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Joint statement on liability protection for physicians and employed professionals of BC health care agencies covered under HCPP in collaborative care models

Introduction

New and evolving models for health care delivery have increased the opportunity for physicians, BC Health Care Agency (HCA)¹ employed professionals and other health care providers to all be involved in the treatment of the same patient. This inevitably reinforces the need for health care professionals to ensure they individually have adequate personal professional liability protection and that the other health care professionals who are part of the health care team are also adequately protected so that one is not held financially responsible for the acts or omissions of another. The Canadian Medical Protective Association (CMPA) and the Health Care Protection Program (HCPP) have developed this document to respond to questions from HCA employees and physicians working in collaborative practice.

Liability risk

When a patient commences a legal action regarding health care treatment, it is common that all health care professionals who were involved in the treatment, as well as the institution or facility where that treatment was rendered, will be named as defendants. A finding of negligence by the court may have a financial impact on the defendant(s) in three ways:

1. Direct liability

Each health care professional, both individually and as a member of the health care team, is accountable for his or her own professional practice. Therefore, if a physician or HCA employee is found negligent, a court may award damages to the plaintiff that are to be paid by the individual defendant. This form of liability is called direct liability. CMPA and HCPP professional liability protection is designed to assist physicians and HCA employees respectively with this kind of damage award.

A defendant employer or facility may also be found negligent or at fault and held directly liable for breaching duties it owed to the patient. These could include, for example, the duty to: select professional staff using reasonable care; review staff performance on a regular basis; have and enforce appropriate policies and procedures; provide reasonable supervision of staff; and provide adequate staffing, equipment and resources.

¹ HCAs covered under HCPP are referred to as HCPP Covered Entities and include Fraser Health Authority, Interior Health Authority, Northern Health Authority, Provincial Health Services Authority, Providence Health Care Society, Vancouver Coastal Health Authority and Vancouver Island Health Authority. A complete list of HCPP Covered Entities is available from HCPP by emailing HCPP@gov.bc.ca.

2. Vicarious liability

If an employee is found to be negligent or at fault, the court may order that damages be paid by the employer pursuant to the doctrine of vicarious liability. This legal doctrine provides that an employer, which may be an individual or a facility, can be held financially responsible for the negligence of its employees. An employment relationship must have existed at the time of the incident and the defendant employee must have been sued for work done within the scope of his or her employment. It will be up to the court to determine in each case if an employer/employee relationship existed and therefore whether vicarious liability would apply. Some of the factors the court would consider in determining if an employment relationship existed are the level of control the employer has over the employee's activities, any agreements which describe the relationship and requirements to follow the employer's policies or procedures.

3. Joint and several liability

When a court finds more than one defendant negligent, the court will assess the amount of damages (often expressed as a percentage of the total damage award) to be paid by each defendant. Defendants can be jointly and severally liable for the damages awarded. This means the plaintiff may recover full compensation from any one of the negligent defendants, even though that defendant may then be paying for more than his/her share of the damages. That defendant may then seek contribution from the other negligent defendant(s) involved.

For this reason, it is essential that each member of the health care team and the facility or institution verify they have adequate professional liability protection in place at the beginning of the working relationship and on an ongoing basis.

Liability protection

Because of the potential liability risks, all members of the health care team and the institution or facility must have appropriate and adequate professional liability protection or coverage to protect both themselves and the patients they treat.

When a CMPA member is sued by a patient regarding medical treatment, that member is generally eligible for assistance from the CMPA. This protection is occurrence-based, which means the eligible professional's protection extends from the date the incident occurred regardless of when the claim was made. CMPA members who have been granted assistance are eligible for legal assistance and payment of damages. In some circumstances, clinics and other practice arrangements may be eligible for assistance. However, physicians should separately purchase clinic insurance for general liability protection. CMPA membership has been recognized as meeting the liability protection requirements for physicians set forth in the by-laws of the College of Physicians and Surgeons of British Columbia.

HCPP provides Commercial General Liability and Professional Liability to all member HCAs in the Province of BC. In addition, coverage is also provided for specified additional liabilities arising from HCA operations. In this context, HCA employed professionals are covered for the professional liability protection offered by HCPP when they are acting under the direction of the HCA.

The level of HCPP coverage has been determined to be sufficient liability protection to meet the insurance requirements set forth in the by-laws of the various professional colleges in BC. HCPP coverage continues to be in effect until cancelled by the Province.

HCPP protection extends to HCA employees as individuals for the defence of their legal actions arising out of the terms of their employment and the provision of professional services. Coverage does not extend to independent acts of the employee which are unrelated to their employment with a covered HCA. Coverage is not available for claims against HCA employees when they are acting in a capacity as an employer, or a business entity such as an incorporated company or partnership.

Risk management

Taking the following steps will help to decrease your potential risks when working collaboratively:

- Be familiar with the scope of practice of health care providers with whom you work.
- Have an agreement about who is the most responsible provider at any given time and the division of roles and responsibilities.
- Have appropriate and adequate professional liability protection and/or insurance coverage.
- Confirm the continuing appropriate and adequate professional liability protection and/or insurance coverage of the other members of the health care team.
- Physicians should contact the CMPA at 1-800-267-6522 to discuss issues related to collaborative practice or the extent of assistance for clinics and other practice arrangements.
- HCA employees should contact their organization's risk manager or chief risk officer to discuss issues related to collaborative practice or the extent of assistance.
- If you have or require commercial insurance covering matters that lie outside the scope of protection provided by the CMPA and HCPP, you should consult a business lawyer or insurance professional about how to identify your business insurance needs and protect your individual and business interests. Consider scheduling a periodic review of these issues.
- If commercial insurance is purchased, abide by the terms of any policy and report any potential or actual claim to the insurer while the policy is still in effect.
- If you change insurers or do not renew a claims-made insurance policy, purchasing tail coverage is recommended.*

* A "claims-made" policy requires reporting a potential or actual claim to the insurer before the policy's expiry date. Only incidents that have occurred after the "retroactive date," if there is one in the policy, and that are reported during the policy period are covered. If there is no retroactive date in the policy, incidents that occurred before the policy came into effect are covered if they are reported during the policy period and you were unaware of the claims at the time you purchased the policy. "Tail coverage" may also be called an "extended reporting clause" or "discovery clause." Tail coverage is only applicable to claims-made policies, and it extends the reporting period in which a claim can be made. When a claims-made policy is not renewed the purchase of tail coverage is recommended.
