



HEALTH LAW

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MEDICO-LEGAL CONCERNS ASSOCIATED WITH EMERGENCY DEPARTMENT OVERCROWDING

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PRESENTATION OVERVIEW

1. Legal and Professional Accountability for all ED Professionals
2. Legal Accountability for the Hospital
3. Increased Exposure to Legal Liability due to ED Overcrowding
4. Ways for Hospital Administrators to Mitigate ED Overcrowding
5. How ED Professionals can Protect Themselves without “Walking Away”

1. LEGAL AND PROFESSIONAL ACCOUNTABILITY FOR ALL ED PROFESSIONALS

1. LEGAL AND PROFESSIONAL ACCOUNTABILITY FOR ALL ED PROFESSIONALS

a) Legal (Civil) Liability:

- i. Physicians
- ii. Nurses

b) Professional Accountability:

- i. Physicians - CPSO
- ii. Nurses – College of Nurses

1. LEGAL AND PROFESSIONAL ACCOUNTABILITY FOR ALL ED PROFESSIONALS

a) Legal (Civil) Liability: Physician (Civil) Liability in ED Context **Law Estate v. Simice [1994] B.C.J. No. 979 (B.C.S.C.)**

Facts:

Patient saw several physicians with complaint of severe headaches. ED physician (among others) did not recommend that patient be investigated for intracranial lesion and did not take necessary steps (i.e. CT Scan) to confirm or rule out diagnosis.

Diagnosis:

Eventually, neurologist diagnosed patient with a giant aneurysm, but patient died awaiting surgery.

1. LEGAL AND PROFESSIONAL ACCOUNTABILITY FOR ALL ED PROFESSIONALS

a) Legal (Civil) Liability: Physician (Civil) Liability in ED Context **Law Estate v. Simice [1994] B.C.J. No. 979 (B.C.S.C.)**

Physician's Defence:

Physicians claimed “economic defence”. Budgetary constraints imposed by B.C. Medical Insurance Plan to “restrict” requests for CT Scans deterred necessary diagnostic test from being performed.

Court:

Rejected defence and in finding defendant physicians negligent, stated:

if it comes to a choice between a physician's responsibility to his or her patient and his or her responsibility to the medicare system overall, the former must take precedence.

1. LEGAL AND PROFESSIONAL ACCOUNTABILITY FOR ALL ED PROFESSIONALS

a) Legal (Civil) Liability: Nurse (Civil) Liability in ED Context

Kielley v. General Hospital Corp. [1997] N.J. No. 123 (Nfld. S.C. C.A.)

Facts:

Patient presented to ED with chest pain and epigastric pain. ED doctor believed pain was epigastric but referred to cardiologist to rule out a heart attack. Cardiologist issued standing order to perform ECG if pain recurs. Pain recurred but ED doctor ignored cardiac etiology and failed to order ECG.

Nurse:

Nurse did not perform ECG as recommended by cardiologist.

1. LEGAL AND PROFESSIONAL ACCOUNTABILITY FOR ALL ED PROFESSIONALS

a) Legal (Civil) Liability: Nurse (Civil) Liability in ED Context

Kielley v. General Hospital Corp. [1997] N.J. No. 123 (Nfld. S.C. C.A.)

Aftermath:

Patient suffered a heart attack which could have been diagnosed earlier if ECG was performed as ordered. Delay in admitting patient to Cardiac Ward was the reason the ECG was not performed.

Court Ruling:

_____ Nurse found negligent for failing to follow cardiologist's order.

“The negligence of ED doctor in omitting to order ECG's does not absolve the nurses of the responsibility for following orders to do so.”

1. LEGAL AND PROFESSIONAL ACCOUNTABILITY FOR ALL ED PROFESSIONALS

a) Legal (Civil) Liability: Nurse (Civil) Liability in ED Context

Kielley v. General Hospital Corp. [1997] N.J. No. 123 (Nfld. S.C. C.A.)

Aftermath:

All ED Professionals are responsible and will be held accountable for their own actions:

The whole system breaks down if employees are free to ignore hospital protocols and doctors' orders because of impressions they might have as a result of conduct of someone else.

1. LEGAL AND PROFESSIONAL ACCOUNTABILITY FOR ALL ED PROFESSIONALS

b) Professional Accountability

- Pertains to one's maintenance of their Certificate of Registration as a Health Professional under the RHPA
- ED Professionals are legally required to practice their profession at all times at an acceptable level (standard of practice)
- With regard to how an ED Professional carries out their duties, Professional Misconduct is defined as:
 - Failing to maintain the standard of practice of the profession (Medicine Act, 1991, O.Reg. 856/93 ss. 1(1)2)
 - Contravening a standard of practice of the profession or failing to meet the standard of practice of the profession (Nursing Act, 1991, O. Reg. 799/93 ss. 1(1))

1. LEGAL AND PROFESSIONAL ACCOUNTABILITY FOR ALL ED PROFESSIONALS

b) Professional Accountability

Johnson (Re) [1994] O.C.P.S.D. No. 13 (CPSO)

Facts:

Female nursing student presented to busy ED complaining of shortness of breath (upon exertion and at rest). Hx of left calf tenderness, oral contraceptives taken and anxiety regarding pending nursing exams.

Examination:

Vital signs taken (BP of 140/90, Pulse 124, Resp. rate of 24), venogram on leg was negative, no leg pain and ECG revealed tachycardia.

1. LEGAL AND PROFESSIONAL ACCOUNTABILITY FOR ALL ED PROFESSIONALS

b) Professional Accountability

Johnson (Re) [1994] O.C.P.S.D. No. 13 (CPSO)

Diagnosis:

Paroxysmal atypical tachycardia and anxiety.

Rx:

Ativan and discharged patient.

Aftermath:

Patient returned with similar symptoms the next day and was discharged again. Two days later, patient presented in severe respiratory distress and despite resuscitation efforts, died.

1. LEGAL AND PROFESSIONAL ACCOUNTABILITY FOR ALL ED PROFESSIONALS

b) Professional Accountability

Johnson (Re) [1994] O.C.P.S.D. No. 13 (CPSO)

_____ Discipline Committee Finding:

Guilty of Professional Misconduct

...he failed to realize the significance of a return visit to the emergency room within 24 hours for similar complaints. In such instances, one is obliged to be more aggressive in pursuing an alternative diagnosis

...beware of gender bias in diagnosing anxiety and missing serious disease

1. LEGAL AND PROFESSIONAL ACCOUNTABILITY FOR ALL ED PROFESSIONALS

b) Professional Accountability - Nurse

College of Nurses of Ontario and Lorraine Bruce-Cummings
(January 14, 2003) Discipline Committee of College of Nurses

Facts:

Several family members made complaints against an ED Nurse regarding her “treatment” of them in the ED of a large, acute-care multi-disciplinary teaching hospital treating an average of 200 patients in a 24 hour period

Allegations:

- Rudeness and insensitive remarks
- Arrogance and uncaring attitude
- Calling security guards to remove family member who did not immediately follow her request to get out of hall

1. LEGAL AND PROFESSIONAL ACCOUNTABILITY FOR ALL ED PROFESSIONALS

Conclusion

- Physicians and Nurses have a duty to their patients above all else
- Failure to seek out all reasonable means of treatment for a patient will create significant civil and professional liability consequences
- Failure to inform patient of alternative treatments and reasons for any limited treatment could create civil and professional liability consequences
- Failure to record attempts to access second opinions or timely intervention can result in the accountability falling on the ED Health Professional

2. LEGAL ACCOUNTABILITY FOR THE HOSPITAL

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Statutory Liability under Public Hospitals Act O.Reg. 332/04, s.s. 2(3)(e)

__The board shall ensure that the administrator, medical staff, chief nursing executive, staff nurses and nurses who are managers develop plans to deal with,

- I. emergency situations that could place a greater than normal demand on the services provided by the hospital or disrupt the normal hospital routine, and
- II. the failure to provide services by persons who ordinarily provide services in the hospital

2. LEGAL ACCOUNTABILITY FOR THE HOSPITAL

Vicarious Liability

Yepremian v. Scarborough General Hospital (1980) 28 O.R. (2d) 494 (O.C.A.)

__Facts:

19 year old male presented to ED feeling unwell and complaining of vomiting, increased frequency of urination and increased thirst.

Assessed by ED physician who called on-call specialist (Internist) twice. Admitted to ICU. 12 hours lapsed before Internist attended on patient. Nurse's observations resulted in diagnosis of diabetes.

Action attempted to make the hospital liable for the negligence of physicians involved in the care.

2. LEGAL ACCOUNTABILITY FOR THE HOSPITAL

Vicarious Liability

Yepremian v. Scarborough General Hospital (1980) 28 O.R. (2d) 494 (O.C.A.)

_____Aftermath:

Diagnosis of diabetes eventually confirmed 12 hours later. Cardiac arrest occurred, followed by coma and brain damage.

_____Notable Quote:

The effective cause of cardiac arrest was the negligence of the specialist in failing to attend promptly. Hospital is not liable for the negligence of specialist (independent physician) in the performance of his medical duties.

2. LEGAL ACCOUNTABILITY FOR THE HOSPITAL

Direct Liability for Maintenance of “Safe” Facility

Yepremian v. Scarborough General Hospital (1980) 28 O.R. (2d) 494 (O.C.A.)

___ Court:

___ It is also well established that the hospital is liable to a patient directly for failure to provide what, in other areas of tort liability, would be called a "safe system".

___ Therefore, a hospital is liable for injury to the patient due to:

- Failure to ensure that physicians, who are credentialed annually, are properly qualified and are performing professionally
- Inadequate or improperly maintained equipment
- Failure to provide proper measures for protecting a disturbed person from injuring himself or other patients
- Failure to provide sufficient personnel to permit rotation of nurses without danger to patients (i.e. "coffee-breaks")

2. LEGAL ACCOUNTABILITY FOR THE HOSPITAL

Direct Liability

Yepremian v. Scarborough General Hospital (1980) 28 O.R. (2d) 494 (O.C.A.)

___ Notable Quote:

Per Blair, J.A., dissenting in part: The novelty of an issue is not a defence. If the Courts had followed the policy of rejecting cases because they had never occurred before, the common law would have atrophied and would not have expanded, as it has done over the many centuries, to meet new problems as society developed and changed.

The past half-century has been marked by the expansion of the law of tort and, especially, responsibility for negligence. In order to meet new situations in a rapidly-changing society, Courts have greatly expanded the concept of the duty owed to others by persons and institutions.

2. LEGAL ACCOUNTABILITY FOR THE HOSPITAL

Direct Liability

Braun Estate v. Vaughan [2000] M.J. No. 63 (Man. C.A.)

- Manitoba Court of Appeal has followed minority opinion in Yepremian
- Ruled that a hospital has a non-delegable direct duty to its patients

Facts:

Physician performed a pap smear on a 32 year old female patient. Results came back pre-cancerous. Report was misplaced and not acted on. Patient eventually diagnosed with cancer 11 months later and subsequently died.

2. LEGAL ACCOUNTABILITY FOR THE HOSPITAL

Direct Liability

Braun Estate v. Vaughan [2000] M.J. No. 63 (Man. C.A.)

Court Finding:

Both physician and hospital held liable for error and hospital had a non-delegable duty to patient.

(Hospital) had an independent obligation to provide a reasonable and practical “safe system” including the coordination of services between physician, patient and the institution.

3. INCREASED EXPOSURE TO LEGAL ACCOUNTABILITY DUE TO ED OVERCROWDING

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Catastrophic Cases:

Kyle Martin

Joshua Fleuelling

Effica Mitchell

3. INCREASED EXPOSURE TO LEGAL ACCOUNTABILITY DUE TO ED OVERCROWDING

Catastrophic Cases: Kyle Martin

___ Facts:

___ 5 year old boy brought to ED with high fever, vomiting and diarrhea.

___ At ED:

Patient did not see ED physician until after 3 ½ hours. Father told: “Would have to wait as there were a lot of sick people ahead of him”.

Mother advised nurse that child was not responding and nurse replied: “Oh, that happens”.

When examined, pulse was weak, poor circulation and severe infection suspected.
Transferred to HSC.

3. INCREASED EXPOSURE TO LEGAL ACCOUNTABILITY DUE TO ED OVERCROWDING

Catastrophic Cases: Kyle Martin

Coroner's Inquest:

ED Physician testified:

Treatment for Kyle was delayed because 14 of the emergency ward's 19 rooms were occupied by patients waiting to be transferred to other parts of the hospital.

On the day Kyle was brought to the emergency department...

"I was not tied up with a whole lot of backlogged patients." In fact, he said he and the other doctor there "were ready to receive anyone brought in" but treatment beds were limited.

3. INCREASED EXPOSURE TO LEGAL ACCOUNTABILITY DUE TO ED OVERCROWDING

Catastrophic Cases: [E ffica Mitchell \(2000\)](#)

Facts:

— 10 month old girl presented to ED complaining of severe vomiting. Vomited seven times while waiting in ED. Waited more than 1 hour to see a physician and nurses ignored pleas for help.

Aftermath:

Died of dehydration five hours after arriving at hospital.

— Legal Action:

Parents sued physicians, nurses and the government.

3. INCREASED EXPOSURE TO LEGAL ACCOUNTABILITY DUE TO ED OVERCROWDING

Catastrophic Cases:

Mitchell (Litigation Administrator of) v. Ontario [2004] O.J. No. 3084 (S.C.J.)

Allegations against Government:

Overcrowded conditions at ED resulted in delay in treatment and contributed to death. These conditions were caused by reductions in hospital funding and restructuring decisions made by Conservative government.

___ Legal History:

Government brought a motion to strike out the claim. After hearing and appeal, government was successful in having Statement of Claim struck out. Case against physicians and nurses continued (unreported).

3. INCREASED EXPOSURE TO LEGAL ACCOUNTABILITY DUE TO ED OVERCROWDING

Catastrophic Cases:

Mitchell (Litigation Administrator of) v. Ontario [2004] O.J. No. 3084 (S.C.J.)

Court:

Governing statutes make it clear that the Minister has a wide discretion to make policy decisions with respect to the funding of hospitals.

The terms of the legislation make it clear that (Minister of Health's) duty is to the public as a whole, not to a particular individual.

4. WAYS FOR HOSPITAL ADMINISTRATORS TO MITIGATE ED OVERCROWDING

4. MITIGATING ED OVERCROWDING

- Understand and follow the provisions of the PHA – It's the law!
- Hospital action can be initiated by amending hospital Bylaws

Amendments should be aimed at fundamental cause(s) of ED overcrowding:
e.g. Availability of ward beds to admit patients

Duties of Department Heads / Chiefs

Where the medical staff of a hospital is divided into medical departments, the head of each department may be made responsible by by-law of the hospital, through and with the chief of the medical staff or, where there is no chief, through and with the president of the medical staff, to advise the medical advisory committee with respect to the quality of medical diagnosis, care and treatment provided to the patients and out-patients of his or her department. [Public Hospitals Act, ss. 34\(2\)](#)

4. MITIGATING ED OVERCROWDING

Bylaw Amendments – Daily Assessments

Under Medical Staff Duties:

A member of the medical staff who is the MRP for inpatients of the hospital shall ensure that they assess these inpatients every 24 hours to determine their suitability for being discharged.

Penalty for Breach:

Automatic penalty may include loss of privileges for up to 30 days, effective immediately. Repeat offences may be grounds for permanent revocation of privileges.

Would facilitate more frequent discharges, including weekend discharges.

4. MITIGATING ED OVERCROWDING

Bylaw Amendments – Daily Assessments

Under Medical Staff Committees:

The MAC shall establish a “Discharge Audit Committee” which will oversee the hospital’s discharge policy and meet monthly to review the preceding month’s discharges.

The Discharge Audit Committee shall establish a “Discharge team” consisting of physicians (salaried?), nurses and/or other workers (social workers) whose sole duty will be to assess patients suitable for discharge on a continual basis.

The Discharge Audit Committee shall establish “Discharge Guidelines” for overseeing the efficient discharging of patients on a continual basis.

4. MITIGATING ED OVERCROWDING

MEDICINE IS 24 / 7

NOT 9 – 5

4. MITIGATING ED OVERCROWDING

Bylaw Amendments - Summary

- Preceding bylaw amendments may be seen to be inherent in Board's duty under *Public Hospitals Act* Regulations
- Will no longer be able to rely on "budget cut" excuses – more expected
- Hospital will be vicariously liable for acts of "salaried" Discharge Team Physicians and Nurses
- Without "radical" changes in internal hospital policies on management of "bed inventory", no changes or solutions to ED overcrowding problem will occur
- All "players" must make contributions to solution
- Physicians must play their part by ensuring that their patients are seen and discharged as required and not only when it is convenient to do so

5. HOW ED PROFESSIONALS CAN PROTECT THEMSELVES WITHOUT “WALKING AWAY”

5. ED PROFESSIONALS - PROTECTION AND ACCOUNTABILITY

Document:

- “Details” of ED conditions (i.e. how busy) in chart
- Lack of resources (i.e. unavailable beds for transfer)
- “Attempts” made to locate a bed
- “Attempts” made to have a specialist attend and discharge
- If in doubt, ask for advice, record it and follow it

You can do anything on consent

- Faced with a serious emergency and no immediate availability of treatment beds (i.e. Kyle Martin), create an innovative solution

5. ED PROFESSIONALS - PROTECTION AND ACCOUNTABILITY

Get Involved and Get Independent Advice

- Accept responsibilities and insist upon change
- Speak up!
- Notify hospital administration of ED problems
- Become active in hospital administration
- Form your own committees
- Hold meetings / pass motions and file motions with CEO, MAC and if necessary, the Hospital Board
- Get your own independent legal advice
- Do not take “No” for an answer
- Show administration the “right” solution
- PHA makes it your problem – You have to fix it - No one else will!