HANDLE WITH CARE

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A Risk Management Newsletter For the Health Care Protection Program Members

ARTICLE INDEX AND SUMMARY

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BRIANTE AND PAUR

A Discussion of Two Health Care Negligence Court Decisions

As risk professionals we always need to be on the lookout for trends and new developments. As a lawyer working in health care risk management, with past nursing experience, I need to be aware of court decisions that can be seen as favourable or "just" in the end result (ratio decidendi[1]), but through the course of trial, judgment and appeal reveal criticisms and findings (obiter dictum[2]) that suggest future vulnerabilities for hospitals and their staff.

In this article I will discuss two recently concluded cases in the provision of emergency mental health care: Briante (*Briante v. Vancouver Island Health Authority 2014 BCSC 1511)* and on appeal (*2017 BCCA 148) (2017 SCC # 37595)*[3] and Paur (*Paur v. Providence Health Care 2015 BCSC 1695)* and on appeal (*2017 BCCA 161).*

It is worth noting the trial court judges in both cases made comments based on findings not necessarily upheld at Court of Appeal but nonetheless those remarks will continue to have an impact on how mental health care will need to be delivered in the future, and most certainly the way in which cases are likely to be argued in future.

In Paur the Plaintiff attempted suicide by hanging in the bathroom of an emergency ward after having been certified under the *Mental Health Act*[4]. He suffered permanent brain injury and sued the hospital, the emergency room physician, and the registered nurses (RNs) on duty. The trial judge found the hospital liable under the *Occupiers Liability Act*[5] and in negligence for failing to ensure patient safety, and two of the nurses liable for failing to adequately monitor the patient's activities (in particular the use of the bathroom) during the night.

The trial judge opined that the patient could have been kept safe either by hospitals having ligature-proof ceilings in all bathrooms, or by having protocols in place that would ensure closer monitoring. These 'standards' had not been met.

The action against the doctor for allegedly failing to adequately assess, and then make appropriate orders to protect the patient, was dismissed.

The hospital's appeal of the judgment was successful in part. In the appeal court's view, the standard of care applied by the trial judge to bathroom design and construction had been too high; but the standard of care regarding the monitoring of the patient had been correct and properly applied to hold hospital and nurses liable. The appellate court made an additional adjustment (downwards) in the future care costs that had been awarded at trial. The court also upheld the trial court's decision that one of the RN's delay in attending to the hanging patient contributed to his injuries.

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Although overruled on appeal in this case, in my view the extent and degree to which a safe environment must be provided to acutely ill psychiatric patients in hospital may well start to reach a higher degree than previously such institutions have been able to provide. The fact that the bathrooms in the area where the patient had been temporarily housed were not ligature-proof proved fatal to the hospital's defence at trial, and given the strong (and arguably sound) comments of the trial judge, is increasingly likely to be argued by plaintiff's lawyers despite the final outcome on appeal.

As to the finding the standard of care of the RNs was below the requisite expected (upheld on appeal) the findings are significant for nursing staff who may be less experienced with, or less well-trained in the identification and management of patients at risk for unpredictable behaviours. This is especially true when those patients are under the influence of substances (in this case alcohol) that cloud their own judgment and make the physician's assessments even murkier. The trial judge even went so far as to speculate that the absence of a psychiatric nurse on the ward might have made a difference to the outcome for this patient, given the lack of specific training and/or apparent knowledge of the RNs on duty.

The principle that the standard of care provided by nursing staff must reach the level that would be expected from nurses with the appropriate level of training for the environment and specialty areas in which they find themselves working is an important consideration for all nursing staff in all areas of specialized practice. This will be true for nurses working in orthopedic or obstetrical settings just as much for nurses working with acutely ill psychiatric patients. Entry or general level experience skill sets are not the best fit for specialized areas of practice.

One need only look at the case law involving orthopedic cases involving the identification of compartment syndrome, or obstetrical cases involving the identification of foetal heart distress to see where hospitals and nurses have been found lacking in their provision of care.

When a facility or unit of a hospital holds itself out as being specialized in providing a certain level of care then it needs to staff itself accordingly.

On the other hand, in Briante the experienced and specially trained Registered Psychiatric Nurse was still found to have been ~~80%~~ 90%responsible for the breach of standard of care and 100% liable on appeal. That breach was not ultimately causative of the patient's injuries, and so the case was dismissed at trial and the decision to dismiss was upheld on appeal[4]. But what went wrong for the nurse in Briante?

First let's take a look at some of the facts of the case.

Mr. Briante's family brought their son into a specialized emergency psychiatric unit at a hospital with concerns that he was delusional. The patient was an intelligent, yet unstable, former lawyer who had a history of substance abuse and unpredictable behaviour. He insisted he was not suicidal, that his family had overreacted, that he wanted his privacy respected by not involving his parents and that he would attend an out-patient appointment if not admitted.

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He was assessed by a specially trained and experienced Registered Psychiatric Nurse (RPN) and later by an emergency room physician. The physician discharged Mr. Briante without having consulted a readily-available on-call psychiatrist and the patient was merely referred to a specialized out-patient clinic with an appointment a week later.

Six days later, he attempted suicide by multiple knife wounds and was found bleeding-out by family members. He survived but suffered permanent brain damage as a result. His family brought a medical negligence action against the nurse, physician and hospital for Mr. Briante's injuries and an action for emotional distress suffered by the family members who witnessed the aftermath and emergency response.

The trial judge found the nurse and physician had been negligent, but held the plaintiffs had failed to prove causation and consequently dismissed both actions. Regarding costs, the trial judge awarded the defendants their costs on all issues except for time spent on the standard of care issue, for which he ordered the parties bear their own costs.

The plaintiffs appealed from the dismissal of their claims, arguing the trial judge erred in finding they failed to prove causation. The defendants argued the trial judge did not err in his causation finding, but that full costs should have been awarded to the successful parties. The physician-defendants argued that no standard had been breached by the emergency room physician.

On appeal the finding that the physician breached her standard of care was set aside on the basis the trial judge was required to find the physician had independently failed to meet the standard of care in a way that could not be attributed to the nurse's negligence. The Court of Appeal ruled that the trial judge did not do so, and that his finding on this issue was unsupportable.

Although the trial judge was also found to have misstated the law on causation, his reasons as a whole showed that he properly weighed all relevant evidence in determining whether to draw a factual inference that causation had been proved. The psychiatrist on-call that evening had testified that he would not have been able to involuntarily admit Mr. Briante to the hospital and would have discharged him home as he was not certifiable under the *Mental Health Act*.

To prove causation, the plaintiff/appellants were required to show that, had the on-call psychiatrist been in possession of collateral information the nurse failed to obtain, he would have breached his standard of care in discharging Mr. Briante, and, in addition, that involuntarily admitting him to the hospital would have prevented his suicide attempt. The plaintiff, however, did not cross-examine the psychiatrist at trial and did not prove that what the psychiatrist would have done amounted to a departure from the applicable standard of care.

On the issues of costs, the Court of Appeal upheld the law that states plaintiffs who succeed in showing that defendants act negligently but fail to establish causation are "entirely unsuccessful in the litigation" and the plaintiffs were not entitled to a departure from the general rule on costs, which is to award full costs to the successful party or parties.

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At both levels of court the nurse was criticised for failing to provide additional collateral information to the physician (who is ultimately responsible for formulating a diagnosis and treatment plan for the patient). The trial judge found the nurse ~~80%~~ 90% and the emergency room physician ~~20%~~ 10% responsible for failing to obtain information that might have influenced the emergency room physician's disposition of the patient after assessment. Two of the justices of the Court of Appeal found enough indication to set aside that ~~20%~~ 10%finding in regards to the physician standard of care.

Nonetheless the BC Court of Appeal ultimately found that any breaches were not causative of the patient's act of extreme self-harm some six days after going home. Without the physician having consulted a readily-available on-call psychiatrist, the patient was merely referred to a specialized out-patient clinic with an appointment a week later.

In my opinion the Briante case is a cautionary one for all nurses working in specialized settings, and not one just limited to psychiatric nurses working in specialized emergency settings. While their specialized knowledge and training enables RPNs to form impressions and make recommendations that can be invaluable to patients and other health care providers, all nurses must remember that decisions on diagnosis and treatment plan must rest with the physician. This is true regardless of comparative levels of experience with that patient group, any sense of enhanced scope or ability, past reliance on those abilities, or an apparent culture of team approach.

Without hesitation, in challenging cases where a diagnosis is uncertain or a patient demonstrates an ability to deceive or obfuscate, nurses should always recommend the physician (who should) obtain the opinion and perspective of an on-call specialist (in this case a psychiatrist) when one is readily available.

He or she must also discuss the fact with the physician, that while a patient may wish for privacy to be respected and not have family or others provide relevant information, if that information is available merely respecting the patient's privacy can put the nurse in peril for failing to make use of or pass on the availability of important collateral information.

This case provides a classic example of an appropriate time for risk transfer. Why assume responsibility for decision making beyond one's scope, ability or comfort zone or, put another way, why not step back and defer to consultation and advice from others when there is uncertainty or even disagreement amongst front-line care providers?

All hospital staff working alongside physicians must be mindful of the fact that when it comes to litigation, all defendants (including physicians) have a right to access any viable defence that they may have. This means that the defence of "had I been told X,Y or Z by (the other healthcare provider(s) I would have done A, B or C …" may well exculpate the doctor, yet place an additional (at times unreasonable) onus back to the other health care provider. And if there is no other evidence that the provider did in fact provide or alert the physician to certain information, or if there is no written record of that information having been provided, then there is significant risk the entire exposure will be attributed to the hospital and its employee health care providers.

Furthermore in the case of designing policy, if a policy is not particularly workable or prone to interpretation yet still followed (or as in the Briante case not followed) the institution also may be vulnerable for untoward outcomes attributable to the policy. In the Briante case the fact that the hospital had a specific policy in place to direct-admit patients suspected of having a first break psychosis contributed to the trial judge's sense that the staff did not look after the patient's best interests, given that patient was not then further encouraged to be admitted pursuant to that policy. Such criticism of an institution may ensue (or be argued against it) even in instances where the patient flatly refuses to be admitted and does not meet criteria for involuntary admission or worse, where staff are unaware of such policies in place. In short, unworkable or unused policies cry out for review.

And in Briante we are also reminded of the fact that decisions about whether or not to fully respect a patient's privacy or their specific wish not to have collateral information considered or taken down from family or friends willing and desirous of providing the same, must be a measured and balanced decision. It should always be made in consultation with the physician and/or a supervisor who can assume responsibility for any alleged (but arguably necessary) breach of privacy.

Despite specialized skill and training that nursing staff may have in a particular area of practice, nursing staff need to keep in mind that their provisional observations and recommendations must always be subject to the physician's ability and willingness to accept the ultimate responsibility for the diagnosis and treatment plan they implement.

In the Briante case had the nurse in question said to the physician she was uncomfortable taking (available) collateral information given the patient's stance on privacy, or had she advocated that the emergency room physician consult with a readily available duty psychiatrist, the outcome, at least in terms of the litigation findings, may well have been different.

In Paur had the nursing staff been more highly trained in dealing with patients with both substance use issues and depression or other dual diagnosis situations they would more likely have come to an earlier conclusion the patient's repeat activities in the bathroom in setting it up for hanging, were suspect at an earlier stage.

In conclusion both Paur and Briante offer a window into how emergency mental health cases may be argued in the future, and ultimately how those cases may be decided.

But many of the principles in these cases apply to all areas of health care.

- Specialized areas of practice need to be staffed by appropriately trained nurses and doctors.
- Nurses and doctors must remain within scope and expertise, and must consult with others or transfer risk when they can, and where they find themselves uncertain or facing limitations in their experience.
- Policies that are developed by any organization need to be evidenced based, realistic and followed when they are in place. And if policies are neither followed nor workable they need to be reviewed and changed or archived.

- Observations need to take place as frequently as either ordered, or as indicated by virtue of the risks attributable to a patient, and adjusted to their changing behaviours, signs and symptoms.

- Where and when practicable, accommodations must be built to reasonable standards for providing safe care. For example, ligature-proof ceilings may not be necessary in all areas of a hospital, but they may be necessary in areas where patients identified as at risk of self-harm are being accommodated.

Please note the opinions expressed in this article are those of the author and do not necessarily reflect the views of Health Care Protection Program or the Ministry of Finance.

Earlier versions of this article incorrectly stated that at trial the standard of care breach for the nurse was apportioned 90% and the physician 10%; the apportionments at trial were 80% and 20% respectively. The article is correct that on Appeal the nurse was apportioned 100%. ❒

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[1]Ratio decidendi (Latin plural rationes decidendi) is a Latin phrase meaning "the reason" or "the rationale for the decision". ... In other words, ratio decidendi is a legal rule derived from, and consistent with, those parts of legal reasoning within a judgment on which the outcome of the case depends.

[2]Obiter dictum (plural obiter dicta) is an opinion or a remark made by a judge which does not form a necessary part of the court's decision. The word obiter dicta is a Latin word which means “things said by the way.” Obiter dicta can be passing comments, opinions or examples provided by a judge.

[3]Further leave for the plaintiff to appeal to the Supreme Court of Canada was refused (September 28, 2017)

[4]*MENTAL HEALTH ACT [RSBC1996] CHAPTER 288*

[5]*OCCUPIERS LIABILITY ACT[RSBC 1996] CHAPTER 337*

Section 3(1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.

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Health Care Protection Program

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MANAGING A PROPERTY LOSS

Reporting

Report your loss to the Health Care Protection Program (HCPP) early - as early as possible. The sooner you advise us the sooner we can provide the support required to get repairs underway. Email or fax is generally preferred for the smaller claim submissions, but for a serious water or fire damage event please call the HCPP office at 250-356-1794 immediately. This line is monitored 24-7.

Once your loss is reported to HCPP our first responsibility will be to determine if there is coverage for the loss. Your property coverage agreement is intended to be at least as broad as a comparable commercial coverage agreement and our policy is to interpret coverage as broadly as possible and exclusions narrowly. This means we will look for ways to provide coverage to your organization within the terms of the coverage agreement.

Information Required

The more information you have available, the more efficiently the HCPP team can help you to bring your claim to completion. Here are examples of the type of information that you should include in your claim report (if available) or be prepared to collect:

- What was damaged? Is this property owned/P3/leased by the health authority?
- How did the damage occur?
- When did it occur?
- What is the extent of the damage?
- Photographs of the damage?

- Police or fire departments file number and contact information for the investigating officer.
- Confirm that steps have been taken to preserve any evidence (E.g. retention of any failed parts or equipment).

Coverage

Generally speaking HCPP provides coverage for buildings owned by a Health Care Agency (HCA), all of the contents and equipment which are owned or leased by the HCA and tenant improvements on any leased property (where the lease agreement holds the tenant responsible).

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Coverage is all risk, meaning that every type of sudden and accidental loss is covered unless otherwise excluded. Common exclusions include: wear and tear, gradual deterioration, faulty workmanship, faulty design and manufacturers defect. However, damage which results from one of these exclusions may still be covered. As an example, this means that while HCPP would not pay to replace a hot water tank which ruptures due to age, the costs to repair the water damage which resulted would be covered.

HCPP covers property losses where the damage exceeds $10,000.00. It may not always be obvious at the outset whether the costs will exceed the deductible. Therefore, report early to ensure that you do not inadvertently prejudice HCPP's ability to investigate cause of the loss and/or to effectively control costs.

Emergency Work

HCA's must initiate emergency clean up upon discovery of the loss. Do not wait for HCPP approval before bringing in an accredited restoration service if the size of the loss warrants additional resources. Emergency work is always costed out on a time and materials basis with a requirement for the restoration contractor to provide full supporting documentation including time sheets and materials invoices. There is no risk that reasonable costs for a covered loss would be denied by HCPP simply because they were incurred before the loss was reported to us.

Mould and other contaminants can set in after 72 hours, so it is imperative that efforts be made to extract water and begin drying affected areas as soon as possible.

As soon as possible a scope of work which specifies the extent of the damage and describes what is required to stabilize the structure must be developed. The scope should be created with input from the site, restoration contractor and adjuster (if assigned). Where work is being conducted solely by the HCA, a detailed description of the work involved and a time line for completion should be provided to your HCPP examiner. The scope of work/description of work must include dimensions of affected rooms as well as a diagram/floor plan.

Repairs

The emergency phase is complete once the structure has been returned to a stable condition and the extent of the damage is known. A scope of work which specifies the extent of the damage and describes what is required to repair the structure must be developed. The scope should be created with input from the site, restoration contractor and adjuster (if assigned). Where the repair costs are expected to exceed $10,000.00 two estimates are required. As with the emergency scope the document must include dimensions of affected rooms.

If competitive estimates are obtained for the repair work, based on a specified scope of damage there is no need to obtain any backup documentation with the invoice. The bid price and the invoice should match.

If competitive estimates are not obtained for the repair work, then an estimate on costs is still obtained at the outset, but the final invoice must be supported by full back up documentation (time sheets, materials and sub-trade invoices).

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Any changes to the scope of repair which will impact costs must be documented and approved by HCPP and/or the adjuster (if one is assigned) prior to the additional work commencing.

Claims Resolution

Final invoicing should be provided to the site and the adjuster/HCPP. We strongly recommend that you do not pay the invoices until such time as your adjuster or HCPP has audited the documents and approved them for payment. Often errors are found in the invoice submissions which require correction before payment can be rendered. It is much more difficult to seek a credit back from a contractor than it is to simply pay the correct amount initially.

Any charges for HCA labour to respond directly to the loss must be documented and provided to the adjuster/HCPP at this time. Ensure that employee (either via name or employee number), labour rate, trade and the type of work done are clearly indicated. Any materials consumed must be documented and costed out.

Once the approved costs are finalized, HCPP will forward a Statement of Damage which details the total costs (HCA and any contractors) less the $10,000.00 deductible and the GST rebate of 83%. The Statement of Damage must be signed and witnessed by an appropriate signing authority and then returned to HCPP in exchange for settlement funds.

Subrogation

Where there is the potential to recover from a party responsible for the damage HCPP will likely require additional assistance from the HCA. An investigation will be required in order to determine the cause of the loss and to identify the appropriate parties to pursue. This may require such outside expertise as engineers, architects, fire investigators, etc. The HCA will have a key role in providing documentation such as construction details, floor plans, contracts, maintenance records, etc.

Subrogation recoveries are often lengthy and drawn out processes. There may be ongoing requests for additional information from an HCA as the subrogation claim progresses.

Any funds recovered are shared between the HCPP and the HCA on a pro-rata basis, taking into account the costs of recovery.

Cooperation

Our mandate is to work collaboratively with you to meet our common goal of returning your site to full operations efficiently, effectively and economically. Our claims examiners are readily available to answer your questions. We understand the timelines and urgency of your needs, and will endeavor to assist you accordingly. ❒

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PERFORMANCE MANAGEMENT PITFALLS AND HOW TO AVOID THEM

While it is trite to say that an employer is able to terminate an employee's employment, it can only do so either on a "without cause" basis with reasonable notice or on a "with cause" basis (i.e. just cause). One of the "with cause" basis that is often discussed in the legal authorities and literature is an employee's failure to meet employer expectations or performance standards, despite the employer's feedback by way of performance reviews and communication of expectations.

In ***Cottrill v. Utopia Day Spas and Salons Ltd***, 2017 BCSC 704, the BC Supreme Court recently reviewed the legal principles and considerations when terminating "with cause" based on a failure to meet performance standards. This case demonstrates the risk of liability to an employer who prematurely terminates an employee on the basis of poor performance, without taking all of the proper steps and actions to establish each of the following requirements:

- the employer has established reasonable, objective standards of performance;
- the employee has failed to meet those standards;
- the employee has had warning that his or her employment is in jeopardy if he or she does not meet the standards; and
- the employee was provided with reasonable time to correct the situation.

In *Cottrill,* the plaintiff had worked for 11 years as an esthetician prior to her dismissal. During her employment, the supervisor met with the plaintiff on a regular basis to review her performance in services, retail sales (or home care), request rate and her overall performance related to procedures and protocols, punctuality, team work, and related duties.

In or around March 2015 (after 11 years of employment), the defendant noted that the plaintiff was underperforming in a number of areas, and met with her to discuss the need for her improvement. In March 2015, the plaintiff was told that she must demonstrate her commitment and effort to meet goals/ expectations over the following three months or her position would be terminated.

To assist her in meeting the performance expectations, the defendant provided monthly (for 3 months) 1 hour coaching sessions to assist her in developing an action plan and set goals. Over the next two months, the plaintiff met the criteria and had improved in certain respects; however, she allegedly did not meet expectations on the third month and the defendant decided to terminate her employment, without severance, and relied on the previous March letter as the termination letter.

In considering whether the plaintiff had been wrongfully dismissed, the Court reaffirmed the need to apply a contextual approach when examining if there was cause for termination. The purpose of this contextual analysis is to determine if there is misconduct such that it had led to a breakdown in the employment relationship or is otherwise irreconcilable with the continuation of that relationship.

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In applying the four requirements for termination on the basis of poor performance, noted above, the Court held that to terminate an employment based on performance is a high threshold. The performance issues must be "serious or gross incompetence" so as to amount to a repudiation of the employment contract. Mere dissatisfaction with an employee's job performance does not justify dismissal on a "with cause" basis.

This case is particularly instructive in relation to the third factor (warning). As noted above, an employer must provide the employee with a clear warning, which specifically informs the employee that his or her job is in jeopardy. The Court held that the employer cannot employ oblique language when warning the employee that his or her employment *may* be terminated. It is also not sufficient for the employer to merely criticize the employee's performance, urge improvement, or to state that the employee's job is at stake. Rather, a warning will only be considered sufficient if the employer also *meaningfully* assists the employee to improve.

In this case, the Court found that the defendant failed to establish that the plaintiff had serious performance issues that would justify dismissal. The Court accepted the plaintiff's evidence that prior to the March letter, she believed she had been doing a "great" job. The Court further found that the defendant had not given her a fair and reasonable opportunity to meet the expectations set out in the March letter, which was fatal to the defendant's case. The Court found that the March letter provided to the plaintiff was ambiguous, set an unreasonable and unfair standard, and required the plaintiff to meet performance requirements that she had not been held to previously. Also the defendant's evidence indicated it had already determined it had cause to terminate the plaintiff's employment when it sent the March letter. The Court also was not convinced that the mentoring assistance given provided any *meaningful* assistance to the plaintiff, on the basis that her performance management meetings were substantially similar to the goal setting meetings she had previously engaged in, and left the plaintiff to establish her own goals.

Ultimately, the Court held that the defendant had wrongfully terminated the plaintiff's employment and awarded 8 weeks' severance as well as $15,000 in aggravated damages for the defendant's breach of duty of good faith in the manner it dismissed the plaintiff. In this regard, the Court found that the defendant had acted callously and unfairly in accepting her performance for 11 years only to arbitrarily change the standard to which she was required to perform, and to then dismiss her in three months without a dismissal letter when she failed to meet those standards, even though she had demonstrated a marked improvement in two out of the three months and there was a lack of documentation of her performance for that third month.

Practice Tips:

- Documentation is crucial to track performance management reviews. The employer should document its established reasonable, objective standards of performance; what the performance issue of the employee is; how that issue will be addressed by the employee; what meaningful assistance the employer will provide to assist the employee meet those standards; a reasonable time frame in which to remediate the performance issue; and a clear warning that failure to meet the standards will jeopardize the employee's employment.

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- The documentation should be signed by the employee so as to acknowledge that the employee understood all that was discussed and the standards expected of him/her.

- The goals set out in the documentation should be revisited in a follow up meeting and the employer should check in to see how the employee is doing in his/her actions to meet those standards and what further meaningful assistance the employer can provide to the employee to assist him/her to meet expectations. The Court will look more favourably on an employer who takes meaningful actions to support an employee to succeed versus an employer who, by effect, sets up the employee for failure. ❒

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THE INTERPLAY BETWEEN BC'S STATUTORY TORT OF PRIVACY AND THE TORT OF DEFAMATION

Defamation law and breach of privacy law are separate and distinct, but the two torts are occasionally brought before the courts in the same matter. An attack on an individual's reputation can be done in a manner that also contravenes privacy rights. That said, the courts have little patience for litigants who confuse the two issues or who plead both causes of action when only one is appropriate. Accordingly, understanding the differences between these torts and the legal principles that inform them is paramount when dealing with an action in this area of the law.

For a successful defamation claim, a plaintiff has to establish three elements: that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; that the words referred to the plaintiff; and that the words were published.[1] This is a relatively low threshold and most defamation actions are decided on whether the defendant can make out one or more of the well-developed defences to a defamation action, such as truth, qualified privilege, fair comments or responsible communications. (For a discussion about defences to a defamation claim, please see the blog post entitled "What they wish they knew before publishing"). (This blog post was reprinted by permission in *Handle With Care*, Vol. 13 Issue 3, Fall 2017)

In comparison to the law on defamation, the law on privacy in Canada is in its infancy.[2] There is currently no common law tort of invasion or breach of privacy in British Columbia.[3] Instead, we have a statutory tort of privacy through the *Privacy Act, R.S.B.C. 1996, c. 373* (the "Act"). Section 1 of the Act provides:

1(1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

The nature and degree of privacy to which a person is entitled is that which is reasonable in the circumstances and a court must consider the alleged breach of privacy contextually. Importantly, the scope of this right to privacy is fluid. As put by Justice Sharpe of the Ontario Court of Appeal, certain provincial legislatures, including BC's, have "proclaimed a sweeping right to privacy and left it to the courts to define the contours of that right".[4] This leaves significant room for argument by parties bringing and defending these claims.

Manitoba, Saskatchewan, and Newfoundland have all enacted similar legislation that creates a statutory tort of privacy.[5] Under Quebec law, the right to privacy is protected under the *Civil Code of Quebec* and by Quebec's *Charter of Human Rights and* Freedoms.[6]

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While Ontario lacks equivalent legislation to BC's, the Court of Appeal confirmed the existence of a common law tort of intrusion upon seclusion in Ontario in *Jones v. Tsige, 2012 ONCA 32*. The Court highlighted that allowing a cause of action for an invasion of privacy is particularly important with how significantly technology has impacted the ability to protect one's personal information.[7]

Causes of action involving BC's tort of privacy are often brought under section 1(4) of the Act, which specifically addresses eavesdropping and surveillance.

For example, in *Wasserman v. Hall,* 2009 BCSC 1318 the defendant was awarded damages against the plaintiff, his neighbour, who installed surveillance cameras that overlooked the defendant's yard in connection with their heated residential fence dispute.[8] In *Watts v. Klaemt*, 2007 BCSC 662 the plaintiff was awarded $30,000 in damages after the defendant had monitored and recorded her phone line for over a year and then turned over information gathered during that time period to the plaintiff's employer, resulting in her termination.

Section 3(2) of the Act, which prohibits one from using the name or portrait of another for advertising without that person's consent, is at issue in the ongoing *Douez v. Facebook* class action. The plaintiffs in this case are asserting that Facebook used the name and picture of Ms. Douez and potentially of 1.8 million other British Columbians without consent. This case has attracted considerable attention as a result of the Supreme Court of Canada's June 2017 decision, *Douez v. Facebook, Inc., 2017 SCC 33*, in which Facebook was unsuccessful in ousting Ms. Douez's class action from the reach of our British Columbia Court.

Facebook attempted to do so by relying on the forum selection clause contained in its Terms of Use pursuant to which every user of Facebook agrees, by a click of the mouse, to submit to the California Court and California laws for any dispute that may arise. The Supreme Court of Canada's decision not to enforce this forum selection clause is discussed in a recent blog post. Ms. Douez's class action alleging the breach of section 3(2) of the Act will now be pursued through our British Columbia Court.

Matters brought under sections 1(4) and 3(2) generally do not involve defamation, since the disputes are over intrusions into the plaintiffs' lives rather than the dissemination of information. As noted by Chief Justice McLachlin of the Supreme Court of Canada in *Grant v. Torstar Corp., 2009 SCC 61*, privacy protection does not figure prominently in defamation jurisprudence in part because "defamation law is concerned with providing recourse against false injurious statements, while the protection of privacy typically focuses on keeping true information from the public gaze".[9]

However, cases involving both defamation and breach of privacy are coming up more and more. The courts take care to consider the two issues separately, so it is critical to make distinct, well-reasoned arguments.

In *Griffin v. Sullivan*, 2008 BCSC 827, the plaintiff successfully argued that the defendant breached his privacy and defamed him. It was held that the defendant improperly obtained the plaintiff's name and other personal information, attached it to defamatory statements regarding the plaintiff, and published it on the Internet. The judge was careful to analyze the law of defamation and the law on breach of privacy separately and broke down the plaintiff's damage award accordingly.

The plaintiff in *Hollinsworth v. BCTV*, 1996 CarswellBC 2820, [1996] B.C.J. No. 2638 (S.C.), affirmed (aff'd) in (1998) 59 B.C.L.R. (3d) 121 (C.A.), had undergone surgery to correct his baldness. In doing so, he signed a release permitting the doctor to film the procedure and share the recording with other physicians for training purposes only. Seven years later, BCTV was doing a story on baldness and its treatment and got in contact with Look International, an organization which the plaintiff's doctor had released the training video to. Look International provided the video to BCTV and lied about having permission from the plaintiff to do so. BCTV aired the clip, which showed the plaintiff's full face for approximately three seconds.

The plaintiff brought an action for libel and for breach of privacy. He was not successful in his libel claim, because the court found that the video was true – he had undergone treatment for baldness. However, the plaintiff was successful on the grounds of breach of confidentiality and breach of his right to privacy under the Act against Look International. Again, the judge considered the issues separately and distinctly.

These issues also come up in more protracted, complex disputes. In *Nesbitt v. Neufeld, 2010 BCSC 1605*, aff'd in 2011 BCCA 529, the defendant, Ms. Neufeld, sought damages from the plaintiff, Dr. Nesbitt, for defamation and breach of privacy in her counterclaim. The plaintiff engaged in inappropriate conduct throughout the course of the custody dispute, including: faxing intimate email exchanges Ms. Neufeld had had with a subsequent partner to the partner's work repeatedly; writing letters to the Rotary Club Ms. Neufeld belonged to suggesting that she was mentally unstable, sexually deviant, lied about him in court, and was exposing their daughter to pedophiles; sending letters to the Ministry of Child and Family Development suggesting the same; posting a video to YouTube about Ms. Neufeld; creating two malicious websites about her; and so on.

The Court was careful to consider the defendant's claims for defamation and breach of privacy discretely. It found the documents written by the plaintiff about the defendant to be defamatory and the dissemination of the defendant's personal email correspondence to be a breach of privacy under the Act. Although the two issues were considered separately, the Court awarded global damages of $40,000 for both torts.

If you are thinking of bringing a defamation claim in addition to a breach of privacy claim, or if you are the defendant in an action where both claims have been brought against you, remember that although

there may be some overlap, the courts consider the two issues independently of one another. Keep in mind that the courts tend to have minimal tolerance for plaintiffs that plead multiple unnecessary causes of action. Accordingly, attempts to inappropriately "dress up" a defamation claim as a breach of privacy claim as well, or vice versa, are ill-advised.[9] We recommend that you consider retaining counsel that can highlight such issues for the court and effectively navigate these complex areas of the law if you find yourself in the unfortunate position of having to mount or defend such a claim. ❒

[1] *Lougheed Estate v. Wilson, 2017 BCSC 1366* at para. 155

[2] Raymond Brown, *Brown on Defamation*, 2nd ed (Toronto: Thomson Reuters Canada) at 1.6

[3] *Hung v. Gardiner, 2003 BCCA 257*

[4] *Jones v. Tsige, 2012 ONCA 32* at para. 54

[5] At para. 52

[6] *Ibid* at para. 53

[7] *Ibid* at paras. 65-67

[8] See also *Heckert v. 5470 Investments Ltd., 2008 BCSC 1298*, wherein the plaintiff was also awarded $3,500 after surveillance cameras were installed directly outside of her front door by her apartment's building management to specifically track her movements.

[9] At para. 59

[10] *Niemela v. Malamas & Niemela v. Google Inc., 2015 BCSC 1024* at para. 51

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MANAGING YOUR ORANIZATION'S RISK OF EMPLOYEE FRAUD

The recent BC Supreme Court decision in *Vancouver Coastal Health Authority v Moscipan*, 2017 BCSC 2339 sends a message to the public that they will not benefit from the misdeeds of others when they know or ought to know of unlawful gains. Furthermore, this case highlights the various red flags that employers should be aware of in order to recognize employee fraud, and the steps that employers can take to proactively manage this risk. This article will outline the facts of the case and the decision of the Court, and then offer some insights about how an organization can effectively manage its risk of employee fraud.

Background

Wanda Moscipan was a long-term employee in a position shared between the Vancouver Coastal Health Authority (VCHA) and the Faculty of Medicine at the University of British Columbia (UBC). Between 2003 and 2011, Ms. Moscipan stole and defrauded from the two institutions over an estimated one million dollars, of which approximately $570,000 was taken from VCHA. Ms. Moscipan accomplished this primarily by having busy physicians sign blank cheque requisitions which she directed into an account she controlled. She then used money in the account to pay herself, her husband and their son as well as write cheques for outstanding Visa balances held in their names. In October 2010, Ms. Moscipan was diagnosed with a terminal form of cancer and took medical leave, but asked to continue working evenings. A new Department Head at UBC became suspicious of some of Ms. Moscipan's behaviours, as Ms. Moscipan was not cooperative with him or with the temporary person hired to assist him. In February 2011, the Department Head went to the Dean of Medicine at UBC and requested an audit be conducted of his Department. Shortly after the audit began, Ms. Moscipan transferred a half interest in the family home to her husband, Miroslaw Moscipan. The audit uncovered bookkeeping and accounting irregularities, which led to Ms. Moscipan being relieved of her role at the university in August 2011. A subsequent investigation led to the discovery that Ms. Moscipan was paying herself 100 per cent of a full -time salary from the university, when it should have only been 20 per cent. It was also discovered that Ms. Moscipan gave herself a three percent raise by forging the signature of UBC's Department Head. Ms. Moscipan's fraudulent use of the VCHA account was later uncovered.

Unfortunately, Ms. Moscipan passed away in July 2012. VCHA and UBC filed separate lawsuits against Ms. Moscipan's estate and Mr. Moscipan for the recovery of the misappropriated funds. At this date, the UBC lawsuit has not gone to trial.

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Court Decision

Liability of Ms. Moscipan's Estate for Conversion and Fraud

Ms. Moscipan's liability was not contested at trial, but a summary of the damages suffered by VCHA as a result of her conversion and fraud was provided by the court. The tort of conversion was defined by the Supreme Court of Canada in *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727 at para. 31 as the "wrongful interference with the goods of another, such as taking, using, or destroying these goods in a manner inconsistent with the owner's right of possession." Ms. Moscipan was found to have clearly committed the tort of conversion by taking the funds of VCHA and using them for her own benefit. In *Bruno Appliances and Furniture, Inc. v. Hryniak*, 2014 SCC 8 at para. 21, the Supreme Court of Canada defined the tort of civil fraud as consisting of the following elements: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss. Again, Ms. Moscipan was found to have clearly committed the tort of civil fraud by knowingly making false representations which caused medical staff from VCHA to authorize payments to the account that Ms. Moscipan controlled, resulting in a substantial loss to VCHA. As such, liability against Ms. Moscipan's estate was established.

Liability of Mr. Moscipan for Knowing Receipt

One of two focal points at trial was the liability of Mr. Moscipan, who denied that he was aware of, or had anything to do with, his wife's fraud. Mr. Moscipan was a stay-at-home parent, and so the family's only source of income was Ms. Moscipan's salary of approximately $75,000 per year (after all source deductions). There was no evidence at trial that Mr. Moscipan had direct involvement in or knowledge of Ms. Moscipan's fraud. Sometime prior to the fraud, Ms. Moscipan received a substantial amount of money from her father. Mr. Moscipan argued he suspected both that his wife was receiving even more money from her father and that her salary was more than $100,000 per year, given that he thought by working for the two institutions she was actually working more than one full-time position.

As Mr. Moscipan did not hold a position of trust within VCHA, it had to be determined whether he may be held liable to VCHA for his wife's conversion and fraud. In *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 85 at para. 19, the Supreme Court of Canada determined that "liability may be imposed on a stranger to the trust who is in receipt and chargeable with trust property," referred to as "knowing receipt." In these "knowing receipt" cases, which are concerned with the receipt of trust property for one's own benefit, the Court held that constructive knowledge, which is knowledge of facts sufficient to put a reasonable person on notice or inquiry, will suffice as a basis for liability. Mr. Moscipan was found to have constructive knowledge of his wife's conversion and fraud, as a reasonable person in his position would have had sufficient knowledge of the facts to be put on notice or inquiry. Evidence tendered at trial, including expert opinion, showed the Moscipan family led a richer lifestyle than a typical family of their size with a net income around $75,000. For example, over the period of the fraud, the Moscipan family purchased approximately 15 vehicles and spent approximately $23,000 per year on food when the average family in their circumstances spends approximately $9,000 per year on

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food. Furthermore, Mr. Moscipan gave evidence that he was suspicious of where his wife was receiving her additional income.

Mr. Moscipan was found liable for knowing receipt for all funds which exclusively benefited him, as well as half of all funds attributable to "family expenses," being those expenses for which both spouses were responsible or received a benefit.

Fraudulent Conveyance of the Family Home

Finally, the Court examined whether the disposition of the family home by Ms. Moscipan was intended to delay, hinder or defraud creditors under the *Fraudulent Conveyance Act*, R.S.B.C. 1993, c. 163. If the disposition was found to be a fraudulent conveyance, the Court could order that the family home be sold to satisfy the judgment against the estate of Ms. Moscipan. As indicated in *Kelly v. Gonzalez*, 2014 BCSC 1269 at para. 41, when one or more of the "badges of fraud" are shown to be present, a presumption of fraud arises, causing an evidentiary burden to be placed on the parties to the conveyance to explain the circumstantial evidence of fraud. The following factors are all considered to be badges of fraud: (1) the state of the debtor's financial affairs at the time of the transaction; (2) the relationship between the parties to the transfer; (3) evidence of haste in making the disposition; (4) the timing of the transfer relative to notice of debts or claims against the debtor; and (5) whether the transferee gave valuable consideration for the transfer. The Court concluded that all the badges of fraud were present, causing a presumption of fraud to arise. It was further determined that the circumstances of this case made it apparent Ms. Moscipan's intent in transferring a half interest in the family home to her husband was to protect her family by delaying, hindering or defeating VCHA, meaning it was ultimately a fraudulent transfer. As such, the Court ordered that the conveyance by Ms. Moscipan to Mr. Moscipan was a nullity.

Lessons Learned

This case provides a clear example of a number of red flags which may signal that an employee is partaking in fraudulent activities. While none of the below factors are conclusive evidence of employee fraud, they are important indicators that all personnel should be educated about.

- Red flags related to personnel may include:
- The employee is in financial trouble, such as having significant personal debt or credit problems.
- There is instability in the employee's personal life, including family situations causing financial stress such as a divorce, or habits such as gambling, alcohol use, or drug use.
- The employee refuses to take their vacation or sick leave.
- The employee requests to work outside normal business hours, is often the first to arrive at work, or is the last to leave.

- The employee refuses to share work responsibilities, particularly relating to the control of financial records.
- The employee is easily annoyed at reasonable process-related questions about their work.
- The employee is highly trusted and heavily relied upon by those with financial authority.
- The employee has started to make purchases which seem inconsistent with their personal or family income, such as new properties, vehicles, or other expensive goods.

Red flags related to accounting practices may include:

- Payments made at unusual times of the day or the week, or payments which are out of season.
- Transactions being processed too frequently or not enough, or just generally outside of what the expected pattern should be.
- Payments being made for unusual accounts, such as too many large or small transactions, or too many transactions involving round numbers.
- A high number of refunded, altered, or voided transactions. Questionable parties involved in the transactions, such as outside parties which do not typically receive payments from the company.

Most importantly, this case highlights the need for organizations to create a "risk aware culture," which aims to bring every level of the organization together to effectively identify, assess, and manage risks. There are five key principles or processes that can provide guidance to organizations of various sizes and types in establishing an environment to manage their risk of fraud. These principles or processes are as follows:

- Including a **Fraud Risk Management Program** in an organization's governing structure, which conveys the expectations of the board of directors and senior management regarding how to properly manage risks of fraud through written policies that encourage ethical behaviour.
- Conducting periodic **fraud risk assessments,** tailored to the organization's size, complexity, and industry, which include risk identification, an assessment of risk likelihood and significance, and risk response. Fraud risk assessments should include input from various individuals throughout the organization, including accounting or finance personnel, risk management personnel, operations personnel, internal audit personnel, and legal personnel.
- Establishing **fraud prevention techniques**, such as policies, procedures, and training to avoid potential fraud risk events. Prevention techniques could include background checks on potential employees, anti-fraud training, tailoring the authority of personnel to their level of responsibility, rotating employees through different positions, dividing responsibility among multiple employees, requiring employees to take vacations, not allowing the signing of blank cheques, and reviewing third-party and related-party transactions.

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- Implementing **fraud detection techniques** to uncover fraud events if they do occur. One of the strongest fraud deterrents is awareness that the organization has effective detection techniques. Educating employees about the "red flags" listed above is an example of an effective fraud detection technique. Other techniques include reconciliations, independent reviews, physical inspections, data analysis, and unannounced audits.

- Designing both an effective **reporting process** to obtain input on potential fraud, and a coordinated approach to **investigative and corrective action** to address allegations of potential fraud and instances of non-compliance. Organizations that investigate and prosecute cases of employee fraud reduce their crime losses by receiving compensation from those who are found liable, and also by establishing a reputation for being tough on crime, therefore dissuading employees from attempting to commit fraud against the organization.

Those who either directly commit conversion or fraud against an organization, or benefit from these offences, will be held accountable by the courts. This includes those who are in "knowing receipt" of unlawful gains, meaning that a reasonable person in their position would have had sufficient knowledge to be put on notice or inquiry. In addition to the actual sum lost to a fraudster, these losses can be very disruptive to a workplace due to the time and cost involved in undertaking investigations and corrective measures, as well as recruiting and training replacement staff. Employee fraud can also have negative impacts on staff morale and productivity, and may cause an organization to suffer reputational harm. Besides avoiding workplace disruptions, an organization which has proper fraud prevention policies and practices in place may be able to save a vulnerable employee who is undergoing unusual stress from making a bad decision. Start having a conversation with your organization's board, senior management, and internal auditors about how you can take steps to manage your risk of employee fraud. [1] ❒

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[1] Institute of Internal Auditors, the American Institute of Certified Public Accountants & Association of Certified Fraud Examiners, *Managing the Business of Risk: A Practical Guide* (2009). Note: This publication has been endorsed by the Chartered Accountants of Canada and the Association of Certified Fraud Examiners.

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JURISDICTION:

Lawsuits Relating to BC Care to be Heard in BC Courts: *GOODINGS V LUBIN,* 2018 ONSC 176

In *Goodings v. Lubin et al,* the plaintiffs commenced a legal action in the Ontario Superior Court of Justice; the action related solely to medical care provided to the plaintiffs in a British Columbia hospital. The defendants were successful in having the Ontario action dismissed. In so finding, the Ontario Court confirmed that the BC Supreme Court is the appropriate jurisdiction for starting a legal action related to care provided in BC.

Background

The plaintiffs brought an obstetrical negligence action against several doctors, BC Women's Hospital and Health Centre and a number of nurses. The plaintiffs, a mother and her child (who lacked legal capacity), resided in Ottawa, Ontario, and filed the lawsuit in the Ontario Supreme Court. The defendants brought a motion for an order dismissing or permanently staying the action on the ground that Ontario lacked the jurisdiction to hear the claim in keeping with the ordinary jurisdiction rules which supported the claim being brought in British Columbia. In response, the plaintiffs asserted the court should permit the matter to be brought in Ontario based on two exceptional grounds. The first ground advanced by the plaintiffs was that Ontario was the *forum of necessity*, because the plaintiffs would be exposed to a real risk if the matter was litigated in British Columbia. The risks identified by the plaintiffs were two-fold: (1) that travel to British Columbia for a trial would result in serious harm to and possible exacerbation of the incapacitated plaintiff's mental disorder, leading to self-harm behaviour; and (2) that the plaintiff mother could not be separated from her child to attend a trial in British Columbia, as it would lead to an exacerbation in the child's mental state, including self-harm behaviour. The second ground advanced by the plaintiffs was that the doctrine of *parens patriae* permitted the assumption of jurisdiction by the Ontario Supreme Court. The doctrine of *parens patriae* refers to the power of the court to intervene and act as the "parent" of any child or individual in need of protection.

Decision

The Ontario Supreme Court confirmed that Ontario was not the forum of necessity, as there would be no real risks of harm to the plaintiffs if the matter proceeded in British Columbia in the normal course. The Court concluded there were many reasonable options for preventing any significant difficulties for the plaintiffs if the action was heard in BC.

Furthermore, after a review of the case law, the court also confirmed that "even the plaintiffs' evidence at its highest [fell] far short of establishing the type of exceptional circumstances that would justify applying the doctrine to [their] case." [para 91] The only cases in Canada that have invoked the forum of necessity doctrine did so because the characteristics of the proper forum rendered it unfit for some reason. For example, in the case of *Bouzari v. Bahremani*, [2011] O.J. No. 5009 it was held that the

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plaintiffs, who had commenced a civil lawsuit in Ontario for damages arising from their torture in Iran by the defendant or at his instigation, could not be reasonably required to commence the action in the proper forum, Iran, as it was the foreign state where the torture took place.

The court went on to find that the *parens patriae* doctrine could not apply in this situation either. The court had already determined that there was no real risk of serious physical harm to the plaintiff if the trial were to be conducted in British Columbia, and thus no need of protection. Ultimately, the court could not assume jurisdiction over this action through either the forum of necessity or *parens patriae* doctrines.

As this case exemplifies, it is exceedingly unlikely that a medical negligence lawsuit relating to medical care provided in British Columbia will be heard in a different jurisdiction. If a person wishes to start a lawsuit in such instances the action will need to be filed and heard in BC, regardless of where the plaintiff currently resides, and any difficulties he or she may face in attending a trial in British Columbia. ❒

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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, the University, College & Institute Protection Program and the Midwives 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. ***Handle with Care*** is published twice a year by HCPP.

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