

# RISKPROOF

The Risk Management Magazine for the Canadian Association of Occupational Therapists

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# THE BMS GROUP STORY: INNOVATION AND CHANGE IN THE INSURANCE MARKET

**A**s an occupational therapist considering liability protection, legal counsel and practice risk resources, where do you turn? Professional liability insurance products for healthcare professionals are often expensive and confusing, with many policies placing important conditions or restrictions on your coverage and legal costs. The Canadian Association of Occupational Therapists (CAOT) has taken action to ensure that this is not the case for members participating in the CAOT insurance program.

In partnering with BMS Group (BMS) and the Healthcare Professionals Insurance Alliance (HPIA), CAOT has invested significantly to provide occupational therapists with the most cost effective and comprehensive coverage available, specialized resources, and best in class legal defence. CAOT has optimized your professional liability insurance program and has become the primary source for the protection, advice and practice risk needs of Canadian occupational therapists.

CAOT in partnering with BMS set out to improve and change professional liability insurance services and protection for occupational therapists. Drawing on examples from medicine and nursing, BMS designed the Healthcare Professionals Insurance Alliance. Participating healthcare professional associations, such as CAOT, are directly involved in program development, governance and strategic decision-making of your professional liability insurance program. This means that you're getting access to expanded insurance coverage, specifically tailored to meet the needs of occupational therapists.

The HPIA model is dedicated to providing associations with the tools required to mitigate practice risk and reduce claims. BMS uses claims data to develop practice-specific risk management products that can be used to foster improved performance and enhance client safety. This, in combination with dedicated staff, superior legal

experts from Gowlings, Canada's leading medical and regulatory defense firm, and prudent claims management results in a sustainable, cost-effective insurance product where the profession and the public are rewarded for effective risk management.

We don't cut corners with your coverage or your legal defence. Instead, we partner with your association to put you, the member, first. As a participant in CAOT's professional liability insurance program you have joined over 250,000 Canadian healthcare professionals who are benefiting from the new and innovative HPIA insurance model.



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# GET PROTECTION WITH PROFESSIONAL LIABILITY INSURANCE

**T**he Canadian Association of Occupational Therapists malpractice and clinic insurance provides the most comprehensive and most cost-effective product available for occupational therapists in Canada. Better yet, it is a program designed by occupational therapists for occupational therapists where excess reserves from prudent practice and a reduction in claims stay within the profession.

The purpose of insurance is to pay claims. If a claim is brought against you, you want the assurance of the best coverage and defence available to protect your reputation and livelihood.

Here are few reasons why the CAOT program exceeds anything else available to occupational therapists in Canada:

## Full and cost-effective coverage -

All policies now offer the most comprehensive malpractice errors and omissions liability coverage available, meeting the requirements of the occupational therapy regulatory bodies in Canada. With a minimum of \$5 million per claim limit and \$5 million limit for total claims per member, rest assured that no money will come out of your pocket to top up claims payments;

## Specialized legal services -

You have access to the expertise of one of the most highly recognized legal defence firm in medical defence and professional liability in the country. In changing to BMS Group and the Healthcare Professionals Insurance Alliance (HPIA), subscribers to the CAOT insurance program receive legal representation and services from Gowling Lafleur Henderson LLP (Gowlings) as the exclusive provider of legal services for the program. Legal representation is provided at no cost and without having to pay a deductible or any fees. Gowlings represents a large number of Canada's professional groups such as physicians, physiotherapists and psychologists. They will work with you to achieve the best possible outcome for all involved;

## Enhanced coverage -

Coverage has been enhanced based on the

recognized needs of our members. We're listening! And not only that, we're acting on what you tell us too.

**Considering starting or growing your family?** We now offer a 50% discount for members on maternity or parental leave who will work fewer than six consecutive months during the membership year - saving you money!

**Teaching or participating in a course?** Your policy will cover you for a claim arising in the workplace, but will also cover you when teaching or participating in a course, or when providing advice to someone outside of the employment setting. CAOT's policy offers coverage that follows you 24 hours a day, seven days a week, and is not limited by province or place of work.

**Looking towards retirement?** CAOT's program provides occupational therapists with the opportunity to purchase unlimited coverage for a nominal fee upon retirement. With this protection in place, your policy will automatically extend to respond to any claim made against you for insured incidents that occurred before retirement. One less thing to worry about!



### *Worried about security of client information?*

Cyber liability coverage is now offered to meet the increased exposures related to potential data security and privacy breaches, such as loss of electronic client or employee information.

### **Guaranteed limits of liability and policy coverage -**

As the largest professional liability insurance program for occupational therapists in Canada, funds are in place to provide clients with appropriate compensation for valid claims in a timely manner. Coverage for damages is comprehensive and is not restricted to clients who sustain physical harm. This is particularly relevant for clients who claim financial loss not resulting from an injury, but instead due to some other action (often related to wording in an occupational therapist's written report);

### **Enhanced risk management materials and education -**

We care about client safety! Risk management and insurance professional staff use real data to develop evidence-informed educational and practical client safety resources. These resources are used to promote delivery of safe care across Canada.

Let CAOT help you manage the professional risk associated with occupational therapy practice. Learn more about how CAOT's Professional Liability program protects you, your clients and the profession at [caot.bmsgroup.com](http://caot.bmsgroup.com), or contact the risk and insurance professional staff at BMS Group, [caot.insurance@bmsgroup.com](mailto:caot.insurance@bmsgroup.com) or 1.855.318.6024.

# WHAT AN OUNCE OF PREVENTION CAN DO FOR YOUR PRACTICE

**O**ccupational therapists need liability insurance to practice. We all know that. But when you purchase your coverage, do you think about why you need it, and how important it really is to the future of your practice? Do you know what kinds of insurance you should be getting? What to do in the event of a claim? And where to turn when a complaint has been made against you? Are you sure you're adequately covered and that your insurance provider understands the risks associated with your practice?

Insurance is a complex subject for everyone. Complicated policy riders and "legalese" in the documents makes it difficult to understand. Insurance is something we hope we never need. Many of us ignore the details. When it comes to insurance, wishful thinking is not good enough – not for your home and auto insurance, and certainly not for the practice insurance that protects your clients and your livelihood. You need to understand exactly how your coverage works, what it includes, and more importantly, what it does not include.

As an occupational therapist, having the right insurance isn't a "nice-to-have" – it's an absolute requirement. When reputation, integrity and careers are at risk, you need appropriate coverage and defence.

And then there are all those options! It can lead to confusion. Let's try to explain things more clearly...



## Professional Liability Insurance (PLI):

Professional liability insurance provides coverage against claims that may arise from the practice of occupational therapy. Every occupational therapist who provides services, whether in a paid or volunteer capacity, must be covered by PLI. PLI protects occupational therapists by ensuring that your legal defence is coordinated and paid for if a claim is made against you. Your PLI also covers the cost of any client compensation, or damages for circumstances covered in the policy regardless if they are frivolous or have merit.

While your regulatory body requires you to hold PLI to ensure that the public is also protected by having funds in place to pay claims, there are also other factors to consider: Are you a business owner? Incorporated? Self-employed? If so, you have other insurance considerations because you likely want to protect your business.

## Professional Liability for Clinics:

If you are incorporated or employ occupational therapists or occupational therapy assistants and support personnel, you should consider this additional coverage, which protects your business assets in the event that your business name is included in a statement of claim or lawsuit. Think of it as malpractice insurance for your business name. Coverage is also available for multi-disciplinary clinics.

## Commercial General Liability Insurance (CGL):

In addition to clinic liability insurance, you may want to consider purchasing CGL insurance to protect your other business concerns.

CGL is insurance that protects you in case of bodily injury and/or property damage to a third party that is not caused by negligence. Think of this as your 'slip and fall' insurance. It's also the policy that would respond if you or your staff accidentally damage a client's property while providing in-home treatment.

CGL might seem like an obvious choice for business owners, but it is also recommended for occupational



therapists who are self-employed. If you treat or consult with clients in their homes, or contract your services to hospitals, clinics, or other health care providers, you may want to consider CGL.

The CAOT insurance program is designed by occupational therapists and Canada's best malpractice insurance experts including staff at BMS who are regulated health professionals and practice risk management specialists. Healthcare professionals just like you determine coverage, analyze claims data, examine trends and ensure that the program evolves along with the profession. As scope of practice and risk levels change, so does the CAOT insurance program.

For professional liability, clinic practice or business insurance, nobody puts your interests first the way your association does. The CAOT insurance program is the only one available to occupational therapists in Canada where claims reserves are reinvested back into the membership. With your participation, we continue to remain Canada's largest, most cost effective, and comprehensive insurance program for occupational therapists, protecting over 6,000 members nationwide.

For further information about CAOT's PLI program and other member-specific insurance coverage, visit [caot.bmsgroup.com](http://caot.bmsgroup.com) or call BMS Group at 1.855.318.6024.



# COLLEGE COMPLAINTS: THEY HAPPEN

## Regulatory Complaints Process: A Brief Overview

Occupational therapists are expected to comply with all professional obligations including standards of practice and code of ethics. However, complaints can happen even to the most prudent and diligent therapists.

Anyone can file a complaint to your respective regulatory body (“College”) if they are dissatisfied with your care or conduct, including a client, a family member/friend of a client, a colleague, employer or insurer. Complaints can arise as a result of client interactions, disputes between colleagues or involve non-therapeutic activities. These activities can be a concern if they reflect negatively on your professionalism or suitability for practice.

In Canada, each province has its own legislation which regulates the practice of occupational therapy and the way complaints are processed.

Let’s review the steps involved in a typical complaint to the College. However, this article should not be considered as a comprehensive overview of the process for your particular jurisdiction. If you do have any questions about your jurisdiction, we would strongly recommend that you review the website of your provincial regulator for more details on how a complaint is specifically processed in your province or territory.

### ▶ Notification of a Complaint

The Colleges have a statutory obligation to process all complaints filed against their members. Upon receipt of a complaint, the College will notify you by letter or telephone. If notified, you should determine whether

the College is asking you to respond. If a response is required, Colleges will typically give directions on how and when to respond, including deadlines.

As soon as you receive notification of a College complaint, you should contact your liability insurance provider. As a participant in CAOT’s professional liability insurance program, you have coverage for legal counsel with training and experience who can assist you through the process.

### ▶▶ Preparing a Response

Before responding, you must determine the identity of the complainant and the nature of the complaint. The College usually provides a copy of the complaint letter but occasionally, they will only enumerate the issues set out in the complaint.

When drafting your response, compose yourself. Do not rush and ensure you have access to all relevant documentation. Your response to the College should reflect what happened, your interactions with the client and your rationale behind your care or conduct. When appropriate (and if the College has provided you with the necessary consent), you should make reference to the client’s record and attach any other document available to support your position. It is important to maintain a respectful tone throughout your response and to show empathy, as the College expects you to remain professional no matter how frivolous or vexatious the allegations may be.

Your response should consider the key issues raised by the complainant and whether there is any possibility to improve your practice to reduce the risks

of recurrence. It can be of assistance to you with the College if you are able to demonstrate some insight as to what happened and what you plan to do in the future to address the issue.

Under no circumstances should you ever alter a client's record after learning of a complaint or legal action. Any change to the records will affect your credibility and could lead to repercussions from the College.

You should also discontinue any ongoing treatment with a client who has filed a complaint against you. It is more appropriate to transfer the care to another occupational therapist or discharge the client in accordance with the College's policies and guidelines.

The College will send a copy of your response to the complainant. This might satisfy the complainant, however, some complainants will provide a reply, which the College will forward to your attention for any further comments. You should provide a second response if there are any clarifications required or new issues to be addressed.

### ▶▶▶▶ The Authority of the College to Investigate a Complaint

Provincial legislation typically provides each College with broad powers to investigate complaints filed against their members. During the course of an investigation, the College can attend at your place of work, with or without notice, for an interview, to examine, remove and/or copy the client's record and any other documentation that is relevant to the complaint, including billing information. The College may also seek information from witnesses such as your colleagues and staff. You are required to cooperate fully. Surveillance can also be conducted by the College in the course of an investigation.

If the issues are complex, the College might seek an expert peer opinion from an independent assessor. You should be provided with a copy of any report prepared by the assessor and an opportunity to respond (although the College is under no obligation to share such a report with you.)

### ▶▶▶▶ Consideration of the Complaint

All of the information collected during the course of the investigation will be provided to a panel assigned to deliberate the matter. The composition of the panel varies between provinces but always involves the input of at least one occupational therapist. Once the panel has considered the matter, you will receive a written decision, along with reasons for the decision.

### ▶▶▶▶ Possible Outcomes

In many cases, occupational therapists successfully demonstrate that their care and conduct was appropriate. In those cases, the College will typically dismiss the complaint and take no further action.

When issues are identified with regard to the practice or conduct of an occupational therapist, each College has a broad discretion to dispose of the complaint. While the potential outcomes vary from province to province, some of the more common outcomes are:

- Referral of the matter to alternative dispute resolution;
- Counsel (advise) the member on how to improve their practice by making recommendations or providing guidance;
- Caution (warn) the member that more serious consequences may be considered if the issue reoccurs;
- Require that the member participates in a specified continuing education and remediation program;
- Request that the member enters into a contract with the College imposing some restrictions, limitations, directives or requirements on the member's certificate of registration.

In cases where the College is concerned that an occupational therapist is suffering from a health



condition or disorder, including a substance abuse problem, the College may refer the matter to a committee responsible for assessing the member's fitness to practice.

Where there are serious concerns identified with regard to a member's conduct or practice, the matter is referred to a committee responsible for assessing professional misconduct and competency. Unless the member is willing to plead guilty to the charges, a hearing is required where the College will have the burden of proving its case against the member. The process is similar to a criminal trial. The decision from the panel presiding at the hearing may range from a dismissal of the charges to the revocation of the member's license to practice.

Any decision rendered by a College can be appealed. Each province has its own legislation governing the appeal process.



## Impact of a College Complaint on your License and Registration

All information related to the complaint process is held confidential. However, in the event that your license is revoked, suspended or restricted in any way, this information will be made available to the College's public register.

Your status as a registrant will not be affected as a result of a complaint being submitted unless there is a finding of professional misconduct, incompetence or incapacity made. The fact that a complaint has been submitted does not appear on the College's public register, however, it does remain on file and will be considered by the College if a subsequent complaint is received against you.

*Please note that this commentary is not, nor should it be considered, legal advice and should not be relied upon as such. Should you have any questions regarding informed consent as it relates to your practice, please contact your provincial association, your provincial regulator and/or the Canadian Association of Occupational Therapists. This article was prepared and written by the legal team at Gowling Lafleur Henderson LLP (Gowlings). CAOT members who participate in the Professional Liability Insurance Program are eligible for 30-minute pro bono and inclusive legal claims defence services from Gowlings, one of the largest and most highly-recognized legal firm in medical defence and professional liability in Canada.*

# INFORMED CONSENT: GETTING CLIENTS TO UNDERSTAND WHAT I AM ABOUT TO DO

## A brief overview of the law on informed consent

"**H**ad I known that this could have happened, I would have never agreed to the treatment." Lawyers who defend health care professionals have heard this phrase from plaintiffs on countless occasions. In medico-legal actions, allegations that a plaintiff has not provided an informed consent to the procedure that ultimately caused or contributed to his/her injuries are common.

As healthcare providers, occupational therapists have a legal duty to obtain consent from clients

to ensure that prior to carrying out any type of treatment for a client, the client has consented to that treatment. Failure to obtain consent to treatment from a client exposes you to a potential civil claim and/or proceedings before your provincial regulator.

For consent to treatment to be considered valid, it must be an "informed" consent. The client must have been given an adequate explanation about the nature of the proposed investigation or treatment and its anticipated outcome as well as the significant risks

involved and alternatives available. The information must allow the client to reach an informed decision.

While there are general principles that underlie the doctrine of informed consent, each provincial regulatory body has its own policy guideline and/or practice direction on informed consent. Additionally, some provinces have imposed a statutory obligation to obtain informed consent (i.e. Health Care Consent Act in Ontario or Health Care Consent and Facilities Admission Act in British Columbia). Finally, in addition to practice directions or statutory responsibility, there is a common law duty to obtain an informed consent to treatment. As a result, comments in this article are more general in nature. It is strongly recommended that you review the website of your provincial regulator should you have any specific questions about what is required in your province or territory.

### **1. The client must have the capacity to consent to treatment**

Consent can only be valid if the person providing it has the capacity to do so. The question of legal competency typically arises in situations where you are treating someone who is under the age of 18 or persons who may have some type of mental illness. However, these factors alone should not determine competency (i.e. someone under the age of 18 or who has a cognitive decline and impairment can provide a valid consent to treatment).

When determining capacity, you must be confident that the person consenting to treatment has the ability to appreciate the nature and consequences of the consent discussion. If you have any doubt, seek consent from the parent, guardian, or substitute decision maker. If there is any question as to whether the client may not appreciate the nature and consequences of the consent discussion due to a language barrier, ensure that someone is present who can provide translation.

### **2. The client must receive proper disclosure of information from the caregiver**

Your client must understand the nature of the treatment and why it is being proposed. The client must be advised of the risks associated with the treatment. The question that typically arises is to what extent you have to advise the client of risks. In Canada, you are required to advise a client about attendant, material and special risks. Attendant risks are those that are more common. Material risks are those that are less common, but serious should they occur.

Material risks can differ between clients, so you should take into account your client's particular health and condition when considering what risks are material. Finally, specific risks include those that are

possible with respect to the specific client.

The test in Canada as to whether the client provided informed consent is whether the average reasonable person, in the same position as the client, would have consented to the treatment knowing the attendant, material and special risks.

In addition to the above, the client should be advised of the treatment's impact on lifestyle, and any economic considerations of receiving or refusing proposed treatment. The client must be provided with any alternative treatments available and what the risks and benefits of each would provide. Finally, the client needs to be informed as to the risks of refusing/not proceeding with treatment.

### **3. The authorization should be specific to the procedure to be performed**

The consent that a client provides you must relate to the specific treatment/procedure that you are proposing or recommending.

You do not have to obtain a client's consent for every single step of a treatment plan. However, the blanket consent form, such as that typically signed by the client at admission to a hospital or private practice, is not sufficient. If the method of treatment that you are proposing for a client consists of a course of treatment over a period of time, it is not necessary for you to obtain a separate consent for each stage of the treatment. However, the entire course of treatment should be discussed with the client.

If you include other individuals in the administration of treatment to a client (i.e. students, occupational therapist assistants, etc.), then you must ensure that the client is advised of the fact that others will be involved in providing treatment and that the client consents to their involvement.

### **4. The client should have the opportunity to ask questions and receive clear answers**

The discussion regarding consent to treatment should not be a one-way discussion. Ideally, you should have a conversation with the client where they can ask questions and you can provide the information necessary to answer those questions.

There are numerous criteria that apply for patient/client consent to be valid in Canada:

- 1.** The client must have capacity to consent to treatment.
- 2.** The client must receive proper disclosure of information from the caregiver.
- 3.** The authorization should be specific to the procedure to be performed.
- 4.** The client should have the opportunity:
  - a.** To ask questions
  - b.** To receive understandable answers
- 5.** The authorization obtained should be free of undue influence and coercion.
- 6.** The authorization obtained should be free of misrepresentation of material information.

## 5. The authorization obtained should be free of undue influence and coercion

It goes without saying that you must ensure that your client does not feel pressured or obligated to proceed with the proposed treatment. Not only should you ensure that the client does not feel pressured to proceed by another person, you must also ensure that you are not advocating the treatment plan or procedure in such a way that the client feels they have no choice but to proceed.

## 6. The authorization obtained should be free of misrepresentation of material information.

While you are free to provide the client with your opinion as to the best course of action, you should be as objective as possible when presenting the information to the client. Accurate and impartial information on all treatment alternatives must be provided.

## Documenting the consent discussion

Documenting the consent discussion that you have with your client is essential. While you may have a standard practice as it relates to the discussion you have with a client prior to undertaking treatment, this does not eliminate the requirement to document your discussion. Ideally, you would discuss the proposed treatment plan with the client, document

the discussion with them and then have the client sign off on the treatment plan. However, at a minimum you must document the fact that you spoke to the client, identified the treatment plan/procedure, advised them of the risks and benefits, advised them of any alternatives, made a note of any questions that the client had and whether the client provided consent.

In a medico-legal action where informed consent is an issue, the client will claim that you did not provide them with all of the necessary information to make an informed decision. If you have documented your discussion, that will be helpful in corroborating your argument that you did advise the client of all of the information necessary to make an informed choice.

The lack of documentation regarding a consent discussion increases the chances of a court or regulatory body concluding that you did not provide the client with the information necessary to make an informed choice.

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# “WHAT IF”: RISK IS OUT THERE, LET’S DEAL WITH IT

## 1. I am being sued

- Contact BMS Group and speak in confidence to an insurance professional for advice. Staff at BMS will take down details of the complaint and will communicate these to Novex, your insurance company.
- Novex will contact you after the claim is reported. They will assign you legal counsel.
- Work with your legal counsel to prepare a statement of defence which will need to be submitted to the court within a specified period.
- Never alter a client’s health record after a legal action is initiated.
- You don’t have to do this on your own. CAOT’s insurance program partners are here to help.

## 2. I am the subject of a College complaint

- Contact BMS Group and speak in confidence to an insurance professional for advice. Staff at BMS will take down details of the complaint and will communicate these to Novex, your insurance company.
- Novex will contact you after the claim is reported. They will assist you in determining what the College is asking you to do and will assign you legal counsel.
- Work with your legal counsel to draft your response to the College. Your response should reflect what happened, your interactions with the client and your rationale behind your care or conduct.
- Maintain a respectful tone throughout your response and show empathy as the College expects you to remain professional.
- Never alter a client’s health record after learning of a complaint or legal action.

## 3. I need legal advice

- If you have a practice-related question and are participating in CAOT’s Professional Liability Insurance Program you can access the pro bono legal advice program with Gowlings
- Members can take advantage of this service with questions related to issues such as:
  - Privacy and confidentiality
  - Conflicts of interest
  - Responses to requests for information from third parties
  - Inquiries from your regulatory body
  - Responses to subpoenas
  - Professional misconduct
  - Ethical obligations
  - Professional obligations
- When you make this call, you will hear a recording asking you to leave a detailed message. Please be prepared to provide the following information:
  - Name, telephone number and address
  - Certificate and policy number
  - A brief summary of the issue
- A lawyer will return your call and provide you with free, confidential legal advice in order to help avoid or reduce the probability of a claim or complaint

For more information please visit [www.caot.ca](http://www.caot.ca).

### Helpful contacts:

**BMS Group:** 1-855-318-6024 or [caot.insurance@bmsgroup.com](mailto:caot.insurance@bmsgroup.com)

**Gowlings pro bono legal advice program:** 1-855-783-8825



