BORDEN LADNER GERVAIS LLP

UNDERSTANDING A CIVIL LAWSUIT

HEALTH LAW GROUP

blg.com

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WHAT IS HIROC?

The Healthcare Insurance Reciprocal of Canada (HIROC) is a reciprocal insurance exchange, an alternative to traditional third-party liability insurance coverage. HIROC's subscribing healthcare providers (e.g., hospitals, nursing homes, community health centres and homecare organizations) pool their resources and agree, on a reciprocal basis, to share each other's liabilities. HIROC operates on a not-for-profit basis.

When a healthcare organization subscribes to HIROC, HIROC's support and coverage are available not only to the organization but to each of the organization's employees.

When a HIROC subscriber is confronted with a legal claim for compensation by a patient or family, it is reported to HIROC, whose team of experts assesses and ultimately resolves the claim, with the co-operation and assistance of the affected healthcare providers. All associated costs are covered by HIROC. HIROC strives to be fair and to ensure that its subscribers and their employees are presented as reputable members of the healthcare community.

For more on HIROC, access its website at www.hiroc.com

WHO IS BLG?

Borden Ladner Gervais LLP (BLG) is a national law firm with offices in Calgary, Montréal, Ottawa, Toronto and Vancouver. In our Ontario offices, there are several lawyers who practise extensively in the field of health law. BLG has one of the most experienced, comprehensive and pre-eminent health law practices in Canada.

Among other aspects of health law, we have particular expertise in representing the interests of healthcare providers who are defendants in medical malpractice lawsuits. From 1987 to the present, HIROC has retained BLG as its lead defence counsel in Ontario, for the purpose of providing legal representation and advice to HIROC, its subscribers and their employees.

For further information, see the BLG website at www.blg.com

THE LAWSUIT

1. Overview

A lawsuit is also known as a "civil action," which distinguishes it from a criminal action. A lawsuit has nothing to do with criminal law or professional discipline. Rather, it is a legal proceeding whereby an individual (the plaintiff) most commonly seeks compensation in respect of injuries which they allege were caused by another person's (the defendant's) "negligence". Negligence is defined as the breach of a reasonable standard of care. The law does not require perfection, and it is well recognized that adverse outcomes can occur in the absence of negligence. In a lawsuit, the plaintiff must prove, on the balance of probabilities, that one or more of the defendants were negligent, and that their negligence caused or materially contributed to the plaintiff's damages. Without these three factors being proven (negligence, damages and the causal link between these two), the lawsuit will not be successful.

In medical malpractice lawsuits, it is very common that independent experts are retained by each party to provide opinions with respect to all three of these elements.

The plaintiffs are usually represented by a lawyer having some expertise in medical malpractice, however, some plaintiffs remain self-represented. Healthcare institutions such as hospitals, together with their employees, such as nurses and technicians, are usually represented by the same lawyer, retained by the institutions' liability insurer or insurance reciprocal (e.g., HIROC retains BLG). Physicians who are defendants are usually separately represented, because they are generally considered not to be employees, but independent practitioners with privileges at the healthcare institution. For this reason, physicians are individually accountable and thereby have separate liability coverage. Physicians in Ontario are usually represented by lawyers appointed by the Canadian Medical Protective Association (CMPA). The separate representation does not necessarily imply an adversity of interest. We at BLG strive to be respectful of your working relationships as members of healthcare teams.

2. Stages

a) The Pleadings Stage

The pleadings are the legal documents, such as the Statement of Claim and the Statement of Defence, that are exchanged between the parties and filed with the court. The Statement of Claim is what officially starts a lawsuit. In it, the plaintiffs make certain allegations about the case which they say form the basis of the lawsuit.

In the Statement of Defence, the defendant admits or denies the allegations made in the Statement of Claim, and also pleads the defences that will be advanced. These documents are often drafted very broadly so that every possible avenue can be further explored in the lawsuit. From the perspective of the defendant, the Statement of Claim may contain many allegations that seem to be highly speculative and/or offensive and wrong. This is generally not of concern, as the real issues in the lawsuit do become more refined and accurate as the process continues.

b) Productions and Examinations for Discovery

Each party to a lawsuit is required to disclose to every other party all the facts and information relevant to issues in the lawsuit. Parties disclose relevant information in two ways: the disclosure of documents, and oral evidence provided under oath. Our Rules of Civil Procedure, which govern the conduct of a lawsuit, require that disclosure of relevant facts and information be made well before trial. This disclosure obligation continues, such that information that later comes to light after initial disclosure must also be provided to the other parties.

The purpose of early and continuing disclosure obligations is to permit the parties to better assess the strengths and weaknesses of their own case and their opponents' case. Parties will be better able to determine the proper course of action if they are fully informed of the facts of the case.

(i) Documentary Discovery

Once the pleadings are complete, both the plaintiff and the defendant are required to produce sworn Affidavits of Documents, in which all documents relevant to the claim and in the possession, control or power of the party are listed. All documents must be produced to the other parties in a lawsuit, with the exception of documents that may be subject to privilege. The most common example of a document that is disclosed by a hospital in a medical malpractice lawsuit is the plaintiff's hospital record, and other relevant clinical notes and records made by healthcare providers. The most common example of a document that may be subject to privilege is a summary of a Quality Assurance Committee review, and/or correspondence between the client and his or her lawyer.

In preparing an Affidavit of Documents, it is important that the client provide the lawyer with all documents that might have anything to do with the issues in the lawsuit. The lawyer can then review the documents to determine, first, if they are relevant, and second, if they may be privileged.

(ii) Examinations for Discovery

The Examination for Discovery is a very important stage of the action. At an Examination for Discovery, a party is examined under oath about all of his or her knowledge, information or belief as to all the facts and evidence related to the lawsuit.

The purpose of the Examination for Discovery is to learn all the opposite party's information about the lawsuit, including information about the relevant event, the names of potential witnesses and the evidence the party will rely on in support of the allegations made in the pleadings.

An Examination for Discovery takes place well before trial, and it is not held in a courtroom or in the presence of a judge. It is usually held in an office boardroom in the presence of the lawyers for each party and a court reporter who records all questions and answers. The adverse party is also entitled to be present, but usually is not.

Not all parties are necessarily examined for discovery. If you are asked to attend, we will meet with you ahead of time so that the process can be more fully explained, and sufficient support provided to you so as to ensure that you are able to participate in this process in a credible manner and without undue stress.

At the outset of the Examination for Discovery, you will take an oath to answer all questions truthfully. The opposing party's lawyer will ask you a series of questions. Your lawyer will be present throughout to ensure that no improper questions are asked. There are occasions when a witness does not know the answer to a proper question, but could find out the answer with some reasonable effort. In that case, "undertakings" may be given to provide the answer at a later time, and there are often deadlines within which such undertakings must be answered.

There may be questions asked about which there is a dispute as to their propriety. In this event, there may have to be motions brought to have this issue determined by the court. Occasionally, therefore,

witnesses are ordered to re-attend at an Examination for Discovery in order to answer proper questions that were initially refused.

After the Examination is complete, all questions and answers are transcribed in an official transcript. The transcript of this evidence may be used at trial by the opposing party. If the witness has admitted anything that is harmful to the witness's position and helpful to the opposing party, the opposing party may "read in" the "admission" at trial.

Also, the opposing party may use the transcript of an Examination for Discovery to challenge the witness' credibility. A witness at an Examination for Discovery will likely be asked to testify at trial. If the answers given at the trial conflict with the answers given at the Examination for Discovery, the opposing lawyer can confront the witness with the answer given earlier in order to discredit the witness' evidence at trial.

c) Pre-trial

Prior to trial, lawyers for the parties in a lawsuit have the opportunity to have an informal meeting with a judge. At a pre-trial, a judge will usually express an opinion regarding the issues in the lawsuit. In addition, the judge will assist the parties in narrowing the issues for the trial. Having the perspective of a judge in advance of trial can be very helpful in assisting the parties to assess both the merits and the difficulties of their own and their opponent's case. Very often, after a pre-trial, parties are able to settle their dispute without going to trial.

d) Mediation

Most lawsuits these days would not end up at a trial without the parties having engaged in the process of mediation, if otherwise unable to settle the case. Mediators perform very similar functions to those of a pre-trial judge described above. It is generally only lawyers who attend at a pre-trial, but at mediations, some or all of the clients themselves might attend, and the process of communication between the parties is thereby more direct. Again, very

often, parties are able to settle their disputes with the assistance of a mediator, without going to trial, and the mediation may well take place even before discoveries or before the pre-trial.

e) Trial

At trial, the parties present evidence and argument to a judge alone or to a judge and jury. Due to the discovery process, which permits the parties to know the evidence on which adverse parties will rely, and in the case of medical malpractice cases, the assistance of independent experts, usually disputes can be resolved before trial. In fact, a small percentage of medical malpractice lawsuits actually end up at a trial.

3. Other Matters

a) Joint Representation

Sometimes, BLG is retained by HIROC to act on behalf of more than one defendant in a lawsuit, for example, two hospitals, or a hospital and a nurse, or several nurses. Only rarely does this represent a conflict of interest. The interests of all HIROC subscribers and their employees are usually best represented through this arrangement, and the individual cases of the subscriber hospitals and their employees gather strength from joint representation. Please advise us immediately if you are of a different view or if you anticipate any conflict that might preclude BLG from acting on your collective behalf.

b) Confidentiality of Communications

Not all communications between each of our clients in a particular lawsuit and BLG are necessarily shared with the other as a matter of course. However, while our communications are confidential to outside sources, they are not, as a matter of law, protected by confidentiality as between each defendant we are representing.

c) Conflicts and Contentious Issues

If a conflict does develop and it cannot be resolved, we will not be in a position to act for both or all of the client defendants in the same matter, and depending on the circumstances, may have to withdraw from the matter completely. In such a case, separate counsel will be appointed by HIROC to act for one or more of the subscribers. Should an issue of contention arise, it is a condition of the retainer that our firm be permitted, as circumstances allow, to advise one or more subscribers involved in the matter in relation to that contentious issue and to refer one or more subscribers to other counsel.

4. Who to contact

Each healthcare institution usually has an administrative employee whose portfolio of responsibility includes risk management and/or medical legal matters. This person is usually aware of all outstanding lawsuits, and can be of great assistance in acting as a conduit of information between the healthcare institution, its employees and its lawyers. Any employee who finds herself or himself as a defendant in a lawsuit should take advantage of the support that this person can offer. This person is also usually aware of the general status of a lawsuit and the stage it has reached. In the event that an employee/defendant has a particular question, this person would usually be the first point of contact.

However, individual defendants in a lawsuit should also feel free to contact the counsel appointed for them by HIROC directly with any questions or concerns. Each BLG lawyer has a direct telephone line with confidential phone-mail. We each also have a direct fax line and e-mail. These particulars are provided in any correspondence received from a lawyer. Alternatively, please contact BLG's general telephone line at 416.367.6000, and our receptionist can assist in making that link.

We look forward to working with you in what we know can be a difficult time in your career.

We are committed to representing you to the best of our ability.

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