purposes of liability *culpa* arises if – (a) a *diligens paterfamilias* in the position of the defendant – (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps. This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend on the particular circumstances of each case. No hard and fast rules can be laid down." See also Wicke 1998 *THRHR* 610 fn 4: "An employer can be held liable for the delict of an independent contractor only if he or she was personally at fault and therefore committed a delict."

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List of abbreviations

CILSA	Comparative and International Law Journal of Southern Africa
HPCSA	Health Professions Council of South Africa
Proc (Bayl Univ Med Cent)	Baylor University Medical Center Proceedings
SAJBL	South African Journal of Bioethics and Law
SAMA	South African Medical Association
SA Merc Law	South African Mercantile Law
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

USING A *LOCUM TENENS* IN A PRIVATE PRACTICE[♣]

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SUMMARY

Many medical practitioners in private practice use a *locum tenens* when they themselves are not available to practice. The *locums* are often appointed without consideration of the legal consequences or requirements. Legislation distinguishes between an employee and an independent contractor. If the *locum* is appointed as an employee the doctrine of vicarious liability comes into play which is not the case with an independent contractor. Contracts currently available to appoint a *locum* give the contracting parties a choice between being appointed as an employee or an independent contractor; this should be changed in that all *locums* should be appointed as independent contractors especially if the working of the *Consumer Protection Act* is also taken into consideration. Furthermore, according to the rules of the Health Professions Council of South Africa (HPCSA) the onus to ensure that the *locum tenens* is registered and fit to practice, rests with the principal.

KEYWORDS: Locum tenens, employee, independent contractor, vicarious liability, private practice, reality test.

♣ We are indebted to the anonymous peer reviewers for their valuable comments on an earlier draft of this article.

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