



TRACEY TREMAYNE-LLOYD

tll@gardiner-roberts.com
T: 416-369-4336
F: 416-865-6636

AMENDMENTS TO CHILD PROTECTION LEGISLATION: NEW LEGAL ACCOUNTABILITY FOR PHYSICIANS

Originally published November 2000. Tremayne-Lloyd, Tracey, "Amendments to Child Protection Legislation, New Legal Accountability for Physicians" Canadian Family Physician – Clinical Challenge, Medicolegal File Vol. 46: 2205-6.

<http://www.cfp.ca/content/46/11/2205.full.pdf+html>

Abstract

In Ontario's past and present child protection legislation, physicians are included in the list of professionals designated to protect children and report their beliefs, suspicions, or knowledge of child abuse and neglect. Ontario's recent legislative amendments broaden the definition of child abuse and thereby widen the scope of the duty to report.

Ontario's physicians are greatly affected by passage of recent reform initiatives surrounding the *Child and Family Services Act*. This legislation renders it legally impossible for physicians to avert their eyes from potential or actual instances of child abuse. Physicians can no longer persuade themselves that patient-physician confidentiality is paramount. In fact, according to Ontario's current child protection law, the duty to disclose in instances where the welfare of vulnerable children is at issue supersedes the duty of confidentiality.

Similar child protection legislation exists throughout Canada. Courts will now likely interpret child protection legislation broadly, favouring protection and promotion of children's rights. Canadian physicians should use Ontario's legislation as a guide to broadening their diagnosis of child abuse and widening their duty to report.

LAW IN ONTARIO: BACKGROUND

In 1997, the provincial government undertook a comprehensive reform of Ontario's child protection system, specifically through amendments to the *Child and Family Services Act*. The Minister of Community and Social Services introduced Bill 6, entitled the *Child and Family Services Amendment Act (Child Welfare Reform)*, 1999 (CFSAA). (An identical bill, entitled Bill 73, introduced in October 1998, did not receive Royal Assent

Tracey Tremayne-Lloyd is a Senior Partner in the firm of Tremayne-Lloyd Partners in Toronto, Ont. The firm is dedicated to protection and promotion of the legal rights of health professionals at all levels.

Gardiner Roberts LLP

40 King Street West Suite 3100 Scotia Plaza Toronto, ON, M5H 3Y2
T: 416.865.6600 F: 416.865.6636 www.gardiner-roberts.com

before the end of the legislative term and was reintroduced as Bill 6 in April 1999.) In May 1999, the CFSAA received Royal Assent, thereby revising Ontario's child protection legislation with the intent of protecting children by creating a broader definition of abuse and a wider scope for duty to report.

PURPOSE OF THE AMENDMENTS

As a whole, child protection legislation aims to provide for the welfare and protection of Canadian children through a variety of services for both children and their families. The recent amendments attempt to address whether it is the actual drafting of the legislation or the manner in which it is applied that has led to inadequate protection of vulnerable children.

Regardless of whether this failure to protect children adequately has resulted from a lack of needed legislative reform, greater public awareness and more effective enforcement of existing law have led to an overall legislative objective to better safeguard those children "in need of protection."

REDEFINING ABUSE

The distinction between the old and new definitions of child abuse lies primarily in the phrases "to suffer abuse" and "in need of protection." A child in need of protection is one identified by a professional as a child whose best interests, protection, and well-being are not being sustained.

Although laws governing medical practitioners are similar across the country, they can vary greatly from one jurisdiction to another. Specific answers to questions cannot be given in a national publication. While the information in this article is true in general, it is intended to bring issues to your attention, not to give specific advice. You should consult a lawyer if you have specific concerns. Members of the Canadian Medical Protective Association can contact the Association at 1-800-267-6522. Readers may submit questions on medicolegal issues by fax to Dr Philip Winkelaar at (613) 725-1300. They will be considered for future Medicolegal Files.

The redefinition of abuse specifically includes "pattern of neglect" in the grounds for protection and replaces "substantial risk" with "risk that the child is likely to be harmed." The standard for reporting actual, potential, or suspected emotional (as opposed to physical) harm is lowered from "severe" to "serious."

REDEFINING DUTY TO REPORT

Under child protection legislation, professionals, specifically physicians, are under a legal duty to report to the Children's Aid Society knowledge, beliefs, and suspicions they have that children are "in need of protection."

Gardiner Roberts LLP

40 King Street West Suite 3100 Scotia Plaza Toronto, ON, M5H 3Y2
T: 416.865.6600 F: 416.865.6636 www.gardiner-roberts.com

PENALTIES FOR NOT ADHERING TO CHILD PROTECTION LEGISLATION

Professionals are liable for failure to report according to the broader definition of children in need of protection. Physicians, therefore, are legally accountable for failing to report when the information leading to suspicions or beliefs is obtained in the context of their professional duties.

Penalties upon conviction of failing to adhere to these statutory provisions include fines of not more than \$1000 or imprisonment for not more than 1 year, or both. Such penalties, however, are not necessarily the end of physicians' legal accountability. Conviction under CFSA child-protection provisions might also lead to charges of professional misconduct by the College of Physicians and Surgeons and even civil lawsuits for negligence resulting from failure to report.

EXTENDED LEGAL LIABILITY LIMITATION PERIOD

A further legal accountability issue in this area includes an extension of the limitation period for commencement of lawsuits arising from physicians' breach of their statutory duty. Legislation governing regulation of health professions requires that any such negligence action be commenced against professionals within 1 year of the time physicians knew or ought to have known the facts upon which the lawsuit is based. Despite this, this limitation period is relatively meaningless in a child-protection context.

Given that the person harmed by breach of this statutory obligation is likely to be a child, the limitation period does not actually begin until that child has reached the age of 18 years. Consequently, a physician's potential liability and exposure could extend for years.

CONCERN FOR PHYSICIANS

Recent amendments to child protection legislation might lower the bar on duty to report to such an extent that physicians are placed in a compromising position of legal ambiguity and practical uncertainty. Uncertainty stems primarily from the broadened grounds for identifying children "in need of protection." The expansive nature of the grounds determining "in need of protection" creates an almost unremitting duty to report.

Only with data from future reports, studies, and expert panels will we be able to determine whether the legislative goal of increasing the promptness, frequency, and circumstances for reporting abuse and neglect has been met. Physicians' response will reflect whether the broad definitions and requirements of this legislation are practical and effective.

Gardiner Roberts LLP

40 King Street West Suite 3100 Scotia Plaza Toronto, ON, M5H 3Y2
T: 416.865.6600 F: 416.865.6636 www.gardiner-roberts.com

RECOMMENDATIONS

Unless and until relevant court cases and rulings successfully challenge the new legislative provisions, physicians should observe the following three recommendations:

1. Keep the purpose of the legislation in mind and ensure you promote the best interests, protection, and well-being of children.
2. Avoid liability for failure to report by reporting any suspicions, beliefs, and knowledge of child abuse or neglect as soon as possible.
3. Determination of reportable behaviour and scenarios must take into account the newly amended definition of abuse.

Such determination should consider:

- whether children are suffering, or at risk of suffering, a pattern of neglect;
- whether children are being, or at risk of being, physically harmed;
- whether children are suffering, or at risk of suffering, from serious (though not necessarily severe) emotional harm; and
- whether children are “in need of protection.”

CONCLUSION

Broadly speaking, the CFSAA definition of abuse includes behaviour at risk of occurring as well as behaviour that is actually occurring; behaviour that is serious rather than severe; emotional or physical behaviour; and (unlike the *Child and Family Services Act*) consideration of a pattern of neglect.

While these new provisions could seem ambiguous, vague, or difficult to interpret, they breathe new life into child protection laws. In light of ever-increasing public pressure for professional accountability, these child protection provisions will be jealously guarded and vigorously enforced.

Ignorance is not an excuse for not adhering to the law, even if such ignorance results from lack of knowledge or comprehension. Physicians who ignore or who fail to respond to the child protection laws do so at their own personal and professional peril. As health professionals charged with a statutory obligation to safeguard children “in need of protection,” physicians should seek guidance if they have doubts or confusion as to their legal obligations and liability for child protection.

Acknowledgment

I thank Vanessa A. Tanner, a student at Osgoode Hall Law School in Toronto, Ont., for her contribution to this article.

Gardiner Roberts LLP

40 King Street West Suite 3100 Scotia Plaza Toronto, ON, M5H 3Y2
T: 416.865.6600 F: 416.865.6636 www.gardiner-roberts.com