RISK NOTE

HIROC

Overview of Medical Malpractice Actions

OVERVIEW OF ISSUE

The prospect of being involved in a medical malpractice lawsuit can create significant anxiety for healthcare providers and organizations. This Risk Note provides a basic overview of the principal issues and stages of a medical malpractice lawsuit so that healthcare providers can have a better idea of what to expect if they are drawn into one.

KEY POINTS

- To succeed at trial, plaintiffs must prove: duty of care, breach of the standard of care, causation, and damages.

THINGS TO CONSIDER

Definition

- A medical malpractice lawsuit is a civil action that can result in monetary compensation for harm that results from the delivery of inadequate care. Although there are no definitive numbers for Canada, in other jurisdictions it has been found that only a relatively small percentage of incidents result in actions and only a minor percentage of these succeed (Bismark et al., 2006; Pukk-Härenstam et al., 2008; Schmidek & Weeks, 2005).

Elements of a Successful Malpractice Action

- There are significant hurdles the plaintiff(s) in a medical malpractice action must overcome in order to succeed. The plaintiff(s) (patient and/or family) must prove with evidence the following things (Morris & Clarke, 2011):
  1. **Duty of Care** – The defendant provider(s) must owe a duty to the plaintiff/patient. This ordinarily requires an established care relationship with the patient.
  2. **Breach of the Standard of Care** – The care provided must have failed to meet a reasonable standard in the particular circumstances of the case. What is reasonable is determined by the care which would be provided by a normal, prudent practitioner with the same experience and standing. The standard of care is generally determined with reference to evidence from experts (i.e. other practitioners with suitable expertise). Misadventures/errors in judgment (if all relevant factors were considered and the patient was appropriately assessed) and failures to act in accordance with improvements or modifications that could be suggested in retrospect are not breaches.
  3. **Harm** – Compensable injury or harm sustained by the patient, which could be remedied monetarily. Damages cannot be recovered for sorrow, grief, embarrassment, hurt feelings, or the ordinary emotional disturbances that will occasionally afflict anyone. Damages can be recovered for: pain and suffering including related expenses (e.g. medical equipment, cost to modify home); lost income; and future care costs.
  4. **Causation** – Proof that, on a balance of probabilities, the patient's injury would not have occurred 'but for' the defendant's (care provider's) breach of the standard of care. The breach need not be the only cause of damages. There is also a requirement that the harm be "caused in law" – that is, that the harm was a reasonably foreseeable result of the defendant's negligent conduct.
- Sometimes a malpractice action is clearly indefensible (e.g. wrong site surgery or intrathecal injection of the wrong medication) and in these instances, compensation would be expected to flow quickly. However, in most cases, the facts are not clear and a long process to seek and assess expert opinion related to standard of care, harm, and cause ensues (Morris & Clarke, 2011).

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Stages in a Civil Action

- There are a number of stages in a civil action or lawsuit. Not all of the stages may take place as medical malpractice actions may be settled partway through the process or be resolved early at a motion (a hearing before a judge that is smaller than a trial). The general steps in a proceeding are:
  - **Pleadings** – legal documents are exchanged between the parties setting out the allegations being made and the other parties' responses (e.g. Statement of Claim, Statement of Defence).
  - **Documentary Production** – The parties deliver sworn Affidavits of Documents listing the relevant documents they possess and exchange non-privileged documents (e.g. medical records).
  - **Examinations for Discovery** – Witnesses (typically the parties and a representative of any healthcare organization involved) give evidence to the opposite parties under oath in the presence of a court reporter (but without a judge or jury being present).
  - **Mediation** – A mediator will assist the parties with trying to settle their disputes. This is mandatory in some jurisdictions and in others it may not occur.
  - **Pre-trial** – An informal meeting with a judge attended by all parties to determine if the action can be settled, and if not, to narrow the issues and help the parties prepare for trial.
  - **Trial** – Parties present evidence and arguments to a judge or judge and jury who will then decide what damages, if any, each plaintiff is entitled to and each defendant must pay. A very small percentage of claims proceed to this stage.
  - **Appeal** – A party may seek to have an appeal court overrule part or all of the trial decision. This is not a re-trial and is based on the evidence presented at trial.

Note: the typical civil action lasts 4 – 7 years (with the exception of obstetrics). It is not uncommon for insurance adjusters and/or defence counsel to interview staff several times over the course of an action to gain an initial understanding of the facts of the matter and then to obtain additional information later on as more evidence is obtained and new issues or allegations arise. Counsel will also help prepare staff who will be testifying. To assist HIROC subscribers in arranging interviews with affected staff, a customizable letter template is available for healthcare organizations to distribute to staff.

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