



RISK MANAGEMENT

Professional liability

In addition to being the subject of a patient complaint, a dentist who fails to obtain a patient's informed consent to treatment or to otherwise provide care in accordance with the standards of the profession may be held civilly liable.

Patients may turn to the courts for compensation. In Ontario, the legal system applicable to such situations is called the common law of tort. Common law is judge-made law and a tort is a civil wrong.

Torts may be intentional or unintentional. Conducting a procedure with no patient consent could be prosecuted as an intentional battery and could also be criminally actionable as an assault. Accidentally performing the wrong intervention, providing care without fully informing the patient of its risks, benefits and alternatives and failing to meet the standard of care in executing treatment all fall under the law of negligence as an unintentional tort.

Because of the deliberate nature of the conduct giving rise to an action for battery, a patient does not have to prove damage in order to be entitled to receive compensation for treatment performed with no authorization at all. Negligence occurs as a result of inadvertence and is considered less morally blameworthy than intentional wrongdoing. Therefore, a patient seeking damages for negligent dental care must show not only that

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the treating practitioner breached the applicable standard of care, but also that the patient suffered injury as a result (referred to as causation).

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In order to prevail in an action for alleged failure to obtain informed consent, the patient must show that the health-care provider did not disclose all of the information required to make a fully informed treatment choice and that, had that information been provided,



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a non-negligent complication would have been avoided. Expert evidence is usually required to determine what the patient should have been told about the procedure and whether there were any alternatives that would have obviated or significantly mitigated the risk that materialized.

Generally speaking, the causation issue is resolved by considering whether a reasonable person in the patient's position would have declined the treatment with full disclosure. Obviously, if the therapy was necessary and/or other options carried the same, similar or heightened risks, causation will be hard to establish, and the action will not likely succeed despite the breach of duty.

Negligent treatment covers all other aspects of a health-care intervention, including patient selection, treatment planning, execution and after-care. In an action for alleged dental negligence, a patient must usually have as evidence an opinion from an expert outlining the relevant standard of care and stating that the defendant breached that standard. The patient must also convince the court that, but for the defendant's wrongdoing, injury would not have occurred. Failure to prove any of these elements is fatal to the claim for compensation.

Patients may also commence legal proceedings against dentists for breach of contract. The allegations in such cases often overlap with negligence claims,

in which case the analysis of liability is similar. The outcome of a contract case involving only financial arrangements, not quality of care, turns on proof of the terms of the agreement rather than expert evidence.

Most legal actions for alleged defects in treatment against Ontario dentists are withdrawn without payment, some are settled and few go to trial. Under the Regulated Health Professions Act, 1991, any regulated health professional in Ontario against whom a finding of professional negligence or malpractice has been made must report the finding to the registrar of his or her college. This would include a decision by a trial judge that a dentist was negligent in treating a patient but not a judgment against the dentist in a purely financial dispute.

Since March 2014, all regulated health professionals in Ontario are legally required to have malpractice protection. RCDSO has been providing that protection to all of its members since 1973 through its Professional Liability Program (PLP). 📌

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PLP E-BROCHURE SERIES

This is one of a series of e-brochures developed by staff in the Professional Liability Program. You can find copies of the brochures developed so far on the College website at **www.rcdso.org** in the Member Resource Centre.