

## Medical Legal Issues

00:00

### **Dr. Guylaine Lefebvre:**

We will move to our last-but-not-least panellist today, Maitre Boivin, who is one of our CMPA general counsel and will talk to us about some of the medical legal issues.

00:13

### **Daniel Boivin:**

Thank you, Guylaine. It is quite a challenge to be able to define the legal framework around virtual care. And I'd like to be able to present a black-and-white checklist of everything that physicians must do, but unfortunately, law does not move that fast. Seamus was talking about how extensive the growth will be in the next few years. The law is always lagging behind that, so law will have to adjust pretty fast. The regulators have already started doing that, but I suspect that there will be a lot of precisions and – and details in those – in those reg—regulations, be it at the college level or at the – the provincial regulation level. And the courts, the courts always react. So the legal liability principles will be defined when the first cases hit the courts in five years, and – and the – the issue with the virtual care is that courts will have to decide an issue of virtual care in an environment that will be completely different from the environment that existed when the care was provided, given that the technology will have evolved tremendously in that period of time.

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So I – I'm not able to provide a black-and-white list, but let's look at the framework of the – the – the general principles. And – and one of the positive aspects of the – the pandemic is that it has forced the regulators to accelerate the thinking about virtual care and adopt basic principles that will need to be adjusted for sure, but basic principles. And also, the volume of – of virtual care that all of a sudden was necessary provided an incredible laboratory for the best practices, what works, what doesn't, in an environment where I'm betting that the judges and the regulators will – will have a degree of tolerance that's a little bit more elevated, given that physicians were really thrown into that – that environment in – in a matter of days. So that will lead to more flexibility for the evolution of the – of – of the – the principles.

02:42

So – so let's look – let's look at – at the big building blocks of – of legal principles that need to be taken into account in virtual care. And – and the first one is the issue of getting the information and maintaining it in a – in a confidential way. Now, we're moving from an environment where the care is provided in an office, where the physician knows that, once the set-up is done, that the encounter will be confidential. Other than having to worry about is the door shut or who's in the room with the patient, there's not much that the physician needs to worry about in terms of confidentiality.

03:29

With virtual care, the physician will need to worry about the – the privacy, the confidentiality of the exchange, with every patient. Because what makes virtual care good for the patient and – and acceptable for the patient is the possibility of accessing care from various locations. Darren was – was talking about the possibility of conducting certain pieces of the encounter in the parking lot. Great. Wonderful access. But the physician will have to be sure that it's an environment in which the information can be imparted in a confidential way. These confidentiality obligations are not going away.

04:13

The other aspect of confidentiality is the issue of the patient record. Where is the information kept? The – the obligation to maintain a patient record, a complete patient record, is – is not modified. But with the new applications, with – with the asynchronous poss—possibility of – of getting some information, where is that information residing? Is it transferred into the patient's medical record, the official medical record? All of these issues will have to be thought about when a certain platform or a certain way of delivering virtual care is – is being – is being adopted.

04:56

Looking at the regulatory issues, the – the jurisdiction issue is very much an issue that's front and centre, and has been in the COVID-19 experience. I'm – I'm very pleased that from – hearing from Heidi that FMRAC is looking at the possibility of – of expanding the possibility of – of providing virtual care in more than one province. Because while the patient – while the – the physical presence of the patient reassures the physician that the physician is not practising in another province, virtual care is something else completely.

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From – from one day to the other, in – in border towns, for instance, or in university towns, when – when patients who, for instance, in the Ottawa region, live on the Quebec side used to access their care on the Ontario side, all of a sudden these patients are in Quebec when the physician in Ontario provides virtual care to that patient. That raises issues of is it possible for the – for the physician to – to do that. University students all of a sudden left and went back to their provinces, and – but they still wanted to access the – the care from their physician. And what to say with virtual care of all the snowbirds, who will be dispersed around – around the world, basically, and will want to continue the relationship they have with their – with their physician?

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So the issue of jurisdiction is very important. It goes beyond the – the borders of Canada, but at least FMRAC is looking at resolving issues within the province. That will be – that will be a key aspect. And it's – it's difficult because the physician cannot control or verify where the patient is when the patient is accessing that virtual care.

07:03

Now, the – the other regulatory framework, basic principles have been put in place, but I – I suspect, as I was saying earlier, that, as new tools are being added to the – to the

wonderful array of – of available apps and platforms, colleges will have to adapt to these very quickly because I suspect that patients will push for these – for these convenient apps quickly as well.

07:41

The issue of standard of – of practice, we need to go back to the very basic principles in order to understand what is expected of physicians at this time. There will be a – there will be a time when there will be a very specific and long list of – of things that need to be looked at, but going to the basics, the first issue is consent. Does the patient consent to the – to the use of virtual care, and does the patient understand that virtual care will imply certain limitations on – on what can be done? So obtaining and documenting the consent to the virtual care in Canada will be very important.

08:26

Does the virtual care encounter allow the establishment of an acceptable patient-physician relationship? I mean, it – I'm – I – the – that will be an issue with many of these platforms. It will be an issue with many of the asynchronous ways of getting information to the – the physician, for instance. It is an ethical obligation for the physician to establish an acceptable patient-physician relationship. I suspect that a greater access in – in many circumstances will improve the patient-physician relationship, but physicians will have to be mindful of that.

09:03

What of the quality of the information that's available to the physician? Does the application provide physicians with the – the appropriate information on which to make a diagnosis? And if we look at the experience that the Association has so far with virtual care cases, they really revolve around the – the quality of the information and the quality of the – the decision making on the basis of that information. So that will be very important. The use of bots, the use of automated decision making, does that rob the physician of certain information that should be available for the physician to make a decision? That – that will be key.

09:49

And finally, the issue of proper follow-up. We will need to ensure that the patient is – is properly followed up, that – that the – the end of the virtual encounter is not the end of what the – the – what the – the relationship will be.

10:08

Now, the other block that we'll – we'll have to look at is the issue of – of billing, because obviously physicians will want to be paid for the care they provide. And that's one aspect that often lags the development of – of the apps. I won't – I won't spend more time on the issue of billing, but it's very important for physicians to know that, if they – if they develop a novel way of providing care, they will not only have to ensure that they comply with the college and regulatory framework, but also that they comply with the billing requirements, in order for them to – to get paid. So much, much to – to fill in to have a complete – a complete framework.

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