Liability Issues and Collaborative Practice

Part III: Understanding Legal Actions Against Healthcare Teams

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Surprisingly, very few cases involving healthcare teams have been decided by the courts in Canada. Many claims are resolved before a lawsuit is even started while others are settled after the law suit is begun but prior to trial. In fact, the number of claims and lawsuits for medical malpractice is decreasing.[1]

There are no cases in Canada where a dietitian has been found to be negligent. ENCON, the professional insurer for members of Dietitians of Canada, has paid seven claims since 1989 but only two raised issues of negligence. The first was a food poisoning incident in a facility where the dietitian supervised breakfast and lunch. Even though the incident occurred at dinner, a meal not supervised by the dietitian, ENCON paid $7,637 to settle the claim. The other matter was a dietitian providing incorrect information for a publication. The publication had to be reprinted, ENCON paid 50% of the claim ($1,426) and the dietitian had to cover the other half personally.

Healthcare Insurance Reciprocal of Canada ("HIROC"), which insures 500 health care organizations in Canada, has never paid any claims for negligence of a dietitian *per se*. HIROC has paid claims on behalf of the insured staff at facilities on a global basis where one of them may have been a dietitian. However, since the amount paid on the claim was not apportioned amongst the various staff members, there is no information about claims paid specifically for the negligence of a dietitian.

While these are all very encouraging statistics, it leaves us with little guidance from the

Need to Know

1. There have been no court decisions where a dietitian has been found to be negligent.
2. Very few claims have been paid out by insurers for dietitians for negligence.
3. Notwithstanding these statistics, professional liability insurance is crucial for protecting the public, protecting yourself, and team harmony.
4. Legal actions are not brought against the team but rather the individual professional.
5. Team members are entitled to rely on one another to do their job properly and will not be found to be negligent for having done so.
6. The standard of care varies with experience and training. A Dietitian's conduct will only be judged by comparing it to that of a prudent practitioner with comparable experience and training.

courts about how they will assess the conduct of a dietitian practising on a team in an action for negligence. However, some understanding can be gained from examining the cases involving healthcare teams and making analogies to the practice of dietetics.

IF THERE ARE SO FEW CLAIMS AND ACTIONS AGAINST DIETITIANS THEN WHY CARRY INSURANCE?

Notwithstanding the fact that dietitians have relatively little risk of being sued, or having an insurance claim made against them, it is important for them to be properly insured for several reasons:

1. All of the members of the team should carry professional liability insurance to ensure that the public is fully protected in the event of negligence on the part of one or more members of a healthcare team.
2. Defendants on a healthcare team can be found "jointly and severally liable" for negligence. Where more than one member of a healthcare team is found liable for harming a client, and the court finds that the members of the team are jointly and severally liable to the client, then the client can collect the entire award from one defendant. This means that if the other members of the team are unable to pay or without insurance, the member of the team with the financial means is required to pay the entire award even though the other members of the team are also responsible.
3. Every member of the team needs to be insured to build trust and be confident that they will not incur financial hardship for an uninsured member of their team. The medical profession itself is already urging all professions to make professional liability insurance mandatory.
4. Professional liability insurance for dietitians includes coverage for certain legal fees that can result from actions for negligence, criminal prosecutions, and some proceedings at the College.

LEGAL ACTIONS ARE AGAINST INDIVIDUALS

A healthcare team cannot be sued as such because it is not recognized as a legal entity. Legal entities are individuals or corporations. In the event of negligence or suspected negligence of the members of a healthcare team, parties complaining of that conduct must bring their action against the individual members of the team and list each healthcare professional as a defendant in their action.

So far in Canada, the way the courts are dealing with cases involving healthcare teams is to judge each member of the team according to the standard of care for their profession.[2] A specialist will be judged according to the standards of care of the specialty, not those of the profession in general. In addition to the standard of care of each team member, the courts also closely scrutinize the functioning of the team, the roles of each team member and whether or not team members adhered to the policies of the facility.

TEAM MEMBERS MUST RELY ON EACH OTHER

In general, teams are an efficient way to do work. Canada's healthcare system depends on healthcare teams to function. The most important part of working on a team is the ability of team members to rely on each other to do their job. Our courts have confirmed this tenet of team work several times in the case law.

Granger (Litigation Guardian of) v. Ottawa General Hospital

In *Granger (Litigation Guardian of) v. Ottawa General Hospital ([1996] O.J. 2129 (Gen. Div.))*, a baby experienced oxygen deprivation during delivery and suffered severe brain damage as a result. Her mental age would remain somewhere between 6 and 24 months, she would never be able to do anything for herself and would need constant care for the rest of her life. Her life expectancy was only 20 years.

The main problem related to the fetal heart monitor. While the mother was being monitored by the staff nurse during delivery, the monitor showed a constant

deceleration of the baby's heart rate which means that it was deprived of oxygen throughout that time. Due to her inexperience, the nurse failed to report these results to anyone and this is what caused the baby to suffer irreparable brain damage.

The staff nurse, the nurse supervisor and all of the doctors including the residents and interns caring for the mother, were named as defendants by the family when they sued. The hospital was also named because it was responsible for hiring and overseeing the nurses.

The court said that the obstetrician was entitled to assume that the nurse was properly trained and knew when to report problems. That was her role on the team and the obstetrician did not have to verify that she was doing it.[3] It concluded that:

- the staff nurse was negligent for not reporting the fetal heart monitor results;
- her supervisor was negligent for failing to properly monitor the staff nurse and patient;
- the hospital was liable for breaching its duty to maintain a minimum level of competency in its nursing staff;
- there was no negligence on the part of any of the doctors involved in the case. It is with respect to this last finding that the court made some important statements about team based care:
  - i. Healthcare teams for obstetrics is one of the hallmarks of the Canadian medical system.
  - ii. The ability to rely on one another, particularly for providing accurate information, is critical for team members. Given the desire to provide quality care within budgetary limits, if team members could not rely on each other to do their work properly, our system would fail.
  - iii. Health professionals can expect that their team members are properly fulfilling their role on the team in accordance with the standard of care for their professions. They need not double check their work.. They are entitled to accept that information given to them by members of their health team is accurate and that they can rely upon it.

How does this case apply to dietetics?

Dietitians practising in hospitals and long term care facilities need to rely on information about a client collected by others on the healthcare team. Like the physicians in the Granger case, dietitians cannot be present to observe and record every meal a client eats or the amount of fluid they drink or receive by intravenous.

In some facilities, information about a client's diet is recorded by other members of the care team. Their role is to record a client's caloric macronutrient and fluid intake in the chart. Dietitians rely upon this information to make whatever adjustments are necessary in a client's diet. If the food service supervisor has not properly recorded the information, then, a client might suffer harm as a result of the adjustments made by the dietitian based on that misinformation.

Was the dietitian negligent?

Scenario

An elderly client in a long term care facility is being tube fed. The food service supervisor confuses the client with another client and erroneously records that the client began eating meals and records the calories of those meals. When the dietitian reviews the chart, she calculates the calories recorded by the diet technician and determines that tube feeding can be reduced. The client then becomes malnourished and ultimately dies. The client's family sues the facility, the dietitian and the food service supervisor. *Is the dietitian negligent in this case?*

The answer is no. Applying the principles from Granger and other court decisions which confirm those principles, the dietitian cannot be found to be liable for the harm done to the client. The food service supervisor's role was to record the client's caloric intake. The dietitian could not possibly be present for all of the feedings. The dietitian was

entitled to rely on the information recorded by the diet technician and did not have to double-check the diet technician's work. She would also be entitled to assume that the food service supervisor was doing her job at the appropriate standard of care, otherwise, the long term care facility would not have hired her.

There may be circumstances where the information recorded in the chart should cause the dietitian to question someone else's entries. If the client in the example above had been close to death, and the food service supervisor recorded that he was suddenly consuming large amounts of calories, the dietitian would probably make inquiries of the food service supervisor, and perhaps see the client because this action was unusual. If the dietitian did not do so, and harm resulted to the client, the dietitian might be liable.

EACH TEAM MEMBER WILL BE HELD TO THE STANDARD OF CARE FOR THEIR OWN PROFESSION

In the case of Reynard v. Carr, the patient, Lloyd Reynard was suffering from ulcerative colitis. He was under the care of his general practitioner and a gastroenterologist who prescribed prednisone for him, for almost two years. The prolonged use of prednisone caused him to develop avascular necrosis which resulted in him having to have both of his shoulders and hips replaced with artificial joints. This condition is a well known side effect of prolonged prednisone use, but neither Mr. Reynard's general practitioner nor his gastroenterologist warned him of this. Both physicians also failed to tell him that surgery is an alternative treatment to prednisone for ulcerative colitis.

Quoting from another case about the standard of care for health professionals, the court said:

> *Every medical practitioner must bring to his or her task a reasonable degree of skill and knowledge and must exercise a reasonable degree of skill and care. He is bound to exercise that degree of care and skill which could be reasonable expected of a normal, prudent practitioner of the same experience and standing, and if he holds himself out as a specialist a higher degree of skill is required of him than of one who does not profess to be so qualified by special training and ability.*

The court concluded that knowledge of the side effects of prednisone and the surgical alternative for the treatment of ulcerative colitis were within the standard of care of both the gastroenterologist and the general practitioner. Both of the physicians were therefore found to be negligent in their treatment of Mr. Reynard. Even a general practitioner ought to have known about the problems and risks associated with Mr. Reynard's treatment.

How does this case apply to dietetics?

Dietitians will only be held to the standard of care for dietitians. If a client who is under the care of a healthcare team suffers as a result of health care received, each practitioner on the team will be judged by what a prudent practitioner, with the same experience and training would have done in the circumstances — the conduct of a nurse will be compared to that of a prudent nurse with similar training and experience and that of a dietitian will be compared to that of a prudent dietitian with similar training and experience and so on.

Although the College does not register dietitians as specialists, it is possible for a dietitian to develop an expertise in a particular area of dietetics through work experience and/or professional development. In the event of a legal action, a dietitian who has developed an expertise in parenteral nutrition will have her conduct compared to that of a similarly experienced dietitian and not that of a dietitian working in another area such as public health. Similarly, a dietitian with only one year experience working in a hospital will not have her conduct compared to that of a dietitian who has practised for 25 years in a hospital.

1. **Conference Board of Canada**, "Liability Risks in Interdisciplinary Care", April 2007, p.23.
2. **Bauer (Litigation Guardian of) v. Seager** [2000] 11 W.W.R.. 621 (Man.Q.B.).
3. Ibid.