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Regulatory Jurisdiction

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Regulatory Jurisdiction

(This note is not intended to provide legal advice.)

In this note, we shall briefly review two potential problem areas with respect to jurisdiction for health care professionals practicing telemedicine. The first is regulatory jurisdiction – that is questions regarding whether a practitioner is licensed to practice within a jurisdiction -- and the second is jurisdiction vis-à-vis tortious conduct.

Regulatory Jurisdiction

Telemedicine holds the promise of allowing patients in even the most remote location receive medical care hitherto only available in major metropolitan centres. However, the current regulatory system acts as a barrier to physicians providing treatment to patients outside of the physician's jurisdiction.

Most healthcare providers belong to self-regulating professional bodies. These professional bodies control the terms of access into the profession and have authority over the practitioner. Licensing bodies require that practitioners who offer services in their jurisdiction be duly licensed by that body so that they might exercise control over their members. Failure to meet the standards or to abide by the rules can result in a practitioner being sanctioned by their governing body which have the power to recind their license to practice. Licensing is a provincial matter and so a physician licensed to practice in Nova Scotia can practice there but not in Manitoba and the Nova Scotia College of Physicians and Surgeons has authority over a Halifax physician but not one in Winnipeg. If a Nova Scotia physician practices in Manitoba, they are, for all intents and purposes, practicing medicine without a license.

In a telemedicine context, the physician and the patient may not be in the same jurisdiction and so the question is whether the treatment is deemed to take place in the patient's or the doctor's jurisdiction. If it is the patient's, then a doctor who provides services to a patient may be practicing medicine without a license. If it is the doctor's jurisdiction, then the doctor does not need to meet any further licensing requirements.

In the United States, the U.S. Health Care Financing Administration stated:

> In our view, the use of telecommunications to furnish a medical service effectively transports the patient to the consultant (a concept analogous to the traditional delivery of health care, in which the patient travels to the consultant's office). Therefore, we believe that the site of service for a teleconsultation is the location of the practitioner providing the consultation.[1]

It should be noted, however, that this statement was made with respect to reimbursement of services and considerations of locality for pricing under Medicare. According Pong and Hogenbirk, the "Children's Treatment Network of Atlantic Canada also treats the physician's location as the place where the medical act occurs and, therefore, the patient is considered to be 'transported electronically' to the physician."[2]

Generally, however, this approach has not been followed. The Federation of Medical Regulatory Boards of Canada, the national association of provincial and territorial medical regulatory authorities, recommends that licensing boards adopt specific guidelines to address telemedicine. Furthermore,

> The Federation of Medical Regulatory Authorities of Canada recommends to regulatory/licensing authorities that they adopt the position that when a physician

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[1] U.S. Health Care Financing Administration, "Medicare Program; Payment for Teleconsultations in Rural Health Professional Shortage Areas", 1998, online: http://www.atmeda.org/news/ruralregtxt.html

[2] R.W. Pong & J.C. Hogenbirk, "Licensing Physicians for Telehealth Practice: Issues and Policy Options" (1999) 8:1 Health L. Rev. 3; online QL

> provides a medical service by means of telemedicine, the service is deemed to occur at the patient's location.[3]

Locating the service at the patient's location, then, requires that healthcare providers be licensed in the patient's jurisdiction. This recommendation has been followed by a number of Colleges across the country. The Nova Scotia College of Physicians and Surgeons have released guidelines which, among other things state:

> Other jurisdictions may have different approaches toward complaints about telemedicine. The College recommends that physicians who are considering providing telemedicine services to patients in other jurisdictions contact the appropriate medical licensing authorities in those jurisdictions regarding possible additional licensing requirements.[4]

A similar provision can be found in the Manitoba guidelines.[5]

> The Federation of Medical Regulatory Boards of Canada also recommends that
>
> regulatory/licensing authorities that they define professional misconduct in their jurisdiction as including practice by telemedicine by any member in respect of patients located in the jurisdiction of any other medical regulatory/licensing authority in Canada in circumstances where the member has not obtained the necessary registration licence or authority to do so from the medical regulatory/licensing authority in whose jurisdiction the patient is located at the time such service is rendered.[6]

This recommendation has been followed in New Brunswick where the College has issued regulations that make practicing in another jurisdiction without a license in that jurisdiction a misconduct in New Brunswick: Their regulations state:

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[3] The Federation of Medical Regulatory Authorities of Canada, Policy Statements and Guidelines: Telemedicine, June 1999.
[4] Nova Scotia College of Physicians and Surgeon, Guidelines for the Provision of Telemedicine Services, 2001.
[5] College of Physicians and Surgeons of Manitoba, Guidelines and Statements: Telemedicine, 2002.
[6] The Federation of Medical Regulatory Authorities of Canada, Policy Statements and Guidelines: Telemedicine, June 1999.

> [P]ractising medicine in any manner or by any means in another jurisdiction without being licensed or otherwise authorized to do so by the appropriate medical regulatory authority for that jurisdiction.[7]

In Canada, the requirements to obtain a license are very similar but the process to obtain a license for another province could be costly and cumbersome. At present there are no reciprocity agreements amongst provinces to permit licenses to be portable and thus it seems necessary for physicians to obtain a license for all jurisdictions in which they might be offering services.

Clearly, at some point, licensing authorities will have to address this issue squarely. Possible options identified by Pook and Hogenbirk include retaining the current system where multiple license would be required, a national license which would first require that a practitioner of teleheath meet the requirements of a provincial body, a specific telehealth license, reciprocal agreements between the provinces, license endorsements and so forth.

Jurisdiction for a malpractice suit

If a practitioner from different jurisdiction was involved with a patient's treatment via technology and acts in a negligent manner, the fact that the practitioner was not licensed in the patient's jurisdiction would not shield them from potential liability. Thus, as far as tort liability is concerned, the licensing jurisdiction is somewhat irrelevant. What is important for liability purposes is determining where the tort is found to occur. That is, if a Nova Scotia physician was involved in a telehealth consultation with a patient in

[7] New Brunswick College of Physicians and Surgeons, New Brunswick Regulation 9: Professional Misconduct.

Manitoba and provided negligent advice, did the harm occur in Manitoba where the injury was felt by the patient or in Nova Scotia where the negligent advice was given. This is not a mere idle concern as there are various rules throughout the provinces governing when suits have to be brought or what damages can be claimed for. As well, with respect to medical treatment, there is a body of case law that says that standard of care is location dependent and so a physician in rural Nova Scotia might not be held to the same standard as a physician in Toronto.

Courts will take jurisdiction over a case when there is a real and substantial connection between the jurisdiction and the people involved or the subject matter of the dispute. With the Manitoba patient and the Nova Scotia doctor, the patient could argue that Manitoba is the correct locale for the suit because that is where the patient resides, that is where the patient received treatment, that is where the majority of the witnesses for the patient are and so forth. The physician could argue that Nova Scotia is the proper venue because the negligence occurred in N.S., that is where the witnesses for the physician is, that they ought to be assessed against a standard of care appropriate to Nova Scotia and so forth. Alternatively, if Nova Scotia has a longer limitation period, the patient may wish to bring suit in Nova Scotia. If a dispute arises as to where the suit should be brought, the challenging party has to argue that another locality has a more substantial nexis to the matters at issue.

Generally, courts in Canada have tended to find that the patient's jurisdiction is where the case ought to be heard. This is so even where the patient may wish to bring suit in another jurisdiction.