Litigation – How to Avoid it and How to Deal With it When You Can’t

Josh Liswood
jliswood@millerthomson.com
416.595.8525

Andrea Farkouh
afarkouh@millerthomson.com
416.595.7935
Where Do Lawsuits Come From?

- things that go wrong
- things that are unexpected
- things that are unanticipated
- things that haven’t been communicated effectively
  - lack of understanding
  - emotional component
Identifying the Potential Lawsuit

- incident reporting
  - driven by error or mistake
  - identification of personnel involved
  - driven by negative outcome
  - investigative in nature
  - discretionary
Identifying the Potential Lawsuit

- occurrence screening
  - driven by set criteria
  - monitored by professional and non-professional staff
  - pro-active
  - may be a trigger for investigation, communication, claims management
Managing the Occurrence/Claim

A. accountability to patient/public
B. understanding the Law
C. securing and protecting information
D. supporting and preparing staff
E. identifying indemnification obligations
F. statutory reporting obligations
A. Accountability to Patient and Public

- promoting a culture of safety
- isolated event vs. systems problem
- ensure confidentiality/authorization
- apology and the facts; avoid fault and blame
- don’t make promises you can’t keep
- make sure you have the right spokesperson
1. Critical Incidents (Reg 965)

- 2007 amendments → new Board responsibility to ensure system for disclosing every critical incident to affected patient, SDM, estate
- July 1, 2010 → expanded to include:
  - “disclosure” to administrator, MAC as soon as is practicable after critical incident occurs
  - Analysis of incident and development of plan with systemic steps to avoid or reduce the risk of further similar critical incidents
Critical Incidents

- Accountability and Transparency
  - Communication with patient / SDM
  - Effective internal reporting and notification procedures
  - Analysis of individual incident
  - Development of plan
“Critical incident” defined as an unintended event that:

- Occurs when a patient receives treatment in the hospital;
- Results in death or serious disability, injury or harm to the patient; and
- Does not result primarily from underlying medical condition or known risk inherent in providing the treatment.
B. Understanding the Law

- Liability/ negligence?
- Legal responsibility
- Duty of care
- Standard of care
Liability - Negligence

1. Health professional must owe duty of care to patient
2. Health professional must breach standard of care established for conduct
3. Patient must suffer loss or injury as a result of breach
4. Conduct of health professional must be the cause of loss or injury
Who Is Legally Responsible?

- Potentially, both health professional and organization
- Vicarious liability for care provided by employees
- Organizational responsibilities of due diligence regarding provision of telephone advice, i.e., qualified and skilled staff
- Duty to provide safe and appropriate systems
- Appropriate development of policies and procedures, guidelines, standards; availability of current information and community resources
Duty of Care

- Established by professional credentials
- Set by scope of practice and job description
- Set by gratuitous act
Standard of Care

- Health professional required to “exercise a standard of care and skill which would reasonably be expected of a normal, prudent practitioner of the same experience and understanding” in relation to time at which incident occurred
- CNO, CNA standards, organizational standards
- Expert evidence of accepted practice
- Academic knowledge
C. Securing and Protecting Information

• Considerations:
  • “Disclosure” vs. Reporting
  • Existing requirements regarding disclosure to patient re: systemic steps taken
  • Protection of information (QCIPA, privilege)

• Purpose the information is being gathered for:
  • internal audit
  • quality review
  • potential claim
C. Securing and Protecting Information

- identify those persons who will collect information
- have a set plan
  - policies • statements • packaging and disposables • pictures • identification of witnesses • log books • staffing records • isolate health record • look back
D. Supporting and Preparing Staff

- Meet sooner than later
- Present all available information
- What wasn’t recorded
- There is no retro spectroscopy
- What other support is needed
  - Counseling/employee health
  - Mentoring
  - Legal advice
E. Identifying Indemnification Obligations

- obligation of manufacturer and supplier
  - terms and conditions of purchase
  - representations and warranties
  - is a purchase order form enough
E. Identifying Indemnification Obligations

- service agreements
  - ensure declaration of independent contractor
  - compliance with applicable regulations and standards
  - representation as to credentials, indemnification and hold harmless
  - insurance
F. Additional Statutory Reporting Obligations

- mandatory report pursuant to the Coroner’s Act (s.10)
- report of child abuse or neglect under s.72 Child and Family Services Act
- reporting of sexual impropriety under s.85 of the Regulated Health Professions Act
- loss or mishandling of a narcotic under Controlled Drug & Substances Act
Additional Statutory Reporting Obligations (con’t)

- breach of standard of practice or misconduct - suspension or termination of privileges, employment - RHPA
- Criminal Code offences
- reporting under Technical Standards and Safety Act, 2000 (i.e. elevating devices)
- ss. 26 and 27 of Health Promotion and Protection Act re: reportable diseases
The Claim

- Notice of Action/Statement of Claim
- Statement of Defence and Cross Claims
- Third Party Actions
- Discovery of Documents and Examination for Discovery
- Mediation and Pre-Trial
- Settlement
- Trial
Solicitor and Client Privilege

- what is the current status in Ontario for maintaining privilege?
Questions?

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