



## Accountability, Liability and Malpractice

Statistics from Canadian Medical Protective Association, Canadian Nurses Protective Society, and Healthcare Insurance Reciprocal of Canada reveal that obstetrical litigation is common. Realistic planning for the legal costs of defending a negligence suit is necessary. Negligence is the failure to take the care that a reasonable, careful midwife/ nurse/doctor in similar circumstances would have taken. The following elements must be proved by the plaintiff(s):

1. Duty of care;
2. Breach of the standard of care;
3. Foreseeable harm was caused by a breach in the standard of care; and
4. The value of the harm or loss, known as damages.

A successful defense to an allegation of negligence is that the practitioner's actions were reasonable and prudent in the circumstances. Canadian courts are capable of understanding that different professionals have different roles to play in one pregnancy. While there may be recognition by the court of the team effort, each defendant's role will be analyzed individually. Each practitioner is responsible for their own actions. A health professional is not held directly liable for the negligence of another professional who was acting autonomously within their scope of practice.

A finding of negligence by the court may have a financial impact on the defendant(s) in three ways:

### 1. Direct Liability

Each health care professional, both individually and as a member of the collaborative practice team, is accountable for his or her own professional practice. Therefore, if a practitioner is found to have been negligent, a court may award damages to the plaintiff that is to be paid by the individual defendant. This form of liability is called direct liability.

A defendant employer or facility may also be found negligent and held directly liable for breaching duties it owed to the client. These could include, for example, the duty to: select professional staff using reasonable care; review staff performance on a regular basis; have and enforce appropriate policies and procedures; provide reasonable supervision of staff; and provide adequate staffing, equipment or resources.

### 2. Vicarious Liability

If an employee is found negligent, the court may order that damages be paid by the employer pursuant to the doctrine of vicarious liability. This legal doctrine provides that an employer, which may be an individual or an institution, can be held financially responsible for the negligence of its employees. An employment relationship must have existed at the time of the incident and the defendant employee must have been sued for work done within the scope of his or her employment. It will be up to the court to decide, based on all the facts and circumstances, whether an employer/employee relationship existed. Some of

the indicators of an employment relationship are the level of control the employer has over the employee's activities, any agreements which describe the relationship and requirements to follow the employer's policies or procedures.

### 3. Joint and Several Liability

When a court finds more than one defendant negligent, the court will assess the amount of damages (often expressed as a percentage of the total damage award) to be paid by each defendant. Defendants can be jointly and severally liable for the damages awarded. This means the plaintiff may recover full compensation from any one of the negligent defendants, even though that defendant may then be paying for more than their share of the damages. That defendant may then seek contribution from the other negligent defendant(s). For this reason, it is essential for those working in collaborative practice to verify that all members of the collaborative practice team and the facility or institution have adequate professional liability protection in place.

## **Legal Risk Management Recommendations**

### *Planning*

Ascertain the nature of your legal relationships with others in the collaborative team at the beginning of your collaboration. Establish a system of annual review of current professional credentials of team members, along with proof of current legal defense protection/insurance. You should know the source of your legal defense funding. All members of the collaborative health care team and the institution or facility must have appropriate and adequate professional liability protection to protect themselves and the clients they treat. For those leaving obstetric practice, this may include 'tail coverage' which extends the reporting period in which a claim can be made to an insurer.

### *Communication*

Clear communication between team members and the client should reduce the risks of miscommunication or lack of meaningful planning and coordination (who does what when) where more than one professional is concurrently involved in the care. Establish a method for addressing issues of miscommunication between team members or between a team member(s) and a client. This may include establishing a formal process to ensure complaints or concerns are addressed by the collaborative.

### *Evidence*

Your daily practice can create evidence of your reasonable actions. Policy development and agreed guidelines or protocols are a good way for a team to show it maintains safe systems for clients. Proper documentation on the health record is a requirement of your professional practice and can be your best defense in a legal action. A regular audit of the collaborative's health records will be useful in helping assure the quality of the care you provide is reflected in the records and allows for quality of improvement, where necessary.