WELCOME
Coffee Talk
A Health Industry Seminar Series
Risk Management in Litigation – How to Proactively Manage and Effectively Respond to Civil Litigation Risk

Kathryn Frelick
kfrelick@millerthomson.com
416.595.2979

Lauren Parrish
lparrish@millerthomson.com
416.595.2638
Overview

1. Strategies for Avoiding a Lawsuit
2. Identifying a Potential Lawsuit
3. Managing a Civil Claim
Where Do Lawsuits Come From?

• Events and actions that result in a critical incident or adverse event
• Events that are unexpected/unanticipated
• Failure to comply with legislation
• As a result of things that have not been communicated (or documented) effectively to patients, clients, employees, vendors, etc.
1. Strategies for Avoiding Litigation

• Up to date institutional knowledge of regulatory requirements and standard of care
• Effective policies to support compliance with legislation and standard of care
• Effective employee training to ensure compliance with policies
• Comprehensive review of employee qualifications and physician credentialing
• Monitoring compliance with policies and procedures
• Fulsome dispute resolution and patient relations processes
1. Strategies for Avoiding Litigation

• Effective Communication to Reduce Risk
  • Critical Incident reporting
  • Patient Safety Reporting
  • Disclosure of Harm (Informed Consent)
  • Complaints and Patient Relations Processes
Apology Act

• An apology made by or on behalf of a person in connection with any matter:
  • is not an acknowledgement of fault or liability
  • does not void or affect any insurance or indemnity coverage for a person
  • cannot be taken into account in any determination of fault or liability in connection with that matter

• What is an effective apology?
Parallel Investigations and Proceedings

- Coroners Investigations
- Health Professional Complaints
- MOL, MOHLTC, OHSA Investigations
- Patient Ombudsman
- Privacy Complaints and FOI requests
- Human Resources and Professional Staff
Pre-emptive Strategies for the Best Litigation Outcome

• Contractual protection
• Comprehensive record-keeping (clinical, financial, employment, privileging) and information management processes
• Comprehensive incident management processes
• Appropriate investigation and follow-up – patient complaints, adverse events/critical incidents
Pre-emptive Strategies for the Best Litigation Outcome

• Early notification of legal counsel to establish privilege
• Have risk management processes (policies and process maps) in place to address key areas of risk
  • Preservation of evidence, securing records, equipment (spoliation of evidence)
  • Tissue samples, pathology, digital imaging and diagnostics
2. Identifying the Lawsuit

• Anticipate potential lawsuits and train staff to do the same
• Complaints, threats or demands – identify and document specifics
• Internal risk reporting - triage and escalation process
• Identification of the right process for investigation and follow up, identification of internal and external resources
  • Internal - risk, senior leadership (medical staff and admin), HR, privacy, security, communications, IT etc.
  • External - legal counsel, consultant, insurer, crisis management, crisis support etc.
2. Identifying the Lawsuit

• Once a potential lawsuit is identified:
  • ensure detailed documentation
  • ensure the right people are involved
  • ensure the right resources are triggered
  • ensure that investigation is protected
3. Managing the Claim – Overarching Principles

- Accountability to patient/public
- Understand the litigation process
- Understand the law
- Secure and protect information
- Support and prepare staff
A. Accountability to Patient and Public

- Isolated event vs. systemic problem
- Ensure confidentiality/authorization
- Avoid fault and blame
- Don’t make promises you can’t keep
- Manage reputational risk- make sure you have the right spokesperson
B. Understand the Litigation Process

- Pleadings
- Documentary Discovery
- Examinations for Discovery
- Preliminary Motions
- ADR (mediation/arbitration)
- Pre-Trial
- Trial
- Settlement negotiations
  - Full and Final Release
C. Understand the Law

• Liability in negligence
• Liability in breach of contract
• Liability for privacy breach – no damages required
Liability in Negligence

1. **Duty of Care**: Health facilities and health professionals owe a duty of care to the patient.

2. **Standard of Care**: Health professional must breach the standard of care established for conduct.

3. **Harm**: Patient must suffer loss or injury.

4. **Causation**: Conduct of health professional must be the cause of loss or injury.
Who is Liable?

• Potentially, health care professional AND health care organization
• Health care organizations are vicariously liable for conduct of employees not independent contractors
• Generally, not liable for conduct of physicians (but not always)
  • Organization has a duty to ensure that physicians are competent and qualified
• Organization has a duty to provide safe, appropriate facilities, equipment and care from employees
Liability for Breach of Privacy

• Intrusion upon seclusion or “snooping cases”
• Emerging area of law → different from claims to IPC
• Courts in Ontario have not yet concluded whether health institutions are responsible for this conduct by employees
D. Securing and Protecting Data

• Disclosure vs. Reporting

• Purpose the information is being gathered for:
  • chart audit, incident report, internal review (Information can generally be disclosed)
  • quality review (QCIPA protection) or investigation directed by counsel (solicitor/client privilege)
  • potential civil claim (litigation privilege)
E. Supporting and Preparing Staff

- Identify persons involved
- Meet sooner than later
- Gather all available information (witness statements)
  - Caution staff regarding evidence confidentiality
- Identify/address systemic failures/areas of risk
- Identify what other support is needed
  - counseling/employee health
  - mentoring
  - legal advice/interview with legal counsel
Review of Risk Management Strategies

• Know the law
• Up to date policies to comply with the law
• Effective employee training
• Monitoring compliance with policies and procedures
• Clarify relationships through contract
• Do not condone improper conduct
• Effective dispute resolution processes
Questions?

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