Discovery of the Health Region

By Craig Gillespie and Bottom Line Research[1]

When plaintiff's counsel is in examination for discoveries in a medical malpractice case, issues frequently arise as to the scope of the questions that can be put to the Health Region. Various privileges are available under statutes such as the *Alberta Evidence Act* and the *Hospitals Act*. There are also privileges at common law with respect to specific questions related to an investigation of an incident, the results of the investigation and the recommendations flowing from the incident, for example. This article will take a look at these privileges.

In summary, section 9 of the *Alberta Evidence Act*, R.S.A. 2000, c. A-18 creates an absolute prohibition against disclosure records of the Quality Assurance Committee of a hospital. The Quality Assurance Committee is a committee that has as its primary purpose the carrying out of quality assurance activities. Quality assurance activities are defined as planned or systematic activities the purpose of which is to study, assess or evaluate the provision of health services with a view to the continual improvement of the quality of health care or health services. The case law has interpreted the investigation and review of hospital incidents to be within the mandate of quality assurance committees.

The *Quality Assurance Committee Regulation*, Alta. Reg. 294/2003 designates the Physicians Performance Committee established by the College of Physicians and Surgeons of Alberta as a quality assurance committee for the purpose of section 9 of the *Evidence Act*. Thus, the prohibition against production applies equally to the records of the Physicians Performance Committee of the College.

Section 9 of the *Evidence Act* specifically states that a quality assurance committee excludes a committee "whose purpose, under legislation governing the profession or occupation, is to review the practice of or to deal with complaints respecting the conduct of a person practising a profession or occupation."

Thus it appears that whether the investigations of the College are covered by the prohibition against disclosure depends on which College committee undertook the investigation.

With respect to discussions in medical rounds or with colleagues, the exemption would not apply as it is very specific to the function and operation of the quality assurance committee.

Remedial measures taken by the hospital after the fact are relevant on examination for discovery, however. In *Algoma Central Railway v. Herb Fraser& Assoc.* (1988), 66 O.R. (2d) 330, 1988 CarswellOnt 535 (Ont. Div. Ct.) the court held that the defendant must answer questions about fire safety practices and procedures adopted and enforced after the incident leading to the action, and *Lucko v. Unruh* (1995), 104 Man. R. (2d) 1, 1995 CarswellMan 535 (Q.B.) came to the same conclusion in a medical malpractice case.

In more detail then, section 9 of the *Alberta Evidence Act*, R.S.A. 2000, c. A-18 explicitly exempts quality assurance records from disclosure. The section reads as follows:

> "9**(1)** In this section,
>
> (a) "quality assurance activity" means a planned or systematic activity the purpose of which is to study, assess or evaluate the provision of health services with a view to the continual improvement of
> (i) the quality of health care or health services, or
> (ii) the level of skill, knowledge and competence of health service providers;
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> (b) "quality assurance committee" means a committee, commission, council or other body **that has as its primary purpose the carrying out of quality assurance activities** and that is
> (i) appointed by
> (A) a regional health authority,
> (B) the Alberta Cancer Board,
> (C) the Alberta Mental Health Board,
> (D) **the board of an approved hospital under the *Hospitals Act***, or
> (E) the operator of a nursing home,
> (ii) established by or under another enactment of Alberta, or
> (iii) **designated by an order of the Minister of Health and Wellness as a quality assurance committee for the purposes of this section**,

but does not include a committee whose purpose, under legislation governing a profession or occupation, is to review the practice of or to deal with complaints respecting the conduct of a person practising a profession or occupation;

(c) "quality assurance record" means a record of information in any form that is created or received by or for a quality assurance committee in the course of or for the purpose of its carrying out quality assurance activities, and includes books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner, but does not include software or any mechanism that produces records.

(2) A witness in an action, whether a party to it or not,
(a) **is not liable to be asked, and shall not be permitted to answer, any question as to any proceedings before a quality assurance committee**, and
(b) **is not liable to be asked to produce and shall not be permitted to produce any quality assurance record in that person's or the committee's possession or under that person's or the committee's control.**

(3) Subsection (2) **does not apply to original medical and hospital records pertaining to a patient.**

(4) Notwithstanding that a witness in an action
(a) is or has been a member of,
(b) has participated in the activities of,
(c) has made a report, statement, memorandum or recommendation to, or
(d) has provided information to,
a quality assurance committee, the witness is not, subject to subsection (2), excused from answering any question or producing any document that the witness is otherwise bound to answer or produce.

(5) Neither
(a) the disclosure of any information or of any document or anything contained in a document, or the submission of any report, statement, memorandum or recommendation, to a quality assurance committee for the purpose of its quality assurance activities,
nor
(b) the disclosure of any information, or of any document or anything contained in a document, that arises out of the quality assurance activities of a quality assurance committee,
creates any liability on the part of the person making the disclosure or submission." [Emphasis added.]

The *Evidence Act* makes it quite clear that there is an absolute prohibition on disclosure of the investigative reports generated by a quality assurance committee. The case law interpreting this provision and similar provisions elsewhere suggests that the protection extends to the records resulting from investigations in the wake of an incident.

In *Goad (Guardian ad litem of) v. Cavanaugh* (1992), 3 Alta. L.R. (3d) 18, 1992 CarswellAlta 72 (Q.B.) the plaintiffs sought production of the minutes of the Medical Advisory Committee to which the defendant doctor had provided a summary of events. Trussler J. refused disclosure concluding that s. 9(1)(b) of the *Evidence Act* contains an outright prohibition regarding the production of such documents:

> "The legislature has seen fit to pass legislation in the form of the *Alberta Evidence Act* and to include therein s. 9. In doing so the legislature has obviously, as elected representatives, made a decision of public policy. This section may be restrictive in an age of fuller disclosure, but the section does exist and it is up to the legislature to make any amendments to it. **The object of the section is obviously to promote full discussion by the groups mentioned therein with the purpose of creating an atmosphere in which matters can be investigated and improvements can be made.**
>
> The documents in question fit within s. 9, particularly within s. 9(1)(*b*). **Section 9(1)(*b*) creates a prohibition against the production of those documents. It is, therefore, not a question of whether or not there is a privilege with respect to these documents, it is a question of an outright prohibition.**
>
> **As a result the hospital and the doctors are prohibited by legislation from producing the documents in question.**" [Emphasis added.] (at para. 7-9)

In *Sinclair v. March* (2000), 78 B.C.L.R. (3d) 218, 2000 CarswellBC 1677, 2000 BCCA 459 the B.C. Court of Appeal considered the extent of protection from disclosure of evidence relating to the work of hospital committees provided by s. 51 of the B.C. *Evidence Act.* The court noted that the purpose of the protection is "to protect efforts made by hospitals to ensure that high standards of patient care and professional competency and ethics are maintained, by ensuring confidentiality for documents and proceedings of committees entrusted with this task." (at para. 23)

The court later commented that "the legislature intended to protect this area of hospital activity by preventing access by litigants. Rather than striking a balance of interest, the Legislature made a clear choice in favour of one interest, hospital confidentiality." (at para. 26)

The appellate court concluded that the legislation provided a clear prohibition against disclosure and that an investigation of the practice and procedure of a particular doctor ultimately related to a quality of care issue protected by the legislation.

See also *Lancaster v. Minnaar* (2006), 288 Sask. R. 31, 2006 CarswellSask 557, 2006 SKQB 380 which considers a similar provision in the Saskatchewan *Evidence Act*.

And in *Steep (Litigation Guardian of) v. Scott*, 2002 CarswellOnt 4061 Master Egan noted that Ontario was the only jurisdiction in which quality assurance reports did not have legislative protection. The Master held that common law privilege applied to the documents based on the four Wigmore criteria.

Thus the Health Region enjoys fairly extensive privileges which can limit the scope of discovery of plaintiff's counsel.

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