



THE CANADIAN
MEDICAL
PROTECTIVE
ASSOCIATION

L'ASSOCIATION
CANADIENNE
DE PROTECTION
MÉDICALE



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Joint Statement on Liability Protection for Midwives and Physicians

INTRODUCTION

New and evolving models for health care delivery have increased the opportunity for physicians, midwives and other health care providers to all be involved in the treatment of the same patient. This inevitably reinforces the need for health care professionals to ensure they individually have adequate personal professional liability protection and that the other health care professionals who are part of the health care team are also adequately protected so that one is not held financially responsible for the acts or omissions of another. The Canadian Medical Protective Association (CMPA) and the Healthcare Insurance Reciprocal of Canada (HIROC) have developed this document to respond to questions from midwives and physicians who may treat the same patient during the course of pregnancy, birth and the post-partum period.

LIABILITY RISKS

When a patient commences a legal action regarding health-care treatment, it is common that all health-care professionals who were involved in the treatment, as well as the institution or facility where that treatment was rendered, will be named as defendants. A finding of negligence by the court may have a financial impact on the defendant(s) in three ways:

1. Direct Liability

Each health-care professional, both individually and as a member of the health-care team, is accountable for his or her own professional practice. Therefore, if a physician or midwife is found 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. CMPA and HIROC professional liability

protection is designed to assist physicians and midwives respectively with this kind of damage award.

Apart from the liability exposure of midwives and physicians, a facility such as a hospital or birthing centre may also be named as a defendant. If found negligent, such a facility may be held directly liable for breaching duties it owed separately to the mother or baby. 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

The facility could also be held vicariously liable for the negligent acts of its employees, such as nursing staff or technicians. 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 a facility, 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. Some of the factors the court would consider in determining if an employment relationship existed are the level of control the employer has over the employee's activities, any agreements which describe the relationship and requirements to follow the employer's policies or procedures.

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 his/her share of the damages. That defendant may then seek contribution from the other negligent defendant(s) involved.

For this reason, physicians and midwives should verify that each member of the health care team and the facility or institution have adequate professional liability protection in place at the beginning of the working relationship and on an ongoing basis.

LIABILITY PROTECTION

Because of the potential liability risks, all members of the health-care team and the institution or facility must have appropriate and adequate professional liability protection or coverage to protect both themselves and the patients they treat.

When a CMPA member is sued by a patient regarding medical treatment, that member is generally eligible for assistance from the CMPA. This protection is occurrence-based, which means the eligible professional's protection extends from the date the incident occurred regardless of when the claim was made. CMPA members who have been granted assistance are eligible for legal assistance and payment of damages. In some circumstances, clinics and other practice arrangements may be eligible for assistance. However, physicians should separately purchase clinic insurance for general liability protection.

Insurance arrangements for midwives vary from jurisdiction to jurisdiction. The financial limit of protection may vary slightly with jurisdiction. Hospitals that offer privileges to midwives scrutinize their professional liability coverage to ensure that coverage is sufficient from the point of view of the hospital. Most provinces/territories have legislation governing the minimum professional liability insurance that a midwife must carry to protect the public. Midwives in Alberta, Manitoba, and Ontario have protection through HIROC, the same group that provides protection for many of Canada's hospitals. Midwives' coverage normally extends to claims which include his/her clinic and other working circumstances. Midwives should separately purchase clinic insurance for liability protection.

RISK MANAGEMENT

Physicians and midwives share an interest in reducing liability risks when treating the same patient. Taking the following steps will help to decrease potential risks:

- have appropriate and adequate professional liability protection and/or insurance coverage;

- confirm the continuing appropriate and adequate professional liability protection and/or insurance coverage of the other members of the health care team;
- be familiar with the scope of practice of each team member (e.g., midwife, family physician, obstetrician) in the jurisdiction and institution in which they work;
- have an agreement about who is the most responsible care provider at any given time and what the division of responsibilities is at any given time;
- physicians should contact the CMPA and midwives should contact their professional association or HIROC to discuss issues related to being part of a health-care team or the extent of assistance for clinics and other practice arrangements (contact information provided at right);
- if you have or require commercial insurance covering matters that lie outside the scope of protection provided by the CMPA and HIROC, you should consult a business lawyer or insurance professional about how to identify your business insurance needs and protect your individual and business interests. Consider scheduling a periodic review of these issues;
- if commercial insurance is purchased, abide by the terms of any policy and report any potential or actual claim to the insurer while the policy is still in effect; and
- if you change insurers or do not renew a claims-made insurance policy, purchasing tail coverage is recommended.¹

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¹ A "claims-made" policy requires reporting a potential or actual claim to the insurer before the policy's expiry date. Only incidents that have occurred after the "retroactive date," if there is one in the policy, and that are reported during the policy period are covered. If there is no retroactive date in the policy, incidents that occurred before the policy came into effect are covered if they are reported during the policy period and you were unaware of the claims at the time you purchased the policy. "Tail coverage" may also be called an "extended reporting clause" or "discovery clause." Tail coverage is only applicable to claims-made policies, and it extends the reporting period in which a claim can be made. When a claims-made policy is not renewed the purchase of tail coverage is recommended.

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