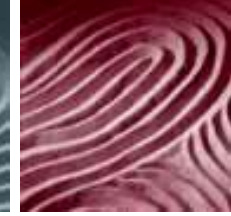


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## TELETRIAGE LIABILITY, RISK AND RESPONSIBILITY

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## **TELETRIAGE – LIABILITY, RISK AND RESPONSIBILITY**

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### **INTRODUCTION**

Teletriage is part of a wide and rapidly increasing process of providing health care via telecommunications, either audio or audio/video, known as telehealth. With this technology, we are able to provide guidance for medical practice (for example surgery) in a remote area instead of having the expense and inconvenience of transporting a patient to a major centre, sometimes over a thousand miles away. We can provide medical advice to other practitioners and to patients. Teletriage is part of the telehealth movement. It is a programme whereby specially trained Registered Nurses provide support and advice over the telephone for immediate health concerns. These forms of health support are based on acceptable, predetermined clinical guidelines and standardized protocols as well as using the personal expertise and training of the nurse. Essentially, a patient will telephone a teletriage centre and speak to the nurse on a health matter that is concerning them.

The advantages of convenience and immediacy are obvious with this programme. Further, in this age of limited health system resources, hospital constraints and under-serviced areas of the province, telehealth and teletriage are one method of increasing access to health care from expert sources. The evolving practice of telehealth however, poses serious challenges to traditional common and administrative law principles that form the regulatory infrastructure of conventional health care practice. The risks of legal liability for clinical health practitioners must be considered in light of the emerging and evolving field of telehealth.

## **THE TELETRIAGE PROGRAMME**

Industry Canada defines Telehealth as “the use of communications and information technology to deliver healthy and health care services and information over large and small distances.”<sup>1</sup> As noted above, this covers a growing number of health care services that includes this telephone nursing practice. The Canadian Nurses Association defines nursing telepractice as “client-centered forms of nursing practice, which occur through, or are facilitated by, the use of telecommunications or electronic means. Nursing telepractice uses the Nursing Process, which encompasses client assessment, planning and implementation through the provision of information referral, education and support, evaluation and documentation.”<sup>2</sup>

Through teletriage, specially trained nurses advise people with symptoms or concerns, usually non-urgent, who are concerned about a health problem. Patients call the programme telephone number and speak with a Registered Nurse. The nurse uses computer-assisted guidelines and her personal nursing expertise to question patients on their problems and recommend the most appropriate type of care. The guidelines are usually developed in conjunction with medical recommendations as well as in keeping with current professional nursing practice. Depending on the nature and severity of the problem, the nurse provides advice for example; self-care, a visit to a family doctor or walk-in clinic; or a visit to the nearest emergency department. The nurse also provides basic health information and information about prescription and over-the-counter medications.<sup>3</sup>

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<sup>1</sup> Industry Canada, *The Telehealth Sector in Canada*, online: (HC) <<http://strategis.ic.gc.ca/SSG/table,2002>>.

<sup>2</sup> Canadian Nurses Association, *Position Statement: The Role of the Nurse in Telepractice*, online: (CNA) <[http://www.cna-nurses.ca/pdfs/PS52\\_Role\\_Nurse\\_Telepractice\\_Nov\\_2001\\_e.pdf](http://www.cna-nurses.ca/pdfs/PS52_Role_Nurse_Telepractice_Nov_2001_e.pdf)>.

<sup>3</sup> John C. Hogenbirk & Raymond W. Pong, “An Audit of the Appropriateness of Teletriage Nursing Advice” (2004) 10 *Telemedicine J. & E-Health* 53 at 54 [*Hogenbirk & Pong*].

## **ADVANTAGES AND RISKS ASSOCIATED WITH TELETRIAGE**

Telephone nursing practice provides a number of important benefits.

1. It increases public access to health services. This is especially so for people living in rural areas and those with compromised health status for whom trips to a physician's office or hospital are not easily accomplished.
2. It may decrease waiting times and reduce unnecessary visits to emergency rooms and physicians' offices reducing the pressure on these already overburdened facilities.
3. It provides immediacy of information to the public and helps the public meet their health care needs and decrease their feeling of isolation when faced with health concerns.
4. For people in rural or under-serviced areas, telerriage provides an improvement in the level of health care provided for their less serious problems.

At the same time, telerriage poses a number of risks that must be addressed, in particular, from a legal and policy standpoint. Health care usually is performed in a face to face situation. The practitioner is able to use all senses to assess the patient including observing the patient's body language and other subtle signs as well as the expressed information provided by the patient. The lack of face-to-face interaction can have significant disadvantages.

1. It may result in failure to assess and/or delay of treatment. The failure to assess risk typically arises when the caller complains of non-specific or vague symptoms or provides an unusual presentation of a serious condition.<sup>4</sup>
2. Advice provided over the telephone may also result in the advisor making a recommendation to apply an inappropriate or unhelpful treatment. Self-care treatment or medication may not be the action of choice or the nurse may make an inappropriate or unnecessary referral.
3. Usually, even in a walk-in clinic venue, arrangements can be made for follow up. In telephone nursing, there may be inadequate follow-up mechanisms that fail to address particular needs for follow up and re-assessment.
4. Maintaining the caller's confidentiality and obtaining informed consent also present new challenges to the health practitioner.
5. In certain parts of the province, particularly near provincial geographic borders, there can be licensing/registration issues as well when a patient may call from out of province, placing the nurse in a dilemma regarding the 'right to practice' with a patient who is not within the jurisdiction of the nurses registration. Further, it brings into question under which laws and professional authority is the nurse practising.

Nevertheless, the above risks arguably are outweighed by the teletriage service's benefits. It is therefore incumbent on the teletriage provider to consider the challenges and potential legal

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<sup>4</sup> See for example *Poole Estate v. Mills Memorial Hospital*, [1994] B.C.W.L.D. 1096 (S.C.) [hereinafter *Poole*], *infra* note 18.

liabilities and prevent or reduce the likelihood of them in a diligent and professional manner, having regard for the great service that the programme can render to many residents.

### **THE LEGAL FRAMEWORK FOR MALPRACTICE AND TELETRIAGE**

Malpractice is the label attached to a breach of professional duty most often expressed as an occasion of negligence. Negligence is conduct that falls below the standard required for the protection of those for whom a risk of harm is reasonably foreseeable. Because we cannot foresee each and every possible occasion of negligence, the law has developed principles which are to be applied to individual incidents.<sup>5</sup> Tort law (or law governing the wrongdoing of one person against another) provides a general framework for the assessment of a defendant health practitioner's liability in negligence. It is a useful framework in which to examine the risks outlined above. This framework is determined by four legal elements:

- 1) whether the defendant owed a duty of care to the plaintiff;
- 2) if a duty of care is established, what is the standard of care associated with this duty and whether it was breached;
- 3) whether the plaintiff has suffered an injury; and
- 4) whether the defendant's breach was the actual and legal cause of the plaintiff's injury.<sup>6</sup>

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<sup>5</sup> Dominic A. Crolla, "Health Care Without Walls: Responding to Telehealth's Emerging Legal Issues" (1998) 19 Health L. Can. 1 at 4 [Crolla].

<sup>6</sup> Mary Jane Dykeman, *Canadian Health Law Practice Manual* (Markham: LexisNexis Canada, 2004) at 6.16 – 6.43 [Dykeman]; see also, Crolla, *ibid.* at 4-5; E.I. Picard & G.B. Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 3d ed. (Scarborough: Carswell, 1996) c. 4.

**Duty of Care of the Telerriage Nurses**

A duty of care is by definition, a relationship that is established between two people where one of the parties owes a specified performance to the other party. It is the legal obligation to behave in such a way (including avoiding certain conduct) which may put the other person in an unreasonable risk of danger. Generally, there are two ways a health practitioner can incur a duty of care to a patient. The first is through the creation of a practitioner-patient relationship.<sup>7</sup> This is created when a patient seeks advice, care or treatment from the practitioner. There is an expectation by the patient that the practitioner is competent to and will provide these things within the skill set that the practitioner is avowing that he/she holds. By agreeing to assist the patient, the practitioner is confirming the relationship and agreeing to provide such care, thus engaging a "duty of care".

The second is implied because the practitioner is now held liable for that duty of care and can be in a negligent position if he fails to exercise that duty appropriately. In other words, it is reasonably foreseeable that the lack of care (or in this instance advice) or the provision of substandard care might result in injury to the plaintiff.<sup>8</sup> In particular, the healthcare practitioner reasonably should have foreseen that the plaintiff would rely on the advice given by the practitioner and thus a duty of care is established.<sup>9</sup>

According to this element of the legal framework therefore, if a telephone call is made and accepted and a health care professional begins to provide information or counselling, a duty of

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<sup>7</sup> Crolla, *supra* note 5 at 5; see also Dykeman, *ibid.* at 6.17-6.18.

<sup>8</sup> *Ibid.*

<sup>9</sup> Crolla, *ibid.* at 6.

care is established and the health care professional then may be subject to liability if the other elements of tort are also invoked by the transaction between the nurse and the patient.

Not surprisingly, therefore according to The National Initiative for Telehealth Framework of Guidelines ("NIFTE"), a duty of care is established in "all telehealth encounters between the health care professional and the patient/client."<sup>10</sup> However, NIFTE points out that the "nature" of that duty is slightly altered from the more common duty that arises in the traditional health practitioner-patient relationship. The primary differences lie in the lack of face to face encounter, the 'one off' relationship (the patient may never deal with that nurse or even that service again) and the consequent uncertain follow-up obligations that may arise from the specific enquiry. As a result, NIFTE suggests that clear guidelines should be put into place to define the scope of the relationship and the duty that arises the moment a caller places a call to the teletriage service and a teletriage nurse accepts that call. In particular NIFTE notes that the teletriage nurse must give "clear and explicit direction to the patient/client at the telehealth encounter as to who has ongoing responsibility for any follow-up and ongoing health care".<sup>11</sup>

#### **B. Standard of Care of the Teletriage Nurses**

As noted above, once a duty of care is established between the nurse and the patient the next element of negligence arises which is, whether the standard of care was breached. Generally speaking, the law has adopted an objective standard of care, determined by "the reasonable person of ordinary prudence". In other words, the health care practitioner is required to exercise "the degree of care and skill which could reasonably be expected of a normal prudent

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<sup>10</sup> National Initiative for Telehealth, *National Initiative for Telehealth Framework of Guidelines* (Ottawa: NIFTE, 2003) at 30, online: (NIFTE) <[www.nifte.ca](http://www.nifte.ca)> [NIFTE].

<sup>11</sup> *Ibid.*





authorities or relevant associations with expertise in telehealth. These guidelines provide a objective criteria for determining the accepted practice of the telehealth practitioners. The court will measure the actions of the teletriage nurse against such standards.

Consequently, it is advisable for the teletriage service providers to endorse and adopt, through internal policy, any national or provincial standards, including those established by the Colleges of the relevant Regulated Health Practitioners. The service should also provide clear and detailed guidelines, standards, policies and procedures for practice that conform to those national or provincial standards.

For example, in the fall of 2003, NIFTE released its Framework of Guidelines (the Guidelines). The Guidelines are a result of a national, multi-stakeholder, interdisciplinary collaboration and consist of a structured set of statements designed to assist individuals and organizations with the development of telehealth policy, procedures, guidelines, and/or standards.<sup>14</sup> With regard to the legal standard of care, NIFTE makes it clear that there is a definite need for each provider of telehealth to develop clear and detailed practice guidelines. According to the Guidelines, all telehealth services must ensure that each health professional possesses the following: i) required skills expected in the professional's field of practice (i.e., a professional and qualified nurse); ii) competent communication skills; an understanding of the scope of service being provided via telehealth; iii) orientation to and ability to navigate the technology systems and environment; iv) an understanding of the telehealth operational protocols and procedures; v) an understanding of any limitations of the technology being used.<sup>15</sup>

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<sup>14</sup> NIFTE, *supra* note 10.

<sup>15</sup> *Ibid.* at 34.

These are samples of the "standards of care" against which the provider will be measured by a court in a negligence action.

In the context of teletriage nursing, these recommendations translate into policies and procedures that provide, for example:

- 1) Proper training and education of the teletriage nurses in these procedures; including extensive training in using the software and computer assistance to develop an ability to navigate through the computer system efficiently.
- 2) A baseline list of questions that should be asked by each nurse in order to ascertain sufficient information relevant to providing advice by telephone. Such a list would not be exhaustive but a beginning minimum upon which the nurse would be expected to build, using her expertise to individualize the patient's situation and to ascertain accurately the circumstances for which she is giving advice;
- 3) Sample information and advice factors that could be used, again as a base line, for specific presenting problems. By way of an example, callers requesting advice regarding an insect bite would be asked a standard set of questions and provided with identified advice as set out in "Guidelines for Insect Bites".
- 4) Clear documentation requirements. At a minimum, the nurses should be required to document the date and time of the call, the name, age and address of the caller, the nature of the enquiry, the advice given including any information regarding follow-up, and the name and status of the nurse.

These guidelines should reflect the standards of the College of Nurses of Ontario regarding advice by nurses over the telephone. According to the College of Nurses of Ontario

("CNO") guidelines, nurses who provide telephone nursing care use the nursing process to "identify client needs and to provide and evaluate care. The Nursing Process has been identified as a standardized process for problem solving that is appropriate for assessing the needs of individuals and groups, regardless of the setting in which the telephone nursing practice is taking place".<sup>16</sup> Similar guidelines have been framed by nurse's regulatory bodies in other provinces.<sup>17</sup>

### Other Standards

There are other issues that must be considered in framing practice guidelines and standards.

### Accessibility

Accessibility is an important aspect of the teletriage practice. The teletriage system should be set up to avoid long waiting times for reaching a nurse or excessive delays in returning caller's messages.

### Language

Another aspect to be considered is a language barrier. As Canada's population becomes more diverse, communicating in English or French may not be enough. It is reasonable to foresee situations where the caller speaks neither of the two official languages. If this is foreseeable, to not take action to prevent miscommunication in such situations can be considered negligently below standard. Even when the caller has some form of proficiency in English or

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<sup>16</sup> College of Nurses of Ontario, *Practice Guide: Telephone Practice*, online: (CNO) <[http://www.cno.org/docs/prac/41041\\_telephone.pdf](http://www.cno.org/docs/prac/41041_telephone.pdf)> [*CNO Guidelines*]

<sup>17</sup> See for example Registered Nurses' Association of Nova Scotia, *Guidelines for Telenursing Practice* (Halifax: 2000), online: (CRNNS) <<http://www.crnns.ca/documents/telenursing.pdf>>.

French, there is potential for miscommunication between the caller and the teletriage nurse, resulting in i) the nurse providing an assessment based on a faulty understanding of the caller's concerns or ii) the patient misunderstanding the nurse's advice. It is therefore crucial to maintain standards of telepractice that provide some form of interpretive mechanisms.

### **Guidelines Alone are Inadequate**

While establishing detailed and clear guidelines is crucial to teletriage practice, it may not be enough to avoid liability. As noted above, the variance in human behaviour makes it impossible to predict and provide for all circumstances. Further, there are inherent risks in teletriage practice, resulting from the lack of face-to-face interaction that might be overcome through the proper questioning of callers. The teletriage nurse should apply her professional judgment in a competent manner to determine what type of information she would need to adduce in order to evaluate the severity of the caller's health problem or concern and see the complete picture.

The common law provides an example of this risk. In the British Columbia case of *Poole Estate v. Mills Memorial Hospital*<sup>18</sup> the defendants were held to be liable for breach of duty of care by not asking enough questions to determine the extent of the patient's problem. *Poole* was an action in negligence against a nurse, a physician and a hospital following the death of the plaintiff's wife as a result of an overdose of anti-depressants. Mrs. Poole had a history of depression when she swallowed what the autopsy revealed to be an excess of eighty 50-milligram tablets of Imipramine, a potent anti-depressant. After noticing that his wife was displaying symptoms such as hallucinations, poor balance, chills and hot flashes, Mr. Poole

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<sup>18</sup> *Poole, supra* note 4.

decided to telephone the Poison Control Center at the local hospital. He was subsequently transferred to a nurse in the emergency ward.<sup>19</sup>

Not wanting to embarrass his wife in revealing her history of depression, Mr. Poole asked the nurse whether it would be "medically dangerous for a person to take six to ten 50 milligrams tablets of Imipramine." The nurse that answered the phone knew little else about Imipramine except that it is an anti-depressant. She turned to the physician that happened to be sitting next to her and conveyed the question. The physician replied that 300 milligrams was a "therapeutic dose". The nurse returned to the telephone and told the plaintiff that the dose was therapeutic. Mr. Poole then asked whether the drug could cause hallucinations or confusion to which the nurse answered that "if it did, that person would sleep it off."<sup>20</sup> Relying on this advice, the plaintiff did not take his wife to the hospital until it was too late and the wife died the next morning.

Assessing the liability of the nurse that answered the call, the court held that the nurse had breached her duty of care by "failing to pursue the matter further". Specifically, the court held that the knowledge she had as a trained and experienced nurse with respect to anti-depressant drugs, together with Mr. Poole's question as to whether the drug could cause hallucinations or confusion, should have alarmed the nurse sufficiently to prompt her to ask more questions of the plaintiff and, perhaps, of the physician.<sup>21</sup>

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<sup>19</sup> *Ibid.* at paras. 1-8.

<sup>20</sup> *Ibid.* at paras. 9-10.

<sup>21</sup> *Ibid.* at para. 16-17. Specifically, the court held that even "though the nurse knew nothing about Imipramine, she did, because of her training and experience, know that: (a) persons suffering from depression are at possible risk for suicide; (b) an overdose of anti-depressant medication is a relative common means of suicide; (c) when suicide is a possibility, it is important to obtain information from a caller as to the condition of the person who ingested the medication; and (d) some individuals can have adverse and potential fatal reactions to even prescribed amount of medication."

With respect to the use of guidelines and protocols, this factor of the court finding is not relevant to the telehealth situation. In the Poole case, the court refused to assign liability to the nurse for not following the protocols prepared for the Poison Control Center, simply because the nurse "had reason to believe that the call was a drug information, rather than a poison control call." Thus, the court chose to ignore the issue of whether there were proper guidelines set up and whether they were followed, and instead accorded liability based on lack of reasonable judgment and proper questioning. This is unlikely to be the case in telehealth action because there should be no confusion in the minds of each party as to the nature of the service provided by the teletriage nurse. Basing its decision on the same principles and analysis, the court did ascribe liability to the physician who answered the nurse's question. His role was clear and the court held that he failed to meet the standard of care expected of him. The court also held the hospital liable on a vicarious liability basis for its employee and for its choice of physician in granting that physician privileges.

As this case illustrates, there is no absolute guarantee against a misadventure occurring as a result of negligent advice given by a teletriage nurse. By following standardized protocols and procedures, asking as many questions as possible, applying reasonable and professional judgment and, in the event of doubt, erring on the side of caution, the teletriage nurse can protect against liability and possibly reduce it but it will also entail personal professional competence, as does any nursing or health care practice.<sup>22</sup>

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<sup>22</sup> A study of the appropriateness of advice given by teletriage nurses to patients in Northern Ontario in 2001 yielded some interesting results. Overall, the teletriage nurse's advice was rated as "appropriate" by at least two of three auditors in over 90% of the audited calls. If not "appropriate", then auditors were three times more likely to rate the advice as "overly-cautious" rather than "insufficient". Hogenbirk & Pong, *supra* note 3 at 53 & 59.

**C. Injury and Causation**

The last two elements of a negligence action, namely, whether the plaintiff suffered injury and whether the defendant's breach was the actual and legal cause of the plaintiff's injury, are determined on a case-by-case basis according to the specific facts of the situation and the ability to prove the causation to the satisfaction of the court. The plaintiff must show a causative link between the negligence of the defendant and his or her injury. In the context of teletriage nursing, this may be difficult for a plaintiff to prove as there is great potential for intervening causative events which contribute to the plaintiff's injury. In addition, sometimes the plaintiff himself/herself might be partially at fault for the injury, for example, for not revealing enough information on the telephone. As a result, a court might find the plaintiff to be partially or wholly liable for his/her injury. This is known as contributory negligence.<sup>23</sup>

**D. The Liability of the Teletriage Provider**

There is a liability for the organization providing the teletriage service - the teletriage nurse's employer. There are two sources of liability for the corporation. The first is the corporation's independent responsibilities to ensure that the practitioners are properly qualified and credentialed; that there are appropriate policies and procedures in place and that there is adequate supervision, monitoring etc. These independent corporate responsibilities exist for any negligence issue. In order to minimize liability therefore, the teletriage provider must be able to prove that it acted with due diligence. The importance of implementing adequate policies, procedures or guidelines cannot be emphasized enough.

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<sup>23</sup> See *Poole*, *supra* note 4 at para. 23, where the court held that Mr. Poole was partially at fault for his wife's death, in part because he did not convey enough information to the nurse.



Second, there is a long standing principle of law that the employer is responsible for the actions of its employees. When an action in tort arises from the behaviour of a professional employee such as a nurse, it is common practice to name the employer as a defendant in the suit as well as the employee.<sup>24</sup> People are going to make mistakes and act negligently. It is within the human condition. Thus the employer is going to be held liable should negligent performance of the nurse be proven along with all other elements of tort listed above. This means that regardless of whether the employer was independently negligent, if it is determined that the nurse-employee was negligent, the teletriage employer will be held liable.<sup>25</sup>

From a due diligence perspective, if the teletriage provider establishes policies and guidelines and ensures that all nurses are properly qualified and receive appropriate training in these guidelines, as well as in the information upon which they may base their advice, and, if the employer ensures appropriate monitoring and supervision, the teletriage provider may be assured of some (but not total) protection from liability.

### **OTHER ISSUES OF LIABILITY IN TELETRIAGE PRACTICE**

The other legal issues arising in the context of teletriage practice and noted above are i) a duty of confidentiality; ii) informed consent and iii) jurisdiction.

#### **The Duty of Confidentiality**

In Canada, health care practitioners owe a patient a duty of confidentiality. This duty is both an ethical and legal obligation. The patient may or may not consent to the disclosure of the

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<sup>24</sup> Dykeman, *supra* note 6 at 6.52.

<sup>25</sup> See *Poole*, *supra* note 4 at para. 22, where the hospital was held vicariously liable for the nurse and physician's negligence.

confidential medical information as he or she sees fit.<sup>26</sup> Provincial privacy legislation is emerging such as the Ontario *Personal Health Information Protection Act* (PHIPA)<sup>27</sup> It is the responsibility of the healthcare provider to ensure that medical records and confidential patient information is secure. Any deficiency in this information regime that results in the unauthorized disclosure or modification of sensitive patient information could result in civil liability for the health care provider and is a provincial offence under the privacy legislation.<sup>28</sup>

Thus, the teletriage service provider must be aware of and ensure compliance with, relevant legislation and regulations designed to protect the confidentiality of the caller's information.<sup>29</sup> As mentioned above, the teletriage provider must establish guidelines and procedures for documenting and recording the caller's information and maintaining the confidentiality of those records. Further, the teletriage nurse must educate the caller about the legal, technical and administrative measures in place to ensure his or her privacy before any information is elicited from the caller. Finally, the teletriage provider should refrain from collecting information that is unnecessary for the provision of the service.

## **B. Informed Consent**

Informed consent is one of the foundations of the legal and ethical requirements of the healthcare industry.<sup>30</sup> In the area of nursing teletriage, consent is considered implied; however it should be based on informed consent that includes providing the caller with information such as:

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<sup>26</sup> Crolla, *supra* note 5 at 10.

<sup>27</sup> S.O. 2004, c.3, Schedule A.

<sup>28</sup> *Ibid.* at 11; see e.g. Ontario's *Regulated Health Professions Act*, S.O. 1991, c. 18, s. 36.

<sup>29</sup> NIFTE, *supra* note 10 at 37.

<sup>30</sup> Ontario's *Health Care Consent Act*, S.O. 1996, c. 2, s. 11 statutorily provides for consent. All Regulated Health Practitioners have standards in their respective Colleges regarding performing care without receiving informed consent from the patient.

The other approach, advocated by most telehealth organizations, is that the jurisdiction that governs the relationship between the caller and the telehealth professional is the location of the professional, namely, where the teletriage nurse is located. This approach has been adopted by most nurses associations.<sup>34</sup>

Because of the uncertainty in this area, it is necessary to inform each caller of the location of the teletriage nurse and that their relationship will be governed by the laws and standards of that province. Whether this approach would be adopted by a court is yet to be determined.

### SUMMARY

As teletriage practice is a very recent phenomenon, there is yet to be enough legal precedent which allows for the determination of the potential liabilities associated with the practice and how they might be avoided. Developing and maintaining clear and detailed practice guidelines, standards and procedures, providing adequate training, applying reasonable and professional judgement and asking as many questions as possible are some of the ways in which teletriage providers might minimize the potential and inherent risks associated with the practice. In any event, as with most novel fields of healthcare, these potential risks might be outweighed by the teletriage practice's anticipated benefits.

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<sup>34</sup> For example, the CNO Guidelines provide: "An Ontario nurse working in an Ontario practice setting who provides telephone nursing to a client outside of Ontario, is considered to be practicing nursing in Ontario and is accountable for maintaining the professional standards of practice as set out by the College". CNO Guidelines, *supra* note 15 at 5.

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i) the nurses name and category; ii) the nature of the help the nurse will provide (e.g., "I will ask you some questions and then provide some information / advice"); iii) how information will be recorded and stored; iv) who has access to the information; v) alternative methods of care available, where applicable; and vi) how the caller may reach the same nurse if further information is needed".<sup>31</sup> Providing all this information to the caller at the outset of the call may make the caller feel more comfortable in discussing his or her concerns with the nurse, and perhaps avoid potential liability that might arise in the future from lack of informed consent.

### C. Jurisdiction

One of the challenges of telehealth is jurisdictional accountability, or more specifically, to which jurisdiction's standards is the teletriage nurse held accountable when the caller is located in another province? This issue is particularly relevant in the context of a malpractice lawsuit because it would determine what practices and laws would apply to the case.<sup>32</sup> In other words, if a patient calls from Hull, Quebec to a telehealth service in Ottawa, Ontario, which professional and legal processes should be applied? Quebec? Ontario? There are two legal approaches that can be taken on this issue.

The first one advocates that when a tort is communicated by telephone, the governing law is that of the jurisdiction in which the caller is located.<sup>33</sup> In the example above, this would mean Quebec. The problem with this approach is that it may require the individual providing advice over the telephone to be licensed or registered in the jurisdiction of the caller. For practical reasons, this approach is therefore quite unpopular.

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<sup>31</sup> NIFTE, *supra* note 10 at 38; see also CNO Guidelines, *supra* note 15 at 6.

<sup>32</sup> *Tolofson v. Jensen* (1994), 120 D.L.R. (4th) 289 (S.C.C.), cited in Dykeman, *supra* note 6 at 4.34.

<sup>33</sup> *Composers, Authors and Publishers Association (Canada) v. Kvos Inc.*, [1963] S.C.R. 136, cited in Dykeman, *supra* note 6 at 4.34.

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