QUALITY ASSURANCE RECORDS AND COMMON LAW PRIVILEGE:

BALANCING COMPETING INTERESTS

Don Cranston, Q.C., Partner, Bennett Jones LLP

&

Alexander Rozmus, Student-At-Law, Bennett Jones LLP

THESIS/PURPOSE

The purpose of this paper is to evaluate the merit and efficacy of asserting common law privilege in relation to Quality Assurance (QA) activities, to prevent the disclosure of records, reports, opinions, and commentary generated from those processes in medical malpractice litigation.

(a)WHY are QA Records Important to Civil Litigants?:

QA records are potentially attractive to litigants in malpractice actions because they identify areas for practice improvement in the provision of health care services. QA activities in relation to adverse events entails a planned or systemic activity, the purpose of which is to study, assess or evaluate the quality of care patients receive with a view to continual improvement. As such, by serving their intended purpose of critically evaluating the occurrence of adverse events with a view to education and systemic improvement, QA records can be candid, revealing, opinionated, and whether intentionally or not, accusatory. If disclosed pre-trial, the critique may taint the question of liability without the benefit of having heard all the evidence at trial.

(b) WHAT Protections Presently Exist?:

There is legislation in each Province and Territory across Canada that reflects the public policy objective of encouraging health care providers to participate freely, frankly, and critically in the quality improvement process. In sum, QA records and reports frequently find express protection in provincial statute. The robustness of the statutory protection differs as to what is specifically protected and the strength of the protection.

Statutory protection, however, may not be applicable when a QA Committee is not properly constituted or the proceedings do not qualify as "legal proceedings." In these instances, common law privilege might apply to protect QA information from disclosure.

(c) WHY Assert Privilege?:

The potentially incriminating and judgmental nature of QA-type records may transform the legitimate fact-finding process of pre-trial disclosure and discovery, into a "smoking-gun" excursion for the peer-reviewed opinion that exposes a systemic weakness or misconduct of a health professional involved in an adverse event. Pre-trial discovery may be used by litigants to extract findings of practitioner fault from sources of information not otherwise available in patient charts or hospital records, which are disclosable sources of factual evidence.

Meaningful quality improvement reviews are characterized by a candid and forthright assessment by the health care providers involved in the events that have occurred. Without a clear guarantee of confidentiality: health care professionals would not freely participate in these reviews for fear of potential liability; the reviews would not operate effectively; and the quality of health care delivered to patients would suffer. Assertions of common law privilege in relation to QA-type information may prevent a "chilling-effect" from dissuading health professionals to participate in QA activities.

(d) HOW Have the Courts Treated Privilege Assertions?:

Courts have recognized the importance of protecting QA-type records at common law. Determination of privilege and protection of QA information is made on a case-by-case basis using the *Wigmore* criteria for privilege and the balancing of privacy rights against the social interest in truth-seeking and fairness in legal proceedings.

In *Slavutych v. Baker*, [1976] 1 SCR 254, the Supreme Court of Canada enunciated the *Wigmore* criteria in the following manner:

1. The communication must originate in a confidence that they will not be disclosed;

2. Confidentiality must be essential to the full and satisfactory maintenance of the relationship between the party;

3. The relationship must be one which in the opinion of the community ought to be sedulously fostered; and

4. The injury that would inure to the relationship by the disclosure of the communications must be greater than the benefit thereby granted for the correct disposal of litigation.

Under the fourth *Wigmore* criterion, the court must engage in a balancing of interests. The balancing will be unique to the circumstances of each case, meaning requests for similar types of records may be decided differently depending on the evidence presented in a particular proceeding.

The trend, however, is to find judgments on opposing ends of the disclosure spectrum, which unfortunately injects a high degree of uncertainty into the present state of law. For example, in *Doyle v. Green* (1996), 182 NBR (2d) 341 (CA), the New Brunswick Court of Appeal held that where the information collected pursuant to quality assurance relates to a specific patient's complaint, and that patient is pursuing legal remedies, it is likely that material will not be protected. Whereas, on the other hand, in *Steep v. Scott* (2002), 62 OR (3d) 173, the Ontario Superior Court of Justice chose to place the goal of improving the quality of health care and health services ahead of any litigation advantage that may accrue to a party by the use of QA-type records.

(e) BALANCING Competing Interests:

The fact that QA records find express protection in statute reflects the greater public policy objective of encouraging those intimately involved with the provision of health care to

continually learn from and improve upon adverse events that occur within the system. This is a public right, associated with a quintessentially Canadian public good: health care should be universally accessible and should strive to achieve an ideal of non-maleficence.

However, when individuals are injured by the negligent conduct of others, the courts should provide for adequate redress. Part of that redress necessitates the disclosure of all material facts that enable a litigant to pursue their claim. That is a private right, associated with each individual's entitlement to an equitable and thorough legal proceeding geared towards uncovering the truth.

QA activities straddle this public-private divide, in that the information and records generated can benefit the public or the individual, but not necessarily both and not at the same time. Legislatures and courts are then left with the task of having to weigh individual justice against furthering a greater just culture of safety within our health care system.