Opinion N°80

Guidance of workers to risk-bearing occupations

Role of occupational physicians and reflections on the ambiguity of the concept of aptitude

Membership of the Working Group:

MMES : CH. DESCHAMPS
H. GAUMONT-PRAT
M. CANTO-SPERBER
N. QUESTIAUX

MM. : S. BELOUCIF
J.-P. CAVERNI
M. SELIGMANN (Moderator)
M. STASI

Expert auditioned:
Professeur Françoise CONSO

Expert consulted:
Professeur François GUILLON

The referral from the French National Union of Occupational Physicians on October 29th 2002, concerned the decree of February 1st 2001 calling for Occupational Physicians to declare medical non-contraindications for the exposure of certain workers to substances which are carcinogenic, mutagenic, or toxic for reproduction[*]. The Union considers that in this way, Occupational Physicians were being asked to select among workers those who could be exposed to such substances. It requested that the government rescind the decree.

The ethical issue is the following: is it allowable – without being at fault – to expose a worker to a known or potential risk as a function of his/her individual characteristics, and with whom must rest responsibility for doing so?

The government rejected the request, and added that it was simply a matter of evaluating "extra risk". The union then appealed to the *Conseil d'Etat* (Council of State, supreme administrative jurisdiction) which rejected the action of nullity, with the consideration "that these provisions only seek to give Occupational Physicians the task of discovering specific risks for certain workers and therefore to preclude that specially vulnerable individuals be exposed to substances which are carcinogenic, mutagenic, or toxic for reproduction; that in no way do these provisions involve a guarantee on the part of Occupational Physicians – who are only stating that there is no particular medical contraindication for a specific worker – that there is neither risk nor danger in exposure to these substances; that neither do these provisions have the effect of transferring to Occupational Physicians responsibilities which belong to employers regarding the protection of workers' health; and that therefore, the provisions under criticism neither compromise the preventive mission of Occupational Physicians, nor in any way their obligations as regards medical deontology" [*].

The *Conseil d'Etat* also added: "considering, finally, that Occupational Physicians have available to them several sources for genetic, behavioural, or background information so that they can assess the specific risks individually incurred by workers exposed to such substances…, the decree under attack gives these physicians the task of screening for specific risks that certain workers may incur".

It should be noted that it is only after this ruling by the *Conseil d'Etat* that the union of Occupational Physicians saw fit to refer to CCNE, and added to the referral: "The *Conseil d'Etat* states that Occupational Physicians may justifiably make use of genetic criteria. Besides the fact that such data has no predictive value, we consider this to be very dangerous and we could imagine some form of medical eugenics".

In January 2003, a group of unions and associations launched on the Internet an "appeal to moral and political institutions and to occupational physicians" to which a large number of people have now appended their signature. This document considers that "the task thus assigned to Occupational Physicians is therefore a task of selection, and that underlying this concept is a renewal of the eugenic fantasy of a standard human being devoid of frailty" and that such thinking is obviously contrary to the ethical principles on which our society is founded. It states that the mission of the occupational health system, as defined by the ILO (International Labour Organization) is to adapt work to man and not man to work. The appeal calls for these new provisions to be revoked and encourages Occupational Physicians to "replace the certificate of aptitude by a statement of medical supervision, and to only use certificates of inaptitude if workers consent to it, and with the sole purpose of

---

[*] The issue of pregnancy must be considered separately. There have always been a certain number of tasks from which pregnant women are excluded for obvious precautionary reasons.

[*] *The Conseil National de l'Ordre des Médecins* (National Medical Association) made known their disagreement to the Minister of Labour in April 2001, in so far as it considered that "the wording of the decree raised problems as regards the deontological principle of a doctor's duty to protect health, and those relating to the establishment of certificates". The Association later considered that by the *Conseil d'Etat's* ruling, it would be possible to avoid "conferring on the certificate established by the Occupational Physician a scope which it did not have".

protecting their health".

The decree under attack regarding the mission entrusted to occupational physicians, is a redraft of article R6231-56-11 of the *Code du Travail* (Labour Code), in particular paragraph 1 of that article to the effect that " workers cannot be assigned to tasks exposing them to carcinogens, mutagens and substances toxic to reproduction, unless they undergo prior examination by an occupational physician and the certificate of aptitude established by this physician states that they do not manifest any medical contraindication to such tasks". A comparison with the previous text shows that the certificate of aptitude stating an absence of contraindications was by no means a newly designed procedure, and that the definition of the action requested of the physician was unchanged. However, the earlier text referred only to carcinogenic substances, whereas now these circumstances apply to a broad range of substances: carcinogens, mutagens and substances toxic to reproduction.

Why does this reform generate so much alarm and opposition, despite rejection by the *Conseil d'Etat* of arguments akin to those set out before CCNE?

Far from being simply a matter of terminology or of adding certain substances to a list of dangerous possibilities, CCNE considers that the reform does indeed raise some real ethical issues, from the point of view of both the symbolic value and the practice of occupational medicine.

1. The feelings generated by this text are certainly not unconnected to the problem of asbestos, for which a decree in 1977 called on occupational physicians to certify that the workers concerned showed no medical contraindication to inhaling asbestos dust, while setting a limit of exposure to this substance which turned out to be very inadequate to protect workers from specific pleuropulmonary diseases.

2. In the context of what can be seen as a failure of protective legislation, extension of the range of situations to mutagens and substances toxic to reproduction has modified the boundaries delineating the intervention of occupational physicians. That space included up until now a fairly circumscribed list of substances recognised as being carcinogenic. From now on, we are no longer dealing with the well identified effect of a few commonly used substances, but with a broader risk covering situations which are not nearly so well defined, and for which knowledge fluctuates from day to day. Occupational Medicine is not designed to integrate into its practice data that are still in the realm of research. How can one evaluate an "extra risk" when the risk itself is poorly identified? Increasing the number of situations for consideration has therefore amplified even further the degree of uncertainty. Absence of individual contraindication is very difficult to assert if one considers the present insufficiency of medical and scientific knowledge.

3. The notion of individual "extra risk" should not obscure that of a general and collective risk. Wording a certificate and saying that there is no medical contraindication for a post involving an element of risk when that risk cannot be determined with any precision, could lead to the extreme interpretation that those concerned are not running any risk at all. Understandably, occupational physicians have no wish to participate in such ambiguity. In any event, whenever the *Code du Travail* stipulates this type of action regarding the posting of a worker to some particular activity, the consequence is never to release the employer from any obligation regarding the organisation of that activity. In this particular case, since the occupational physician is unable to define the risks, he has very little possibility of satisfying himself that employers have taken all the measures required to reduce those risks. In the circumstances, the actual purpose of the certificate of aptitude seems questionable. Is it not to be feared that it also aims to protect employers against possible ulterior legal action?

4. Conversely, should a hypothetical predisposition to a pathology lead to a worker being denied a post for which he might wish to apply, because of a potential risk about which little is known? A report of unemployability for a given post – based only on the principle of precaution - could have the effect of undermining a worker's psychological and economic situation. When the principle of precaution enters into play, there is always the possibility of a faulty assessment of the potential risk. Does this leave much room for a worker's right to exercise free and informed consent and enjoy autonomy?

5. <u>The referral is symptomatic of the difficulties raised by the concept of "aptitude".</u> Unlike "inaptitude", it is not defined in the *Code du Travail*, but it cannot be taken to mean that it defines a category of workers who can knowingly be exposed to a recognised danger. The decree in dispute

represents a paradox because the result is to select those who may run a risk with less danger to themselves, leading in turn to discrimination between workers, whereas more often than not they would hope that when an occupational physician certifies them as "able", this would open the way to broader employment opportunities, and to being the object of a selection which is generally viewed as positive by society.

6. The occupational physician is bound to be aware of these misunderstandings when he informs workers. One of the ethical difficulties in the implementation of the decree in question comes from the fact that, frequently, it will be impossible to evaluate the risk incurred by persons with no patent contraindication, but who should not be left in ignorance of the fact that they are exposed to that risk.

There is also some difficulty in reconciling the consideration of the *Conseil d'Etat* stating that occupational physicians have available to them several sources for genetic information so that they can assess specific risks, with the amendment made in 2002 to the *Code Civil* and the *Code Pénal* (code of criminal law) prohibiting any discrimination based on genetic characteristics, predictive genetic tests concerning a disease that is not as yet apparent, or a genetic predisposition to a disease. In the particular case of Occupational Medicine, the points made in CCNE's Opinion n° 46 (Genetics and Medicine: from prediction to prevention) published in 1995, remain valid: " Instances of a study of genetic traits being useful for preventing work-related diseases are rare indeed in the present state of scientific knowledge. The use of genetic testing in occupational medicine must therefore be exceptional and rigorously restricted to cases on a limited list for which the risk for the individual is sufficiently established and available tests sufficiently reliable and pertinent. Such screening should in no case be systematic nor should its use ever have as a consequence the reduction of preventive action against occupational risks by privileging the elimination of the most genetically exposed workers instead of improving the working environment. Adequate assurance in this respect will only be achieved through a modification of the status of occupational health physicians who presently are employed by the company. So long as their status is not one of independence, their role remains most ambiguous."

A recent Opinion n° 18 by the European Group on Ethics in Science and New Technologies (Ethical aspects of genetic testing in the workplace) concurs with the recommendations made by CCNE in 1995. It considers that: "A genetic test of limited predictive value would add nothing to knowledge of an applicant's ability to carry out the work at the outset and would give very little information on how this might change in the future", and that: "It would be manifestly unfair to base important decisions regarding employment or promotion on the results of tests either of dubious relevance or with low reliability or predictive value". It states that: "As a general rule, ...only the present health status of the employees should be considered in the employment context. It concludes: "In general, the use of genetic screening in the context of the medical examination, as well as the disclosure of the results of previous genetic tests, is not ethically acceptable", and that "The definition of exceptional cases for proposing and performing genetic screening at the workplace should be explicitly regulated by law".

The social contract must allow everyone to avail themselves simultaneously of their right to employment and protection of their health. Although the article under attack in the *Code du Travail*, aims to limit risks incurred by workers and therefore is within the context of occupational medicine's mission of prevention (which involves just as much adapting work to man as adapting man to work), it does seem necessary to dissipate the legitimate uneasiness and the misunderstandings it has caused.

The action of Occupational Medicine applies both individually and collectively, but its present task is more concerned with the prevention of risks than with the management of their consequences. Any transfer of that latter responsibility, which remains fully and entirely that of employers, seems unacceptable to occupational physicians. It would however be beneficial if they were to participate, with experts, representatives of industry and social partners, in a collective definition of the strategy for risk reduction, which is an increasingly important subject in our modern societies.

When work-related risk is involved, the very notion of "aptitude" is ambiguous and can

lead those concerned to believe that they do not incur any risk, or on the contrary, that they have been selected for this hazardous occupation, so that the role of the Occupational Physician may then be viewed as one exposing to a risk rather than preventing it. Extending the text to mutagens and substances toxic to reproduction, albeit with positive intentions, in fact contributes to augmenting the disquiet of Occupational Physicians because these are little known risks for which scientific and medical appreciation is still uncertain. In this context, selection is an impossibility. Information supplied to workers, which is part of the essential functions of Occupational Physicians, is only conceivable if any specific work-related hazards have been identified and all steps for the protection of workers have been taken. Medical aptitude for the post can only be asserted if both of these criteria are present.

CCNE considers that, for posts presenting either real or potential hazards, consideration should be given to eliminating any reference to aptitude, and be content with stating that there is no obvious medical contraindication presently observable to a post involving a risk of exposure to carcinogens, mutagens, and substances toxic to preproduction, with the reservation that the employer can justify that all measures required to identify and minimise that risk have been taken, and keeps the Occupational Physician informed that this is so on a regular basis. The notion of “absence of obvious medical contraindication”, with no reference to “aptitude”, makes it possible to distinguish clearly between what falls into the category of a finding (which is the purview of the doctor), and that which is in the category of a decision to assign to a given task (which is the purview of the employer). The notion of aptitude is not based on any well defined scientific concept, hence the ethical issue raised by transferring to occupational medicine a responsibility which is properly speaking that of employers.

In order to attenuate the ethical conflict justifiably raised by this decree, a first step might be to organise a consensus conference.
Its objectives would be:

1) identify more clearly, scientifically and medically, situations involving a known risk;
2) establish an up-dating procedure for the above;
3) encourage Occupational Physicians to become involved, with due regard to maintaining their autonomy, in the present problems of risk management;
4) to consider a desirable reinforcement of their responsibilities and of their mission, within the framework of values which have always prevailed in France.

Our society finds it increasingly difficult to accept, and rightly so, the simple notion of exposure to a known or potential danger, regardless of the situation of those exposed. Efforts must therefore be made to keep reducing those dangers rather than taking selective guidance decisions.

December 4th, 2003