Midwives Protection Program

RISK NOTE

SUBJECT: Understanding Section 51 of the Evidence Act

What is Section 51 of the Evidence Act?

The *Evidence Act* [1] is provincial legislation that sets out how evidence can be used in legal proceedings. Section 51 of the *Act* details how information and documentation gathered through specific types of health care case reviews are prohibited from disclosure and protected from being used as evidence in legal proceedings. These case reviews occur within hospitals as part of a special committee set up to meet the requirements of the *Evidence Act*.[2] They are often referred to as Section 51 Reviews, Quality Assurance (QA) Reviews, or Morbidity and Mortality (M&M) Rounds.

The purpose of Section 51 is to allow open and frank discussion of clinical events and health care, in order to improve safety and quality of care within the hospital and during ambulance transport without fear of the content of the discussions and information shared being used against the providers in litigation. As such, Section 51 protects many aspects of the case discussion and materials prepared for use within the QA process.[3] However, it does not protect all discussions, and may not protect discussions of care provided outside of hospital, other than during ambulance transport.

Are registered midwives included under Section 51?

Yes, registered midwives are covered under Section 51 to discuss, within a formal QA process, the care they provide within the hospital, or during ambulance transport to hospital. This meets the goal of Section 51 to allow for honest and open discussion within hospitals to improve the quality of care.

On the other hand, if some or all of the midwifery care was provided outside of the hospital, and that outside care is reviewed and commented on within the context of the QA review, it is unlikely that Section 51 would provide protection of a quality review discussion, although this assumption has not yet been tested by the courts. In this case any discussion, opinions, and/or resulting recommendations regarding the midwifery care may need to be disclosed during an investigation or legal proceeding.

What is protected under Section 51?

Within QA case reviews, all discussions of care provided within the hospital are generally protected under Section 51. This includes any preliminary investigations, case summaries, email communications, patient-safety and learning system (PSLS) reports, or any

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[1] *Evidence Act*, [RSBC 1996] c 124 http://www.bclaws.ca/civix/document/id/complete/statreg/96124_01

[2] As described in *Evidence Act*, s 51(1) a Section 51 committee is considered a medical staff committee or one that is established by the board, and that investigates or evaluates the practices of the hospital and health care professionals in the hospital for the purposes of improving medical practice in the hospital or during transportation to or from that hospital.

[3] *Evidence Act*, *supra*, s 51(2).

other correspondence or materials created in preparation for a QA case review.[4] This ensures that hospitals can maintain professional competency and ethics as well as high standards of confidentiality.[5]

Additionally, opinions expressed by the participants at the QA review, and the findings, conclusions, and recommendations of the review committee are protected.

What is not protected under Section 51?

Clinically relevant facts and records are not protected. Even though they are discussed in a Section 51 review, these facts and records remain evidence of the care provided. As such, the records can be requested and the clinical facts can be used in litigation.

Informal case discussions are not protected. These include midwifery peer review, or other case reviews that are not part of an established hospital committee which meets the criteria set out in Section 51 including: being set up for the purposes of QA review, by a properly constituted individual or committee reporting to the Board, for the purposes of improving care within the hospital.[6] This includes any discussion that a midwife may have with colleagues or practice partners after an event; so be very careful about who you discuss cases with and, when you do discuss cases, try to stick to facts and clinically necessary information only.

Any review of care that is not provided within a hospital (or in ambulance en route to the hospital). Legislation specifically refers to the *Hospitals Act*, under which hospitals and ambulance are specifically covered. Arguably, then, the location of the care is likely to affect whether or not discussion of that care is protected under Section 51.[7] Therefore it is unlikely that any review, opinions, conclusions, or findings relating to care provided in patients' homes or in the community would be protected under Section 51, unless it was specifically to address discussion of subsequent care provided in hospital, although this has not been tested in the courts as of yet.

Questions and Answers

"I've been asked to attend a review of a case where there was a poor outcome. Should I participate?"

Generally, yes, but there can be some exceptions depending on the facts of the case, the location of client care and place of birth, as well as the working environment in the hospital site.

1. **If the birth occurred in the hospital, and all care was provided in the hospital, then the case review will fall within the protection of Section 51.** As such, all discussions, reports, opinions, conclusions, recommendations, and materials prepared for the review which occurs as a properly conducted quality review will be protected. In this case, the midwife will likely be advised to attend and participate in the review with a goal to improving patient care in the future.

2. **If the birth occurred in the hospital, but some of the care was provided at home, then only the review of the portion of care that occurred at hospital or en route in ambulance would be protected under Section 51.** However, health authorities could argue that information about the care provided outside of the hospital was pertinent to the

[4] *Evidence Act, supra,* s 51(2)(b).
[5] *Sinclair v. March*, 2000 BCCA 459.
[6] *Evidence Act, supra*, s 51(1)(b).
[7] *Hospitals Act* [RSBC 1996] c 200. http://www.bclaws.ca/civix/document/id/complete/statreg/96200_01

review of the care that occurred within the hospital, and as such choose to review it. While the hospital's review should be limited to hospital and ambulance care, information about care provided outside that was reviewed may not be protected under Section 51. Therefore, midwives are in a difficult position in these circumstances as only some of the care they provided is protected when reviewed by a hospital QA committee.

A prudent approach for a midwife faced with such a review is to provide factual information only regarding the care provided in a home or community setting in the review process, while having a wider ranging discussion of care provided in hospital or during transport to the hospital. Alternately, the midwife can participate fully with the risk that the review will not ultimately have the protection of Section 51, or they can decline to participate, in which case the committee may make a complaint to the BC College of Nurses and Midwives (BCCNM).

Midwives are advised to consider that the BCCNM Standards of Practice include participating in the "evaluation of self, colleagues, and the community" which may be construed to include QA reviews.[8]

It is advisable to contact the Midwives Protection Program (MPP) prior to participating in QA reviews. MPP's advice whether to participate, and to what extent you might participate, will include a consideration of the environment and working relationships between midwives and members of the QA committee. These considerations include how midwives are generally perceived, incorporated, and supported in the specific hospital as well as within the health authority, how informed choice and personalized care model of midwifery is viewed in the hospital, and how QA reviews have been conducted in the past in the hospital as well as the health authority.

"Will the QA committee members know the limits of protection under Section 51?"

Possibly, however, be careful not to assume that the hospital organizing the review will have fully considered your professional rights, responsibilities, obligations and options where a quality of care review is being organized.

Members of the QA committee may be unaware that care provided outside of the hospital is likely not protected under Section 51, and therefore may need to be disclosed in lawsuits or other legal proceedings. As such, you can advise the committee that you are unable to discuss care provided outside the hospital or ambulance unless advised otherwise from the MPP.

"At the end of the QA review process, the committee made several recommendations to improve the safety of future patients. Can I share these with the family?"

The purpose of a quality of care review is to foster a safe environment where all those involved can share perceptions and opinions of what gave rise to the incident and hopefully make recommendations for improvement to reduce the chances of recurrence in future.

In some circumstances it is important to share information arising from a Section 51-protected review with the patient and/or family. In these cases, actions implemented as a result of the recommendations that come out of a review may be disclosed, as well as any additional relevant medical facts learned during the review. However, please discuss this with the MPP prior to disclosing anything to the family.

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[8] BC College of Nurses and Midwives of (2020). *Standards of Practice: Standard Thirteen*. Retrieved online https://www.bccnm.ca/Documents/standards_practice/rm/RM_Standards_of_Practice.pdf

"Can a discussion or case review occurring at a QA committee meeting ever become a complaint to the BCCNM?"

Yes. Midwives should recognize that if the QA process raises significant concerns about a provider's care, a quality review committee may make a complaint to the provider's college should they deem it appropriate.[9] This is especially true should they feel that care provided outside of the hospital requires a review, in which case they would suggest the BCCNM review it. Another time a complaint may arise is when the midwife declines to participate in a QA case review. In these circumstances, the committee may disclose information that the midwife might have expected to be protected.

In this case, the BCCNM is required to investigate even in circumstances where the client, her family, a colleague or other individual health care providers have not lodged complaints personally.

It is important to note that midwives are not obligated to self-report to the BCCNM any poor outcomes or potential cases where a complaint may arise. Should you have specific concerns it is important to speak to the MPP and legal counsel prior to contacting the BCCNM.

Test your Knowledge

Scenario 1:

A registered midwife (RM) attends a planned home birth, which was transferred to the hospital for augmentation as the client didn't progress past 7 cm dilation after 20 hours of active labour. An obstetrician was consulted and oxy orders were received. Soon after oxytocin was started, there were significant decels, and a stat CS was ordered. The baby had low Apgars, and blood gases were significantly out of range. As such, a mandatory M&M case review occurred. It is unknown yet if the baby will have long term effects, but the baby is in NICU requiring ongoing supportive care. Also, the family has expressed concern that perhaps the hospital transfer should have occurred sooner.

1. **Should the RM attend the M&M review, even if the labour started at home?**

   Yes, she should attend. She should report this birth to the MPP as the client or family may complain and there was a poor outcome. The risk of litigation is increased due to the high risk newborn. Also should she decline the hospital committee may initiate a complaint. She should speak to the MPP prior to the meeting, and should ensure that only facts are discussed if any of the pre-hospital care is included in the review.

2. **Should the M&M committee discuss the portion of care that occurred at home?**

   No, unless they feel that it is pertinent to the care that was provided in the hospital. Otherwise they should either not discuss the pre-hospital care, or only discuss the facts as shown in the records without preparing any new evidence, reports or opinions on the care. Any discussions of pre-hospital care may not be protected.

[9] *Evidence Act*, *supra*, s 51(5)(b).

3. **If the M&M review resulted in specific recommendations, are those protected or can they be shared with the patient and family?**

The resulting recommendations should not be shared with the family. However it may be beneficial to let the family or client know that improvements have been made, without informing them that the improvements are the result of the Section 51 review. Seek advice from the MPP prior to sharing the recommendations specifically.

Scenario 2:

A registered midwife (RM) attends a client at home who had paged with strong contractions, bleeding and ruptured membranes at 35 weeks. On arrival at the client's home, the midwife finds the client actively labouring with birth appearing very imminent and fetal buttocks presenting on exam. She engages all of the appropriate emergency measures including calling 911, and informing the hospital of her pending unplanned home breech birth. The baby is born soon after with 911 arriving shortly thereafter. Baby appears vigorous but the RM and parents would prefer to transfer to hospital for a pediatrician consult as there was a delay of delivery of head. On arrival, the RM finds the staff unsupportive and questioning whether she had planned the home breech birth. A PSLS is filed by one of the staff, which results in a QA committee review the following week.

4. Should the RM attend the QA review when she is invited, considering the birth occurred at home?

Possibly. This case would require a discussion with the MPP prior to attending. As well, it would be important to discuss with the QA committee organizer the goal of the review, considering the limitations of protection under Section 51 prior to the review. Should the organizer believe it remains important to review the case, the RM should request that only the facts as recorded be discussed.

5. **Are there any other concerns that the RM might have, should the panel decide that elements of her care were below the standard expected?**

In any QA review, providers should be aware that the committee can initiate a BCCNM complaint should they have concerns. In this case, the RM should be aware that the hospital may issue a complaint, and should contact the MPP if she has not already.

Scenario 3:

Two RMs practice at the same hospital. In order to meet their BCCNM peer review requirements, the midwives from the various practices that work at the hospital get together for peer reviews every few months. Each of these midwives presents their recent cases at the peer review, which takes place in a hospital meeting room.

6. Are the discussions that the midwives had about the cases protected by Section 51, because they happened in the hospital?

No. Just because the meeting happens inside of the hospital walls, it is not automatically protected under Section 51. Unless the review is conducted as part of a properly constituted Section 51 committee, which a midwives-only peer review would not be, any discussion, summaries, opinions, or recommendations could be called into evidence in legal proceedings. Therefore, in order to minimize risk of needing to disclose the content of the peer review, midwives should not discuss cases at peer review that they believe may be litigated or become part of a BCCNM complaint. Also, when discussing the case, they should ensure that no personal client information is shared and notes should not be taken regarding the content of the discussions.

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