

TELEHEALTH: PROCEED WITH CAUTION

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With the approach of the 21st century the prospects for using telecommunications in the practice of medicine loom large. While all physicians already rely on telephones, faxes and computers, the opportunities for growth in the next few years will create a new paradigm for medical practitioners. Along with the undeniable advantages will come the inevitable liability concerns and realities.

To date there has been little jurisprudence in Canada related to the use of telecommunications in health care. In the meantime, the CMPA has identified some of the medico-legal issues and provides this broad framework as a “heads up” for physicians.

Definition

The Advisory Council on Health Info-Structure for Canada defines telehealth as, “The use of communications and information technology to deliver health and health care services and information over large and small distances.” The definition is very broad and covers a variety of technologies in use today as well as those not yet conceived or developed.

Scope

The American Council on Medical Education and the American Council on Medical Services have identified four levels of telehealth interventions:

- LEVEL I** Involves activities such as the transfer of medical records, faxes and e-mail over analogue telephone lines.
- LEVEL II** Refers to the transmission of x-rays and other images and the use of telemetry and still video (e.g., tele-radiology and tele-pathology).
- LEVEL III** Involves interactive video, satellite and microwave transmission and images (e.g., teleconsultation).
- LEVEL IV** Includes experimental applications such as smart gloves that would allow palpation in surgery guided by a specialist and performed with the help of robotics.

While this categorization is rather artificial, it does demonstrate the wide spectrum of telehealth applications.

Jurisprudence

At the time of writing there have been no reported court decisions in Canada or the United States involving any Level II or higher telehealth intervention. Clearly, Level I interventions have been common in medicine for many years and have been the basis of litigation.

In tort law a patient who alleges having suffered an injury in a medical context is required to convince the court that the defendant health practitioner was negligent. The finding of negligence requires four elements:

- DUTY OF CARE** Does the defendant owe a duty of care to the plaintiff?
- BREACH OF DUTY** Has the defendant fallen below the standard of a normal prudent practitioner of the same experience and standing?
- HARM OR INJURY** Has the plaintiff suffered any harm or injury?
- CAUSATION** Was the defendant's conduct the actual or legal cause of the plaintiff's injury?

Duty of care

A duty of care has been found by Canadian courts in telephone conversations. In fact, in at least one British Columbia case the court found the physician liable despite the fact that the physician never met, spoke to or examined the patient.

Telehealth stretches the boundary of the traditionally-understood physician-patient relationship, which is based on seeing, examining and treating patients. The legal concept of the physician-patient relationship is directed by several contextual factors. Two hallmarks for its creation are:

- (1) the provision, passively or actively, of information from a patient to the physician; and
- (2) the provision of or understanding to provide care or advice by the physician.

With telehealth using real-time or near real-time interactive technologies, it is not difficult to see how the courts could consider a duty of care to have been created under these circumstances.

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Standard of care

It will be the burden of the judge or jury, whichever is in the role of weighing the evidence, to carefully consider the facts of each case and determine whether or not there was a breach in the standard of care. While the "reasonable practitioner standard" will apply in these cases, it may be more difficult to establish in the relatively new context of telehealth. This lack of existing standards is a source of much legal uncertainty for both practitioners of medicine and legal counsel.

Professional medical organizations such as the Federation of Medical Licensing Authorities of Canada have begun considering the implications of telehealth. Many other organizations such as the Royal College of Physicians and Surgeons of Canada, the Canadian Medical Association, the Medical Council of Canada, the College of Family Physicians of Canada and others will be responsible for developing telehealth policy that will help the courts establish the requisite standard of care. In many instances it will be the ultimate responsibility of Parliament and provincial and territorial legislatures to “codify” these policies into binding legal principles. Until then there will remain some uncertainty regarding the standard of care expected of physicians involved in telehealth.

Can liability be found without a physician-patient relationship?

Increasingly, physicians are using electronic formats to display medical information, often through Internet websites. It is unlikely that a court in Canada would find a physician-patient relationship exists between the physician providing the information and the person who views it on a website, absent any other compelling reasons to believe that the physician maintaining the website has done no more than conveniently summarize information from a variety of sources. This assumes there is no interactive exchange of information and advice between the physician and patient via the website.

Teleconsultations

Liability for injury arising from advice provided in words proffered is known as the tort of negligent misstatement. This could arise through advice provided to another physician who has been consulted via telehealth. Of course the courts would still be required to differentiate between negligent advice and an error of judgment. Whether the consultation is with a patient or with another physician, should it become necessary to defend the physician against an allegation of negligence, the benefit of having accurate documentation of the information received and the advice proffered cannot be over-emphasized. Teleconsultations between primary care physicians and specialists have the benefit of providing useful information in a timely fashion but can also be the basis for litigation. Physicians should be careful to provide reasonable advice and should not believe that because they have not seen the patient in person they would be insulated from litigation.

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Vicarious liability

Physicians are vicariously responsible for any negligent act or omission of their employees that may cause prejudice to a patient. This would apply to employees hired to operate and maintain telehealth equipment. Because of the inherent complexity of this equipment it may be difficult for physicians to effectively supervise the work of technicians. Because of the risk of exposure to liability, physicians may wish to ensure that they have well-established working protocols and qualified technical staff doing the work. Independent verifications of the work and protocols would be helpful should medico-legal difficulties require a physician to defend the technical aspects of the telehealth intervention.

Telehealth holds the promise for physicians and patients to interact over great distances and access information not otherwise available. Telehealth is in rapid evolution and the liability issues will inevitably evolve with it. Involved physicians should keep themselves aware of new developments.

Physicians thinking about practising telehealth should review the following considerations before becoming involved.

Checklist ✓

- Carefully select which patients should or can be treated via telehealth. Technical limitations and clinical circumstances may make a face-to-face consultation preferable.
- In circumstances where telehealth interventions are available, in time it may be considered a breach of the standard of care not to use it when face-to-face consultations are not available.
- If the consultation crosses provincial, territorial or national boundaries, verify whether or not the licensing authorities require licensure in more than one jurisdiction. For telehealth services that cross national boundaries, Canadian physicians should be aware they may incur liability in other countries for which the CMPA will not provide assistance.
- Prior to participating in any proposed telehealth project, satisfy yourself as to the quality of health care that will be offered.
- Determine who will be responsible and liable for the maintenance, training and operation of technical staff and equipment.
- Obtain informed consent from patients for their participation in and use of telehealth interventions.
- In the absence of consent or in the circumstance of technical problems, arrangements should be in place to allow for the provision of the required care by alternate means.
- What records will be kept of the intervention? Where will they be kept and for how long? How will the records be maintained in confidence and how will treating physicians and patients gain access to them should it be requested or required?
- All electronic links must be made in such a way as to reasonably ensure the medical information will not be intercepted by someone for which it was not intended.
- Physicians should ensure that the scope of their involvement in a patient's care is clearly defined. What responsibility, if any, will the physician have for the technical aspects of the telehealth intervention?
- Ensure that only approved and reliable technology is used at both ends of the electronic link.
- Follow the recommendations of professional associations regarding telehealth. Keep abreast of new technological developments.



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