RISK REFERENCE SHEET

HIROC

Mismanagement of Patients' Rights

Claims involving allegations that a patient's rights were breached in the course of receiving mental health care can take a variety of forms. Examples of these include allegations of:

- Failure to obtain consent to treatment;
- Failure to adequately assess capacity to consent to treatment;
- Providing inadequate notice of detention;
- Failure to provide rights advice;
- Denial of civil rights;
- False imprisonment.

These claims often occur when there has been a perception by the patient that the healthcare practitioner improperly treated or detained them in a mental health facility. Claims, whether meritorious or not, may be pursued vigorously by the patient.

COMMON CLAIM THEMES

- Heightened sensitivity by courts to ensuring access to justice for vulnerable claimants.
- Claims not focused or complaints about variety of issues pursued.
- Scrutiny of specialized documentation and records (e.g., forms under the Mental Health Act).
- Infrequent and small indemnity (i.e. awards to the patient) payments, if any.
- Significant resources spent by legal counsel and psychiatric facility staff to defend claim.
- Individual practitioner and team biases resulting in:
    - The underestimation of the mental health crisis from the patient's perspective;
    - Disregard or dismissal of the patient's concerns or complaints.
- Insufficient staff education and practical experience with mental health legislation related to patient rights (e.g., rights of patients on a Form 1).

CASE STUDY 1

A family member of a person with a mental illness attended before a Justice of the Peace to obtain a Form that authorized police to apprehend and transport the person in custody to a psychiatric facility for evaluation. The person was evaluated by a physician in the emergency department and placed on another Form, authorizing their detention for further psychiatric evaluation. A few hours later, the person was evaluated by a psychiatrist, who determined the person did not require admission and recommended outpatient follow up. The person brought a lawsuit, claiming they had been unlawfully detained, due to the physician's alleged failure to provide them a Form including notice of the reasons why they were being detained as required by the Mental Health Act.

Expert review of the case noted that the physician failed to note that the Form providing notice had been delivered and there was no record of notice on the chart. In addition to a claim for damages, the plaintiff sought injunctive relief that all of the hospital records associated with this attendance be destroyed. This matter proceeded to trial where the trial judge ultimately accepted the physician's evidence that the Form providing notice was delivered and found there was no basis to order the hospital to destroy the person's clinical records.

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COMMON CLAIM THEMES cont'd

- Challenges balancing safety practices and patient's rights and autonomy.
- Patient's perception that:
  - Consent was not obtained (e.g., for treatment, detention, restraints);
  - Civil rights were denied;
  - Libel, slander and/or defamation occurred;
  - The patient was falsely imprisoned or detained.

Subsequently, the plaintiff was unsuccessful in attempts to appeal the decision with both the Court of Appeal and the Supreme Court of Canada. Significant legal costs could have been avoided if there was documentary evidence of both the Form authorizing the patient's detention for further psychiatric evaluation and delivery of the Form pertaining to notice of why the patient was being detained in the hospital record.

CASE STUDY 2

After presenting to a public transportation facility intoxicated and carrying a concealed weapon, a patient was found not criminally responsible and detained at a psychiatric facility pursuant to a provincial Review Board Order. Six months after the patient's initial admission, the patient was granted an absolute discharge, after a provincial Court of Appeal determined the patient was no longer a significant risk to the safety of the public. Following the patient's discharge, the patient threatened to initiate an action against the psychiatric facility, as well as against several governmental bodies, alleging wrongful detention, violation of rights, and the inappropriate or improper disclosure of information. A potential claim was reported by the psychiatric facility. Expert review of the case was generally supportive of the care provided to the patient, finding little exposure to the involved facility, as all decisions related to the patient's alleged wrongful detention were made by treating physicians, involved courts, and various boards. Ultimately the claimant did not pursue formal legal action. Although a formal legal claim was not initiated, the adjuster and legal counsel spent many hours on this claim due to a number of motions filed and the need to research limitation periods. This case emphasizes the importance of documenting the legal basis on which the patient was detained at the facility and provided with care.

Canadian Case Examples

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MITIGATION STRATEGIES

Reliable Care Processes

- Adopt a standardized current legislation-based consent to treatment and capacity protocol and decision aid to assist practitioners to interpret and apply patient rights-related related legislation, that includes (but is not limited to) the need to:
    - Conduct an evaluation of the patient's capacity where appropriate and document the findings;
    - Provide clear and documented notice to the patient of a finding of incapacity and the right to challenge the finding;
    - Arrange for patient rights advice where required;
    - Ensure the patient understands that Mental Health Act privacy provisions apply to psychiatric records that supersede provincial privacy legislation;
    - Obtain informed consent from a capable person for their own treatment, or from the appropriate substitute decision-maker for an incapable person;
    - Obtain informed consent from a capable person for disclosure of their personal health information outside the circle of care, or from the appropriate substitute decision-maker for an incapable person.
- Adopt processes to oversee procedural requirements related to admission status (e.g., filing and review of Forms with the Officer in Charge, informed transitions to and from voluntary status).
- Adopt a standard process to track when various forms (e.g., Forms 1, 3 and 4) are expiring.

Education

- Implement formal multifaceted and targeted educational strategies to support and enhance practitioners' interpretation and application of consent to treatment and capacity-related legislation (e.g., participation in interdisciplinary workshops and in-situ simulations; sharing of learnings and trends from periodic chart audits and extracts, analysis of reported incidents, and medical-legal matters).
- Ensure the educational strategies include (but not limited to):
    - Applicable legislation (e.g., the Mental Health Act, Health Care Consent Act and Substitute Decisions Act as well as relevant portions of the Personal Health Information Protection Act (PHIPA));
    - Legal requirements for treatment and admission;
    - The need to ensure patients are aware of their rights.

Documentation and communication

- Ensure complete, timely and judicious documentation of:
    - Assessments relating to the patient's admission status and evaluations of capacity;
    - Consent discussions;
    - The patient's receipt of notice of a finding and rights advice;
    - The patient's expressed understanding of their status, if appropriate;
    - The filing and review of Forms by the Officer in Charge, as required.

Monitoring and Measuring

- Engage in a statutory compliance review of applicable legislative requirements (e.g., Forms are implemented and reviewed appropriately by the Officer in Charge, according to legislated timelines).
- Implement formal strategies to monitor and measure adherence to, and effectiveness and efficiency of patient rights related processes (e.g. ,periodic review of health records to determine if notice was documented appropriately, medical-legal claims involving perception that consent was not obtained, inadequate notice of admission status, failure to provide rights advice, or false imprisonment).

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REFERENCES

- HIROC claims files.
- Byrick, K, and Walker-Renshaw, B. (2016). A practical guide to mental health and the law in Ontario. Ontario Hospital Association.
- C.B. v. Sawadsky. (2005). O.J. No. 3682 (SCJ).
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- Health Care Consent Act, Statutes of Ontario (1996, c. 2). Schedule A.
- Mental Health Act, Revised Statues of Ontario (1990, c. M.7).

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