

DEPARTMENT OF JUSTICE

Communicating with the Police & Legal Assistance to a Crown servant

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Subjects reviewed today:

1. Negligence and Professional Liability Protection
2. The Crown's Liability & Treasury Board's Policy on Legal Assistance and Indemnification
3. Communicating with the Police
4. Testifying as a nurse

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- 1. Negligence and Professional Liability Protection**
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Negligence

- **Definition of negligence:** consists in the doing of some act which a reasonable person would not do under the circumstances, or in omitting to do some act which a reasonable person would do under the circumstances.
- **Tort:** a civil wrong, which unfairly causes someone else to suffer loss or harm, resulting in legal liability
- If you are found to be negligent, and your negligence caused someone to be injured, you can be found liable (and therefore responsible) for the injuries suffered by the client/patient

The 4 Elements of Negligence that must be proven:

- ✓ 1. Defendant must owe the plaintiff a duty of care
- ✓ 2. Defendant must breach the standard of care established by law
- ✓ 3. Plaintiff must suffer an injury or loss
- ✓ 4. Defendant's conduct must have been the actual and legal cause of the plaintiff's injury

If all 4 elements of negligence are proven....

Then the court declares that there was indeed negligence committed by the health care provider and apportions the responsibility amongst the providers

College of Nurses of Ontario (CNO) Professional Liability Protection requirements (PLP)

- All CNO members must hold Professional Liability Protection (PLP).
(See CNO website for more information)

How does this apply to me as a HC nurse?

- If you are employed as a nurse, then your employer may have liability protection for you. You are responsible for confirming that this coverage meets the requirements set out in the by-law. If it does, then you do not need to purchase additional PLP.
- We will examine how the Crown protects its employees.

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Crown Liability

- Refers to the body of law governing the tort liability of the Crown
- The Crown is only liable for the actions of its civil servants
- The Crown is liable for the damages for which, if it were a person, it would be liable in respect of a tort committed by a servant of the Crown, or a breach of duty attaching to the ownership, occupation, possession or control of property
- Crown servants must advise appropriate officials of incident that may result in a claim against the Crown

The Crown's Vicarious Liability

- Being liable without personal fault
- Responsibility in law for the misconduct of another person
- Based on relationship with person at fault (like employer/employee relationship)
- Torts committed in the course of employment

Vicarious Responsibility:

The automatic responsibility of one person for another's wrongdoing through prior relationship only, irrespective of the first person's fault or deed.

A doctrine that states that a “master” can be vicariously liable for a tort committed by a “servant” who acts in the course of employment.

How does the Crown protect its employees?

Through Treasury Board's Legal Policy on Legal Assistance and Indemnification. Its objectives are to:

- 1) Protect Crown servants from personal financial losses or expenses incurred while they were acting within the scope of their duties or in the course of their employment, and were not acting against the interests of the Crown;
- 2) Protect the Crown's interest and its potential or actual liability arising from the acts or omissions of its Crown servants; and
- 3) Ensure continued and effective public service to Canadians

Indemnification and Legal Assistance

- **Indemnification:** payment or reimbursement of amounts paid as a result of a judgment or a cost award against a Crown servant or as a result of a monetary settlement of a claim or an action made or brought against a Crown servant that is pre-approved by the approval authority based on the Department of Justice Canada's recommendation.
- **Legal assistance:** includes the cost of the services of the Department of Justice Canada, a Crown agent or private counsel, as well as paralegal services and includes necessary travel costs, incidental costs and the use of essential expert witnesses.

Legal assistance is offered to employees in the following circumstances:

- ...sued or threatened with a suit
- ...charged or likely to be charged with an offence
- ...named in a legal action or under threat of being named in a legal action
- ...faced with serious personal liability before any court, tribunal or other judicial body
- ... requested or compelled to appear before
 - Commission of Inquiry
 - Inquest
 - Similar proceedings

Are you eligible for indemnification?

Did you:

- ... act in good faith? (honestly, without malice and met reasonable dept expectations)
 - ...not act against the interests of the Crown?
 - ...act within the scope of your duties or course of employment with respect to the acts or omissions giving rise to the request?
-
- Initial presumption that you meet the basic eligibility criteria but not an automatic right to receive indemnification and assistance

The protection does not include:

- Matters arising while the requestor was engaged under a contract for services (if you weren't a government employee at the time of the event)
- Activities undertaken as a volunteer
- You have initiated your own claim or action against someone
- An internal investigation or an internal administrative recourse mechanism can be used (such as grievance, disciplinary process)

Recovery if found to dishonest or not within the scope of your duties

- If indemnification and/or legal assistance paid,
- but it was subsequently established that the Crown servant acted dishonestly
- or it was determined that the Crown servant did not act within the scope of their duties or course of employment,

....the Crown may take action to recover the total amount of assistance or indemnification paid

How do I request legal assistance?

- Speak to your manager at the earliest opportunity
- You authorize the Department of Justice Canada to represent you
- Submit a request to the approval authority (with your manager)
- Make a factual report of the incident leading to the request

Dept. of Justice

- Oversees all matters relating to the administration of justice in the federal domain
- The provider of legal advisory, litigation and legislative services to federal government departments and agencies
- Supports the Minister of Justice in advising Cabinet on all legal matters

Health Canada Legal Services

- The Department of Justice establishes satellite departmental legal services units (DLSU)
- Work in-house with Health Canada
- Deals with all aspects of HC, including FNIHB issues

ON Region Regional Offices

Other regions

Represent federal departments and agencies anticipating or involved in litigation
Liaise with DLSU counsel and departmental representatives
Assist you in preparation for proceedings and throughout

Health Canada

Instructing your lawyer

- Generally, Justice counsel will provide the legal assistance requested
- The Attorney General provides primary instruction to counsel, rather than you
- Counsel has a responsibility to keep you informed of the progress of the litigation and the instructions given by the Attorney General
- Your input on the instructions given is welcomed
- If you disagree with the instructions given by the Attorney General, you are free to retain, instruct and pay private counsel

Your part as the client

- Provide the facts
- Participate in witness interviews
- Gather and produce documents
- Attend examinations for discovery
- Assist in fulfilling undertakings
- Instruct your counsel
- Prepare for trial

Opposing counsel

You could be contacted by another lawyer for a variety of reasons. If so:

- Do not provide any comments, opinions or advice to opposing counsel;
- Call Legal Services (or your litigator if one has been assigned); and
- Do not speak to any opposing counsel without having received instructions from your Justice lawyer.

Objectives of today's presentation

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4. Testifying as a nurse

Right to obtain the information?

- Beware of improper disclosure to the police of information about a patient's identity and other details learned in the context of nurse-client relationship
 - Nurses are naturally cooperative individuals who may want to assist the police.
 - Lawyers, police officers, insurance company representatives, and others may request information about a patient. The individuals may insist it is their right to obtain the information and may threaten you if the you do not comply (obstruction of justice)
 - If approached during the course of a police investigation, you are encouraged to **consult your NIC** who may have the authority to make such decisions immediately.
-

Is the Police “looking for” information?

- Calmly tell the police officer you would be happy to assist, but that you require consent from the patient or legal documentation such as a search warrant or court order to do so.
- Generally you should refrain from disclosing patient information to the police or any other third party unless:
 - there is a patient **consent**; or
 - the disclosure is **required by law**.
- This is a complex situation and you may want to seek legal advice or intervention may be necessary to ascertain if the particular investigation is authorized by legislation or if the police request appears to be overreaching.
- Where disclosure is permitted but not required, check HC/FNIHB policies that provide guidance as to when and how disclosure is made.

Limiting disclosure

- Only disclose information with client consent or a legal obligation to do so (unless there is a substantial risk of significant harm to the health or safety of the client or others). In that case, review your CNO requirements regarding duty to report & check policies.
 - Confidentiality should be preserved to the maximum possible extent even when disclosure is required. This means:
 - limit the amount of information disclosed; and
 - the number of people to whom you disclose to limit the harm.
 - Review HC/ FNIHB's privacy policies including:
 - confidentiality,
 - collection, use and disclosure of personal information and relevant consent,
 - access to records,
 - storage, retention and disposal of records.
-

Occurrence Number:

Police Case ID:

CANADA
PROVINCE OF ONTARIO
PROVINCE DE L'ONTARIO

(Region/Région)

SUBPOENA TO A WITNESS
ASSIGNATION À UN TÉMOIN

Form/Formule 16
Section/Article 699

To/à :

Of/de : ON

WHEREAS

ATTENDU QUE

of
de

has been charged that he/she,
a été inculpé(e) d'avoir le ou vers

at
à

did commit the offence of:
commis l'infraction consistant à :

145(3) Fail to comply with condition: CC-Dual
266 Assault-level 1: CC-Dual
733.1(1) Breach-probation: CC-Dual

and it has been made to appear that you are likely to give material evidence for the prosecution or defence
et qu'on a donné à entendre que vous êtes probablement en état de rendre un témoignage essentiel pour la
poursuite

THEREFORE, this is to command you to attend before the presiding judge or justice on the
À CES CAUSES, les présentes ont pour objet de vous enjoindre de comparaître devant le juge ou le juge de paix
présidant le

th day of
jour de

, yr 201
an

at 10:00 AM, at
à heures, à
courtroom
à la salle d'audience

Provincial Court

☒ to give evidence concerning the above charge;
pour rendre témoignage au sujet de ladite inculpation;

(Ignore if
(ne s'applique

☒ and to bring with you anything in your possession or under your control that relates to the
et d'apporter avec vous toute chose en votre possession ou sous votre contrôle qui se
said charge, and more particularly the (specify any documents, objects or other things required).
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Judge/Justice of the Peace in and for Ontario/Chambre de la Cour
Juge ou juge de paix dans et pour la province de l'Ontario ou greffier de la cour

FOR INFORMATION ON ADDRESS
TO ONTARIO COURTS
FOR PERSONS WITH DISABILITIES, CALL
1-800-387-4456
TORONTO AREA 416-325-0111

POUR PLUS DE RENSEIGNEMENTS SUR L'ADRESSE
DES PERSONNES HANDICAPÉES
AUX TRIBUNAUX DE L'ONTARIO, COMPOSEZ LE
1-800-387-4456
RÉGION DE TORONTO 416-325-0111

What is a subpoena? A summons?

Subpoena:

- a command for the nurse to attend a criminal or other court proceeding (civil trial, divorce court).
- A subpoena alone is not sufficient reason for a nurse to breach patient confidentiality.

Summons/Subpoena duces tecum: (subpoena for production of evidence)

- A document issued by a court, agency, board or commission, or another person, requiring a person to attend and to produce documents or other things.
- Usually directs the nurse to bring "any documents or materials which are relevant to the action," but it typically does not require the nurse to speak to anyone, even the police, about the contents of those records or any aspect of a patient's health before being ordered to do so by the presiding judicial body (e.g. judge) in the hearing room.

What is a search warrant?

- An order issued by a justice under statutory powers, authorizing a named person to enter a specified place to search for and seize specified property which will provide evidence of the actual or intended commission of an offence.
- Grants the police broad legal authority to search for and seize evidence.
- The order gives the police the right to attend your place of work and take certain items that they find.
- The police should show you the warrant. If they do not show it to you, ask to see it to inspect it.
- The police can search only for evidence that is listed in their warrant, and they can look only in places where they might find the evidence.
- When faced with a valid search warrant that specifies the seizure of a patient's records or information, then you must release the information to the police.
- Only disclose the patient information listed in the warrant

Police investigations of patients

- Treating a patient who is under arrest or the subject of a police investigation can be challenging.
- The confidentiality obligations apply even when a patient is under arrest or otherwise being detained.
- Duty to maintain the confidentiality of a patient's personal health information persists even if the patient is unconscious or otherwise impaired beyond having the capacity to consent.

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Subpoenas

- A requirement to appear before a court or tribunal to give evidence and/or produce documents
- Failure to comply can result in contempt charge
- Tension: duties as a civil servant and as a nurse to keep matters confidential

Legal Assistance when the nurse receives a subpoenae

Eligibility:

- Is it in the public interest to have the Crown servant appear?
- Does the matter concern events where the Crown servant was acting within the scope of his/her duties, or in the course of employment?
- If you receive a subpoena or request to appear, advise your manager and DLSU counsel **immediately**

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When subpoenaed

- The legal assistance will generally consist of an explanation of nature of the proceedings, the servant's duty as a witness, and the need to protect certain information from disclosure
- You are not generally represented by counsel before the court or tribunal
- Legal review is necessary to ensure compliance with legislation if you are requested to produce documents

Giving evidence as a witness

- A witness is there to prove ordinary facts. They may give evidence of personal observations, e.g. the facts of an accident they observed, or the conduct of others they have seen. These facts may include diagnosis and treatment for a medical professional
- Cross-examination is unpleasant – you may find your judgment or credibility called into question, and you may feel you are not permitted to give complete answers

Summary: Key points

- If you get involved in the legal system, counsel is available to you – use us early and often
- Review HC/ FNIHB's privacy policies to know how to deal with requests from police
- When in doubt, ask for help from your NIC or Legal services

Questions?

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