Handle With Care

Volume 12, Issue 1 **Summer 2015**

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

In this Issue:

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Health Team Leader's Message

It's been a while since the last issue of Handle With Care as we managed a heavy workload with limited resources. I'm delighted to say HCPP now has a full complement of staff and it's time to move our newsletter from the back burner. Please check out, **What's New—Staffing Changes,** to see who's left our team to pursue other endeavours and meet our new staff members.

Health care facilities are full of people—whether it's staff, volunteers, patients or visitors. In this issue of Handle With Care we have focussed on some aspects of risks associated with people. One of our external counsel borrows from a school case that highlights the need for any employer to take a collaborative approach when accommodating staff members in the article, **An Accommodation that Passed the Smell Test**. Our claims abstract, **Negligent Walking,** examines the case of negligent walking and the duty owed to others who may be around us as we move about in our daily lives. Risk Wise Answers **FAQs about Volunteers** and the Risk Buzz explains how to report and track **Fire Protection System Impairments,** which helps keep everyone in a facility safe.

I hope you find something to help you with the risky side of people.➤

Sharon White, Director—Client Services
Health Care Protection Program

What's New - Staffing Changes

There have been some staff changes at the Health Care Protection Program (HCPP) since publication of our last newsletter.

Congratulations go to Linda Irvine who began her permanent position as Executive Director, Risk Management Branch effective October 17, 2014. Linda takes over leadership of the Risk Management Branch (RMB) from Phil Grewar following his retirement last June 2014. RMB houses HCPP and other similar programs across the public sector.

Sharon White began her new permanent position as Director, Client Services – Health effective November 7, 2014. Sharon is stepping into Linda's former position and was previously a Senior Risk Management Consultant with HCPP for 13 years.

Jeff Milne accepted a position as Senior Risk Management Consultant with the Education team at RMB effective November 3, 2014. We wish Jeff much success in his new role.

Megan Arsenault began her new role as Senior Risk Management Consultant with the Health Team effective February 26, 2015. Megan is stepping into Sharon's former position and was previously a Risk Management Consultant with HCPP for the last 7 years.

Kathie Thompson retired on April 17, 2015 following a varied career in nursing, as an ICBC claims examiner, and Senior Consultant with HCPP. We wish her many happy hours sailing upon the sea and in her garden amongst the rhododendrons.

Milaine Moen joined HCPP in March 2015 and replaces Kathie as Senior Consultant. Milaine brings a wealth of knowledge with

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What's New - Staffing Changes *(continued from page 1)*

more than 25 years of insurance and risk management experience, the last 8 years as a Senior Risk Management Consultant with the Core Government and Crowns Team at RMB.

Darren Nelson moved from our claims department into a Risk Management Consultant role on June 1, 2015. He brings an in-depth knowledge and understanding of HCPP, particularly with respect to Property Coverages.

Cheryl FitzSimons is the most recent staff addition starting on June 9, 2015 as a Risk Management Consultant. Cheryl comes to us from the Ministry of Technology, Innovation and Citizens' Services, where she was an Information and Privacy Senior Analyst. Prior to this, Cheryl worked for Frank Cowan Company, a managing insurance broker in Ontario where she did risk analysis work, contract reviews and placed coverage to meet the needs of various clients including municipal, hospital and long term care facilities.

Please refer to the last page of this newsletter for a complete listing of all HCPP staff and up to date contact information.➤

An Accommodation that Passed the Smell Test

Accommodating an employee who is sensitive to fragrance is no small task. After all, airborne allergens in publicly accessible areas cannot be controlled nor do they affect all people. A recent human rights decision assessed what an employer did to accommodate its employee.

A teacher with a severe dust and scent allergy requested accommodation from the School District. Among other things, she was sensitive to laundry detergents, shampoos and Bounce fabric softener. The teacher claimed that she could not take medication to ward off some of the effects of scent and the only remedy was complete avoidance.

To accommodate the teacher, the School District did the following:

- In 2010, with collaboration from Human Resources, the teacher, and the union, an accommodation plan referred to as the "Exposure Control Plan" was put in place and updated over time during progress meetings with the union;
- The carpet in the teacher's classroom was removed and replaced with linoleum;
- Signage about being scent-aware was posted inside and outside the classroom;
- Staff were advised what scent-free and scent-aware entailed and were asked to be respectful of the teacher's condition. This was communicated during start-of-year staff meetings and, in a separate session, by the human resources manager and a union representative;
- The teacher and the principal collaborated on newsletters to parents and school-wide notices about being scent-free;
- All soap in the school was changed to unscented foam soap;
- Liquid white-out was replaced with white-out tape;
- The teacher was provided with an employer-paid cell phone so that she could contact the office from anywhere in the building if she needed to step away from her duties due to an exposure;
- The teacher was given a classroom with a door to the outside so she could step out if necessary;
- Because of the close working relationship between the special education assistant and the teacher, the principal defrayed some of the costs incurred by the education assistant in purchasing unscented products that she bought to accommodate the teacher;
- During school-wide events such as the Christmas concert, the education assistant would take students to the gym in place of the teacher.

Although the teacher had been transferred to a scent-aware school, she continued to experience reactions to scent. She eventually went on medical leave. The teacher then filed a human rights complaint against the School District and the human resources manager who managed her accommodation. The teacher alleged that they refused to accommodate the teacher by not providing or enforcing a scent-free work environment and that they subjected her to psychological harassment. The essence

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An Accommodation that Passed the Smell Test *(continued from page 2)*

of her complaint was that because she continued to react to scent exposures at the school, she wanted more control over her environment, including over individuals –staff and students alike – by asking them to leave the room or even by having primary age children change their clothes and permitting her to wash the clothes at her home and return them. She also wanted control in common areas such as the computer lab, photocopier room, and the library.

The Exposure Control Plan was amended in February 2013 to provide that in the event the teacher suffered a scent exposure, she was to report to the principal or teacher-in-charge and if necessary, go home. She was not permitted to ask the students or their education assistants to leave the classroom. In one instance, she was advised that it was not appropriate that she had moved the children and their desks outside in 10˚C weather, due to her perception of a scent.

While an employer is obligated to accommodate an employee to the point of undue hardship, the employee cannot expect a perfect accommodation and must work with the employer to achieve a reasonable accommodation. The Supreme Court of Canada has stated, "[i]f a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged"[1]. The Tribunal noted that the impact on others is one of the key considerations in *Renaud.*

No one can guarantee that a building accessible by the public will be entirely scent-free. Schools designated as "scent-aware" request through signage and newsletters that the parents/public/ staff refrain from using scented products. The School District, however, did not have the authority to ban or discipline staff or students for wearing scents at school. Nor would the school be the only source of exposure.

To prove that she suffered discrimination, the teacher had to show that the School District, on a balance of probabilities, treated her adversely in her employment because of her dust and scent allergy and failed to appropriately accommodate her. If an employee's disability cannot be accommodated without undue hardship, the complaint will not succeed.

After going on medical leave, the teacher did not seek further modifications to the Exposure Control Plan, which was the result of discussions between herself, her union, and the employer and which all parties had approved. The principal had also been diligent in documenting how he had responded to each and every complaint or concern brought forward by the teacher.

The human rights tribunal member found that the respondents took significant steps to accommodate the teacher, and that there was no evidence their efforts were somehow flawed. The Member agreed with the respondents that the process of reaching an accommodation or working within it once agreed cannot itself constitute a breach of the Human Rights Code or adverse impact[2] for harassment.

As a result, the teacher's complaint was dismissed.

This case is a good example of an employer responding in a thoughtful and sensitive way to a difficult accommodation issue which required the balancing of a number of important interests. It also demonstrates the significance of collaboration in the accommodation process and the critical importance of documenting both any agreements reached and the resolution of any issues which may arise after agreements are signed off.

BULL HOUSSER

This accommodation indeed passed the smell test.➤

Penny A. Washington, Partner, Bull Housser & Tupper LLP
Sharon Mah, Paralegal, Bull Housser & Tupper LLP

1 Central Okanagan School District No. 23 v. Renaud [1992], 2 S.C.R. 970

2 Petrar v. Thompson Rivers University and another, 2014 BCHRT 193

Claims Abstract: Negligent Walking

There is a myriad of tasks that people in the medical profession have to be skilled at and many things they have to be aware of in order to fulfill their professional obligations to their patients and to those with whom they work. But is the rather mundane task of walking one of these things? Yes it is.

In this case, the plaintiff was a volunteer at a residential mental health facility operated by a Health Authority. The patients at the facility were known to occasionally become upset to the point of behaving violently. All volunteers were given personal protection alarms and the nurses were required to take training in nonviolent intervention. A contracted agency was responsible for screening and placing volunteers with the facility. In November, 2009, one of the patients at the facility was becoming agitated. This patient was known to become increasingly upset and if left unattended, her behaviour could escalate to violence. A nurse employed by the facility was in the nursing station at the time the patient started to become agitated. The nurse left the nursing station with the intent of intercepting the patient in order to calm her down. As the nurse left the nursing station, she was focused on the patient and although not running, was moving quickly and purposefully. The volunteer was outside the nursing station. She too was focussed on the patient. At this moment, the nurse and volunteer collided. Both the volunteer and the nurse were watching the patient and neither saw the other before the collision. The nurse was larger than the volunteer; the volunteer being 60 years of age, 5 foot two inches tall and about 95 pounds. In addition, the volunteer suffered from rheumatoid arthritis. Upon colliding, the volunteer fell and broke her hip.

The volunteer sued the Health Authority and the nurse. She argue four alternative grounds of liability, that: the Health Authority breached the *Occupiers Liability Act* (the Act); the Health Authority was negligent in allowing the Plaintiff to volunteer at the facility; the nurse was walking negligently; and the nurse committed trespass to the person of the plaintiff.

The Court dealt with each allegation in turn. The Court characterized the Plaintiff's claim pursuant to the Act as whether, "…(the Health Authority) should have known and taken steps to ameliorate, or otherwise warn volunteers at (the facility), of the possibility that nurses might move quickly through (the facility) when responding to a patient." The Court briefly discussed the law relating to the Act and stated that the issue is whether the Health Authority breached its duty to take such care in all the circumstances of the case to reasonably ensure the safety of the Plaintiff. The court noted that volunteers are exposed to some danger while at the facility, but that the Health Authority took steps to ameliorate those risks. But the incident in question did not arise out of the type of risk for which the Health Authority was concerned. The Court reasoned that this incident was therefore unusual and in part at least because it never had occurred previously, it was not reasonable that the Health Authority should have foreseen such collisions as a risk and thus need not have taken steps to prevent it.

The Plaintiff's second argument was that Fraser Health was negligent in allowing her to volunteer at the facility and in failing to warn her she could get knocked down. The Court dismissed this argument on the basis that Fraser Health did not owe the Plaintiff a duty of care to warn her nor prevent her from volunteering at the facility.

The Plaintiff's third argument was that the nurse committed the tort of trespass to the person of the Plaintiff and as the nurse was employed by the Health Authority, it was vicariously liable for the tort of the nurse. The Court applied the "traditional rule" and quoted McLachlin CJ in Non-Marine Underwriters, Lloyd's of London v. Scalera, 2000 SCC 24, at paragraph 8:

> "The traditional rule, as noted, is that the plaintiff in an action for trespass to the person (which includes battery) succeeds if she can prove direct interference with her person. Interference is direct if it is the immediate consequence of a force set in motion by an act of the defendant." And "The burden is then on the defendant to allege and prove his defence."

DUTY
BREACH
CAUSATION
\+
DAMAGES
NEGLIGENCE

The defences to trespass to the person include consent and that the act was both unintentional and without negligence. In our case, the parties agreed the Plaintiff did not consent to the collision, nor did the nurse intentionally collide with the Plaintiff. This left the question of whether the nurse was negligent. The Court decided to deal with that question under the Plaintiff's last argument; that is, was the nurse negligently walking?

In a case in negligence, the Plaintiff must prove four elements. Does the defendant owe a duty of care to the plaintiff? Did the defendant drop below the

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Claims Abstract: Negligent Walking *(continued from page 4)*

standard of care? Did the plaintiff sustain damage? And, was the plaintiff's damage caused (in fact and in law) by the defendant's breach? In our case, the defence acknowledged that a duty of care was owed, that the Plaintiff did suffer damage and that the damage was in fact a result of the collision.

The defence argued that the Plaintiff's damages were too remote and thus in law were not caused by the nurse. The defence pointed out that the Plaintiff was unusually frail and that a normal person would not have fallen and been injured and thus the damage was too remote. The Court disagreed. It found that the Plaintiff falling over and being injured was reasonably foreseeable in the circumstance and therefore not too remote.

The Court then considered whether the collision amounted to a breach of the standard of care owed by the nurse and quoted the case of Mills v. Moberg (1996), 27 BCLR (3d) 277 (SC) at paragraph 6:

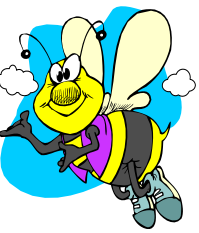
> "The duty of pedestrians to one another is to act as an ordinary person would in the circumstances, using the degree of care and vigilance which the circumstances and the interests of others using the walkway demand."

Although the Court noted that nursing staff would have to be vigilant and act quickly in dealing with potentially volatile patients, it did not think this was an excuse to "…be heedless of other persons standing or walking in the (facility) who might be in her path…". The Court found the nurse negligent. The defence also argued that if the nurse was found negligent, so too should the plaintiff also be found contributorily negligent. The Court agreed with the defence's argument that the Plaintiff ought to have known the nurse would be leaving the nursing station to attend to the patient, and by standing near the entrance to the nursing station and staring at the patient, the Plaintiff was partly responsible for the collision. The court noted that the Plaintiff was heedless to the nurse, just as the nurse was heedless to the Plaintiff. Given this assessment, one might have expected the Court to apportion liability between the Plaintiff and the defence on an equal basis. Instead, the Court found the Plaintiff 40% at fault, but gave no analysis as to why the apportionment should be other than equal.

The law has been described as a blanket, with its different areas all interwoven together and overlapping and covering us in warmth and protection to one degree or another in everything we do. And this includes walking. Whether you are walking down a city sidewalk, or hurrying to assist a patient, you still need to be mindful of those in close proximity to you; as you will owe them a duty to take care not to cause them damage by your walking. In the case we have been discussing, it is clear the fact the nurse was hurrying to assist a patient did not make a difference. If the nurse had been pushing a crash cart to get to a code blue, arguably, she would have had to take less care to those bystanders in her immediate vicinity given the necessity of having to get to the patient as quickly as possible.➤

Kevin Kitson, BA, LLB
Senior Claims Examiner/Legal Counsel

Risk Buzz - New Process for submitting Fire Impairment Notices



Health Care Agencies (HCAs) are required to report any known interruption to, flaw or defect in any fire protection or alarm systems. When an HCA's fire protection system or alarm is shutdown or impaired, the HCA, and those for whom they are responsible, are at a higher risk of sustaining a property or bodily injury claim if the shutdown or impairment is not managed properly. Reporting a shutdown or impairment heightens the awareness of all parties to ensure there are warnings or mitigations in place to prevent the spread of smoke or fire and make certain the system is reinstated following the impairment.

Did you know the process for submitting Fire Protection System Impairment Notices changed in 2014?

Effective October 27, 2014, the fillable PDF form moved to Marsh's Impairment Tracking System, www.mitracking.com. Log on to this website to report any sprinkler systems or other protection systems that are non-functioning or malfunctioning in your facility.

Remember to add your secondary contact information in the event of your absence as a reinstatement reminder will be sent out. If you do not know your username and password for the site please contact your organization's Risk Manager.➤

Risk Wise Answers - Volunteers Q&A

Q - What benefits does a volunteer have if injured? If the injury occurs while the volunteer is commuting to the volunteer's work, is there voluntary compensation coverage available?

The injury a volunteer sustains must be accidental and must arise in the course of the volunteer's duties. Injury occurring while commuting to and from, before the volunteer's work commences or after it has been completed, is not covered.

HCPP does offer voluntary compensation benefits in recognition of the commitment to service made by volunteers where they suffer temporary or permanent total disability, or dismemberment arising from an accident occurring in the course of their duties. Compensation is based on a weekly indemnity amount of $150, with the number of weeks payable varying depending on the duration and nature of the disability. Necessary medical expenses not otherwise recoverable are also included.

Q - Is a volunteer covered for their attendance at conferences and similar events?

No. HCPP does not consider attendance at conferences or similar like events to be part of their volunteer duties.

Q - If a Health Care Agency (HCA) is hosting an event where HCA volunteers and non-HCA volunteers will be helping out, would the non-HCA volunteers be covered under HCPP?

Yes. Since these non-HCA volunteers are acting under the direction and supervision of HCA they would be covered under HCPP.

Q - If a volunteer during their volunteer duties (e.g. volunteers at health auxiliary thrift stores which includes making a bank deposit on auxiliary's behalf) was robbed, would HCPP replace the amount of funds that was stolen?

Yes. HCPP Crime coverage would cover the loss. The coverage provides up to $25K, subject to a $500 deductible.

Q - If a volunteer had their personal property damaged in the course of their volunteer duties, for example their eyeglasses were damaged as a result of a fall, would HCPP cover the damaged property?

No, HCPP would not provide coverage for their eyeglasses. HCPP does not provide coverage for any personal property of a volunteer.➤

Hospital Corners— Quick Risk Tips

In an insurance policy, the word "Occurrence" generally means the incident or event that is the subject of the loss.

Q - What is the difference between an insurance policy written on a Claims Made basis versus one written on an Occurrence basis?

The reporting basis of an insurance policy is significant when it comes to a claim. If a policy is written on a Claims Made basis, in order for a claim to be covered, it must be filed with the Insurer during the policy period. Coverage is triggered when an incident is reported.

When a policy is written on an Occurrence basis, coverage is triggered when an incident actually occurs as opposed to when it was reported. The incident must occur during the policy period but, subject to the time limits set out in the *Limitation Act*, it does not matter when the claim is filed. This is important when we consider that some claims do not manifest themselves or get reported until years after an incident has taken place. There are pros and cons associated with both types of policies.

Q - What is the difference between a Per Occurrence limit and an Aggregate limit?

A Per Occurrence limit refers to the largest single claim an insurance policy will pay and defend. This can also be referred to as the "per Claim" limit.

This same insurance policy may also have an Aggregate limit. The Aggregate limit refers to the total amount the policy will pay in any policy period.➤

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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