



APPENDIX C

Nurse Practitioner

Professional Practice and Liability Issues

March 2005

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Executive summary

This report summarizes the main features of professional practice and liability protection programs offered to nurse practitioners (NPs) in Canada. The report then focuses on these programs from the perspective of the NP in differing work environments. This is followed by a discussion of several significant issues facing NPs in collaborative practice. The report concludes with several recommendations for NPs to shape the future for these issues.

Introduction

When a nurse practitioner¹ (“NP”) receives a licence to practice, she or he² is presented with a new horizon of opportunities. As the NP embarks on her advanced practice nursing career, there are three principal work environments from which she must choose, namely:

1. a hospital, health region or health care agency environment where NPs are *employees* of the institution;
2. a private or community clinic where NPs are *employees*³ of the clinic and work along side one or more physicians; or
3. practising as an *independent contractor* in the community or in collaboration with health care professionals in a clinic or health care institution.

It is for the second environment that the Ontario government has announced funding of \$30 million each year to support 400 nurse practitioner positions.⁴ Nevertheless, it is the third environment, namely the NP working as an independent contractor that often

¹ The title nurse practitioner (NP) varies across Canada. This report is written for NPs: some of the statements in this report may or may not be applicable to advance practice nurses, RNs or other health care providers.

² This report will hereinafter refer to NPs as members of the dominant gender group, recognizing of course that there are NPs of both genders.

³ The test to determine if someone is an *employee* is determined by the degree of control that is exercised over that person’s work. Issues such as regularity of salary, policies and procedures in the workplace, written agreements, restrictions on other work, reporting relationships, and discipline would be factors in determining employee status.

⁴ Ontario Ministry of Health and Long-Term Care, Background - The McGuinty government's commitment to nursing. February 14, 2005 CNW news release. Retrieved March 31, 2005, from http://ogov.newswire.ca/ontario/GPOE/2005/02/14/c4100.html?lmatch=&lang=_e.html

receives more attention because this role is perceived to overlap, to some extent, with the role of a family medical practitioner.

FAQ: When an NP is working as an “independent contractor” does it mean that the NP is working in isolation and not collaboratively?

A: No. The term “independent contractor” is a legal term which distinguishes whether or not someone is an employee. NPs who work exclusively as “independent contractors” will still work collaboratively with other health care providers. Being an “independent contractor” should not be construed to mean that the NP is working in isolation from other health care providers. Many RNs have worked for years as independent contractors.

After the NP chooses the work environment in which to commence her practice, she must pay attention to certain issues surrounding her practice, namely professional practice and liability protection issues. Since the NP is not trained in legal, liability and insurance matters, these subjects can be very confusing. This report intends to clarify the different types of defense protection, liability protection and insurance that is available to the NP.

The report will show that for NPs in Canada there are very few gaps in liability protection. In fact, at times, there is duplication in liability protection for the NP which suggests inefficiencies. Ultimately the NP requires some kind of financial compensation (either salary increases or funding increases) to afford appropriate protection and indirectly that becomes a health care cost. If there is duplication of liability protection, then our health care dollars are better spent rationalizing the protection available or ensuring that duplication is not being forced upon the NP.

This report is divided into five parts. Part I discusses NP professional practice and liability issues in very introductory terms. Part II identifies and distinguishes legal assistance plans, liability protective associations and societies and liability insurance. Part III addresses these issues in the context of the three NP working environments referred to above. Part IV focuses on some of the key current issues and debates

concerning liability protection for NPs in collaborative practice. Part V provides some conclusions and recommended next steps for NPs. Within each part there are some frequently asked questions (FAQs) to focus this report for the NP.

The methodology used to develop this report consisted of personal conversations with Canadian Nurses Protective Society (CNPS), Healthcare Insurance Reciprocal of Canada (HIROC), leading RN defence counsel, administrators of NP Liability Protection Plans, and administrators of Legal Assistance Plans. Additional resources included a review of program and policy descriptions, existing collaboration agreements between NPs and physicians, independent contractor contracts between NPs and provincial ministries of health, employment agreements between NPs and physicians and NPs and hospitals, and Canadian Bar Association material from several sessions concerning medical malpractice. The author is a lawyer representing NPs and has been directly involved in negotiations between a provincial government and provincial NP association, negotiations of the terms and conditions of employment for NPs in 140 hospitals, as well as negotiations of several collaboration and employment agreements between individual NPs and physicians.

Part I – Nurse practitioner – professional practice and liability issues – a primer

NP liability, in legal terms, means the NP's legal responsibility for her acts or her omissions in her professional practice. A nurse practitioner can be held responsible for her practice in a variety of forums. Even if the NP's practice is not negligent, she can become entangled in any number of proceedings as a party or a witness with possible liability exposure and thereby incur substantial legal fees defending her practice and reputation.

Some of the proceedings that can affect her include:

1. a professional discipline complaint to the NP's regulatory body;
2. a criminal investigation or prosecution;

3. a coroner's inquest; or
4. a civil claim for compensation in the form of damages.

Of course, the mere possibility of these proceedings should underscore that the NP should practise in a fashion to avoid these proceedings. The manner in which the NP manages her practice to avoid these liability pitfalls will always be a question of balance and there are numerous resources and articles available to the NP that will describe the balance to be struck in a particular area of practice. The NP's regulatory body is a good source for information regarding safe practice and the Canadian Nurses Protective Society is a good resource for risk management assistance.

Nevertheless, the NP's practice would become distorted if she were expected to personally assume every possible risk each time she practises her profession. For example, if all of the NP's family assets were placed at risk every time the health of one of her patients deteriorates, then it is likely that this would negatively affect the NP's ability to perform her best. In order to alleviate her personal financial risk, she must have adequate professional practice and liability protection.

FAQ: I worked as an RN for 20 years and never was concerned about professional practice and liability issues. Now that I am an NP, why should I be concerned?

A: When you worked as an RN, you were probably working as an employee for a hospital, health region or health care agency. In Canada, when an employee is found liable for a professional act done in the course of her employment, her employer is also held liable. This is called "vicarious liability." Most employers will carry insurance for their professional staff. As long as you were working within the capacity of your employment and within your scope of practice, your employer was vicariously liable for your practice. Furthermore, for professional discipline complaints, criminal charges or inquests, it was possible that you had membership in a legal assistance program which protected you against certain legal expenses.

FAQ: For an NP, do additional authorized acts of diagnosis, treatment and prescribing change the notion of vicarious liability?

A: No; however, where the NP has increased responsibility in these areas, her professional and legal accountability is increased.

FAQ: If I work as an employee, can I assume that my employer has sufficient liability insurance coverage for me? Why would I ever need external liability protection or liability insurance?

A: Hospitals and other health care institutions generally have adequate insurance that covers their employees. This, however, does not protect the NP against professional discipline complaints, criminal prosecution, or circumstances where she may be in conflict with the employer.

FAQ: If my employer's insurance limits are insufficient, can a claimant come after me personally?

A: If the claim exceeds the limits of the employer's insurance, then the liability obligation will still be shouldered by the employer outside of its policy; however, if your employer does not have sufficient insurance and the employer is not substantial enough (i.e., a small community clinic) to withstand a sizable claim, the NP or any health care provider could be exposed to liability and should have liability protection and/or additional liability insurance to protect her. Since some employers may not have adequate insurance coverage, NPs should obtain written confirmation about their coverage. Assumptions can put NPs at risk.

FAQ: If I carry on a safe practice, why do I need liability protection or insurance? Why can't I simply assume the risk myself?

A: Liability protection and insurance has a wider purpose than simply protecting the NP from possible financial ruin. Liability protection is also there to protect the general public and the reputation of the profession. If a liability claim resulting from a negligent act by the NP is not satisfied, then the legal system's objective of compensating the patient for the loss suffered would not be met. Additionally, even NPs who carry on a

safe practice may be subject to a lawsuit, professional discipline complaint or a criminal charge. Defending against such allegations is very costly.

Part II – Legal assistance programs, liability protective associations and societies, and liability insurance

Where there is potential liability for an event, there are legal assistance programs, liability protective societies and associations and finally, liability insurance policies which are available to the NP. Each one has its own features and there is, at times, overlapping protection for the NP. The distinctions of each of these are important for the NP to understand.

This report starts with descriptions of the most basic programs which provide legal assistance, but no liability protection, before describing the more comprehensive programs which provide liability protection. It is liability protection which is subject to much of the current debate described in Part IV of this report.

A. Legal assistance programs

When an NP becomes involved in one of the aforementioned proceedings or even some other proceedings, often her first expenses are legal expenses. In fact, legal expenses are frequently the only significant expense, particularly if the NP is exonerated or if the proceeding is other than a civil action.

The goal of a legal assistance program is to provide financial assistance so the NP can have access to legal representation for certain proceedings. The program may provide legal advice or refer the NP to an external legal adviser. The programs may have a full-time lawyer who assists with certain kinds of proceedings or a roster of lawyers to whom the NP may be referred. The program may operate by direct payment to the lawyer at a fixed hourly rate or an indemnification of some of the NP's legal costs within a pre-set scale.

Some examples of existing legal assistance programs are as follows.

LAP – *Legal Assistance Program*⁵ was started in 1986 by the Registered Nurses’ Association of Ontario (RNAO). RNAO members are eligible at a cost of \$60/year and the program now has close to 10,000 members. The program is administered under pre-established rules or protocol and the NP can assume that her claim will be assessed reasonably. Up to \$10,000 can be authorized for legal fees which an NP may incur as a result of an issue arising during the time she joined the program. The kind of proceedings that are covered by LAP are appearances before the College of Nurses of Ontario (CNO) as a result of a letter, report or investigation, appearance as a witness in an inquest or inquiry resulting from a job incident, appearance under a subpoena as a witness in matters under the *Nursing Act*, witness in a court proceeding regarding an incident relating to the profession of nursing, sexual harassment, and other individual employment-related matters. The fact that LAP has provided financial assistance to more than 1,000 members confirms that it serves as valuable protection for the NP.

LEAP – *Legal Expense Assistance Plan* was established in 1984 by the Association of Registered Nurses of Newfoundland and Labrador (ARNNL) to provide financial assistance for legal advice in respect to professional discipline before the ARNNL. This plan is somewhat different from other LEAP plans described below because it is administered by the members’ regulatory body. It does not provide assistance for any other kind of proceeding.

DEAP – *Disciplinary Expense Assistance Plan* is administered by the *Newfoundland and Labrador Nurses’ Union* (NLNU) to assist its members pay certain expenses for professional discipline hearings that the ARNNL LEAP plan does not cover.

⁵ RNAO, Member Benefits – Legal Assistance Program. Retrieved March 31, 2005 from <http://www.rnao.org/membership/benefits/lap.asp>

LEAP – *Nova Scotia Nurses' Union* (NSNU)⁶

LEAP – *New Brunswick Nurses' Union* (NBNU)

LEAP – *Ontario Nurses' Association* (ONA)

LEAP – *Manitoba Nurses' Union* (MNU)

LEAP – *British Columbia Nurses' Union* (BCNU)⁷

Each of the above legal expense assistance Plans is administered by provincial nursing unions as discretionary plans to provide levels of legal assistance or financial assistance to their members to pay for legal expenses for a variety of legal proceedings as outlined in their respective plans. Some of the plans offer very limited financial support for an initial interview with a lawyer for professional discipline hearings. A few offer much more extensive financial support not only for discipline professional discipline hearings but also for other proceedings. For example, the plan offered by NSNU may provide legal assistance in matters concerning a fatality inquiry or coroner's inquest where the member feels that her employer has a conflict in representing her or is not properly representing her, or matters of a judicial inquiry where the member feels that her employer has a conflict in representing her or is not properly representing her. It even provides limited financial assistance for initial consultation for criminal matters and civil lawsuits may also be available. The ONA plan, started in 1980, may cover matters where the member is a witness arising from a job related incident in a coroner's inquest, court custody cases, criminal code cases, matters where the member has a substantial interest in an inquest and matters where the member is criminally prosecuted (and found not guilty) arising from a work related incident. While the plans are discretionary, there is often a dispute resolution process for resolving claims by members for assistance under the plans or the final discretion is held by a senior union officer.

Unions in the remaining provinces or territories may also have formal or informal plans to assist their members to varying degrees with their legal expenses. Of course, all the

⁶ NSNU, Legal Representation. Retrieved March 31, 2005 from <http://www.nsnun.ca/main/main.asp?L1Id=4&L2Id=112&L3Id=41>

⁷ BCNU, Legal Expense Assistance Plan – Description and Guidelines. Retrieved on March 31, 2005 from http://www.bcnu.org/LEAP/Descriptions_guidelines.pdf

nursing unions provide employment related assistance to their members including collective bargaining and grievance arbitration for alleged breaches of the collective agreement by employers, including discipline and discharge grievances. It would not be unusual for a union in any province or territory to provide, on an ad hoc basis, legal advice or financial assistance for a member who has been subjected to an unusual claim if it is connected to her workplace.

Union-sponsored programs are restricted to union membership and to activities that happened in the unionized workplace. Some NPs are not included within the scope of the bargaining unit⁸ and some incidents fall outside the workplace, such as activities related to an additional independent NP practice; therefore, the union-sponsored plans may be of limited or no value to those NPs.

Legal assistance programs, for the most part, address situations where the NP and her employer have or may have conflicting interests or where the NP is facing professional discipline by her regulatory body. It is in those circumstances where these legal assistance programs are most useful because they financially assist the NP's access to legal advice and support when the employer does not. They *do not* provide liability protection or insurance for civil cases (i.e., malpractice claims) where a patient, a collaborating health professional or a third party may be entitled to compensation, and most of them do not pay the cost of defending an allegation of criminal wrongdoing.

B. Liability protective associations and societies

The purpose of a liability protective association or society is to provide significantly more comprehensive protection than simply providing financial assistance for legal advice. In a civil lawsuit against her, the NP has potential financial exposure to items not covered by legal assistance programs, including significant legal expenses, and court-ordered damages and costs (i.e., the legal expenses of the claimant).

⁸ The Alberta *Labour Relations Code*, RSA 2000, Ch. L-1, sec 1.s.1 statutorily excludes NPs from being members of a union. In other provinces/territories, the wording or interpretation of the bargaining unit scope clause would determine this issue.

CNPS –The *Canadian Nurses Protective Society*,⁹ established in 1988, is the only protective society for nurses in Canada. Eligible NPs (and RNs) are offered broad legal liability protection including financial and legal assistance, information from nurse lawyers and education on legal issues for nurses. For registered NPs, assistance is available up to \$5 million (\$1 million for other registered nurses) for each occurrence, to a maximum of \$5 million (\$3 million for other registered nurses) per year for civil lawsuits. Financial assistance is also available for criminal charges, successfully defended criminal lawsuits and alleged breach of statute arising from the provision of a professional nursing service (other than professional discipline). Legal assistance for witness appearances and criminal investigations is also available.

FAQ: What is an example of when an NP might need legal advice if she is only a witness to a criminal proceeding?

A: If the police attend at an NP's home to investigate a crime committed by or against one of her clients and they ask for information about the client, the NP may need legal advice as whether her response will breach patient confidentiality.

The wide membership base of the CNPS makes it a primary source of liability protection for the nursing profession in Canada. Not only is the nurse substantially protected from financial exposure, but the public and collaborating health professionals can take considerable comfort in the existence of CNPS because, to the extent that CNPS protects the liability of the NP (or RN), then the legal system's objective of compensating the patient for the loss suffered is met. What is *not* available from CNPS is financial assistance for legal expenses in relation to professional discipline. That feature was found in the legal assistance plans referred to above.

CNPS' counterpart in the medical profession is the Canadian Medical Protective Association (CMPA) which provides liability protection to its physician members.

⁹ Canadian Nurses Protective Society, CNPS Services. Retrieved March 31, 2005 from http://www.cnps.ca/cnps_services/index_e.html

One of the major advantages of protective associations and societies is that they have developed expertise in the very profession that they are serving. In the case of CNPS, the society is staffed by nurse-lawyers who are able to bridge the significant nursing-legal issues that arise. Protective associations and societies also have considerable history and goodwill to maintain when exercising their discretion in allowing a claim. As non-profit organizations, they recognize that it is necessary to be responsive to the legal issues facing the professionals they serve. In the case of CNPS, it is governed and operated by nurses and reflects the needs and interests of the nursing profession.

FAQ: How can an NP become eligible for CNPS liability protection?

A: Any registered NP in any province/territory¹⁰ (except B.C. and Quebec) is automatically eligible for protection, but in the case of Ontario, registered NPs (and RNs) must also be members of RNAO. NPs in Ontario who are not RNAO members are not eligible for CNPS protection. There are no individual members of CNPS. The members of CNPS are the 10 professional nursing associations and colleges listed in the footnote. Each association/college pays a membership fee to CNPS to create the fund from which assistance is offered to NPs and RNs.

C. Liability insurance

In Canada, the word “insurance” is defined in each provincial insurance act by language comparable to the following:

"insurance" means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value on the happening of a certain event.¹¹

¹⁰ Subscribing members of CNPS are Alberta Association of Registered Nurses (AARN), Saskatchewan Registered Nurses Association (SRNA), College of Registered Nurses of Manitoba (CRNM), Registered Nurses Association of Ontario (RNAO), Nurses Association of New Brunswick (NANB), College of Registered Nurses of Nova Scotia (CRNNS), Association of Nurses of Prince Edward Island (ANPEI), Association of Registered Nurses of Newfoundland and Labrador (ARNNL), Registered Nurses Association of the Northwest Territories and Nunavut (RNANT/NU), Yukon Registered Nurses Association (YRNA).

¹¹ British Columbia Insurance Act, RSBC 1996, CHAPTER 226, s.1. The insurance acts of other provinces and territories provide comparable definitions of insurance.

A liability insurance policy is a legally binding contract whereby the insurance company collects a fixed premium in return for assuming a risk for a fixed term of usually one year. Anyone receiving the actual written insurance policy will quickly realize that a policy is a complex legal document with many stipulations, conditions and nuances. For example, in some policies, the NP must actually suffer the loss (i.e., pay the damages out of her own pocket) before she can claim against the policy to be indemnified. In others, the mere exposure to the loss will spur the insurance company into action.

FAQ: Aren't all insurance policies, i.e., car insurance, house insurance, life insurance, liability insurance really the same thing?

A: No. A malpractice insurer normally takes an active role once a claim has been filed to contain the loss. Imagine if a life insurance company, upon notice that a client with term life insurance had been admitted into hospital, were to jump into action to keep the client alive until the policy has expired!

Generally in Canada there is provincial or territorial legislation that enables a third party suffering a loss to claim against a liability insurance contract.¹² Therefore, if an NP is found to be liable to a patient and the NP fails to pay the amount necessary to satisfy the judgment, then the third party may make a claim against her liability insurer. Direct access by a third party to claim against the NP's policy is an important distinguishing difference between liability insurance, legal assistance plans and protective associations and societies.

The other important distinguishing feature is that most insurance policies are *claims made* which means the claim must be made during the life of the policy or its renewal period as defined in the policy. A claim may take months or years for it to arise or surface after an incident took place. If the NP were to cancel a *claims made* policy, any claims arising after the cancellation are denied regardless of whether the incident took place during the

¹² *Insurance Act*, R.S.O. 1990 c. I. 8, s. 132.

life of the policy. This would leave the NP personally exposed. To obtain protection against this possibility, she could purchase *tail coverage* from the insurer, if available. Tail coverage serves to extend the reporting period beyond the termination of the policy for events that occurred during the policy period. The cumulative cost of *tail coverage* for several years after the policy is cancelled will likely cost as much as a full year's premium of liability insurance.

Protective associations or societies such as CNPS offer *occurrence-based* protection which means that the NP's (or RN's) membership in her professional association or college at the time of occurrence of the event determines whether the claim will be allowed, regardless of whether the NP or RN is still a member of her regulatory body or professional association.

FAQ: Can you give an example that clarifies the meaning of claims made, tail coverage and occurrence-based?

A: Assume an NP had insurance while she was working in the year 2003. She retires in 2004. In 2005, she is sued for something that allegedly happened in 2003. Under a claims made policy, unless she had notified the insurer of the incident while the policy was in effect in 2003, she would be denied coverage because the policy had expired. If she had purchased tail coverage for the years 2004 and 2005, she would continue to be covered. If she was eligible under an occurrence-based liability protection program such as CNPS in 2003, then she continues to be eligible for liability protection because the incident occurred while she was a member of a CNPS member association or college.

FAQ: Does an NP have to worry about claims long after retirement?

A: Normally not. Most provinces have legislation called a "limitations act" which limits the time for a claimant to file a claim. This is why tail coverage is normally only available for seven years or less as it is related to the length of most limitations periods. A claimant who is out of time due to a limitations period is unable to make a claim. In most provinces, but not all, the limitations clock starts running when a claimant first becomes aware of a claim. In some provinces, the clock starts running from the date of

*the incident (i.e., childbirth, surgery) even if the claimant does not identify a problem at the time. Clearly, for a group such as midwives where there are compromised baby issues, many years may pass before the claimant has knowledge of a claim. NPs, however, are **not** normally involved in health care issues where the knowledge of the claim would arise many years after the NP's involvement.*

In addition to malpractice liability coverage, commercial insurers will usually offer insurance in other areas. NPs practising independently may require general liability insurance¹³, office contents insurance, and so on.

FAQ: Should the NP be concerned about other insurance besides malpractice liability insurance?

A: Some malpractice liability insurance policies contain a general liability insurance aspect that covers property damage or bodily injury. Others do not. An NP who practises as an independent contractor (i.e., she is not working as an employee) must be concerned about ordinary accidents for which she may have general liability (e.g., the NP accidentally causes a flood at a patient's home) or tenant's liability (e.g., a patient slips and falls on the front steps of the NP's office). General liability insurance policies are readily available across Canada and the same policies are often used for a broad range of professions and businesses. Many NP funding or collaboration agreements require that the NP have general liability insurance of a certain minimum level.

There are four examples of malpractice liability insurance policies available to practising NPs.

CNPS Plus¹⁴ provides several options for differing levels of professional liability insurance. The basic coverage is for \$2 million professional liability per claim with a \$2

¹³ General liability insurance (sometimes referred to as business insurance) provides protection from lawsuits related to operating a business such as someone slipping on the front steps of the NPs office. General liability insurance does not cover issues arising directly from the provision of nursing services.

¹⁴ Canadian Nurses Protective Society, . Retrieved March 31, 2005 from http://www.cnps.ca/cnps_plus/index_e.html

million annual aggregate. On top of the basic policy, there are options for an additional \$3 million professional liability coverage, \$2 million – \$7 million general liability for those who operate a business, \$15,000 for disciplinary defence, \$10,000-\$35,000 office contents coverage, \$5,000 laptop coverage, tail coverage of up to six years and directors' and officers' liability insurance.

NurseInsure¹⁵ is an option available only to RNAO members. Options include: \$1 million – \$5 million professional liability per claim with a annual aggregate of \$1 million – \$5 million; \$2 million general liability insurance; buildings and contents insurance; computer equipment insurance; practice interruption insurance; crime insurance; directors' and officers' liability insurance.

In B.C. and Quebec, (where there is no CNPS liability protection) there are provincial insurance programs that are tied to registration.

*Registered Nurses' Association of British Columbia's (RNABC's) Captive Insurance Corporation (CIC)*¹⁶ was established in 1988 and RNABC fully funds it through the annual dues of its regulated members. British Columbia has special insurance legislation¹⁷ which has relaxed certain rules regarding taxation, minimum capitalization and solvency ratios which facilitated the establishment of CIC. CIC provides for \$1 million¹⁸ professional liability coverage and \$2 million general liability insurance. The coverage is automatic for nurses who are registered with RNABC subject only to the limitations in the policy. RNABC is not a member of CNPS. Nurses who require additional coverage are invited to apply to CNPS Plus.

¹⁵ Registered Nurses Association of Ontario, Malpractice and Business Insurance for Members of the RNAO Requiring Extended Practice Coverage, October 2003. Retrieved March 31, 2005 from <http://www.rnao.org/html/PDF/NurseInsure.pdf>

¹⁶ Captive Insurance Corporation, Liability Insurance for Registered Nurses, November 2002. Retrieved March 31, 2005 from <http://www.rnabc.bc.ca/pdf/16.pdf>

¹⁷ *Captive Insurance Act*, 1987 SBC Chap. 9 Index Chap. 200.5

¹⁸ The limits for CIC are being reviewed just as the CNPS limits were recently increased. Readers should check the CIC website for current limits.

La Capitale is the liability insurer for the *Ordre des infirmières et infirmiers du Québec* (OIIQ). It insures all members in good standing of the order who participate in the professional liability program.¹⁹ La Capitale provides professional liability, legal costs for civil and criminal defense (unless the member pleads or is found guilty), claims that the member has conducted an illegal practice of another profession and legal expenses before a coroner. The limits of coverage are \$1 million per incident up to \$3 million per year with additional limits for legal and other expenses. La Capitale also offers various options to insure for general liability, office contents, computer, document, income loss and tenant's liability. Members who seek additional insurance can also subscribe to CNPS Plus.

FAQ: Are there occasions where the liability insurer will deny coverage?

A: Yes, for example, coverage for alleged sexual assault, also known as “abuse and sexual misconduct” is universally denied by insurers.

Part III Professional practice and liability issues from three practice perspectives

The report now focuses on these issues from the perspective of the NP in different work environments.

A. Nurse practitioners working as employees of hospitals, health regions or health care agencies

Hospitals employ NPs in a variety of positions. In some, the NPs are predominantly engaged in direct nursing care, while in others they work in other roles such as program managers or nursing practice leaders. Many NPs who work as employees of hospitals, health regions or health care agencies also sit on committees within their workplace or as representatives on external committees.

¹⁹ La Capitale General Insurance Inc, Professional Liability Insurance Program, Feb. 2005. Retrieved March 31, 2005 from http://www.oiiq.org/infirmieres/inscription/formulaires_pdf/2005_2006/program_ins.pdf

In all of these roles, the NP may be exposed to professional practice and liability issues. For example, she may be faced with:

1. a professional discipline complaint to the NP's regulatory body;
2. a criminal investigation or prosecution;
3. a coroner's inquest; or
4. a civil claim for compensation in the form of damages;

For a *professional discipline complaint* to the NP's regulatory body, the NP would have to pay for her own defence unless she has a legal assistance program available to her. If the NP is not included in the union with a legal assistance plan or her work falls outside of her union membership position, she will not be eligible to claim for legal assistance from a union's legal assistance plan to defend a professional discipline complaint at the NP's regulatory body. For that NP, (unless she is in Newfoundland or Labrador and is covered by the ARNNL LEAP plan) she could purchase a plan such as RNAO's LAP program if she is registered in Ontario or purchase a disciplinary defense option with an insurer such as CNPS Plus. CNPS Plus would first require the NP to subscribe to basic malpractice coverage before they allow access to this option.

For *criminal investigations or prosecutions*, or for *coroner's inquests* or other witness appearances, most NPs in Canada have automatic eligibility for legal assistance through CNPS. If she qualifies through union membership to a legal assistance program or subscribes to the RNAO LAP program she may receive or be reimbursed for legal expenses pursuant to the requirements of that program. Availability of commercial liability insurance to cover criminal investigations or prosecution is limited. Many employers will support an employee's access to legal advice or financially support an employee's appearance as a witness where the matter is a routine part of an employee's employment, such as an employee working in a rape crisis centre who may be routinely subpoenaed to give evidence at a criminal trial.

FAQ: Can you give me an example where an NP may be criminally charged?

A: A few common examples are allegations of sexual assault, and theft of drugs or patient property. CNPS as well as some legal assistance programs provide protection against these claims as long as the allegations are not proven.

For a *civil claim* only, the employer's insurer would normally defend the NP so that the employer's civil liability exposure is controlled. In Canada, there is a legal principle of *vicarious liability* which holds the employer responsible for acts performed by its employees in the course of their employment. This means that the hospital, health region or health care agency bears the primary obligation to defend the lawsuit and to cover damages resulting from that lawsuit. In light of the principle of vicarious liability, employers typically have liability insurance²⁰ to cover claims against their employees. CNPS, however, will provide support or advice to the nurse but would normally defer to the employer's insurer due to the principle of vicarious liability. Similarly, CIC would stand behind the nurse but would also defer to the employer's insurer due to the principle of vicarious liability.

In the case of CNPS or CIC, their liability limits would normally apply as excess protection which would serve to protect the NP in the event she was legally obligated to pay anything due to the failure of the employer's policy to cover the incident or if the judgment was over and above the maximum limits of the employer's policy.

The Ontario Nurses Association (ONA) also provides an excess policy for its members. This excess policy requires that the member first be covered by an institutional policy and that the claim must exceed the limits of the institutional policy. In this instance, it is unlikely that the excess insurance will be called upon very often, if ever.

²⁰ For example, an organization, called HIROC (Hospitals Insurance Reciprocal of Canada) was formed in 1987, "to provide health care organizations with a stable, financially sound and practical alternative to meet their liability insurance needs. Starting with 52 hospitals in Ontario, the reciprocal has expanded to encompass health care facilities across Canada. Hospitals, nursing homes, community health centres, home care and other health care organizations make up the more than 350 HIROC subscribers, representing over 500 facilities in Canada." Retrieved March 31, 2005 from [http://www.hiroc.com/who we are.html#4](http://www.hiroc.com/who_we_are.html#4) Other commercial insurers also cover hospitals, health regions or health agencies.

FAQ: Should an NP who is employed at a hospital, health region or health care agency consider getting individual liability insurance?

A: The answer to this question is subject to some debate. Employer policies are normally restricted to events that occur when the NP was engaged within the scope of her employment. In other words, if the event giving rise to the claim fell outside the scope of her employment-related duties, such as volunteer work, off-work emergencies, or independent contractor activities, then the NP is not covered. It is not sufficient for the NP's activities to be within the scope of her nursing practice if she engaged in activities outside the scope of her employment. Any excess insurance coverage, such as that provided by ONA, that is dependent on there being employer liability insurance, would also be denied. The only protection that the NP could rely on would be CNPS protection (in B.C., CIC protection; in Quebec, La Capitale) and/or individual liability insurance. If the NP has the existing backing of CNPS or RNABC's CIC or OIIQ's La Capitale, it is likely a waste of money to purchase individual malpractice liability insurance. Only those Ontario NPs who do not belong to RNAO would face personal financial risk in this situation.

FAQ: Can you provide an example of what you mean by duplicating existing protection?

A: Assume an NP with Ontario registration working at an Ontario hospital has \$5 million in vicarious liability coverage under the hospital insurance policy. She will also be protected by the hospital's assets to the extent the claim exceeds the hospital policy limits. If the hospital fails to pay the excess amount, clearly the NP would be vulnerable. If she is an RNAO member, she will automatically have liability protection through CNPS for another \$5 million. If she is part of the ONA bargaining unit, she will automatically have excess liability protection of another \$2 million.²¹ If she were to also consider subscribing to CNPS Plus, or NurseInsure, she would be duplicating existing protection.

B. Nurse practitioners working as employees in a private or community clinic

²¹ ONA appears to be the only nurse union to sponsor liability insurance coverage.

When an NP is an employee of a private or community clinic, once again she may be exposed to professional practice and liability issues. As was the case for the NP employee of a hospital, health region or a health care agency, she may be faced with:

1. a professional discipline complaint to the NP's regulatory body;
2. a criminal investigation or prosecution;
3. a coroner's inquest; or
4. a civil claim for compensation in the form of damages;

Similar to the institutional setting, conceptually, the NP who is an employee of a clinic would be entitled to the same vicarious liability protection that exists for the NP who is an employee of a larger institution. The difference with the clinic setting is that the employer is usually much smaller and the NP should ascertain for herself, in writing, the extent to which her employer has liability coverage. This also applies where the NP is working for nursing agencies, nursing homes, retirement homes, lodges, industry and other non-traditional employer settings. She should also consider the financial viability of her employer in the event that the insurance coverage for employees is not sufficient or contains important conditions, exclusions or deductibles. Indeed the clinic's coverage may be dependent on individual coverage of the physicians and other health care professionals, particularly if the clinic is privately operated by a physician group. The NP may negotiate with the clinic to reimburse her for the costs of obtaining additional liability insurance where there appears to be insufficient protection provided by her employer.

As was the case for the NP working as an employee of the hospital, health region or health care agency, she may already have liability protection from CNPS, CIC or La Capitale as described above. These would act as excess or additional protection over and above the protection she has under the vicarious liability obligations of her employer.

In a clinic setting, it is less likely that she is a member of a union and therefore she may have to consider her exposure to professional discipline complaints. For such an NP, unless she is in Newfoundland or Labrador and is covered by the ARNNL LEAP plan, to

obtain protection for this, she would have to consider professional discipline optional coverage under CNPS Plus (though she must purchase the malpractice insurance first) or in Ontario she has the opportunity to purchase the RNAO LAP program.

Frequently, when an NP is working for a clinic, the funding for her position will be coming from a provincial ministry of health. That funding may compel the NP to have a certain minimum level of protection. Alternatively the clinic or its advisers may require a certain minimum level of protection. In both cases the NP should negotiate whether the clinic should reimburse her for the cost of this protection. These are discussed in the Part IV of this report.

C. Nurse practitioners working as independent contractors in collaboration with health care professionals in a clinic or health care institution

In the case of an NP working as an independent contractor, the NP must be careful about her professional practice and liability issues. She no longer has any vicarious liability protection that is available to employees. The independent contractor has primary direct liability exposure and so she should be particularly vigilant in arranging appropriate professional practice and liability protection.

Funding Agreements

The agency that is funding the NP's activities, perhaps the ministry of health, will likely insist that the independent practising NP sign a funding agreement for her position. The funding agreement will also require that the NP maintain a minimum level of liability protection. Some funding agreements will further require that the NP indemnify the funding agency so as to ensure that the funding agency is protected against judgments that are the responsibility of the NP. In such discussions, the NP practising independently should expect to assume responsibility for her share of liability. What the NP should be wary of is any indemnity clause that purports to indemnify another party, including a funding agency, for something that is beyond her share of liability. This is an enormous problem for the independently practising NP and the issue is discussed further in Part IV of this report.

Contractual Collaboration Agreement

For an NP to work independently, she will likely be required to sign a contractual collaboration agreement. Since she will be working in collaboration with physicians and other health care professionals, she must be careful about *joint and several* liability. The legal concept of joint and several liability is that where two or more professionals share in the liability for a claim, then, vis-a-vis the plaintiff, they are both liable to the plaintiff for the entire amount of the claim. In other words, if the NP is found to be 10 per cent at fault and the physician is 90 per cent at fault, and if for some reason the physician does not pay his or her share of the liability, then the NP must pay 100 per cent of the judgment. The reverse scenario is also true.

The NP must therefore ensure that everyone with whom she is collaborating has adequate liability insurance and that appropriate indemnity agreements have been signed in any collaboration agreement between them. Each party should indemnify the other, but only to the extent of their portion of direct liability. Since the collaborating physician will have exactly the same concern as the NP regarding joint and several liability, this is a subject that should arise early in discussions between them. This is described further in Part IV of this report.

FAQ: What professional practice and liability protection should the NP in independent practice obtain to be adequately protected?

A: Minimum levels will often be negotiated and set out in the funding agreement and the collaboration agreement. The NP should ensure that, whatever professional practice and liability protection is required by the agreements, it is in fact available to her. To this end, the NP should be looking at what she may already be eligible for, such as CNPS or RNABC's CIC or OIIQ's La Capitale. In addition to this she should consider what might be available for purchase such as CNPS Plus, RNAO's NurseInsure or some other commercial insurer.

PART IV Current liability protection issues facing nurse practitioners in collaborative practice

A. What is the appropriate level for NP professional practice and liability protection?

This is both an easy and a difficult question to answer. The easy answer comes from approaching this question from a risk analysis. In the U.S., there is a requirement to report malpractice payments and adverse actions concerning NPs and other health care practitioners. Accordingly, there is a single database which identifies the risk posed by NPs as compared to other health care practitioners. The results of their most recent annual report²² show that NPs give rise to very few claims.

In the period from Sept 1, 1990 to December 31, 2003, (13 years and four months) there were 302 claims against NPs in the United States. According to the American Academy of Nurse Practitioners there are approximately 100,000 practising NPs in the U.S. in 2003.²³ Therefore, there is one claim annually for every 330 practising NPs.

FAQ: Of the 302 claims against NPs in the U.S. over that 13 year and four month period, what categories of claims were the most frequent?

*A: The claims were broken down into the following categories: 45 per cent were diagnosis-related, 25 per cent were treatment-related, 14 per cent were medication-related, six per cent were obstetrics-related, with the remaining 10 per cent being related to anesthesia, equipment or product, IV or blood, monitoring, surgery or miscellaneous.*²⁴

²² National Practitioner Data Bank, 2003 Annual Report. Retrieved March 31, 2005 from http://www.npdb-hipdb.com/pubs/stats/2003_NPDB_Annual_Report.pdf

²³ American Academy of Nurse Practitioners, Nurse Practitioner Workforce Data Survey 2004. Retrieved March 31, 2005 from <http://www.aanp.org/Practice+Policy+and+Legislation/Practice/NP+Workforce+Data+Survey+2004.htm>

²⁴ National Practitioner Data Bank, 2003 Annual Report, p. 58. Retrieved March 31, 2005 from http://www.npdb-hipdb.com/pubs/stats/2003_NPDB_Annual_Report.pdf

Between 1990 and 2002, the maximum payment for a claim in the U.S. against an NP was U.S. \$2,450,000²⁵ with the average claim being less than U.S. \$500,000. In Canada, NPs and RNs have been working in an NP role in remote areas for many years yet CNPS has reported that they have had *no* payments for these nurses between 1997 and 2001.

Where, then, is the justification for having liability protection limit as high as \$5 million? This leads to the difficult part of the answer.

Physician groups assess NP's risk from the perspective of their own risk experience. It is likely that the Ontario Ministry of Health and Long-Term Care has assessed NPs from the perspective of their experience with physicians and midwives. Since an NP's practice risks cannot be compared to that of a midwife or a physician, assessing them from the perspective of these unrelated professions is not an evidence-based approach.

Unfortunately, physician groups have been vocal in expressing views about appropriate limits. Contemporaneous to this has been the Ontario Ministry of Health and Long-Term Care requirement for high limits of liability protection that bear no relationship to the risk posed by the NP.

Commercial insurers will, of course, be prepared to provide malpractice liability insurance coverage at higher limits, but that drives up the premiums that they will demand from the NP. This, in turn, drives up the cost of health care.

Fortunately for NPs, the CNPS, a non-profit nursing organization, has raised its level of liability protection to \$5 million for NPs to facilitate the immediate implementation of the NP role in Canadian health care for the benefit of the public. CIC is also reviewing the limits of its liability protection for NPs.

²⁵ Elaine Borg, Professional Liability Protection for NPs, Nurse Practitioner Forum, September 21, 2004, referencing the National Practitioner Data Bank, Public Use Data File 1990-2002.

Unfortunately, many NPs are being forced to pay malpractice liability insurance premiums for levels of protection that are not justified by the historical risk experience of NPs documented in the U.S.

What is most ironic in this whole debate is that the greatest risk faced by an NP is the risk of her becoming named as a co-respondent in a lawsuit brought against a collaborating physician. The NP is exposed to more indirect risk from the practice of the physician than she is exposed to direct risk from her own practice. If the physician has *claims made* malpractice liability insurance as opposed to CMPA coverage, which is occurrence-based, then the NP must also be concerned that the physician will, sometime in the future, obtain *tail coverage* when the physician's policy is no longer in effect. This represents a potential gap in physician liability coverage.

Since NPs practice is low risk and the size of the claims are historically very small, NPs should not be coerced into having to purchase more liability protection than is reasonable.

B. What kind of indemnity should an NP provide to a funding agency?

Normally, the funding agency that demands the highest level of indemnity is the ministry of health. It is not unusual for a ministry of health to demand minimum levels of liability protection to be maintained by the health care practitioner that they are directly supporting. As was pointed out earlier, the levels of liability protection set for the NP have not been evidence-based on historical risk but rather, they have been adapted from unrelated health care professions which practise in areas of higher risk.

This difficulty is compounded when a ministry of health requires that an indemnity clause be signed by the NP which requires the NP to indemnify more than her share of the direct liability. At the time of writing this report, the Ontario Ministry of Health and Long-Term Care (MOHLTC) requests the independent NP practitioner to indemnify the Ministry from and against all costs, losses, claims, liabilities and damages (including incidental, indirect, special or consequential damages) incurred as a result of any claim or

proceeding relating to the provision of nursing services or otherwise in connection with their agreement with the NP. While the ministry might be persuaded to limit its request to an amount of \$5 million per incident, this may exceed the NP's share of direct liability and is, therefore, still problematic for the NP.

First, the NP is, in effect, becoming the liability insurer for the ministry for matters that go beyond her own professional practice and liability. If such protection is available for the NP, then she is paying premiums for protection that should not be her obligation. The argument in the other direction is that other independently practising health care professions have provided such indemnities to the ministry. This argument is nullified by the fact that the ministry reimburses those professions for their cost of the liability protection.^{26 27 28}

Second, as was clearly shown, the established CNPS liability protection program is tailor-made for NPs and has widespread application. As a protective society the program is discretionary and is limited to the NP's own costs and/or liability. This program does not indemnify third parties. The CNPS program is ideally suited for the NP in independent practice and CNPS already has the professional staff to address liability and most other legal issues that arise as a result of an NP's practice. By protecting the NPs liability, the public is well protected by the existence of CNPS. For the Ontario MOHLTC to request an indemnity clause to protect the ministry against something that goes beyond the NPs share of direct liability forces the NP to find a commercial insurer simply because of the nature of the indemnity clause written by the MOHLTC.

²⁶ Sullivan, Patrick, CMPA, OMA try to heal rift over regional rating, Canadian Medical Association Journal, July 25, 2000, where it is stated that the province of Ontario currently covers about 72 per cent of physicians' CMPA costs. Retrieved March 31, 2005 from <http://www.cmaj.ca/cgi/content/full/163/2/201>

²⁷ Government of Alberta, Alberta continues grant for midwives insurance, May 4, 2002, where the government announced that they would pay \$9,880 of the \$13,880 annual premium of Alberta's registered midwives. Retrieved March 31, 2005 from <http://www.asac.ab.ca/Media/gov/020504.html>

²⁸ Association for Safe Alternatives in Childbirth, Midwifery Across Canada, December 3, 2001, which states that the governments of Ontario and Quebec provided the full cost of liability protection while BC and Alberta provided part of the costs. Retrieved March 31, 2005 from <http://www.asac.ab.ca/updatesMidwiferyCanada.html>

FAQ: Can you provide an example of a situation where a ministry of health may have its own liability or costs?

A: Assume an NP conducts, as part of her practice, a study where a Pap smear is done for a number of clients. Prior to receiving the lab results of the Pap smear, the MOHLTC cancels the funding for her program. The NP advises the ministry of the outstanding study but does not have the authority or funding to follow up on the study. One client's lab results suggest follow-up testing and the client has subsequent complications. The client sues several years later as to the failure of the NP to recommend follow-up testing in a timely fashion. The NP joins the ministry as co-defendant and the ministry is found liable for costs and damages.

C. What kind of indemnity clause should the NP provide to and obtain from a collaborating physician?

The collaboration agreement properly sets down the contractual terms and conditions outlining the extent and manner of collaboration between the NP and the physician.

When it comes to liability exposure, both the NP and physician recognize the fact that they can *both* be named defendants in a lawsuit and that they can *both* be found *jointly and severally* liable to a third party. In collaboration agreements, it is important for each of them to draft language to indemnify each other *only for their portion of liability* for any claim. If the agreement requires the NP to completely indemnify the physician, or vice versa, then one side ends up bearing an inappropriate portion of the damages.

A clause that would be acceptable in a collaboration agreement would read as follows:

The NP and the physician each shall obtain and maintain throughout the term of this agreement, at their respective sole costs and expense all liability protection necessary or desirable in order to carry out their respective duties under this agreement. In the event either the NP or physician maintains liability protection pursuant to a "claims made" malpractice liability insurance policy, then they further undertake to

purchase adequate tail coverage, as necessary, for the period following the expiry of the policy. This undertaking shall survive the term of this agreement.

The NP and physician will disclose to each other the nature and limits of their liability protection that they have and the details will be attached as an appendix hereto.

The NP and physician agree, to the extent of their share of direct liability in any particular claim, to indemnify and save each other and each others heirs, executors, administrators, personal legal representatives, successors and assigns harmless from and against any and all costs, expenses, damages and losses (including legal fees and disbursements on a solicitor and her own client basis), incurred by any one or more of them for or by any reason of any cause, matter or thing arising out of, in connection with or on account of the services provided by either of them or the conduct of the NP's nursing practice or the conduct of the physicians' medical practice.

Fortunately, a significant joint statement was recently issued by CMPA and CNPS which recognizes that each health care professional should be “adequately protected so that neither is held financially responsible for the acts or omissions of another.”²⁹ This joint statement will serve as the appropriate guidance to ensure that indemnity clauses with the right balance will be agreed to in collaboration agreements.

D. Should provincial ministries of health fund NP liability protection?

This issue arises from the imbalance that exists in the provincial ministries' treatment of NPs compared to other independently practising health care providers. The precedent of

²⁹ CMPA/CNPS, Joint Statement on Liability Protection for Nurse Practitioners and Physicians in Collaborative Practice, March 2005. Retrieved March 31, 2005 from http://www.cnps.ca/joint_statement/joint_statement_e.html

government funding of liability protection is now well established. It has been long recognized that the cost of providing liability protection is part of the cost of the delivery of health care services.

Instead of being financially reimbursed for the costs of their professional practice and liability protection, nurse practitioners working in independent practice are being expected to pay personally the costs of professional practice and liability protection. At the same time, funding agreements are mandating levels of liability protection that bear little resemblance to the risk posed by an NP's practice.

Further, the indemnity clauses required of NPs by the funding agreements provide for indemnification beyond the extent of the NPs practice liability, thereby affecting the NPs' ability to rely on the established CNPS program. In order to fully meet that part of the indemnity that is beyond the NP's responsibility, the NP may be forced to obtain commercial liability coverage that duplicates some significant aspects of the CNPS program.

Not only is there justification for government-funded NP liability protection, there is a strong argument that any ministry of health requirements should not be permitted to drive up the costs of that liability protection unnecessarily. Unnecessary costs in this area will ultimately increase the amount NPs require to carry on their practice and thereby drive up health care costs generally.

PART V – Conclusion and recommended steps for nurse practitioners

This report has outlined many of the professional practice and liability protection programs that exist for NPs in Canada. NPs generally have numerous programs to protect them, some of which overlap. As a low risk group, NPs need to be concerned about issues that are serving to inflate the costs of their liability protection. These include issues that cause the NP to have duplicate protection, excessive limits, unbalanced indemnity clauses that unnecessarily force reliance on for-profit malpractice insurers.

An NP should take stock of the professional practice and liability protection he or she may have in the current position, whether working as an employee for a hospital, health region, health care agency, a private or public clinic or as an independent practitioner in collaboration with other health care professionals.

NPs who are employees, especially at smaller facilities, should take the time to ascertain the amount of liability protection that has been obtained by their employer and determine if they need to obtain additional protection. Perhaps they should ask their employer to cover the cost of that additional protection. Once obtained, the NP should be diligent in keeping up the necessary registration or premium payment to ensure that it does not lapse.

NPs who are independent practitioners in collaboration with other health care professionals, should take the time to ascertain the amount of liability protection that they have. They should check on the limits required in their collaboration agreement and the limits required in any funding agreement. They should also check on the wording of any indemnity clauses that they signed to determine if they have provided indemnity that is beyond the scope of their liability protection. They should also check on the indemnity clause that they received from a collaborating health care provider as well as the nature and level of their liability protection.

If the NP's protection is with CNPS and she signed an indemnity agreement that indemnifies beyond her share of direct liability, she should give her funding authority or her collaborating physician this report and ask for the indemnity clause to be modified.

The recommended next steps for NPs are as follows.

1. Lobby their respective nursing organizations to have a national voluntary database that keeps track of all claims made against NPs and all payments made so that a

solid history can develop to provide evidence of reasonable limits of liability protection in funding agreements and collaboration agreements. CNPS currently has such a database but further input is needed from NP liability insurers to make this a national database.

2. NPs who intend to practice as independent contractors should negotiate funding agreements and collaboration agreements that contain reasonable limits for their professional practice and liability protection and reasonable indemnity clauses that indemnify only to the extent of the NP's share of direct liability.

3. Lobby their respective provincial/territorial governments to cover the cost of professional practice and liability protection if those same governments are covering these costs for other professionals.

4. Carry on a safe practice in accordance with the NP's licensing body's professional practice standards. Utilize practice advisers and the licensing body's website for assistance with professional practice issues. Keep up-to-date through continuous learning opportunities.

5. Consult the nurse lawyers at CNPS when in doubt to manage legal risks and make use of the educational material available, including workshops presented by nurse lawyers and the CNPS website for their members.