



VIA E-MAIL

30 May 2008

Annie Schiefer, Project Manager
Health Professions Regulatory Advisory Council
55 St. Clair Avenue West
Suite 806, Box 18
Toronto ON M4V 2Y7
HPRACSubmissions@ontario.ca

*Professional
Liability
Protection
for Nurses
by Nurses*

*Protection
responsabilité
professionnelle
pour les
infirmières par
les infirmières*

Re : HPRAC Consultation on Interprofessional Collaboration

Dear Ms. Schiefer,

Thank you for the opportunity to make a submission to the Health Professions Regulatory Advisory Council on this issue of great interest to the Canadian Nurses Protective Society [CNPS].

CNPS is a national not-for-profit society funded exclusively by its member organizations, which are 10 provincial and territorial nursing colleges and associations. CNPS provides professional liability protection for over 99,000 eligible nurses across Canada.

As CNPS' mandate is centred on liability matters, we are responding only to Questions 6, 7 and 8 in HPRAC's Discussion Guide.

Question 6: Do you have evidence from your experience that liability issues are a barrier to interprofessional care?

Yes. The key question is the source of legal defence funds in case of a malpractice suit. Once this is identified and in place, health professionals can focus their energies on delivery of health services.

CNPS has had several experiences that lead to the observation that liability issues are both a real and perceived a barrier to interprofessional practice. What is needed is appropriate legal defence funding, based on the types of liability that may arise.

In January 2004, CNPS increased the financial limit for nurse practitioner [NP] professional liability protection to \$5 million per incident, with an annual aggregate of \$5 million (the amount for registered nurses remained at \$1 million per incident). This was not based on a Canadian claims history that would justify such a degree of protection, but was in response to pressure applied by the Canadian Medical Protective Association (CMPA) and the Ontario Medical Association (OMA) and a continued desire to protect the public. Physician groups feared that doctors will be held legally accountable for the actions of an NP. However, raising the limit does not address the fact that the vast majority of NPs are employees. Their employers will have corresponding legal responsibilities as a result. Due to the legal doctrine of vicarious liability, the need for liability protection rests with the employer. It is therefore the employer's limit that is most relevant (see answer to Question 7).

Published following the increase in CNPS protection to NPs was the CMPA/CNPS Joint Statement On Liability Protection for Nurse Practitioners and Physicians in Collaborative Practice (March 2005). CNPS has heard from nurses, doctors, administrators and government officials that this has helped clarify matters. Published in June 2007 was the CMPA/HIROC Joint Statement on Liability Protection for Midwives and Physicians, which is patterned after the CMPA/CNPS Joint Statement.

An example of appropriate legal defence planning and funding is the group insurance arranged by the Association of Family Health Teams of Ontario [AFHTO] in 2007. As Ontario has grappled with the provision of primary care, the Ministry of Health and Long Term Care has funded various interprofessional practice configurations, one of which is Family Health Teams [FHT]. Physicians are funded to run FHTs. So, not only do they practice medicine, but physicians are also employers of various professional and support staff, or purchasers of services from independent contractors. In recognition of the corresponding legal responsibilities inherent in being an employer, AFHTO worked with an insurance broker, which put together an affordable group insurance plan (FHT funding includes money to purchase insurance for the FHTs as legal entities). When a court applies the legal doctrine of vicarious liability, an employer with liability insurance which covers their corporation, partnership, or business, including their employees, will have an appropriate source of funding to satisfy the judgment.

Provincial governments fund doctors' legal defence costs uniquely through CMPA protection. Like CNPS, CMPA is often erroneously called insurance but it is not. It is a discretionary professional liability defence fund. There are limits to CMPA and CNPS assistance. CMPA makes a distinction between the provision of professional services and of business liabilities, as does CNPS. Doctors can contact CMPA to see if their business (clinic, practice, office...) meets the criteria for CMPA Assistance to Clinics and Facilities. If it does not, then doctors who are employers of other health professionals, for example, NPs, should seek appropriate insurance, namely, insurance that will respond to their various business liabilities, including the application of vicarious liability. CNPS advises nurses who are

business owners and employers of this legal responsibility and the same pragmatic remedy: appropriate insurance. CNPS sponsors a group insurance plan for nurses for this purpose called CNPS Plus. Another Ontario group insurance plan for nurses sponsored by the Registered Nurses Association of Ontario (RNAO) is called NurseInsure. These plans are intended to provide professional liability coverage for nurses who are business owners and employers of others, and nurses who are independent contractors.

Question 7: Should all regulated health professionals be required to hold minimum professional liability insurance coverage?

No. Not all. For those who are employees, requiring them to purchase insurance would add a layer of expense to health care costs for no principled reason.

Liability protection that will respond to the ways in which courts assign legal responsibility is recommended when health disciplines work together. The common law principles of direct liability and vicarious liability are laws of general application. These common law principles are not specific to doctors, hospitals, and nurses, nor are they exempt from them.

This means employers of health professionals should be prepared to bear the cost of the court's application of the legal doctrine of vicarious liability. Employers who happen to practice a health profession themselves (for example, doctors) are not exempt from its operation. Health professionals in independent practice are wise to insure both their business and their professional practice.

A persistent concern for physician groups is that CMPA is unlikely to pay for the business liability arising from the application of vicarious liability, hence their repeated insistence that other health professionals have their own liability insurance. What is consistently missing in this position is a distinction between the legal responsibilities inherent in the practice of medicine and the legal responsibilities of being an employer of others. The fact that CMPA may not pay for the legal defence cost of its members' employees does not shift the liability risk, and the protection needed to address the risk, to the employee. Even if employed health professionals have their own liability insurance, it does not negate the employer's legal liabilities and the employer's responsibility to the public to insure that risk.

The majority of nurses, including nurse practitioners, are employees. As nurse practitionership became part of Ontario's plan to deliver primary health care services in the past 10 years, the question of funding them had to be addressed. It was possible that they would in reality be independent contractors, working in true collaboration with other members of the health care team, including physicians, and not under the control of employers, but this did not come to pass. The political pressure applied to government to prevent NPs from having billing numbers was successful. Funding for NPs is streamed through some other entity (hospital, clinic or community health centre, etc.), not directly to NPs themselves.

Perhaps the most difficult or contentious issue this raises is the issue of control. Because of their education, skill, and awareness of their professional accountability, nurses may require little, if any, direction and control of their daily practice. From a legal perspective, 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. For example, see Canadian Medical Association's Discussion Paper of July 2007 "Putting *Patients First*®: Patient-Centred Collaborative Care" paper at p. 8 where it is stated that non-physicians are to do things like ordering tests "in a manner acceptable to the clinical leader [physician]". Because of the level of control exerted in the workplace over nurse employees, the law allocates the financial risk of negligent employee behaviour to the employer.

Courts make determinations about employment versus independent contractorship based on the reality of the work environment, not on the titles of the parties. If a nurse is truly an independent contractor, she will be responsible for her own legal defence funding. However, a person's professional qualifications and skill-set do not equate to self-employment nor do they override the employer's responsibilities in law.

In recognition of this reality, hospitals have insurance for their health professional employees, including NPs and other nurses in advanced practice. Physicians, nurses, physiotherapists, etc. who own and operate clinics and offices should take the same steps to ensure they, as employers, have adequate insurance that will respond to the way in which courts award damages to be paid.

Where there is more than one defendant found liable by a court, an assignment of joint and several liability may be made by the court to protect the successful plaintiff in case one or more of the liable parties is unable to pay the damages awarded against them. Liability is assigned to individuals, not teams. If insurance coverage of all parties is adequate, there would be no cause for concern about the application of joint and several liability. The solution is simple: physicians, employers (including physician employers) and independent contractors should all have adequate and appropriate insurance coverage.

Question 8: If so, what would be the minimum expected terms and conditions for that insurance coverage?

If this were to be required, it should be phrased as professional liability protection, which would capture both insurance and legal defence funds like CMPA and CNPS.

If a health professional is an employer, there should be a mandatory legislated requirement that they have appropriate liability insurance or protection to cover their business and their vicarious liability for their employees. What is adequate in terms of financial limits and scope of protection would depend on the size of the enterprise, the number of employees and the type of health care being provided to the public.

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Thank you and I look forward to the results of this discussion.

Sincerely,

A handwritten signature in black ink, appearing to read 'P. McLean', written in a cursive style.

Patricia McLean, R.N., B.N., LL.B.
Executive Director
Canadian Nurses Protective Society

Attached: CMPA/CNPS Joint Statement On Liability Protection for Nurse Practitioners
and Physicians in Collaborative Practice, March 2005

Canadian Nurses Protective Society Briefing Note, Collaborative Practice:
Are Nurses Employees or Self-employed?, August 2006