Top Five Legal Tips for the Health and Wellness Industry

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Lawsuits involving the health and wellness industry happen, though they are not often the subject of reported decisions in Canada. It is crucial for regulated health professionals, non-regulated consultants (aestheticians/cosmeticians/laser technologists), as well as spa and medi-spa owners and operators in the industry to be wary of potential risks, which may leave them vulnerable to liability and negative publicity. Below are five of our top tips based on our experience in this area.

1. Don't expect to rely on waivers of liability

Regulated health professionals cannot rely exclusively on waivers or release of liability forms in medical negligence claims.

In the 2018 case,*Rush v De Ruiter,1*the Ontario Superior Court of Justice (ONSCJ) considered the effect of a waiver of liability in the context of Intense Pulsed Light (IPL) therapies administered by a registered nurse. The plaintiff brought a claim for negligence in the administration of the IPL therapy. On a summary judgement motion, the defendant nurse claimed that the consent and waiver of liability form signed by the plaintiff barred her claim in negligence because it contained the words, "*I hereby release this clinic, its staff, and any other provider from any and all liability for any adverse effects that may result from this treatment*."

Justice B.A. Allen considered the claim to be within the realm of medical negligence, despite the fact that the treatment provided was of a cosmetic nature and did not need to be performed by a regulated health professional. In dismissing the defendant's claim, the court found that there were no authorities that involved the exclusions from liability in a medical negligence context and held that:

[f]undamental to that reason is that doctors and other medical practitioners have an overriding professional obligation to do no harm. This is what is expected by the profession. This is what patients seeking treatment and the public expect.

The effect of a release from liability in a consent to medical treatment would be that a patient signs away their right to sue a practitioner for their careless errors. This would

mean that the patient themselves would assume the risk of errors while the medical practitioner escapes legal responsibility for their own substandard practice.

Although the court did not set out why the cosmetic treatment rose to the level of medical negligence, it is likely that this conclusion was reached, in part, because the treatment was provided in a clinic by a regulated health professional, who would otherwise be held to a higher standard of care than a non-regulated consultant. Even though this case involved a regulated health professional, it could be influential for non-regulated consultants where a cosmetic treatment involves a risk of harm comparable to a medical treatment. As such, we caution that non-regulated consultants not assume that they can rely on the use of waivers for their services.

2. Informed consent is a process, not a form

Those in the beauty industry should be cautious when relying solely on a form to obtain consent for a proposed cosmetic treatment. The Health Care Consent Act mandates that consent to treatment, which includes anything done for a cosmetic purpose except if the treatment poses little or no risk of harm to the person, must:

- relate to the treatment proposed;
- be informed;
- be given voluntarily; and
- not be obtained through misrepresentation or fraud.

Consent is considered informed if the person receives information about:

- the nature of the treatment;
- the expected benefits of the treatment;
- the material risks of the treatment;
- the material side effects of the treatment;
- alternative courses of action; and
- the likely consequences of not having the treatment,

that a reasonable person in the same circumstances would require in order to make a decision about the treatment. In addition, the person must receive a response to any requests for additional information they may require about the matters just listed.2

When providing a cosmetic treatment with the potential of harming the individual to whom it is provided, it is important to ensure that the information above is shared with, and understood by, the client before proceeding with the treatment. An invitation to questions and a subsequent discussion, along with the provision of a form, assists in ensuring that the client is properly informed.

The appropriate amount of disclosure will depend on the treatment being administered. In *Anderson v Lafontaine,3*the Ontario District Court considered the amount of warning regarding specific risks required before proceeding with a treatment. There, the plaintiff sought damages for injuries she alleged were suffered due to the defendant's negligent administration of electrolysis treatment on a blackhead on her upper lip. The plaintiff alleged that the defendant had an obligation to warn the plaintiff of the specific risks associated with the procedure.

Justice Hoilette held that the actual result of the procedure, which was a small pit in the place of the blackhead, was one within the contemplation of the plaintiff. Additionally, while an "*abundance of caution may well have inspired the defendant, specifically, to* direct the plaintiff's mind to the likelihood of a more obvious 'pit' replacing a more or less *apparent blackhead. The failure to do so, [cannot] be viewed as such a departure from what might reasonably be expected of someone in the position of the defendants as to constitute negligence*."

3. Documentation is evidence

Documentation can be the best defence when facing claims in negligence. An adult plaintiff typically has two years to initiate a lawsuit, and even when the lawsuit is filed promptly, it can take years before the relevant party may have to recall the events which took place. As such, timely, accurate records are essential in establishing the quality of the service provided.

Any discrepancies and inaccuracies could be used to discredit your evidence. In the 2009 case,*Ayana v Skin Klinic,4*the ONSCJ preferred the evidence contained within electronic clinic notes entered an hour after the treatment over the oral evidence of standard practice of the technicians performing the laser hair removal treatments at issue.

4. Medi-spas, spas and beauty clinics are liable for their staff 's negligence

Medi-spas, spas and personal service settings may be found vicariously liable or liable as owners and operators for a number of claims against them and their staff. It is crucially important that organizations ensure staff are qualified and properly trained to:

- provide the treatment;
- obtain informed consent to treatment;
- use the products and equipment; and
- properly document the treatment, in compliance with applicable laws, including taking contemporaneous notes whenever there is a problem or complaint.

Also, medi-spas, spas and personal service settings must ensure that they and their staff keep up to date with Health Canada recalls on the products they offer and the equipment they use.

As reiterated by the court in *Ayana*, where technicians were found negligent, it follows that the clinic or spa at which they are employed would be negligent as well. Clinics are not, however, vicariously liable for the actions of independent contractors operating out of their location, as was held by the British Columbia Supreme Court in *Harris v Pavel.5*

5. The consequences of a privacy breach can be significant

Medi-spas, spas and personal service settings must comply with applicable privacy legislation and understand their clients' rights to privacy and the security of their personal information, while balancing legal requirements and business needs.

Regulated health professionals must also comply with their record-keeping obligations under their professional specific acts and regulations. For example, registered massage

therapists must meet the requirements of the General Regulation made under the Massage Therapy Act, 1991 in addition to any College of Massage Therapy standards of practice, guidelines and policies. And non-regulated consultants must comply with their record-keeping obligations under the Personal Service Settings Regulation made under the *Health Protection and Promotion Act*.

With privacy, less is more. That is, the collection and use of personal information should be limited to legitimate and identified purposes that are disclosed to clients and for which informed consent (through a process and not just a form) is obtained.

Medi-spas, spas and personal service settings must also put in place appropriate privacy and data protection policies and practices that withstand legal scrutiny.

The consequences of a privacy breach can be significant, involving complaints, investigations, findings, fines and damages awarded in court cases. Privacy class action lawsuits are becoming more common. Don't let your efforts to grow your business, make more sales, and reach more people be thwarted by law suits or negative publicity resulting from a privacy breach.

As a final/bonus tip, we recommend that those working in the health and wellness industry tread carefully when considering the issues raised above. To minimize their potential exposure, they should consult with a lawyer with experience in the industry well before they are faced with a lawsuit or a privacy complaint.

1 2018 ONSC 1210

2 *Health Care Consent Act, 1996*(s.11).

3 1989 CarswellOnt 2580.

4 2009 CarswellOnt 4734.

5 [1997] B.C.J. No. 357.

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