

Nurse Practitioners **&** **Liability Protection**

Physician concern about liability protection for nurse practitioners (NPs)* was identified in a recent study¹ as one of several barriers to the implementation of the role of the nurse practitioner in primary health care/collaborative practice settings. The Canadian Nurses Protective Society (CNPS) has been proactive in removing this barrier.

CNPS came into being in 1988. CNPS is a national not-for-profit organization that administers a fund created by nurses to assist eligible nurses with certain legal defence expenses. In order to be eligible for CNPS' assistance, a nurse must have been a member in good standing of one of CNPS' member associations/colleges at the time of an incident. Our members are AARN, SRNA, CRNM, RNAO, NANB, CRNNS, ANPEI, ARNNL, RNANT/NU and YRNA. It should be noted that in Ontario, the College of Nurses is not a member of CNPS. RNs must be members of RNAO to receive services and benefits from CNPS.

Historically, CNPS member organizations did not distinguish between different types of nursing practice for registration purposes. Today, however, most statutes governing the registration of NPs require a separate registration or classification for NPs. Because eligibility for CNPS assistance is tied to a nurse's registration with a member association or college, this change created an opportunity for CNPS to offer a different level of assistance to registered NPs. The question was whether a different level of assistance was warranted.

The CNPS Board of Directors reviewed evidence of the high quality of care provided by NPs and of their relatively infrequent, relatively low damage awards in the US. The available evidence did not suggest that NPs were at greater legal risk than other RNs.

However, a number of Canadian realities could not be ignored.

Concerns about the adequacy of NPs' liability protection voiced by groups

like the Canadian Medical Protective Association (CMPA) and the Ontario Medical Association (OMA) were being listened to by physicians and provincial governments. Physician groups feared that doctors would be held legally accountable for the actions of an NP.

There is virtually no Canadian NP claims history to date to refute those concerns. This makes it difficult to predict the frequency or cost of potential civil lawsuits, or what the maximum legal costs and damage awards will be in the future. The American experience gives us a good indication, however, and Canadian courts have consistently been far more conservative than their American counterparts in the awarding of damages.

As a nursing organization, CNPS was in a position to act to address these concerns, and to support the development of the nurse practitioner role. Changes were made in two stages to meet the perceived needs of NPs. The first change was in April 2003, when the CNPS Board of Directors increased the CNPS limit of assistance to NPs to \$2 million, having ensured that an additional \$5 million of insurance was available from CNPS Plus, a CNPS-sponsored commercial insurance plan, giving NPs access to a total of \$7 million in liability protection.

The focus of the physician groups' concern then became "tail coverage", or the availability of liability protection for an NP after the NP left a collaborative practice setting, in case a lawsuit arose after the NP's commercial insurance had expired. After an in-depth analysis of all of the relevant factors, the CNPS Board of Directors decided to increase the CNPS financial limit for NPs' professional liability protection in January 2004 to \$5 million per incident, with an annual aggregate of \$5 million. As CNPS' protection is occurrence based, i.e. tied to the nurse's membership in his or her professional association or college at the time of the incident, this gives eligible NPs \$5 million of available assistance from CNPS after a professional liability insurance policy has expired.

CNPS' Executive Director, Pat McLean, stated:

"We hope this initiative will serve to remove some of the barriers, real or perceived, to the full employment of nurse practitioners in Canada

and to the provision of the services this group of nurses has to offer the Canadian public.”

When notified of this change, Dr. John Gray, Executive Director of the Canadian Medical Protective Association (CMPA) wrote:

“...that the increase in the limit of liability protection to a maximum of \$5 million per year, plus the continued availability of occurrence-based protection has addressed all of our previous concerns.”

“...the decision of the Board of Directors of the CNPS to increase the limit of liability protection is welcome news to us, and should remove a potential deterrent to the development of collaborative working relationships between physicians and nurse practitioners.”

The NP as an employee

Currently, the majority of NPs are employees. NPs may make independent treatment decisions within the scope of their practice but there is a legal employee - employer relationship.

When an NP is an employee, the NP is like any other employee in Canada in that the legal doctrine of vicarious liability applies if the NP is sued for doing what she or he is hired to do, i.e. the NP's actions are within the scope of her or his employment. This principle is based on venerable common law that, in essence, says if the employer has the benefit of an employee's work, then the employer must bear the risk.

Almost all health care employers have a policy of professional liability insurance to cover the cost of defending their employees in a civil lawsuit, which includes membership in HIROC (Healthcare Insurance Reciprocal of Canada). In any event, (insured or not) for the typical malpractice lawsuit naming a nurse practitioner employee as a defendant, the cost of defending the claim will be borne by the NP's employer.

For employee nurse practitioners, CNPS protection remains available in the unlikely event it is needed. NPs should contact CNPS in the event of an

adverse patient incident for information on the role of CNPS in this situation.

The NP in independent practice

If a nurse is in independent practice, the legal principle of vicarious liability will not operate since the NP is not an employee. The NP will be solely responsible for ensuring she/he is adequately protected against professional practice liability.

If the NP is sued for the provision of professional nursing services, the NP may have decided to rely entirely upon the professional liability protection available through CNPS. If a contract of professional liability insurance has been purchased as well, care should be taken to abide by its terms and to report a potential claim or actual claim to the insurer while the policy is still in effect. Further assistance could also be available from CNPS if the limits of the commercial insurance policy were to prove inadequate to meet the potential damages.

CNPS does not provide protection for a business entity. If an NP's business is sued, the NP will have to rely upon the insurance, if any, purchased to fund its legal defence. Insurance coverage for a nursing business is available through CNPS Plus, the CNPS-sponsored group insurance plan primarily for nurses in independent practice operated by Aon Reed Stenhouse, an insurance broker. For more information on CNPS Plus, call 1-800-267-9364 for details or follow the links on www.cnps.ca.

Tail coverage

Changes in an NP's practice, such as retirement, may mean a change in the perceived need for professional liability insurance. If the NP has purchased commercial insurance, the coverage will expire when the policy expires if the incident has not already been reported. An NP may wish to extend the CNPS Plus coverage period to cover possible lawsuits commenced after the policy expires arising from incidents that occurred while the policy was in effect. This is called "tail" or "extended reporting" coverage. This kind of policy will extend the reporting period of a claim for up to 7 years. Premiums for a tail coverage insurance policy must be paid annually and the premium

amount would be determined by the insurance company. These premiums are usually 50% or less of the final policy year's premium.

As always, if the NP was a member in good standing of a CNPS member organization at the time of an incident, the NP would be eligible for CNPS protection, so tail coverage may not be required. If purchased, it would increase the amount of "tail" protection beyond the \$5 million available from CNPS.

CNPS

The state of nurse practitionership is still under development in Canada. Uncertainties are inevitable. If you have questions as to how CNPS protects your practice, call CNPS at 1-800-267-3390 or visit www.cnps.ca. There is a special web page for advanced practice nursing.

* NP definition: Currently there is no legislated title common to all Canadian jurisdictions to identify nurses with a larger scope of practice. For CNPS purposes, an NP is a nurse registered by a member association or college as "RN extended class (EC)", "RN extended practice (EP)", "Nurse Practitioner" or other **legislated title** designating the RN as an advanced practice nurse.

1. Ontario, Ministry of Health and Long Term Care, *Report on the Integration of Primary Health Care Nurse Practitioners into the Province of Ontario* (June 30, 2003), online:
http://www.health.gov.on.ca/english/public/pub/ministry_reports/nurseprac03/nurseprac03_mn.html

Submitted by the Canadian Nurses Protective Society, 11 June 2004.