

Liability Issues and Collaborative Practice

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Part II - Professional Liability Insurance - What you should know

PROTECT THE PUBLIC AND PROTECT YOURSELF

To ensure that both the public and you are fully protected in the event of an adverse event, you need to decide whether you need professional liability insurance. Even if you already have it, you should consider whether you need more to be adequately covered.

Remember, the greater the risk in your practice, the greater the need for insurance. As a general rule, if you are working in a clinical setting, you should be insured.

This article is the second part of a series on liability issues in the team setting. In particular, it examines professional liability insurance for all Registered Dietitians. It looks at the purpose of liability insurance, what coverage it provides, whether you need it, and what happens in the event of a claim or legal action against you.

THE TWO PURPOSES OF PROFESSIONAL LIABILITY INSURANCE

1. Protecting the Public

Professional liability insurance provides financial compensation for the public in the event of damages caused by you. Clients need to know that they have recourse in the event of harm. Knowing that they can access a professional's insurance, by way of a claim or law suit against a professional's liability insurance, provides them with a sense of security when they seek treatment.

2. Protecting Yourself

Professional liability insurance protects you from having to pay personally for any harm that clients suffer as a result of your conduct. If you do not have insurance and you are successfully sued for negligence, you will be personally liable for any damages awarded to the client. This means that your personal property, including real estate and investments, can be seized to pay for the damages awarded to the client. Even in cases where you are found not to have been negligent, you will still have to finance the cost of defending yourself. Funding the defence is something else that professional liability insurance will cover.

WHO PROVIDES PROFESSIONAL LIABILITY INSURANCE FOR DIETITIANS AND WHAT DOES IT COVER?

1. Healthcare Insurance Reciprocal of Canada (HIROC)

HIROC insures approximately 500 health care organizations in Canada including hospitals, nursing homes, community health centres, and home-care agencies. Dietitians employed by any of these HIROC subscriber organizations, are covered for negligence under the HIROC policy. You should verify your particular coverage with your employer, as each organization's policy is different.

Even if your employer is insured by HIROC, it is important to note that the HIROC policy

does not cover legal fees or costs with respect to College disciplinary proceedings or criminal prosecutions for any crimes, including fraud, theft, assault, sexual assault, or criminal negligence.¹ These are considered the health professional's personal responsibility and not the responsibility of the health care organization.

Dietitians and other health professionals employed by a health care organization are insured to the maximum amount of the organization's coverage and their legal fees are covered on top of the insured maximum. HIROC recommends that hospitals carry between \$15 and \$20 million in coverage. Most hospitals will carry a minimum of \$10 million. This is ample coverage given that, to date, this amount exceeds the highest damages award ever made in Canada for medical negligence, few claims are made against dietitians, and most claims and actions against dietitians are settled for under \$10,000. Few claims have been made against dietitians in Canada, and most claims and actions against dietitians are settled for under \$10,000.² HIROC premiums are paid entirely by the health care organization; the individual health professional pays nothing for this insurance.

As already stated, criminal conduct by an employee is not covered under the HIROC policy. The health care organization could, however, be found legally responsible in an action if it were shown that it employed someone when they should not have. If, for example, the health professional in question had let their certificate of registration lapse or had their certificate of registration suspended or revoked by the College, and the health care organization failed to ensure that the professional's credentials were current.

2. Dietitians of Canada

The principle source of professional liability insurance for dietitians in Canada is Dietitians of Canada (DC). The annual insurance premium of approximately \$80.00, in Ontario, is only available to DC members (annual membership for DC is \$422.94).

The coverage provided to each subscriber is up to an aggregate or annual total of \$5 million and the maximum

coverage per occurrence is also \$5 million. This amount includes legal expenses and there is no deductible. The aggregate amount and the per occurrence maximum are more than adequate coverage for dietitians, considering that the very few claims made against them usually settle out of court for less than \$10,000.³

This insurance also covers legal fees in other proceedings of up to \$100,000 for a successful criminal prosecution. The insured person is only entitled to the coverage if he or she is found not guilty of the charges. It also covers legal expenses of up to \$25,000 if:

- a letter of complaint is made to the College of Dietitians of Ontario;
- a dietitian is subpoenaed to attend before a tribunal (including the Discipline Committee of the College);
- a dietitian is required by subpoena to testify as a witness at court or before a tribunal in relation to matters arising from any health legislation in Ontario or any incidents arising out of a dietitians role as a dietitian.⁴

There are several exclusions to coverage. No coverage will be provided by the insurer for:

- (a) damages arising from deliberate, dishonest, fraudulent, or criminal acts; and
- (b) any fines, penalties, punitive damages or exemplary damages ordered or awarded by the court.⁵

3. Other Insurers

You can purchase insurance from other insurers who cover health professionals. ENCON provides the policy for the Dietitians of Canada and you can also obtain your own insurance through them. ENCON does not publish any information about rates and coverage, and is not licensed to deal directly with the public. You must apply for ENCON coverage through a broker.

HOW DO YOU KNOW IF YOU NEED PROFESSIONAL LIABILITY COVERAGE?

Many health professions are required by their health regulatory college to carry professional liability insurance. In large part, this is due to the amount of risk associated with their practice. Because physicians are at the greatest risk of being sued for negligence, they are one of the

professions required to carry insurance. Within a particular profession, the amount of insurance required will vary depending on the amount of risk involved in a practice area. Obstetrics, for example, is one of the highest risk areas of medicine and, therefore, carries much more insurance than many other specialties.

Currently, dietitians are not required by the College to carry professional liability insurance. Whether they need it, depends on their practice area and the risk of adverse events occurring. Dietitians who do not have any direct contact with clients have little need for professional liability insurance, beyond what is covered by their employer or organization, because there is very little risk of an individual bringing a lawsuit against. Where the risk is minimal, you need little to no professional liability insurance; where the risk of an adverse event happening is high, then you require professional liability insurance. To determine what insurance you require if any, you need to consider your

practice area and the risks presented there (see the table below).

HOW DOES THE INSURANCE WORK IN THE EVENT OF A LEGAL ACTION?

For all dietitians, carrying additional insurance is advisable to cover you in the event of a criminal prosecution or College disciplinary proceedings. Even if you have no direct client contact, there may be circumstances where you could be disciplined by the College, such as failing to maintain records or falsifying records. Similarly, you might be charged with a criminal offence in relation to your work as a dietitian as outlined above for which you will want your legal fees paid.

The law of professional liability insurance is very complex. And, because every claim or legal action is distinct, it is impossible to create a set of rules about how insurers

Practice areas for dietitians in the order of increasing risk to clients and increasing need for professional liability insurance.

Low Risk

Dietitians who are employed by private corporations that do not provide healthcare, such as food production and sales corporations, do not see clients and therefore do not require professional liability insurance. Further, in the event of a legal action against them for something they did during their employment, they would be covered by the corporate insurance.

Dietitians working in public health, who do not have direct client contact, have little need for professional liability insurance. In the event that harm is caused by their advice to the public, the employer's insurance should provide coverage.

Dietitians working in public health who do see individuals, families, or groups are at an increased risk of being sued and might consider obtaining insurance. For example, a dietitian who fails to report that a child is failing to thrive or is being abused is at risk of being sued.

Dietitians employed in hospitals and clinics that are insured by HIROC will have coverage for claims and legal actions for negligence.

Dietitians employed by facilities not covered by HIROC need to inquire about the facility's coverage. You want to make sure that you are fully protected for actions in negligence including your legal expenses. If you are not, then, you should get your own insurance.

Dietitians in a private practice involved with client care are at the greatest risk from actions in negligence because of that involvement and because they have no other coverage. Within this category, some dietitians may be more at risk than others, such as, those working with clients with eating disorders or the elderly. Dietitians in this group are advised to obtain the appropriate professional liability insurance for your practice.

High Risk

decide to pay out damage awards. In the case of an action or claim against the members of a healthcare team working in a facility covered by HIROC, however, here are a few general comments:

1. HIROC's responsibility is to insure the healthcare organization and its employees. It will normally consider itself to be the primary insurer if the action is against a member or several members of a healthcare team and where HIROC coverage applies. Only in rare cases, will the secondary insurer (where a team member has his/her own health professional insurance) participate in any settlement. HIROC does, however, obtain an employee's consent to represent them in any action.
2. As long as HIROC coverage applies, all employees named as the defendants are covered to the organization's maximum, and all of them will have their legal fees paid.
3. HIROC does not cover physicians, except when they are acting on behalf of the healthcare organization in an administrative capacity (e.g. chief of staff, committee member, etc.). Almost all physicians obtain professional liability coverage through the *Canadian Medical Protective Association (CMPA)*.
4. The vast majority of claims and lawsuits against healthcare organizations insured by HIROC are dropped. The rest are usually settled. A few go to trial.
5. Where both a healthcare organization insured by HIROC and a physician are named in a legal action, HIROC and the CMPA will come to one of four positions:
 - a. The physician or the CMPA is solely responsible, and HIROC should be let out of the action;
 - b. The healthcare organization/employees are solely responsible, and the CMPA should be let out of the action;
 - c. Neither HIROC nor the CMPA are responsible, so the action should not proceed or should settle without costs; or
 - d. A determination of shared liability must be made amongst the defendants.

6. Actions may go to trial:
 - a. if the insurers do not believe there is evidence of any negligence and can therefore defend themselves in the action;
 - b. if the insurers agree there is liability but cannot agree on the apportionment of damages between them; or
 - c. if the insurers and plaintiff cannot reach an agreement on a fair settlement and attempts at alternative resolution have failed.

WHAT INFORMATION SHOULD RDS OBTAIN FROM THEIR EMPLOYERS ABOUT THEIR COVERAGE?

HIROC has no objection to employees getting information about a facility's coverage. Dietitians should seek information from their facility's administration or risk management department and employers should be providing dietitians with the details of their insurance coverage. Ask your employer:

1. Are you covered under the facility's policy?
2. What is the maximum you are covered for?
3. What losses are you covered for? Are you covered only for claims and actions for negligence or for criminal and disciplinary proceedings too?
4. Are your legal fees covered?
5. What, if any, are the exceptions to your coverage?

Once you have answers to these questions, you will be able to decide whether you need any additional coverage.

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1. Criminal negligence is defined in section 219 of the *Criminal Code of Canada* as when you either do something or fail to do something that it is your duty to do, and in the process display a wanton disregard for the lives or safety of other persons.
 2. *Conference Board of Canada*, "Liability Risks in Interdisciplinary Care", April 2007, p. 3.
 3. *Ibid.*, pp. 29 & 31.
 4. ENCON, *Policy for Errors and Omissions Insurance for Associations*, Endorsement 6, Section I.
 5. ENCON, *Policy for Errors and Omissions Insurance for Associations*, sections 3 and 5.