

Professional Practice and Liability on the Net

Bernard C. LeBlanc

Steinecke Maciura LeBlanc

Professional Regulation and Discipline

*Vol. 9 No. 5
Spring 2009*

Can You be Guilty of Misconduct if Nothing Happens?

In order to find that a practitioner has engaged in some form of professional misconduct, they generally need to either do something wrong or fail to do something that they should. For example, charging an excessive fee, releasing confidential information without consent or engaging in any form of billing fraud are obvious acts of professional misconduct. But what if a practitioner suggests an inappropriate course of action and it is never acted upon? This is one of the issues in a recent Ontario case, *Yar v. College of Physicians and Surgeons of Ontario*, [2009] O.J. No. 1017. It was alleged that Dr. Yar engaged in professional misconduct simply because she intended to administer a thrombolytic drug with respect to two cardiac patients when the requisite criteria for ordering the drug were absent. The interesting part about the case is that in both cases, a nurse and another physician stepped in to stop the drug from being administered. The issue really was whether a simple intent to administer the drug was sufficient for a finding that the physician breached the standards of practice of the profession.

The Divisional Court found that practitioners can indeed be found guilty of misconduct even if the drug was not administered. The Court pointed out that misconduct proceedings are not criminal trials, where there is a requirement for an act or specific omission. In criminal trials, the Crown typically needs to prove that an act took place and that the accused intended to do the act. The Court distinguished criminal cases by stating that “there is no requirement of an act or an attempt to underpin a finding of professional misconduct”.

The physician’s counsel argued that because of the protocol associated with administering the thrombolytic medication, there was no possibility that the physician’s order, or in one case only the possibility of ordering the drug, would be acted upon. However, the Court pointed out that it was sufficient that the physician intended or contemplated the inappropriate use of the drug:

“Thankfully, due to the intervention of third party nurses and Dr. Chu, there was no chance that the drugs would be administered to the patients in question...Another time, there might not be a nurse or doctor who was prepared to intervene.”

The Court also made it clear that it was prepared to contemplate a wider range of activity that might constitute professional misconduct:

“This is a disciplinary proceeding with the objective of protecting the public. The concern about creating inappropriate risks to patients is properly within the ambit of a disciplinary proceeding, and is at the core of the expertise of those involved in the disciplinary process.”

Practitioners and regulators will want to be aware of this case as it arguably expands the scope of what might constitute professional misconduct. On the one hand it may be argued that there was in fact an “act” in this case, which was the simple contemplation of the administration of the drug. On the other hand, misconduct is usually found when, as in a case such as this, the practitioner actually orders or dispenses the drug and it is taken by the patient. Arguably, this case would support taking action on the basis of any substantial advice even if it is not acted upon. Others may attempt to use this case to justify an even further expansion of what might constitute professional misconduct. However, it is likely that this case also comes close to “the outer limits” as to what may constitute professional misconduct.

[Professional Practice and Liability on the Net is a monthly Internet newsletter addressing issue of interest to a wide range of professionals. Please consult with a lawyer for specific legal advice. If you wish to be removed from the list of subscribers, please simply reply to this email. If you wish to reprint this article, please provide appropriate credit, and send a copy of the publication to, Steinecke Maciura LeBlanc, 393 University Avenue, Suite 2000, Toronto M5G 1E6. Or, call 599-2200, ext. 232, or email: bleblanc@sml-law.com. Visit our website at <http://www.sml-law.com>. Comments and suggestions are also welcome.]