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Dr. Who?
Key concerns in Non-physician medical malpractice in Canada

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I. INTRODUCTION

Physicians and surgeons are not the only providers of medical services and procedures. Medical services can include those performed by non-physician health professionals, such as a nurse, an ultrasound technician, or a respiratory therapist. These procedures are often ancillary to the work of a physician. Other medical service professionals provide elective treatments such as laser hair removal, Botox injections, massage therapy, and chiropractic care. Such procedures may take place in a clinic or a spa, and like the work of a physician, provide great benefit to their patients or customers. While a physician acts to preserve life and reduce pain, many other classes of medical procedures and professions attempt to reduce a patient's pain and symptoms, or to enhance their beauty through an elective cosmetic procedure. However, like the work of a physician the benefits of these procedures also carry with them the risk of injury.

This paper intends to set out the general principles of the law of medical malpractice in Canada with a particular focus on specialized healthcare services performed by non-physicians. It will then apply these principles to specific examples involving specialized or elective medical procedures which are categorized based on the degree of risk of the procedure and the given profession. These cases will demonstrate that the same principles of medical malpractice that govern a claim against a surgeon will be equally applicable against a non-physician medical professional or practitioner. With each of these cases there is a brief takeaway to assist the reader in recognizing and remediating potential risks and claims. It then concludes with a discussion of waivers and the effective use of signed informed consent forms.

II. PRACTICALCONSIDERATIONS

A. THE REGULATION OF HEALTH PROFESSIONS

What distinguishes a medical profession from a non-medical profession is determined largely by Canada's provincial legislatures. For example, in Ontario the ***Regulated Health Professions Act***[1] permits a select group of professions to create their own self regulatory bodies, which are usually referred to as colleges.[2] These colleges serve to protect the public by, among other things, guarding admission into the profession, setting educational requirements, disciplining members, maintaining practice standards for a given profession. In Ontario, the medical professions that are subject to statutory regulation include:

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[1] 1991, SO, c. 18

[2] Given that health policy is provincially regulated in Canada the range of health professions subject to legislative oversight will vary in each province.

- Nurses
- Dentists
- Denturists
- Midwives
- Psychologists
- Massage therapists
- Respiratory therapists
- Naturopaths
- Optometrists

These regulatory bodies are important for underwriters and may affect a medical malpractice claim for several reasons. First, not all professions are subject to the same degree or rigour of regulatory oversight. The degree of oversight generally corresponds to the degree of risk engaged by the given profession. For example, nurses are subject to stricter technical and professional standards than massage therapists and acupuncturists. The professional standards that are set by a college will inform the requisite standard of care and a breach of these may found the basis a claim in negligence (this is discussed in much greater detail below). Further, the breach of these standards can also result in a college taking disciplinary action against a professional. While evidence adduced at a disciplinary hearings is generally inadmissible in a subsequent court proceeding a finding of professional misconduct may in some cases be evidence of professional negligence. The principles of evidence and the conduct administrative proceedings are beyond the scope of this paper but the additional degree of risk is something that underwriters and counsel should be aware of.

B. THE CMPA

The Canadian Medical Protective Association (CMPA) is a not-for-profit, mutual defence association which is governed by a council of physicians representing members from across Canada.[3] The CMPA has a near monopoly over the provision of liability insurance for physicians in Canada. Underwriters should be aware that no such monopoly exists for the dozens of other medical professions in Canada.

III. GENERAL PRINCIPLES

The following will set out the general principles of medical malpractice by exploring the key aspects of each cause of action.

[3] "About" CMPA.ca, https://www.cmpa-acpm.ca/about, (accessed April 5, 2017).

A. BATTERY

Most cases involving medical malpractice are framed in negligence but allegations of battery are not uncommon. A battery occurs when someone touches another person without their consent.[4] If a physician performs a procedure without their patient's consent they may be liable for a battery. The importance of this basic legal right was explained by the Supreme Court of Canada as follows:

> *The right to determine what shall, or shall not, be done with one's own body, and to be free from non-consensual medical treatment, is a right deeply rooted in our common law. This right underlies the doctrine of informed consent… The fact that serious risks or consequence may result from a refusal of medical treatment does not vitiate the right of medical self determination…. It is the patient, not the doctor, who ultimately must decide if treatment – any treatment – is to be administered.*[5]

Consent to treatment is not simply a yes or no. If consent is not fully informed, or it is obtained through fraud, duress, or undue influence, may constitutes battery. For example, in *Quick v. Reitzik*,[6] the patient was referred to a dental surgeon for extraction of one tooth. The dental surgeon said he would take "two roots", which meant two teeth, but the patient thought that he meant only one tooth. The plaintiff subsequently claimed in battery and succeeded on the grounds that her consent was not fully informed. The evidence also established that the patient had been referred only for the removal of a single tooth. The concept of consent will be explored in greater detail below.

B. BREACH OF CONTRACT

The relationship between a patient and a practitioner, or a customer and a clinic, is also contractual. A patient may sue a practitioner for breach of contract on the ground that he or she relied on an express or implied term of the contract. Most commonly, a doctor will be under an implied contractual obligation to exercise reasonable care and skill.[7] However, if a physician guarantees an outcome for a procedure, he or she may be held responsible if this guarantee is breached.

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[4] *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24

[5] *Fleming v. Reid (Litigation Guardian)* (1991), 82 DLR (4th) 298 (ONCA), cited in *Ciarlariello v. Schacter*, [1993] 2 SCR 119, per Cory J. at p. 135

[6] 2007 BCPC 177.

[7] Ellen I. Picard & Gerald B Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 4th ed., (Toronto: Carswell, 2007) at para. 433.

This issue has arisen in the context of cosmetic surgery. In *Mok v Wong*,[8] the plaintiff sued the defendant plastic surgeon for breach of contract for failing to improve her appearance. In *LaFleur v Cornelis*,[9] liability was imposed on a cosmetic surgeon for not providing a smaller nose in accordance with his pre-operative sketch. More recently, in *Dehekker v Anderson-Penno*,[10] a physician was found to have breached her contract with her patient when laser corrective surgery did not achieve the guaranteed result.

What is particularly risky with a guarantee is that if a patient proves on a balance of probabilities that a verbal guarantee was made, the patient will not need to prove an injury, and will only need to prove that the guaranteed outcome did not occur.

C. NEGLIGENCE

In order to establish a claim in professional negligence, a plaintiff must prove that the defendant owed him or her a duty of care, that the defendant breached that duty, and that the breach caused a loss or injury that is compensable.

1. Duty of Care

It is well established that medical professionals and technicians owe a duty of care to their patients. This duty arises as soon as a doctor/patient relationship comes into existence.[11] Even if a procedure is not "medical" in the traditional sense, a duty of care will be found to exist. For example, chiropractors, counsellors, laser hair technicians, have all been found to owe a duty of care to their patients, clients, or customers.

This duty of care can potentially extend beyond the patient/practitioner relationship to also include third parties. In *Urbanski v. Patel*,[12] a surgeon negligently removed a patient's only healthy kidney. The patient's father then donated his own kidney to his son. The Court held that the surgeon owed a duty of care to the father, because it should have been reasonably foreseeable that the patient's father or someone else in the family would likely donate their own kidney if harm came to the patient's only kidney.[13]

2. Standard of Care

The standard of care is that which conforms with the recognized practices of a given medical profession. Specifically, a practitioner must possess and employ a reasonable

[8] [1996] OJ No. 1971 (ONGD).
[9] (1979), 28 NBR (2d) 569 (QB).
[10] 2014 ABQB 95.
[11] *Reynard v. Carr* (1983), 50 BCLR 166 (SC).
[12] (1978), 84 DLR (3d) 650 (MBQB).
[13] *Ibid*, at 671.

degree of learning and skills ordinarily possessed by practitioners in similar circumstances.[14] The applicable standard of care is specific to a practice and profession. For example, chiropractors are held to the standard of the ordinary, careful, competent chiropractor.[15] By way of another example, a laser hair removal technician must meet the standard of care expected of a reasonably diligent laser therapist placed in his or her shoes at the material time.[16]

Practitioners who hold themselves out as specialists must accordingly meet the standard demanded of those specialists.[17]For instance, if a generalist chiropractor advertises that he or she specializes in treating degenerative disc disorders, the treatment provided by that chiropractor will be measured against specialists who treat such conditions.

The standard of care in the medical context is shaped by a wide range of indicators. The first is the profession's governing statute and the applicable regulations. For example, section 23 of Ontario's *Healing Arts Radiation Protection Act* prohibits an x-ray technician in Ontario from operating a model C.A.T. scanner aside from those designated by the minister.[18] By way of further example, the associated regulations require every diagnostic x-ray machine in Ontario to have warning lights that indicate when the machine is "energized and ready to produce x rays."[19]

Each profession will also have its own statutory body, usually referred to as a college, which drafts its own bylaws and standards of practice. For example, some acupuncturists can perform a procedure that may induce labour. The College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia has issued a specific practice standard for this procedure which requires the practitioner to:

> *Record the patient's medical history and all pertinent information in the patient's clinical record, including but not limited to the patient's age, week of pregnancy/gestation, if primiparous (first pregnancy) or multiparous (history of one or more pregnancies), current complications, and history of complications in previous pregnancies/deliveries.*[20]

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[14] *Crits v Sylvester*(1951), 1 DLR (2d) 502 at 508, aff'd [1956] SCR 991.

[15] See *Penner v. Theobold* (1962), 40 WWR 216 (MBCA); *Cawley v. Mercer*, [1945] 3 WWR 41 (BCSC); and *Shepherd v. Knight,* [1985] OJ No. 508 (ONHC).

[16] *Barbiero v. Elmbrook Cosmetic Centre Inc.*, 2005 CanLII 30310 (ONSC).

[17] *Sylvester*, *supra*,note 12 at 508.

[18] RSO 1990, c. H.2, s. 23(3).

[19] *Ibid.*, section 9.

[20] "Acupuncture for Induction of Labour" Practice Standards (Effective February 2, 2015), College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia.

The professional standards created by a respective governing body are afforded a great deal of deference by the courts.[21] However, if these standards are themselves deemed unreasonable, a practitioner may be found liable even if he or she met those standards.[22]

In many areas of practice, and within a given profession, there can exist competing schools of thought or different preferred methods of treatment. A physician or a practitioner can adopt a standard that falls outside of the dominant standard of treatment, so long as it is a "respected school of thought."[23]

Laws of general application apply to practitioners and clinics in addition to those narrow and specific professional standards. For example, federal (and in some cases Provincial) privacy legislation regulates the handling of customers' personal information, and can also provide for remedies if a clinic or practitioner improperly shares a client's information, even if such disclosure is inadvertent.[24] The *Occupiers Liability Act* also requires clinics to take reasonable steps to prevent hazards that could foreseeably cause harm to others. For example, in *Tran v. Kim Le Holdings Ltd.*,[25] a nail and beauty business was held liable when a customer slipped and fell on some spilled acetone.

It is important to note, however, that medical practitioners are not held to a standard of perfection. A practitioner or technician can make errors in judgment, so long as those errors were "reasonable" in the circumstances. This principle was explained by the Supreme Court of Canada as follows:

> *An error of judgment has long been distinguished from an act of unskilfulness or carelessness or due to lack of knowledge…. [T]he honest and intelligent exercise of judgment has long been recognized as satisfying the professional obligation.*[26]

On the other hand, the risks posed by a procedure or treatment will also critically inform the appropriate standard of care. The standard of care imposed on a practitioner will increase depending on the degree of foreseeable risk of a given procedure, medical product, remedy, or service.

3. Informed Consent

To be valid, consent must be informed, voluntary (*i.e.*, absent coercion or duress), capable, and not the result of fraud or deceit.[27] Failure to obtain valid and informed

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[21] *Wallace v. Zradicka*, 2006 BCSC 1166.

[22] *Ter Neuzen v. Korn*, [1995] 3 SCR 674.

[23] *Wilson v. Swanson*, [1956] SCR 804.

[24] See for example the *Personal Information Protection and Electronic Documents Act*, SC 2000, c. 5.

[25] 2011 BCSC 1690.

[26] *Wilson v Swanson*, [1956] SCR 804.

[27] *Gerula v Flores* (1995), 126 DLR (4th) 506 (ONCA); *Norberg v. Wynrib*, [1992] 2 SCR 226.

consent may result in a battery claim, or at the very least will be a positive indicator that the practitioner failed to meet the requisite standard of care.

It is well established that healthcare professionals have a positive duty to disclose the inherent risks of procedures, as well as those that could suddenly materialize during or after the procedures that they perform.[28]

In general, a physician must provide a patient with all the material information relating to the proposed treatment. Courts have held that this is not a "routine legal requirement" but a "vital process" of communication between doctor and patient.[29] A physician must also answer any specific questions posed by the patient, and must disclose the nature of the proposed treatment, its gravity, and any material, special, or unusual risks involved.

If a certain risk is a mere possibility (which ordinarily need not be disclosed) but carries serious consequences (*e.g.*, paralysis or even death), it should be regarded as a material risk requiring disclosure.[30] Furthermore, a medical practitioner must canvas alternative treatments with the patient, as well as the consequences of inaction.[31]

4. Causation

If a court finds that a medical practitioner has breached the standard of care, the plaintiff must then prove that the breach caused the injury and resulting damages. A court will ask whether the patient or customer would have suffered the loss *but for* the practitioner's negligent conduct? The plaintiff must also prove that the loss was a foreseeable consequence of the breach. In the medical malpractice context, this question is often answered by the court with the help of multiple experts. The assistance of experts, however, does not always yield fast and easy answers for courts. The Alberta Court of Appeal summarized this problem as follows:

> *... A simple cause-effect formula does not work because there are generally a number of forces relevant to the injury: the patient's compromised condition; treatment and care by a number of healthcare professionals; the body's reaction to drugs, surgery, or other interventions. In many cases, even the expert witnesses do not agree on what caused the injury.*[32]

Causation is also relevant if the plaintiff claims to have not consented to the treatment. A common dispute is one where the professional is alleged to have not disclosed a

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[28] *Kern v Forest*, 2010 BCSC 938.

[29] See for example *Brito v. Woolley et al.*, 2003 BCCA 397.

[30] *Hopp v Lepp*, [1980] 2 SCR 192, and reaffirmed in *Reibl v Hughes*, [1980] 2 SCR 880.

[31] *Dickson v Pinder*, 2010 ABQB 269.

[32] *McArdle Estate v Cox*, 2003 ABCA 106, at para 24.

specific risk associated with the treatment which ultimately materialized. A customer may receive a Botox injection from a naturopath, for example, but not be informed of the risk of getting a severe skin rash. In this situation, the court must determine whether a fully informed, reasonable person in the patient's position would have declined the procedure, or would more likely have chosen to go ahead, *i.e.*, willingly accept the risk. Although this question is viewed objectively, the court must consider the patient's particular circumstances.[33]

IV. CONTEXT: CASE LAW AND RISK MANAGEMENT

The following will explore how courts have applied the principles of medical malpractice in the non-physician context. These cases will demonstrate that the same principals govern a claim against a surgeon as they do a chiropractor or a laser hair removal technician. The cases are organized on a risk continuum, from the highly invasive cosmetic surgery to the lowest risk and least invasive practices of a naturopath.

A. HIGH RISK PROCEDURES

1. Cosmetic surgeries

Cosmetic surgeries can be highly invasive and consequently pose a high degree of risk for the professionals, technicians and clinics involved in the procedure. In addition, a patient for a cosmetic surgery is also a customer who is purchasing a service to correct or alter a bodily feature. The measure of success or failure of a surgical result, although usually not life-threatening, will therefore be at least partially subjective.

As discussed above, surgeons can be held liable for breach of contract if they guarantee a specific result and that result is not achieved. More common, however, are allegations and findings of negligence. For example, in *Tiglao v. Sleightholm*,[34] the plaintiff underwent a breast augmentation surgery as well as a procedure to remove a caesarean section scar. The plaintiff was Filipino and spoke little if any English. Although the physician had explained the procedure and all of the risks associated with it, the Court determined that his treatment was in fact negligent because his explanation was given wholly in English.

> ***Takeaway***: *The risks of a procedure must be communicated in a way that the patient understands. This may mean using laymen's terms or in some circumstances requiring an interpreter to be present.*

[33] *Arndt v. Smith*, [1997] 2 SCR 539.

[34] 2012 ONSC 3092.

In *Asgari v. Jain*,[35] the plaintiff underwent a number of cosmetic procedures including an acid peel and a liposuction. The plaintiff alleged that the physician had not adequately disclosed the risks of permanent numbness in the area to be operated on, that she had not explained how large the scars could be from the procedure, and that she had negligently recommended these procedures. The plaintiff argued that the defendant did not disclose the risk of death, and asserted that had she done so she would not have undergone the procedure. The plaintiff also alleged that she had chosen the defendant because her yellow pages advertisement represented that she was a specialist surgeon when in fact she was a general practitioner. The Court dismissed all of her claims, in part because it concluded that general practitioners in the area regularly employed the same procedures that the defendant physician had advertised. Further, the Court held that although other practitioners in the area refused to perform the procedure due to the risk of death, the court found on the evidence that the defendant physician had informed the plaintiff of this risk.

> ***Takeaway*****:** *If a practitioner or clinic advertises that they perform a specific procedure ensure that they carry the necessary qualifications, and that those with similar qualifications carry out these procedures in the area.*

B. MEDIUM RISK PROCEDURES

1. Minimally invasive cosmetic procedures

In Canada, several professions may perform procedures involving injections. Although procedures such as Botox are minimally invasive, there are some significant risks that may materialize, such as swelling, discomfort, discolouration, and serious infection.

The case of *Dowell v. Millington* highlights some of these serious risks.[36] The plaintiff visited the defendant's spa for dermal filler injections and to have electrolysis performed on her face. The spa in question had a contractual relationship with a registered nurse to split fees generated by performing the injections. The nurse called the manufacturer of the dermal filler to confirm that it was safe to perform the electrolysis shortly after receiving the injections. However, the dermal filler was, unbeknownst to them, a product that was no longer authorized for sale and use in Canada. The combined effect of the procedures caused the plaintiff's face to become swollen and infected. She was hospitalized and underwent surgery to have the dermal filler squeezed out of her face. The nurse and the clinic were found liable in negligence.

> ***Takeaway***: *A clinic and a professional should have an administrative system that periodically ensures that any products they use are up to date.*

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[35] [2006] OJ No. 2437 (ONSC).

[36] 2016 ONSC 6671.

Further, if they offer multiple procedures they should be aware of the possible effects that they may have on a customer.

In *Felde v. Vein and Laser Medical Centre*,[37] the plaintiff underwent a cosmetic procedure to remove fat, muscle, and skin from her lower eyelids. Afterwards, she suffered ongoing discomfort in one eye, and had difficulty reading. She also felt that her eyes had become asymmetrical, causing her to be self-conscious about her appearance. At issue in this claim was whether the defendant physician had discussed the material risks in a manner that allowed the patient to make an informed decision about the operation. In the face of differing accounts of what occurred, the Court took note of the physician's demeanour on cross-examination, observing that he was not empathetic, his communication was hurried, and that he seemed not to have adequately canvassed her medical history. The Court concluded that he likely failed to conduct an effective dialogue, and that he was not a good listener. As a result he was found liable in negligence.

Takeaway: *The practitioner should not rush though explaining the risks and procedure.*

In *Barbiero v. Elmbrook Cosmetic Centre Inc.*,[38] the plaintiff underwent a number of laser hair removal treatments that resulted in the skin on her chin becoming discoloured for two years. She was a real estate agent and alleged that as a result of this discolouration she lost her confidence, and her income declined. The Court held that she was informed of the risks involved in laser hair removal treatment, including discolouration of the skin. Of particular note, the plaintiff had signed a form that explicitly described discolouration as a possible side effect of the process.

Takeaway: *A written consent form is an effective tool in proving that all risks were disclosed to the patient*

2. Chiropractic treatments

In *Loffler v. Cosman*,[39] the plaintiff alleged that the defendant had negligently performed chiropractic manipulations which caused a herniated disk. He also alleged that he had not understand the consent form setting out the risks of the procedure. The plaintiff had been given a lengthy consent form by the clinic's receptionist that explained all of the material risks of the chiropractic treatment, including the possibility of a herniated disk. Faced with differing accounts of what had occurred when the plaintiff was presented with the consent form, the Court ultimately found in favour of the chiropractor, in part because of the clinic's "invariable practices" providing the consent

[37] 2002 CanLII 2656 (ONSC), aff'd 2003 CanLII 19431 (ONCA).

[38] 2005 CanLII 30310 (ONSC).

[39] 2010 ABQB 1777.

form to patients in a standardized format. The clinic receptionist's evidence was that she always asked patients if they had any questions for the chiropractor. This, according to the Court, was sufficient to rebut the plaintiff's uncorroborated claim that he not given a chance to ask questions about the contents of the consent form.

> ***Takeaway:*** *If a clinic or professional employs standardized procedures in carrying out their duties they may be able to rely on those standards as proof that they took a certain course of action, despite the fact that they have no recollection of it.*

In *Dickson v. Pinder*,[40] the plaintiff read material explaining, and was also informed by the defendant chiropractor, that a particular therapy could cause a stroke. However, she did not understand what a "stroke" was, or that this was a very serious result. The court held that by not explaining the characteristics and consequences of a stroke, the defendant failed to disclose sufficient information to allow her to make an informed decision. He further breached his duty of disclosure in not discussing treatment alternatives to "spinal manipulative therapy". However, the claim was ultimately dismissed on the causation branch of the test.

> ***Takeaway***: *A practitioner should not assume a general level of understanding of their patients. Even commonly known consequences and their severity should be explained.*

3. Ultrasound and x-ray technician

The case of *Weingerl v. Seo*is an insightful example of the hidden risks in what appears to be a low risk procedure and practice.[41] In that case, an ultrasound technician was employed by the defendant x-ray and ultrasound clinic. The employee technician secretly videotaped the plaintiff in the changing room and, while conducting the ultrasound examination, engaged in unauthorized touching of the plaintiff. After the video camera was discovered at the end of the plaintiff's examination, a struggle ensued in which the employee attempted to retrieve the camera. Ultimately, the plaintiff suffered serious psychological damage.

The Court was asked to consider whether the clinic was directly liable for the unauthorized acts of its employee. Applying the Supreme Court of Canada's reasoning in *Bazley v. Curry*,[42] the Court held that the clinic's enterprise and the duties entrusted to its employee materially increased the risk to the public. In addition, the Court also held that ultrasounds, by their very nature, require employees to touch clients in intimate parts of the body. The evidence was clear that the clinic had no procedures in place that

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[40] 2010 ABQB 269.

[41] 2003 CanLII 13285 (ONSC).

[42] [1999] 2 SCR 534.

would have permitted a female patient to request the attendance of another staff member during any part of an examination, nor was there any possibility of supervision or spot checks by another staff member. The defendant clinic was therefore found directly liable for the unauthorized acts of its employee.

> ***Takeaway:*** *A clinic or employer can be liable for unauthorized acts of a technician if the patients or customers are placed in vulnerable positions. To minimize the risk the clinic should properly supervise and screen their employees and maintain systems of oversight.*

C. LOW RISK

1. Exercise clinics

In *Moodie v. Perfect Images Inc.*,[43] the plaintiff suffered injury after using the defendant exercise clinic's "toning beds." The plaintiff had explained to the clinic that she had serious back problems and had undergone a number of surgeries to her spine. The defendants assured her that the machines were safe for persons with back problems. The plaintiff was subsequently injured by the machines and rendered completely disabled and unable to work. The Court determined that the clinic knew that the tables could potentially be harmful to someone with back problems. Ultimately, the Court concluded that the machine did not cause her injury, but rather, it aggravated her pre-existing condition.

The case is interesting because the customer signed a waiver before she engaged in the exercise treatment. The defendant sought to rely on the waiver, but the Court noted that the print was too fine and the terms had not been sufficiently brought to the plaintiff's attention. In addition, the plaintiff had written on the waiver form that she suffered from back problems. In light of these specific facts which influenced the Court's decision about the efficacy of that particular waiver, the case unfortunately does not offer more general insight into the enforceability of waivers in a health care or professional context.

> ***Takeaway:*** *An exercise clinic must consider the risks to each individual customer. While a waiver may be enforceable if the "treatment" is more akin to a sport or recreational activity before the court will even consider its enforceability.*

[43] [1993] BCJ 502 (BCSC).

2. Acupuncture

In *Rose v. Pettle*,[44] the plaintiff claimed to have contracted a skin infection from a course of acupuncture treatments. The claim was brought as a class action representing all patients who had been treated by the specific acupuncturist. The plaintiff class alleged that the defendant acupuncturist was negligent for, among other things, reusing single-use disposable needles. The claim also asserted that the acupuncturist may have exposed the plaintiffs to hepatitis, HIV, and other blood diseases. The class action was brought against the specific practitioner as well as the clinic where she worked. The court certified the class action and then subsequently approved a settlement of $320,000.

> ***Takeaway:*** *A clinic can be exposed to significant risk in the form of a class action if a professional in their employ fails to follow appropriate professional standards.*

3. Physiotherapy

In *Swityk v Priest et al*,[45] an 85-year-old plaintiff sued his physiotherapist in small claims court claiming that she was negligent in administering certain treatments to his foot. In particular, when the physiotherapist removed the taping from his foot it was revealed that his foot had developed a sore. The defendant was nonetheless successful in dismissing the claim with the assistance of an expert who explained to the Court that she had followed the standards of her profession in dealing with the plaintiff and the manner and procedure she followed in evaluating the need for the taping. It was also determined that she had obtained the plaintiff's fully-informed consent – she had explained to him how and when he ought to have removed the tape, and had also explained the risk of skin irritation.

> ***Takeaway***: *This case is a good example of how courts employ the same negligence analysis for a physiotherapist as they would a physician. Further, it highlights the frequent need for an expert report, even in the small claims context.*

4. Alternative medicine and naturopaths

There is little to no case law in Canada relating to alternative medicine and the work of naturopaths. There are, however, some reported decisions in the United States. For example, in *Charell v. Gonzales*,[46] the plaintiff was diagnosed with uterine cancer. She sought a second opinion from the defendant practitioner of alternative medicine. The defendant treated her by prescribing a special diet protocol. Unsurprisingly, the cancer

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[44] 2004 CanLII 11385 (ONSC).

[45] 2006 BCPC 518.

[46] 660 NYS2d 665 (Sup. 1997).

metastasised and caused blindness and back problems. The jury determined that the treatment provided by the defendant was a departure from good and accepted medical practice and he was found liable to the plaintiff for his negligent treatment.

> ***Takeaway:*** *A practitioner of alternative medicine, like a physician, has a duty to refer out if the requested care exceeds their competence level.*

In *R. v. Stephan*,[47] the parents of a young child were charged in a criminal court and convicted of criminal negligence causing death for treating their son, who had contracted meningitis, with "natural remedies" such as horseradish. They persisted in doing so even after a family friend who was a nurse advised them that he might have had meningitis.

In the course of treating her son's illness, the mother called a naturopathic clinic and spoke to a worker to inquire about how she should treat her son's meningitis. The naturopath testified at the criminal trial that she was with a patient when the clinic worker asked her this, to which she responded to tell her that she needed to take the child to the emergency room right away. The naturopath stated that she had never met the mother and that she remained by the phone long enough to ensure that that message was relayed.[48]

After the conclusion of the criminal trial a group of Canadian physicians wrote to Alberta's College of Naturopathic Doctors expressing concern about the practices of the naturopath in question. The College investigated and found no evidence of misconduct. The College reached this conclusion in part on the grounds that the naturopath had never met the mother or the child.[49]

> ***Takeaway***: *A naturopath likely owes a duty to warn a potential patient that treatments should not be relied on as the sole means of treating a potentially life threatening illness.*

V. WAIVERS AND RISK MANAGEMENT

In addition to the specific points demonstrated by each of the cases above, there are a number of standard procedures that a clinic or practitioner may adopt to diminish the risk of a medical malpractice claim. A common method used by many clinics is the use of a waiver or an informed consent form.

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[47] 2016 ABQB 319.

[48] See "Naturopathic doctor in Alberta meningitis toddler death under investigation", *The Toronto Star*, April 28, 2016.

[49] See "Regulator clears naturopath in Alberta boy's meningitis death that saw parents criminally convicted", *National Post*, March 16, 2017.

A. WAIVERS

Waivers and releases are perhaps the most common method of reducing liability risks where the enterprise or activity being proffered involves the potential for bodily harm. In our view, a court is unlikely to allow a medical practitioner to contract out of the duty of care owed to a patient. This issue was considered in the complex case of *Hobbs v. Robertson*,[50] where the plaintiff expressly informed the defendant surgeon and hospital that they could not under any circumstances give her a blood transfusion because she was a Jehovah's Witness. The hospital then provided her with a general waiver which stated:

> *I hereby release the CHILLIWACK GENERAL HOSPITAL, its agents and personnel, and the attending doctors from any responsibility whatsoever for unfavourable reactions or complications or any untoward results, which may include death, due to my refusal to permit the use of blood or its derivatives and I fully understand the possible consequences of such refusal on my part.*

The evidence was such that the procedure, a hysterectomy, would usually cause some blood loss. However, the patient sustained massive blood loss and died. The patient's family then brought a claim against the hospital and the surgeons.

The defendants brought a motion in Court seeking to dismiss the claim, arguing that the patient had voluntarily assumed the heightened risk of the procedure without blood transfusion, and had released them from any claims that might result from their negligence. In support of their argument, the physicians relied on case law involving waivers in the sports and recreation context.

The Court held that although the patient had indeed assumed the risk of the hysterectomy, the form she signed did not amount to a voluntary assumption of risk of the surgeons' negligence. The Court stated that such a release or waiver would likely be unenforceable for reasons of public policy:

> *As a matter of public policy, I seriously question whether surgeons should be allowed to contract out of liability for the harm created by their negligence in the course of surgical procedures, regardless of the wording of the release form used. Simply stating the issue in the foregoing language demonstrates that the answer must be in the negative. An affirmative answer could allow irresponsible and negligent surgery, the consequences of which would be visited on a patient without recourse. In my opinion, the nature of the event being a surgery, and the complete reliance by a patient on a surgeon, dictates a negative answer to the foregoing question.*

[50] 2001 BCSC 162. The Court of Appeal ordered a new trial on evidentiary grounds. The subsequent decision, indexed as 2004 BCSC 1088, was also appealed and remitted back to trial on the grounds that the action should not have been decided on the basis of the evidentiary record before the trial judge.

The defendants' motion was thus dismissed. However, the Court of Appeal overturned the decision and ordered a new trial on the grounds that the trial judge did not have the proper evidentiary records to reach its conclusion. In the new trial, the BC Supreme Court arrived at a different outcome on the enforceability of the waiver and held that it was enforceable. The Court held that the release was a term of the doctor-patient contract and that it constituted an express agreement to assume risk and prohibited recovery when death resulted from the inability to transfuse blood. The Court also disagreed that such a term would, in the circumstances, be void for reasons of public policy. This decision however, like the previous one, was overturned on Appeal on the grounds that the trial court had rendered its decision without hearing the submissions of the hospital who was a co-defendant.

Unfortunately, other than the *Hobbs* decisions there are no reported cases where a court has been asked to interpret or enforce a waiver in the context of medical treatment. In our view, *Hobbs* should not be relied on for the proposition that a waiver signed by a patient will preclude them from bringing a claim in professional negligence.

B. WRITTEN INFORMED CONSENT

Many medical malpractice claims turn on whether or not the practitioner informed the patient of all the risks of a procedure. In other words, did the practitioner obtain fully informed consent? A written form that sets out all of the risks of a given procedure will serve as effective proof that the patient or customer was fully informed of all of the material risks. Further, the plaintiff's signature on the form will also serve as an indicator that the patient read and understood these risks.

As was demonstrated in *Loffler v. Cosman* and in *Felde v. Vein and Laser Medical Centre*, simply providing a prospective patient a form or giving a one-way explanation of the risks may be insufficient to satisfy this duty. For example, in *Loffler* the plaintiff was provided with a form that he signed. The court implied that if the patient was not afforded the opportunity to ask the chiropractor questions, the consent may not have been fully informed. The court also noted that because the chiropractor had signed the form he had likely discussed the risks with him.

Our recommended practice to obtaining informed consent is as follows:

1. The practitioner discusses with a patient the risks of a given procedure.
2. The practitioner discusses alternatives to treatment and the risk of non-treatment.
3. These risks are set out in the consent form.
4. Ensure the plaintiff is witnessed signing the consent form.
5. The practitioner signs or marks the form to indicate that he or she was present when the form was read.

6. Give the plaintiff a meaningful opportunity to inquire about any risks.

The implementation of the above will of course vary with the context and the particular circumstances of each proposed treatment.

At the very least, if a form is to be used to assist in explaining risks to a patient their signature should be witnessed *and* the patient should be afforded a meaningful opportunity to discuss any risks with the practitioner.

It is important to bear in mind that a practitioner cannot download the process of consent to a standardized form. Such a form will only form part of the evidentiary record that consent was obtained. Consent is a process, and the fact that someone has signed a consent form does not necessarily mean that consent has been provided.[51] This piece of paper is not a substitute for the rapport between a doctor and patient.[52]

VI. CONCLUSION

This paper has canvassed a spectrum of medical services that are typically elective. The services discussed range from invasive medical procedures (*e.g.*, cosmetic surgery) to more therapeutic treatments (*e.g.*, spas, weight loss clinics) and other forms of care that are not necessarily always "medical" (*e.g.*, naturopathic). Yet even if the procedure is elective or even not strictly medical, the existence of a duty of care will usually go unquestioned because the patient will be "so closely and directly affected" by a defendant practitioner's conduct that he or she must take reasonable care to protect against foreseeable harms.[53]

As this paper has also shown, the standard of care – what is considered "reasonable and prudent" – varies amongst different healthcare services. Practitioners must be alive to standard of care issues that arise specifically in the context of specialized health services. Consider, for example, whether the standard of care might be higher when a patient is undergoing a procedure performed by doctor versus the same procedure being carried out by technician with no formal medical training. By way of another example, some of the procedures discussed in this paper routinely cause discomfort or pain to patients, such as laser hair removal. Under these circumstances, a technician or physician must be cognizant of the accepted practices with respect to expressions of discomfort or pain by a patient during procedures whose very nature causes discomfort or pain.[54]

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[51] Rozovsky, *The Canadian Law of Consent to Treatment*, 3rd ed. (Markham: LexisNexis, 2003) at 143.
[52] Picard & Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 4th ed., (Toronto: Thomson-Carswell, 2007) at 50-51.
[53] *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562.
[54] See e.g. *Ayana v. Skin Klinic*, 2009 CanLII 42042 (ON SC), where the plaintiff suffered a burn injury to her neck from laser hair removal. The Court noted that even though there is "invariably some discomfort

We have sought to emphasize throughout the paper that individuals seeking to undergo elective procedures or other therapeutic treatments are unlikely to be aware of the risks involved. Certainly, one does not go to the spa thinking about all the possible dangers associated with it. This means that obtaining informed consent is critical. This also means that waivers signed in specialized healthcare settings are unlikely to succeed as a defence against liability unless careful steps are taken to alert patients – who surely do not expect to get hurt in such settings – to the nature of the waiver and the types of risks and liabilities it purports to release.

In sum, when it comes to specialized health services, practitioners who not only understand and follow the accepted practices of their profession, but also clearly raise and discuss the risks *in addition to* potential benefits of the treatment, will be better equipped to avoid liability in malpractice claims.

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associated with the procedure", this "gives no licence, however, to disregard the patient's complaints of discomfort or pain" (para 269).