CANADIAN NURSES PROTECTIVE SOCIETY

August 2006

COLLABORATIVE PRACTICE: ARE NURSES EMPLOYEES OR SELF-EMPLOYED?

THIS DOCUMENT is a briefing note in response to nurses, doctors, governments and others who have questions and concerns about nurses' professional liability protection. It addresses how and why courts currently decide medical malpractice (negligence) cases, types of liability, and types of working relationships and their impact on liability risk and protection. By understanding these issues, appropriate liability protection can be put in place by all parties in collaborative practice.

HOW COURTS DECIDE MALPRACTICE CASES

When a patient initiates a malpractice lawsuit, it is resolved by the law of tort. Tort law aims to achieve: compensation for the plaintiff who proves wrongful injury; justice; education; and deterrence of negligent acts.[1]

For the court to find a health professional negligent, the plaintiff must introduce evidence to prove four elements: duty of care; breach of the standard of care; foreseeable harm caused by a breach in the standard of care; and damages.[2] When health professionals work in teams, this judicial approach does not change. Historically, it has not been deemed fair that if a member of the team is proved negligent that the other team members are held accountable by virtue of being fellow team members.[3]

TYPES OF LIABILITY

After the value of the damages is established, the court will identify which defendant is responsible for the payment of which damages according to the following principles of law:

1. Direct Liability

Each health care professional, both individually and as a member of the collaborative practice team, is accountable for his or her own professional practice. Therefore, if a [practitioner] is found to have been 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. Canadian Medical Protective Association (CMPA) and Canadian Nurses Protective Society (CNPS) professional liability protection is designed to assist physicians and [nurses] with this kind of damage award.

A defendant employer or facility may also be found negligent 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.

2. Vicarious Liability

If an employee is found negligent, 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 an institution, 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.

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 their share of the damages. That defendant may then seek contribution from the other negligent defendant(s).[4]

TYPES OF WORKING RELATIONSHIPS: EMPLOYEE OR SELF-EMPLOYED?

The answer to this question is important in the context of malpractice lawsuits and liability protection because of the legal doctrine of vicarious liability and the financial consequences resulting from its application. This is a business liability. Whether the employer or employee is a health professional is irrelevant. Because damage awards can be expensive for employers, a prudent employer should have appropriate liability protection in place to cover this known risk.[5]

There are two ways to work: as an employee or as a self-employed individual, known in legal terms as an independent contractor. Historically, most nurses have been employees and this remains the case today. But the health care environment is in a state of flux. With the rise of nurse practitionership, the creation of new health teams and the unsettled issue of privatization, more nurses may become independent contractors. To identify the liability protection needed by all parties, it is important to know the difference.

Although there is no one test to determine if an employment relationship exists, decided tax and tort cases provide factors that courts look at in combination to make this determination. What follows are not exhaustive lists of factors and there is no set formula for their application. The relative weight of each factor will depend on the particular facts and circumstances of each case.[6] The court is not bound by the characterization of parties to an agreement or contract as independent contractors if the facts reveal an employment relationship.[7]

Factors that indicate an employer - employee relationship:

- does not own the business or practice;
- has no financial investment in the enterprise;
- does not share in the profits of the enterprise and bears no risk for its financial losses;
- employer control is exerted over the work and how it is done, for example, policies and procedures directing nursing practice;
- is required to report to a supervisor;
- does not provide own equipment;
- does not hire own helpers; and
- receives fixed salary with routine deductions.

Factors that indicate self-employment:

- owns the business or practice;
- has financial investment in the enterprise;
- profits from the enterprise or risks financial loss;
- controls own activities;
- is not required to report to a supervisor;
- as a term of a contract, may be required to follow certain policies and procedures, for example, to ensure compliance with privacy legislation;
- provides own equipment;
- hires own helpers; and
- submits invoices for services rendered.

Perhaps the most difficult or contentious issue when considering whether or not nurses are employees is the issue of control. Because of their education, skill, and awareness of their personal accountability, nurses may require little, if any, direction and control of their daily practice. The important feature of control in an employment relationship is that the employer has the power to exercise control over the subordinate employee, not whether they actually do so.

LIABILITY PROTECTION

Appropriate and adequate liability protection, responsive to the types of liability which may be incurred, can only be put in place when all parties have the same understanding of the nurses' status as employees or independent contractors. Therefore, nurses should decide if they wish to be self-employed before signing an independent contractor agreement, for example, to join a team of health professionals. Nurses interested in being self-employed should review the implications of this proposed working relationship with a business lawyer prior to signing any agreement.

Employers and owner/operators with health profession employees are financially responsible in law for certain wrongs the employees may commit within the scope of their employment because of the court's application of the doctrine of vicarious liability. Employers should seek professional advice on appropriate insurance. Employees should confirm with their employer that there is appropriate and adequate insurance in place to cover this legal obligation.

Independent contractors must decide on the type and amount of liability protection needed to protect their personal assets. Seeking advice from a business advisor is recommended. While most Canadian nurses have automatic professional liability protection (but not business liability protection) from CNPS, there may be options about the sources of additional legal defence funding for professional and business liabilities, for example, CNPS Plus®. To understand the professional liability protection available from the Canadian Nurses Protective Society and for more information on CNPS Plus®, go to www.cnps.ca or call 1-800-267-3390.[8]

If decisions about the source of legal defence funding are not addressed when health professionals begin to work together, and on an ongoing basis, they risk discovering after a lawsuit is commenced that their assumptions about liability protection were incorrect. This could result in unnecessary professional and personal financial jeopardy.

ENDNOTES

1. The Supreme Court of Canada made the following statement about deterrence:

   One of the primary purposes of negligence law is to enforce reasonable standards of conduct so as to prevent the creation of reasonably foreseeable risks. In this way, tort law serves as a disincentive to risk-creating behaviour. *Stewart v. Pettie,* [1995] 1 S.C.R. 131 at 150.

2. Canadian Nurses Protective Society, *infoLAW®*, Negligence (Vol. 3, No. 1, November 2004).

3. In *Granger (Litigation Guardian of) v. Ottawa General Hospital*, [1996] O.J. No. 2129 (Gen. Div.) (QL), doctors, nurses, and a hospital were sued. The court responded to evidence that certain functions within the obstetrical team (who did what, when and how) were within the realm of nursing. The doctors on the team were not responsible for the nurses negligence. The court made these findings:

   Nurses are professionals who also possess special skills and knowledge and the same principles apply as in the case of doctors, residents and interns. They have a duty to use those skills in making appropriate assessments of patients and to communicate accurately those assessments to physicians. (para. 26)

   The staff obstetrician should be entitled to rely upon the information being given to him or her by the staff nurse on the understanding that the nurse, assigned by the hospital to these duties, has been properly trained, is sufficiently experienced and knows what he or she is doing at all times within the scope of his or her professional responsibilities. (para. 34)

4. From Canadian Medical Protective Association and Canadian Nurses Protective Society, *CMPA/CNPS Joint Statement on Liability Protection for Nurse Practitioners and Physicians in Collaborative Practice* (Ottawa: Author, March 2005). Online: www.cnps.ca.

5. In the case in footnote 3, the court, as usual, applied the doctrine of vicarious liability, saying:

   In this case, the nurses were employees of the Ottawa General Hospital and if they breached their duty to exercise appropriate skill and care in making interpretations and communicating information to physicians and damage results, the hospital will be liable. (para. 26)

6. *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983; Canadian Nurses Protective Society, *infoLAW®*, Vicarious Liability (Vol. 7. No. 1, April 1998); and Canada Revenue Agency, *Employee or Self-Employed?*, Document RC4110(E) Rev. 06 (Ottawa: Author, 2006). Online: www.cra.gc.ca.

7. *Dynamex Canada Inc. v. Mamona*, [2003] F.C.J. No. 907 (F.C.A.).

8. Please refer to Canadian Nurses Protective Society, *infoLAW®*, Independent Practice (Vol. 4, No. 1, November 2004).

CANADIAN NURSES PROTECTIVE SOCIETY
SOCIÉTÉ DE PROTECTION DES INFIRMIÈRES ET INFIRMIERS DU CANADA

Address: 50 Driveway, Ottawa, ON K2P 1E2
Telephone: (613) 237-2092, 1-800-267-3390
Fax: (613) 237-6300
Web site: www.cnps.ca

Adresse : 50, Driveway, Ottawa, ON K2P 1E2
Téléphone : (613) 237-2092, 1-800-267-3390
Télécopieur : (613) 237-6300
Site Web : www.spiic.ca