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Mandatory physician reporting of drivers with medical conditions: Legal considerations

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BACKGROUND: Physicians are facing ever-increasing legal obligations in all Canadian jurisdictions to report patients believed to be unfit to drive a motor vehicle or pilot an aircraft. In most Canadian jurisdictions these statutory obligations are mandatory; in others, they are discretionary.

OBJECTIVES: To provide a legal perspective on a physician's duty to report in the various jurisdictions in Canada.

METHODS: Reporting legislation and case law from each of the Canadian jurisdictions were compared with respect to reporting requirements, physician protection and the production of medical reports. Federal legislation was examined in respect of the duty to report pilots deemed unfit to fly. Lastly, provincial guidelines and medical standards were examined for their impact on standard of care issues.

RESULTS: While the obligations vary slightly from one jurisdiction to another, the majority of Canadian jurisdictions provide for mandatory reporting. Additionally, courts have been willing to apply and give considerable weight to medical guidelines, such as those formulated by the Canadian Medical Association and other provincial medical bodies, to determine the scope of a physician's obligation to report.

CONCLUSIONS: In all jurisdictions, a physician who fails to report in circumstances where the physician is of the opinion that a driver is unfit faces potential quasi-criminal liability, civil liability and/or College disciplinary proceedings. The current statutory provisions and professional guidelines leave little room for the exercise of discretion on the part of the physician.

Key Words: *Drive; Mandatory; Physician; Pilot; Reporting*

La déclaration obligatoire des conducteurs atteints d'un état pathologique par les médecins : Des considérations d'ordre juridique

HISTORIQUE : Les médecins affrontent l'obligation juridique toujours croissante dans tous les territoires canadiens de déclarer les patients qu'ils pensent inaptes à conduire un véhicule automobile ou à piloter un avion. Dans la plupart des territoires canadiens, ces dispositions législatives sont obligatoires. Dans d'autres, elles sont discrétionnaires.

OBJECTIFS : Fournir une perspective légale sur le devoir de déclaration du médecin dans les divers territoires du Canada.

MÉTHODOLOGIE : Les dispositions législatives sur la déclaration obligatoire et la jurisprudence de chaque territoire canadien ont été comparées pour ce qui est des exigences de déclaration, de la protection des médecins et de la production de rapports médicaux. La loi fédérale a été examinée à l'égard du devoir de déclarer les pilotes jugés inaptes à piloter. Enfin, les lignes directrices provinciales et les normes médicales ont été étudiées afin d'évaluer leurs répercussions sur les normes des soins.

RÉSULTATS : Bien que les obligations varient légèrement d'un territoire à l'autre, la majorité des territoires a adopté la déclaration obligatoire. De plus, les tribunaux sont disposés à appliquer et à accorder un poids considérable aux lignes directrices médicales, telles que celles qui ont été formulées par l'AMC et d'autres organismes médicaux provinciaux, et à déterminer la portée de l'obligation de déclaration du médecin.

CONCLUSIONS : Dans tous les territoires, un médecin qui ne déclare pas un cas lorsqu'il est d'avis que le conducteur est inapte s'expose à une responsabilité quasi-criminelle, à une responsabilité civile ou à des mesures disciplinaires du Collège. Les dispositions législatives et les lignes directrices actuelles laissent peu d'espace à l'exercice de la discrétion du médecin.

All Canadian provinces and territories have enacted some form of legislation regarding physician reporting of a patient who is believed to be unfit to drive a motor vehicle. In some jurisdictions, this duty is mandatory; in others, it is discretionary. In either case, the duty to report is an exception to the normal rules in respect of physician-patient confidentiality. In each jurisdiction, some form of statutory protection is provided to physicians while fulfilling their obligations to report, although conditions may exist for the protection to be applicable.

The present paper provides a legal perspective, comparing each of the Canadian jurisdictions with respect to reporting requirements, physician protection and the production of medical reports. The legal principles with respect to standard of care and causation are outlined, and case law from both mandatory and discretionary jurisdictions is canvassed (Table 1). Brief mention is made of the federal provisions of the *Aeronautics Act* that provide for mandatory reporting of patients who are deemed unfit to pilot an aircraft. Lastly, provincial guidelines and application of applicable medical guidelines and standards are examined for their impact on standard of care issues.

Only three provinces in Canada – Alberta, Nova Scotia and Quebec – allow for discretionary reporting.

While the wording in each statute may differ, the language from Ontario's *Highway Traffic Act* is a good example of the language of mandatory reporting sections across Canada.

Section 203[1] of the Act provides:

"Every legally qualified practitioner shall report to the Registrar the name, address and clinical condition of every person sixteen years of age or over attending upon the medical practitioner for medical services who, in the opinion of

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TABLE 1
Nature of reporting obligations

Province	Statutory reference
Alberta*	Currently, no mandatory/discretionary statutory provision for physicians† Mandatory for patient to report a medical condition, Alberta Reg. 320/2002, s 16[1]
British Columbia	Mandatory, *Motor Vehicle Act*, s 230[2]
Manitoba	Mandatory, *Highway Traffic Act*, s 157[1]
New Brunswick	Mandatory, *Motor Vehicle Act*, s 309.1[1]
Newfoundland	Mandatory, *Highway Traffic Act*, s 174.1[1]
Northwest Terrritories	Mandatory, *Motor Vehicles Act*, s 103[1]
Nunavut	Mandatory, *Motor Vehicles Act (Nunavut)*, s 103[1]
Nova Scotia	Discretionary, *Motor Vehicle Act*, s 279[7]
Ontario	Mandatory, *Highway Traffic Act*, s 203[1]
Prince Edward Island	Mandatory, *Highway Traffic Act*, s 233[1]
Quebec	Discretionary, *Highway Safety Code*, s 603
Saskatchewan	Mandatory, *Vehicle Admin. Act*, s 94[1]
Yukon	Mandatory for physician, *Motor Vehicle Act*, s 17[3]; Mandatory for patient, s 17[1] and [2]

**In Alberta, the College of Physicians and Surgeons discourages the practice of reporting only when the patient may not be reliable. It takes the position that "only by routinely reporting all failed medical standards for the operation of a motor vehicle, will public responsibility for this important preventive health program become widely accepted" (Reporting Unfit Drivers, CPSA Guideline, Revised March 2003, page 2). †While section 64 of the* Highway Traffic Act *provides the Minister may make regulations respecting the notification to the Registrar by physicians and optometrists of any condition that a person has that may affect that person's ability to operate a vehicle in a safe manner, no such regulation has been enacted to date*

TABLE 2
Privilege status of medical reports

Province	Statutory reference
Alberta	Not addressed
British Columbia	Not addressed; subject to the provisions of the access to information legislation
Manitoba	Privileged, s 157[7]
New Brunswick	Not addressed
Newfoundland	Privileged, s. 174.1[3]; not admissible as evidence at trial except to prove compliance, s 174.1[4]
Northwest Territories	Confidential, s 313
Nunavut	Confidential, s 313
Nova Scotia	Not privileged; subject to access to information legislation
Ontario	Privileged, s 203[3]
Prince Edward Island	Privileged, s 233[3]
Quebec	Not admissible in court, s 606
Saskatchewan	Privileged, s 94[3]; not admissible except to show that report was made in good faith
Yukon	Not addressed

the medical practitioner, is suffering from a condition that may make it dangerous for the person to operate a motor vehicle."

Provincial statutes differ as to whether the medical reports produced in compliance with these statutory requirements are privileged (Table 2).

In the reporting context, where a document is prescribed by statute to be privileged, the report given by the physician with respect to his or her patient is privileged, and for the information and use of the registrar and/or the medical review committee only. In some jurisdictions, the reports are not privileged or the use is restricted to limited situations, for example, as evidence that the reporting of the medical condition was made in good faith or to confirm compliance.

With respect to penalties, while the Ontario legislation provides no specific penalty for failure to report a medically unfit patient, there is a general penalty provision in section 214[1] of the *Highway Traffic Act* that reads as follows:

> "Every person who contravenes this Act or any regulation is guilty of an offence and on conviction, where a penalty for the contravention is not otherwise provided for herein, is liable to a fine of not less than $60 and not more than $500."

While there are no reported circumstances where a physician has been convicted of an offence under the provision for failure to report, there are other 'penalties' for failing to report, including prosecution under a regulatory statute, professional discipline or civil liability.

APPLICABLE LEGAL PRINCIPLES: CIVIL LIABILITY

Civil actions brought against physicians for failing to report are based on principles of the law of negligence. Negligence is conduct that falls below the standard of reasonable care expected in the circumstances. For a finding of negligence in a medical negligence context, two aspects must be proven: first, that the physician breached the requisite standard of care, and second, that this breach was the cause of the defendant's damages.

Standard of care

The conduct of a physician must be assessed against the conduct of a prudent and diligent physician placed in the same circumstances (1). Stated another way:

> "Every medical practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. He is bound to exercise that degree of care and skill which could reasonably be expected of a normal, prudent practitioner of the same experience and standing, and if he holds himself out as a specialist, a higher degree of skill is required of him than of one who does not profess to be so qualified by special training and ability" (2).

Causation

Liability in negligence cannot be found unless the alleged damages are caused by the negligent conduct.

There are two leading decisions of the Supreme Court of Canada that provide guidance on the issue of causation.

Causation is established where the plaintiff proves to the civil standard (balance of probabilities) that the defendant caused or contributed to the injury.

In Athey v. Leonati (3), the Supreme Court of Canada confirmed that the general test for causation (general but not conclusive) is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the

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negligence of the defendant. Where the "but for" test is inconclusive, the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the loss. Notably, the Court held that the presence of other non-tortious contributing causes does not reduce the extent of that liability. Therefore, loss cannot be apportioned according to the degree of causation where it is created by both tortious and non-tortious causes.

In Snell v. Farrell (4), the Supreme Court of Canada held that causation need not be determined with scientific precision. The Court acknowledged that in many medical negligence cases, the facts lie within the knowledge of the defendant physician, and very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary. In any event, the legal or ultimate burden rests with the plaintiff.

CASE LAW FROM MANDATORY REPORTING JURISDICTIONS

There are few reported cases interpreting the scope and application of statutory reporting requirements.

In an Ontario decision, Ferguson Estate v. Burton (5), the defendant experienced an epileptic seizure and lost consciousness while driving. His car crossed the median and struck a car, killing the driver. The driver's estate sued the defendant and his employer. The defendants subsequently brought a third-party claim against the driver's physician who treated him before the accident for failing to report the driver's medical condition to the Registrar of Motor Vehicles.

The defendant suffered from an arteriovenous malformation that the evidence suggested would lead to a 20% chance of the defendant experiencing sudden unconsciousness. He had suffered no seizures involving loss of consciousness in the two-and-a-half years before the accident. Five months before the accident, he had an abortive seizure without loss of consciousness. The physician believed that the defendant's anticonvulsant medication was controlling the epilepsy. However, the defendant did not always take his medication, and on the day of the accident, he had neglected to take it.

The action against the physician was dismissed because the court was not satisfied on the balance of probabilities that the physician failed to treat and advise his patient in accordance with the standard expected of an ordinary family physician at the relevant time. The court arrived at its conclusion based, in part, on the fact that the physician had discussed with his patient beforehand the three conditions that had ultimately contributed to the accident. Accordingly, it was held that there was no breach of the Canadian Medical Association (CMA) guidelines, particularly the duty to warn the patient not to drive. Lastly, there was no evidence that the patient's licence would have been suspended if the doctor had reported his patient's condition. The trial judge found that, under the circumstances, had an investigation been conducted by the appropriate licencing authorities, they would not have suspended the defendant's licence.

In another Ontario decision, Toms v. Foster (6), the issue of reporting temporary conditions was examined. The defendant driver suffered from cervical spondylosis and caused an automobile accident that seriously injured the plaintiff, a motorcyclist and his passenger. The defendant's physicians (a general practitioner and a neurologist who had attended to the driver before the accident) did not report his medical condition to the Registry of Motor Vehicles as required by the *Highway Traffic Act*.

At the trial, the court found the doctors liable and awarded substantial damages to the plaintiff. On appeal, the physicians argued that the obligation to report under the statute was not mandatory but rather a matter of discretion for the doctor. One physician argued that he believed the defendant's condition to be temporary and that he could be trusted not to drive if so advised. The physicians conceded that they both knew at the time of the accident that the defendant was unfit to drive.

The Court of Appeal dismissed the appeal and held that the reporting obligations under the *Highway Traffic Act* were mandatory and made no exceptions for temporary versus permanent conditions, or whether a patient could be trusted not to drive. The court held that suspension would have been probable had the doctors reported the defendant's condition to the Registrar. Further, the court held that the duty of physicians to report is a duty owed to members of the public and not just to the patient.

The Ontario Court of Appeal also upheld a finding of liability against physicians in Spillane v. Wasserman (7), in which a fatal motor vehicle accident occurred involving a cyclist and the defendant truck driver. The defendant driver suffered from seizures known to his physicians, who failed to report his condition. The evidence at trial established that the doctors were both aware, or should have been aware, that the defendant suffered nocturnal and daytime seizures on a fairly regular basis. The trial judge further concluded that the doctors failed to run blood tests on a routine basis to confirm control and compliance of prescribed drugs.

The court held that the physicians were held liable for failure to report under the statute, as well as failure to follow the minimum College of Physicians and Surgeons of Ontario and CMA standards. Further, it was held to be insufficient to state that the patient was "a normal compliant patient because he did not fit the pattern of a noncompliant one". At trial, the court held the physicians 40% liable for the damages in negligence.

The Court of Appeal upheld the finding of liability but reduced the apportionment of the physician's liability to 5% on the basis of the patient's own deliberate conduct: failing to report some seizures, neglecting to take medication and falsifying his licence renewal application.

In Lax v. Denson et al (8), the plaintiff sued the defendant physician for his own injuries sustained in a motor vehicle accident, which occurred 10 days after his discharge from a psychiatric hospital. It was alleged that his licence would have been suspended if his condition had been reported by his physician.

The action was dismissed at trial on the basis that, even if the licence had been promptly revoked, it was unlikely that knowledge of revocation would have been communicated to the plaintiff by the date of the accident. The defendant doctor's medical expert testified that from December 1987 to December 1993, the average delay between reporting of information and confirmation of its receipt was 88 days. Therefore, it was held that, in these circumstances, the failure to report did not cause or contribute to the accident.

CASE LAW FROM DISCRETIONARY REPORTING JURISDICTIONS

In the Alberta decision of Wenden v. Trikha (9), the confidentiality dilemma between patient and physician was considered. This action arose as a result of injuries sustained by the

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plaintiff in a motor vehicle accident caused by the defendant. The defendant was a student who suffered from a medical disorder who had voluntarily admitted himself to the hospital on several occasions. He had been released on the basis of good progress and that his condition was controlled with medication. On the day before the accident, the defendant voluntarily admitted himself to the hospital but left the next day in a vehicle. The plaintiff brought an action against the defendant driver, the hospital and the psychiatrist who treated him.

The court found the defendant driver fully responsible. The hospital and the psychiatrist were held to have discharged the duty of care owed to the defendant or to any third party.

In the reasons for judgment, brief reference was made to section 14[2] of the *Motor Vehicle Administration Act* (10), which allows for the discretionary reporting of medical information. The trial judge simply stated that he did not consider that this statutory provision affected the question of to whom a duty of care was owed in this case. He went on to briefly explain the implications of the section, stating that it did not impose a duty to report, but that it did deal with the confidentiality problem from a liability point of view as between the patient and the physician.

AERONAUTICS ACT

The *Aeronautics Act* (11) prescribes mandatory reporting requirements in section 6.5[1] as follows:

> "Where a physician or an optometrist believes on reasonable grounds that a patient is a flight crew member, an air traffic controller or other holder of a Canadian aviation document that imposes standards of medical or optometric fitness, the physician or optometrist shall, if in his opinion the patient has a medical or optometric condition that is likely to constitute a hazard to aviation safety, inform a medical adviser designated by the Minister forthwith of that opinion and the reasons therefore."

The Act provides protection for the physician or optometrist for anything done in good faith in compliance with the section (12), and further, information provided under the section is privileged (13).

Physicians who report disabilities pursuant to the Act cannot be compelled to testify. Section 6.5(5) provides a limited medical privilege applicable to both civil and criminal proceedings because of the wide ambit of the language used, "any legal, disciplinary, or other proceedings" (14).

STATUTORY REPORTING OBLIGATIONS, GUIDELINES AND MEDICAL STANDARDS

Most Canadian jurisdictions rely on the CMA guidelines *Determining Medical Fitness to Drive: A Guide for Physicians* (15) as a guide to determine when a driver's license should be suspended and restored.

The Northwest Territories and Nunavut are the only jurisdictions for which there is express reference to "prescribed guides or codes" in their *Motor Vehicles Act*. Section 103[2] of the statutes provides:

> "For the purposes of satisfying subsection [1], a medical practitioner may adopt the recommendations contained in prescribed guides or codes that have been prepared to assist medical practitioners in determining if a person is unable to operate a motor vehicle in a safe manner because of a physical or mental disability or disease" (16).

Few jurisdictions, including British Columbia, possess their own guidelines with respect to physician reporting. The *Guide to Determining Medical Fitness to Drive a Motor Vehicle* (17) was prepared by the British Columbia Medical Association. While the final responsibility for determining medical fitness is with the Superintendent by statute, great weight is placed on the recommendations of the British Columbia Medical Association outlined in the Guide in determining the medical fitness of the individual in question. The suspension decision is subject to review procedures outlined in the Guide.

Does breach of a statutory obligation to report result in automatic civil liability? The Supreme Court of Canada has addressed this question and has held that civil consequences of a breach of statute should be subsumed in the law of negligence. Further, it has held that the notion of a tort of statutory breach giving a right to recovery merely on proof of breach and damages should be rejected, as should the view that an unexcused breach constitutes negligence per se, giving rise to absolute liability. However, it is also clear that proof of statutory breach, causative of damages, may be evidence of negligence. Further, the statutory formulation of the duty may afford a specific and useful standard of reasonable conduct (18). Where the duty of a health professional is prescribed by statute, the failure to perform the duty may constitute actionable negligence.

In addition, some provincial regulatory Colleges specifically set out policies to address the reporting issue. For example, in Ontario, the College of Physicians and Surgeons of Ontario policy 10-00 provides that the reporting requirement pertains not only to ongoing patients of the physician, but also to anyone "attending upon the medical practitioner for medical services", which includes those individuals seeing a physician for industrial or third-party examinations/assessments. The report must be in writing and sent to the Medical Review Section of the provincial Ministry of Transportation. Although the policy does not specify a time period in which the report must be made, it should be done as soon as possible.

Does a physician face civil liability for failing to comply with provincial legislation, a College policy or a CMA guideline that provides for mandatory reporting? A physician's failure to comply with a mandatory reporting obligation under a statute may result in potential quasi-criminal liability under the statute. A physician's failure to comply with a College policy may result in disciplinary proceedings taken by the College. However, the breach of a statute, College policy or other professional guideline does not necessarily automatically result in civil liability.

The statutory formulation of the duty may afford a specific and useful standard of reasonable conduct to be applied by the court.

In determining civil liability, courts frequently refer to practice guidelines and standards in determining that a physician has met a reasonable standard of care.

While conformity with common practice and recognized professional guidelines will generally exonerate physicians of any complaint of negligence, there are certain situations where the standard practice itself may be found to be negligent. However, this will only be where the standard practice is

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fraught with obvious risks, such that anyone is capable of finding it negligent, without the necessity of judging matters requiring diagnostic or clinical expertise (19). Further, the fact that the professional has followed the practice of his or her peers may be strong evidence of reasonable and diligent conduct, but it is not determinative (20).

It appears that courts have been willing to apply and give considerable weight to guidelines, such as those formulated by the CMA, to determine the scope of a physician's obligation to report. While these guidelines are not determinative, unless a court finds that the guidelines are themselves unreasonable, they will be given considerable weight in determining whether a reasonable standard of care has been met by the physician.

CONCLUSIONS

Physicians are facing ever-increasing legal obligations to report patients who they believe are unfit to drive. While the obligations may vary slightly from one jurisdiction to another, the majority of Canadian jurisdictions provide for mandatory reporting. In all jurisdictions, a physician who fails to report in circumstances where the physician is of the opinion that the driver is suffering from a condition that may make it dangerous for the patient to operate a motor vehicle faces potential quasi-criminal liability, civil liability and/or College disciplinary proceedings.

The current statutory provisions and professional guidelines leave little room for the exercise of discretion on the part of the physician and do not provide the physician with the ability to make judgments depending on his/her assessment of a patient's compliance with verbal instructions not to drive and/or to address temporary conditions. Unfortunately, current statutory requirements and professional guidelines do not address the reality of lengthy delays in the review process by provincial licencing bodies, the lengthy delays that occur before a license is suspended or the delays in reinstatement, which extend the period of suspension well beyond what is reasonably required.

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