HANDLE WITH CARE

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A Risk Management Newsletter for the Health Care Protection Program's Members

In this Issue:

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Health Team Leader's Message

The phrase "The only constant is change" has never captured the spirit of our times more accurately than it does right now. As the economic, environmental and political landscape of our world shifts before our eyes – so too do our energies in keeping abreast of it. At HCPP we have a new Director, and bid a fond farewell to Janice Butler. Janice's passion for the creation of a just culture in health care using sound risk management principles promises to be an asset in her new role as Director, Patient Safety and Quality, for the Vancouver Island Health Authority.

In this issue of Handle with Care, we deal with an ongoing issue (infection control) in a new way by examining our own ability to control the environment through clean scrubs in ***The Right to Bare Arms.*** Our Claims Abstract this issue looks at ***Employer's Liability*** in the case of Dr. K, a physician who successfully brought action against a health authority for damages following a misrepresented recruitment opportunity. The first of our Claims Notes is up on the HCPP website. Drop in to www.hcpp.org and read about the risks associated with ***Compartment Syndrome.***

Those of our members in the facilities management area of health care will be interested in our article on ***Fire Protection System Impairment Notices.*** And add one more risk to the many that exist in the procurement process by reading **Risk Wise Answers**, where we showcase the contractual risk of including a deductible that is lower than that available under the Provincial Construction Insurance Program. Last and certainly not least, we draw your attention in ***Hospital Corners*** to ways to protect confidential patient information in laptop computers.

In closing, I am reminded of the fifth step in the Province's risk management methodology and why it is so important to continually Monitor and Review. As the environment in which we operate changes, so does the likelihood and consequence of the risks we face. It is incumbent on us to regularly question our assumptions in order to maximize opportunities and minimize threats. Risk management can add value to the decision-making process as we inevitably adapt and move forward.

Finally, we welcome any suggestions for future articles, risk tips you would like to share or initiatives you may like to showcase. Please do not hesitate to send your comments/suggestions to us at HCPP@gov.bc.ca

Linda Irvine, Director
Health Care Protection Program

Links of Interest and Dates to Remember

Halifax 9: Human Performance and Healthcare Safety - October 22-24, 2009
http://www.buksa.com/halifax

BC Patient Safety & Quality Council - This new council replaces the Patient Safety Task Force. http://www.bcpsqc.ca

2009 RIMS Canada Conference St John's Newfoundland—September 13-16, 2009
http://conference.rimscanada.ca/RIMS/RIMS_Canada_Conference/Home/

The Right to Bare Arms

Patient rights groups are calling it the “smart scrub issue”, coining phrases such as: “the right to bare arms” and “wash your hands before you touch me” and using slogans such as: “Clean scrubs inside. No scrubs outside!”

While we don’t endorse this site, www.hospitalinfection.org is an example of what is available to the public. If you read some of the many peer reviewed publications supporting the stance taken by the Committee to Reduce Infection Death you’ll see what we mean. At first blush the approach may seem a bit “out there” but when you look at the credentials of the advocates and the science behind their efforts it's hard to disagree.

Health care providers and their employers should turn attention to the fact that many people are becoming ill (and sometimes dying) from infections that may be carried on their scrubs, lab coats and other uniforms. In the U.S. infections contracted in hospital are now the fourth largest cause of death, more deaths per year than from AIDS, breast cancer and motor vehicle accidents combined.

We know that MRSA and c. difficile are rampant in many hospital settings and increasingly common in the wider community. C. difficile is a water borne bacteria that is easily transmitted, not killed with ordinary laundry detergent in cold or warm water wash. A nursing uniform or physician scrub washed at home, along with the family clothing, has the potential to transfer bacterial spores to others, including health care providers’ own family members. Scrubs, white coats and uniforms are frequently seen in hospital cafeterias, restaurants and fast food establishments where health care providers interact with the general public and children at play. In one study it was determined that 50% of physicians admitted their white coats were washed less than once a week and 15% admitted that their coats were washed less than once a month.

Many Scandinavian countries have reduced the rates of hospital-based infection with stringent infection control measures and screening for MRSA. In addition to strict enforcement of hand washing and equipment cleaning measures, a number of hospitals are requiring their staff to wear clear plastic disposable gowns before touching patients. Uniforms are also supplied by the facilities and laundered within the hospital to ensure that adequate levels of bleach and sufficient temperatures are reached to properly clean uniforms, coats and scrubs.

Where infection rates are being reduced by such simple measures, there is value in health authorities and clinicians taking a closer look at the role health care providers and their scrubs may play in spreading infections.➤

Claims Abstract—Recruitment of Physicians and Employees

Background: This abstract is specific to the recruitment of physicians to work within the health authority; however, it also is applicable to all forms of recruitment and hiring of employees and senior executives.

Dr. K. was recruited by a health authority to work as a thoracic surgeon in a city in BC. Dr. K. left his own medical practice he had for 30 years and moved to BC based upon the written confirmation by the Community Administrator of the hospital of his position as thoracic surgeon with some on-call general surgery requirements. It is important to note that during their negotiations it was clear that Dr. K only wanted to practice thoracic surgery.

Two years after Dr. K. started with the health authority all thoracic surgeries were centralized to a different city. Only certified thoracic surgeons were permitted to work at

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Claims Abstract (continued from page 2)

the centralized surgery centre. Dr. K. did not have certification as a thoracic surgeon although he did have many years of experience as a thoracic surgeon. Dr. K. was given one year written notice of the termination of his practice with the hospital with the option to continue to practice in general surgery.

This claim went to trial.

The Allegations: Dr. K. sued for breach of contract claiming he was in an employment-like relationship with the health authority and also in tort, for negligent misrepresentation based upon the omission of the health authority to advise Dr. K. that there were some discussions and possible plans surrounding the development of a centralized surgical centre which may result in thoracic surgery no longer being offered at the hospital he would be working.

The Outcome: This claim went to trial. The Court determined that the health authority had breached the employment contract with the physician and also that the health authority's conduct amounted to negligent misrepresentation. The Court awarded damages to Dr. K in the amount of $243,500 plus costs and disbursements.

During the trial the health authority argued the plan to centralize thoracic surgery was only a possibility at the time Dr. K. was being recruited and when he commenced his position. The health authority further argued there was no duty on the health authority to disclose the possibility of a risk arising in the future. Various senior executives, including those directly involved in the recruitment of Dr. K. testified they were aware to varying extents of the proposed plan to centralize thoracic surgery to a different city.

The Court found that the information about the centralization of thoracic surgery did relate to a future development, but the information existed at the time of recruitment and had a direct impact on the nature and future viability of the position being offered to Dr. K. Further, the health authority was aware of the importance to Dr. K. of practicing thoracic surgery with only on-call work in general surgery. As the future viability of the thoracic surgery program was of critical importance to the representation to Dr. K's position the failure to disclose the possible plan constituted "inaccurate and misleading representations."

The health authority was also found to be negligent and that Dr. K. reasonably relied on the information provided to his detriment which meets all elements of the tort of negligent misrepresentation.

Dr. K. also alleged that there was a breach of contract in two ways:

1) That the health authority would not undermine the plaintiff's thoracic surgery practice; and
2) That Dr. K. would not be dismissed, or constructively dismissed, without reasonable notice by the health authority, or payment in lieu.

The Court determined Dr. K. was neither an independent contractor nor an employee, but rather was in an "employment-like relationship". The British Columbia Court of Appeal (the Province's highest court) observed that workplace relationships exist on a continuum with the employer/employee relationship at one end and independent contractor at the other, where no notice to terminate is required. Employment-like relationships fall in between and such individuals are not employees, but are entitled to some rights, including reasonable notice.

In the case of Dr. K. the court first analyzed whether Dr. K. was an independent contractor. This test has four elements:

1) Whether the health authority exercised control over Dr. K.

The Court determined that the bylaws in place governed the relationship between the health authority and the doctor. These bylaws set out the hiring, employment conditions, physician privileges, discipline and conduct expected. The health authority exercised substantial control over Dr. K.

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Claims Abstract (continued from page 3)

2) Who owns the tools of the business?

The tools of the business in this situation were medical facilities and equipment which were owned and maintained by the health authority.

3) Who has an opportunity for profit?

The Court determined that as the fees were paid by M.S.P. Dr. K. did not have any independent profit opportunities in the performance of his tasks.

4) Who bears the risk of loss?

Again, the court determined that aside from the financial benefits associated with the privileges to work within the health authority Dr. K. did not bear the risk of loss.

Let the person recruited make the determination of whether they want to take the risk and accept the position or not.

Having found that Dr. K. was not an independent contractor the Court then went on to consider whether or not Dr. K. falls into the "employment-like relationship" category. The tests for this category are as follows:

1) The relationship between Dr. K. and the health authority was intended to be one of infinite duration and permanency.

2) The degree of reliance/closeness of the relationship; and

3) The degree of exclusivity.

The Court determined that as Dr. K. had moved across the country and left his practice of 30 years behind there was an intention of permanency. Further, Dr. K. had financially relied upon the relationship with the health authority; and lastly that Dr. K. relied exclusively on the health authority for his livelihood. The court stated the fact that Dr. K. was paid by MSP should not automatically operate as a bar to finding an employment-like relationship.

Damages Awarded: The Judge awarded damages on the basis of the tort of negligent misrepresentation not on the basis that Dr. K was in an "employment-like relationship". As the health authority had given Dr. K. 12 months' written notice he likely would not have received any damages for breach of the employment contract, wrongful or constructive dismissal.

By awarding damages for negligent misrepresentation the Judge could give substantially higher damages, $243,500 plus costs and disbursements to Dr. K.

Lessons Learned: When recruiting staff, physicians, and/or executives it is vital to advise the person being recruited of any possible future plans related to their area of practice that may impact on the permanence (or lack thereof) of their new position. Let the person recruited make the determination of whether they want to take the risk and accept the position or not.

In addition, it was clear the senior executives of the health authority were not aware that Dr. K. was being recruited specifically for thoracic surgery in this city as when one senior executive of the health authority was asked if he would have been concerned about the plan to employ Dr. K. as a thoracic surgeon the answer given was that he would have been "concerned because that would conflict with our long term plans."

This statement clearly demonstrates how the failure to communicate plans to senior executives involved in recruiting can have unfortunate and costly consequences.

**** Please note that as the Judge awarded damages based upon negligent misrepresentation and not breach of contract the Judge's finding that Dr. K. was in an employment-like relationship is less binding on other Judges. In addition, there are several cases not discussed in the reasons in this case which find that physicians are independent contractors. It is HCPP's view that this finding does not result in health authority's being liable for the acts and omissions of physicians for their treatment of patients, rather the health authorities may be liable for their actions in the employment context. Only further cases will clarify this issue and we will make every effort to keep you informed if this issue is raised in other cases.****➤

Fire Protection System Impairment Notification

The HCPP Loss Control Program has a number of means to assist Health Authorities in minimizing risks to their assets. One of these is Fire Protection System Impairment Notification . Like most commercial insurers, HCPP asks that any and all impairments be reported before they occur, in the case of planned impairments, or when they are discovered, for concealed and emergency impairments. HCPP has Marsh Canada administer the Fire Protection System Impairment Notification on our behalf. This article will provide an overview of the process.

First though it is important to understand what constitutes a fire protection system and what is meant by impairment. A fire protection system could include an automatic sprinkler system, an extinguishing system, a detection system or the alarm system associated with either one. It is impaired when any part of that system is removed from service either partially or completely. Ultimately these systems reduce the severity of a fire or explosion if one occurs. If that system is not operating, or its ability to operate is limited, the risk a facility will suffer a severe loss increases the longer the system is impaired. One frightening statistic from the National Fire Protection Association report, *U.S. Experience with Sprinklers* (January 2009) is that "when sprinklers fail to operate, the reason most often given (63%) was shutoff of the system before fire began, as may occur in the course of routine inspection maintenance."

The aim of the Fire Protection System Impairment Notification is to help ensure that all appropriate measures are in place to decrease the likelihood a severe fire will occur when a fire protection system is impaired. By requiring written notice of an impairment, those responsible for the impairments are reminded to take the necessary steps to mitigate against losses while the system is impaired and ensure it is re-activated in a timely manner and operating properly upon reactivation.

The Fire Protection System Impairment Notice form (found on the HCPP website, www.hcpp.org) used by Marsh for reporting an impairment is set up to help the facility ensure they have considered all the risks and put in place appropriate mitigations. Once it has been completed it should be faxed or emailed to Marsh (contact information below). Upon completion of the work or interruption that caused the impairment, Marsh should be informed the system has been re-activated. This can be done using the same form, completing the Restoration box information, and sending it to Marsh.

There are a large number of things to consider when shutting down a fire protection system. Many of these are listed on the impairment notification form but there are others as well. Consider including any or all of these items in a checklist for conducting maintenance on a protection system.

1) **Notify Marsh Risk Consulting** by faxing or emailing the Fire Protection System Impairment Notice. Complete all sections carefully, with particular care taken in the section describing which system is being impaired, and the area affected. Be sure to make as accurate an estimate as possible when indicating the approximate date and time for equipment shutdown and restoration, and ensure all applicable precautions taken are checked off. This information enables Marsh, if necessary, to advise on the best measures to minimize the hazard.
2) **Notify the local fire department** (and alarm monitoring company, when applicable) so they will know what protection equipment and water supplies are available and how best to fight a fire.
3) If possible **schedule any work, which involves shutting off sprinklers for weekends or idle periods**, when there are fewer ignition hazards present.
4) **Make arrangements in advance to have all personnel, materials, and tools ready** when sprinklers are shut off, so the job can be moved quickly to completion.
5) **Use emergency measures to keep as many sprinklers in service as practical.** These would include use of temporary connections to hydrants or adjoining sprinkler systems. In some cases the shutoff can be avoided entirely by use of pipe tapping machines that permit connection to underground mains without shutting off the water.

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Fire Protection Systems (continued from page 5)

6) **Lay out charged hose lines** from the nearest hydrant or standpipes, and provide wooden plugs or caps so the large open ends of pipes may be closed quickly and water turned on fighting a fire.

7) **Attach a tag or some visual cue** to the valve when closed indicating that it is out of service, and establish a follow-up procedure to assure reopening when work is completed. Never lock a valve in the closed position.

8) Use overtime if necessary to **expedite completion of work.** If possible, do not leave sprinkler systems shut off overnight.

9) Have a **reliable person patrol** the shutoff areas continuously.

10) When a sprinkler valve is closed for replacement of sprinklers following a fire, station **someone at the valve and have it opened immediately if fire breaks out again.** When a sprinkler valve is closed due to an impairment of the sprinkler system, station someone at the valve if the valve can be opened to restore much of the protection in the event of fire.

11) **Restore all valves to their fully open position as soon as repairs are completed.** Then make a full-flow drain test on the downstream side of each valve that was closed. If drain tests are satisfactory, re-lock or reseal the valves. Then notify the Marsh Risk Consulting by fax or email of the Fire Protection Equipment Impairment Notice (with the completion time now filled out) that protection has been restored. The local fire department and alarm monitoring should also be advised that protection has been restored.

To submit a Fire Protection Impairment Notification please fax it to Marsh Canada Ltd (Attn: Nancy Pratt) at 604-692-4850 or by email at nancy.r.pratt@marsh.ca.

Contacts for this program are
Warren Paolucci of Marsh:
Ph# 604-692- 4883
David Foxall of HCPP: Ph# 250-356-8718

Risk Wise Answers

Why is it important to make sure the insurance requirements in your construction project contract match the coverage provided in the Provincial Construction Program?

As of January 2008, all Health Care Agencies (HCA) are required to place insurance for construction projects with a value in excess of $1,000,000.00 through the Provincial Construction Insurance Program. http://www.fin.gov.bc.ca/PT/rmb/ref/cp/Health%20-%20Owner%20Insured%20Projects.pdf

There have been several instances where the insurance requirements stated in the project contract were not aligned with the insurance coverage provided under the Provincial Construction Insurance Program. In these cases the agreement with the contractor specified coverage for property (Course of Construction policy) with a $2,500.00 deductible, while the program provided a $10,000.00 deductible. Claims arose for damage to the building during construction and the gap of $7,500.00 in coverage was revealed. In this situation the HCA's would be responsible for absorbing the $7,500.00 difference.

In order to avoid these circumstances from recurring we remind you of the importance of reviewing the insurance requirements for construction projects and ensuring that they fully align with the coverage provided under the Provincial Construction Program.

Full details on the construction program can be found at:
http://www.hcpp.org/content/pdfstorage/10370216841302008739 04AM30143.pdf

Risk Management Branch Conference Postponed

In our last issue we advertised our plans to host a second Risk Management Conference. Dates were scheduled, the meeting space was booked, hotel rooms were reserved, speakers were arranged and our program was looking very solid. We are disappointed to announce that given these times of restraint, we had to make the hard decision to postpone the conference.

But your need and demand for risk management education and information doesn't go away because of economic downturn. If anything, these times demand greater emphasis on managing our risks and taking advantage of opportunities as they arise.

To that end, the Health Team is going to be working hard in the upcoming months to take advantage of the new technologies enabled with our Vista/Office 2007 upgrade and other tools to provide as much low- or no-cost, accessible information and educational opportunities as possible. Check with your Chief Risk Officer regarding education opportunities in your area.➤

Hospital Corners— Quick Risk Tip

Many health care workers keep confidential patient information in laptop computers. Laptops enable health care workers to have a portable office and take necessary information with them into many different kinds of work environments. Portability can take on a different meaning, however, when the laptop computer and the patient information or other sensitive material stored on it, is stolen from the trunk of a car or from an office. The loss of the laptop itself may be a minor issue compared to a potential breach of privacy due to loss of the data on the computer. Data that includes names, addresses, telephone numbers, Personal Identification Numbers, social insurance numbers and detailed medical information may be used by fraudsters to steal identities leading to theft of money and other illegal uses an of individual's information.

Theft of the computer should be confirmed immediately and the police notified. The Health Care Agency (HCA) Risk Lead should be notified promptly by the person the HCA has identified is to receive the first report of the loss. The HCA Freedom of Information and Protection of Privacy (FOIPPA) officer should also be notified as soon as possible. It is also important to promptly notify the Health Care Protection Program (HCPP) of the loss of the laptop because of the loss of the confidential data contained on it could lead to legal action against the HCA. The FOIPPA officer, in consultation with other HCA staff as necessary, will review the known information to ascertain if the data is in a format that can be accessed by anyone or if the data is in a secure format. If there is a potential for a breach of privacy the HCA must notify all the known individuals whose information has been stolen as well as consider if a report to the Office of the Information and Privacy Commissioner is warranted. The Breach Notification Assessment Tool; Privacy Breach Management Policy Template; Key Steps in Responding to Privacy Breaches and Privacy Breach Checklist are all available from the Office of the Information and Privacy Commissioner at www.oipc.bc.

Prevention is the best way to handle potential loss of data. All laptops should be protected by encryption for sensitive data as passwords can be bypassed fairly easily by professional thieves. Laptops should be locked to a secure object when not under constant observation and never left in vehicles even when not visible from outside the vehicle. Loss of the laptop and data can lead to a long, involved and costly recovery operation that can be avoided by attention to security. This information also applies to flash drives and other portable data storage units. ➤

About Our Organization...

We are the Client Services Team for the Health Care Protection Program (HCPP). HCPP is a self-insurance program which is funded by the Health Authorities of BC. The program is housed within the offices of the Risk Management Branch of the Ministry of Finance which also has responsibility for similar programs such as the Schools Protection Program, and the University, College & Institute Protection Program. As part of the services of our program, we provide risk management services including risk mitigation, risk financing and claims and litigation management to HCPP member entities including all the Health Authorities and various other stand-alone health care agencies in the Province of BC. ➤

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We Need Your Feedback!

What do you think about "Handle With Care"? We always love to hear your comments. Please send us your feedback!

Are there any topics you would like us to cover? Email us at HCPP@gov.bc.ca

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We're on the Web!
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