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The Family Health Team initiative is proving to be highly successful as judged even at this early stage of implementation. FHTs bring family physicians together with other health professionals to provide improved access and quality of care for their patients. The assistance from other professionals in caring for their patients is the vital next step in primary care reform. An important aspect of the evolution of FHTs which must not be overlooked is the issue of liability and liability insurance for FHTs and FHT physicians and associated professionals and other staff.

Most Family Health Teams are physician led and therefore physicians are members of the corporation and/or directors of the Boards that govern FHTs. At the same time they are clinicians and team leaders. This paper will attempt to outline some of the liability issues that physicians and their professional colleagues and staff need to take into account when they become members of a FHT. The issues are of course no less important for community FHTs.

This is a very brief outline of the six types of liability and the liability insurance or protection which is available for each to physicians and associated health professionals and staff in FHTs. This is a brief document which outlines liability situation as we know it at present. Readers are encouraged read other documents, a few of which are listed at the end, and to consult with knowledgeable lawyers, insurance brokers and relevant organizations. This paper is based on reading of relevant materials and discussions with lawyers and officials from various organizations including CMPA, CNPS, OMA, and insurance brokers and companies. It has been written by physicians in an attempt to communicate in simple language in an attempt to increase awareness and engagement with the issue.

There are six types of liabilities that need to be covered by insurance or protective organizations.

1. Board of Directors liability
2. General liability
3. Direct Individual Professional Liability
4. Joint and Several Liability
5. Institutional Liability
6. Vicarious Liability

The first four types of liability are reasonably familiar to physicians and are rather straightforward and well-established. The fifth type is less well known but will be briefly described. The sixth has been a matter of much confusion, discussion and debate over the past two years.

This is in large part because the formation of interdisciplinary collaborative teams in family physicians' offices with funding from the MOHLTC on the current large scale is a new development in primary health care. The resulting changes in risks, case law and quantification of liability have not yet been established. The various protective and representative organizations and insurers are struggling to understand and fairly appropriate the liability and protection needed for team practice.

The CMPA (Canadian Medical Protective Association) has just released an updated version of document on liability in collaborative practice which all physicians and associated professionals are urged to read (reference 1 below). With regards to confusion that FHTs have encountered over the past two years the CMPA document states:

“An important, but often unstated element of supporting collaborative care lies in ensuring that the regulatory and judicial authorities charged with enforcing accountability frameworks and adjudicating liability are familiar with the evolving nature of health care delivery and the changing roles and responsibilities of health professionals. These authorities and the courts need to adapt to the changed circumstances in the same manner as the providers and patients. Lahey and Currie² addressed this issue by advising that systemic changes in professional practice are “learned” by the courts on a slow, conservative, incremental, case-by-case basis.

We cannot afford the risk of discovering a liability gap through a potential future medical legal case in which a FHT or individual professionals end up having to pay out a large settlement and finds they are uninsured for the loss and therefore suffer financial ruin. FHTs, collaborative teams, and improved quality of care cannot flourish unless the professionals and staff are comfortable with the liability protections that are in place.

There are still some uncertainties but what is clear is that two years into the implementation of FHTs that liability protection gaps do exist . We need to fill those gaps as soon as possible. There are now a number of insurance products available which protect against vicarious liability for health professionals working in our offices, whether employed by the FHT or by the practice with funds flowed from the FHT.

If physicians and their new professional colleagues and staff and FHT administrators have not already done so they should acquaint themselves with the issues. They should seek further advice and clarification as necessary from competent legal and insurance experts and protective organizations.

Prevention of Medical Legal Misadventure

There is excellent advice in the CMPA paper about ensuring a safe working environment and reducing risks through the building of well communicating well functioning collaborative inter-professional teams. FHTs should utilize the principles and processes of inter-professional education to enhance team members' ability to work well together. Collaborative team care can improve patient care, but the corollary is that team

dysfunction (poor communication and knowledge, no negotiation of roles, responsibilities and communication around patient care) can easily decrease the quality of care and increase the probability of misadventure leading to medical legal action. Likewise, the development of policies and procedures around all of the functions of FHTs and practices will help them to function well and will prevent misadventure.

Protections against liability

1. Board of Directors Insurance:

This insurance product is well known in the business community and protects members of Boards from legal actions brought against the Corporation. The most common would be “wrongful dismissal”. This type of insurance is widely available.

2. General Clinic or Facility Insurance:

As part of the FHN/FHO contract, physicians are obligated to have \$5 million dollars facility insurance to cover the physical structure in which they practice. This is also known as CG&E or “comprehensive”, “fire and theft” and “slip and fall”) insurance. This type of insurance is widely available. For FHTs who have offices that are separate from clinical practices, separate facility insurance purchased by the FHT will be necessary. If the cost for insurance in this category is increased for the practices as a result of additional staff or patient flow or expansions of clinical space due to renovations or moves/co-locations, this would be a cost that would be eligible for FHT funding as applicable along with other facility overhead costs.

3. Professional Liability Insurance:

Each Health Care Professional in the team should consider whether they need to have individual liability insurance or membership in a suitable protective association to protect themselves in case of professional misadventure. For physicians this would be CMPA membership. For other RHPA (Regulated Health Professionals Act) or non RHPA health professionals there is available insurance or membership in a protective association.

For RNs (registered Nurses) or NPs (nurse practitioners) membership in the RNAO Registered Nurses Association of Ontario comes with entitlement to their Legal Assistance Program including automatic membership in the (CNPS) Canadian Nurse Protective Society. The same applies to RPNs through their association RPNAO.

If RNs NPs or RPNs (or any other FHT funded health professionals) are employees of the FHT or a practice, their employer is responsible for maintaining primary professional liability insurance as part of its vicarious liability responsibility (see next section). However nurses are encouraged join the ONA or RPNAO (and other professionals should consider having their own protection) for various reasons including 1. there is benefit to having your own legal advisors 2. protection would be crucial for the individuals if FHTs or FHT practices did not carry adequate vicarious liability insurance 3. There are some actions which might not be covered in an employer’s insurance for example protection against allegations of criminal activity or for professional discipline complaints or for acts committed while not at work.

4. Joint and Several Liability:

Here we quote again from the CMPA paper.

“Physicians have long been exposed to the concept of joint and several liability (where more than one party is responsible for having caused injury to another but the plaintiff may recover full compensation from the provider most able to pay, even though that recovery is out of proportion to the degree of liability). Under a collaborative care model, the risks posed by joint and several liability will now be extended to other professionals and they should all make adequate provision for this risk”.

Here it is again is important that the FHT and the FHT practices and each professional all carry adequate personal liability insurance particularly where there is an independent contractor relationship with associated health professionals

5. Institutional Liability

A Health Care institution or physician employer owes a duty of care to patients, a breach of which can lead to vicarious liability (discussed below) or “institutional” liability. The latter flows from the responsibilities the institution owes directly to the patient. These include ensuring that appropriate policies are in place that will create a safe environment for the patient for example relating to privacy, consent, clinical policies and procedures, and supervision. The facility has a responsibility to the patient to ensure that staff is skilled and knowledgeable. Insurance is available for FHTs and Practices for this type of liability.

6. Vicarious Liability:

Vicarious liability in Canadian common law is a principle or doctrine whereby an employer is responsible for the actions of their employees. The CMPA document (reference 1) states: *“Vicarious liability is a risk posed when health professionals are employees of an individual or other legally recognized entity (such as a corporation or a partnership). The employer (for example, a hospital or a physician or a group of physicians) may be liable for the negligence of employees. Depending on the composition and functioning of the collaborative team, vicarious liability may also be extended to other team members”.*

Physicians and FHTs may be exposed to vicarious liability under two circumstances:

1. When the FHT is the employer of the associated health professionals or administrative or support staff:

In this case the FHT is directly responsible for purchasing and maintaining insurance to cover the direct professional liability of its employees, and to cover its own vicarious liability as employer.

2. When the associated health professionals or administrative or support staff are employed by the practices with funding flowed from the HFT under some sort of written accountability relationship.

In this case the individual physician (or group of physicians or partnership or whatever the case may be) is again fully responsible for purchasing and maintaining insurance for its employees, to cover their employee's direct professional liability, and to cover their own vicarious liability as employers.

Even if nurses and nurse practitioners have their own insurance coverage, if the FHT or FHT practice does not have adequate insurance the CNPS (Canadian Nurses Protective Association), their protective association, has made it clear that they would fully defend their member but then seek compensation of all losses from the FHT or FHT practice (i.e. usually the physicians). Because of the principle of Canadian law as outlined above we are told by legal experts that they would in all likelihood be successful. We have not consulted with other professional's protective associations but it seems likely that the same principle applies.

On the other hand the CMPA maintains that it maintains the right to seek redress of damages from an employed professional (Reference 3). It is not clear whether they would be successful given the above principle. As stated earlier there is continuing confusion due to the lack of court precedents and case law in this new collaborative team era.

In any case the lack of clarity can give no comfort to physicians in face of the CNPS's clear position that they would sue the FHT or the FHT practice as above; nor for the associated health professionals in view of the CMPA's statement about recouping losses. In the meantime we need to make sure that everyone is suitably protected in event of a misadventure while the protective organizations and courts sort it out.

With respect to NPs or other professionals who wish to have an independent contractor relationship with a practice or with the FHT: In the event of a medical-legal misadventure there will be an argument in court over who is responsible for the actions of the professional. The court will decide on a case by case basis whether the nature of the relationship is of an independent contractor or employer-employee relationship and will base this on the relevant Revenue Canada Taxation guidelines. (Reference 5). We are told that any existing contract that declares an independent contractor relationship will be judged irrelevant. If the court decision was that there is or was an employment relationship the employer (i.e. the FHT or the HFT practice) will be fully responsible for the costs of the defense and any judgment) due to the principle of vicarious liability.

FHTs and FHT practices employing professionals with (or without) FHT funding must purchase insurance to cover their vicarious liability. This includes insurance for the direct liability for professional and non professional employees and insurance for employer's liability e.g. for protection against allegations that their employer's duties and responsibilities have not been properly discharged. FHTs who investigated found that there was no suitable insurance product available but due to the efforts of FHT

physician and staff, the insurance industry has responded and there are now products which cover HFT and individual vicarious liability.

Reasonable caution and good risk management practice would be that FHTs and physicians who are employing RNs and NPs or other professionals purchase full occurrence based liability insurance for both the direct professional liability of their employees or independent contractors and their own vicarious liability as employers.

Academic and Community FHTs may have some liability insurance available through Hospital University or Community organizations that they are part of or affiliated with. This may be applicable to various service agreements and contracts which FHTs may enter into.

The MOHLTC has made it clear that it will fund any insurance that is necessary as a result of the formation of FHTs.

Questions and Answers:

1. **Question:** Doesn't the CMPA cover vicarious liability for physician or clinics who are employers?

Answer: Yes, and no, and maybe. First of all, to receive any assistance physicians must be members of the CMPA. For a practice with multiple physicians all must be members for the clinic or facility to receive assistance (Reference 2). For NPs (who are judged to have an "independent" scope of practice) the CMPA has indicated in various documents and verbally through its physician advisors and staff that it will not defend the actions of an NP employed by a FHT or a physician.

For RNs, and other employees the CPMA does provide some assistance in certain chosen circumstances (Reference 3). Note again that this CMPA document states that even if a physician or physician group did meet the ownership criterion: "If the CMPA is required to pay damages assessed against a member on behalf of health care professionals who have the ability to see and treat patients independently, then the CMPA will pursue the member's legal right to claim-over against those health care professionals to ensure that their professional liability coverage responds.

RNs who are working full to their full scope under medical directives and chronic disease management protocols in newly emerging collaborative teams in FHTs may well see, assess, treat, and manage and discharge patients without any physician-patient direct contact on that appointment day. In this case CMPA staff have made it clear that the CMPA would consider that they are functioning "independently" in the CMPA's definition and the CMPA would then in all likelihood not provide assistance to them in the event of medical legal misadventure. They might, depending on the circumstances, but this would be decided on a case by case basis. This would be presumably based on whether the physician named in a legal action could better be

defended by a joint defense. We understand that further written clarification from the CMPA may be forthcoming.

2. **Question:** Our FHT has purchased insurance through my local broker. How do I know if it covers vicarious liability for my FHT and for the practices if FHT dollars are flowed to them to employ nurses?

Answer: You need to consult an expert lawyer or independent insurance broker who knows about professional and vicarious liability examine your policy wording. In a number of cases when the wording was examined it turned out that there was a specific exclusion for professional liability and therefore there was no vicarious liability protection.

3. **Question:** What is the difference between occurrence and claims based insurance?

Answer: An example: A patient makes a claim against a physician three years after an occurrence that led to an adverse outcome. The connection to the occurrence was not realized by the aggrieved party until three years later. The physician retired two years after the occurrence and stopped paying for the insurance. In the case of an occurrence based insurance policy the coverage would still apply since it is occurrence based. In the case of claims based there would be no protection since the claim was made at a time when the insurance is no longer being paid and the insurance is claims based. If there is a decision to purchase claims based insurance it needs to be accompanied by tail coverage (extended reporting clause) to provide protection for claims initiated sometimes many years after the medical care was provided.

References:

1. Collaborative Care: A medical liability perspective CMPA Sept 2007
2. A 2005 CMPA/CNPS Joint Statement on Liability Protection for Nurse Practitioners and Physicians in Collaborative Practice
3. CMPA Assistance to Clinics and Facilities December 2004 (revisions effective Jan 1, 2005)
4. Nurse Practitioner Professional Practice and Liability Issues March 2005 Canadian Nurses Association www.cnpl.ca
5. Collaborative Practice: Are Nurses Employees or Self-Employed CNPS August 2006