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# Risk Management in Litigation – How to Proactively Manage and Effectively Respond to Civil Litigation Risk

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# 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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