

The Emotional and Financial Impact of Medical Malpractice Litigation

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Halifax 8 – Winnipeg 2008

Trends in Malpractice Litigation

- ◆ 30% decrease in lawsuits against Canadian doctors since 1998
- ◆ As a ratio of lawsuits to CMPA membership, the decrease = 45%

(CMPA 2007 Annual Report: Ottawa, 2008, at 10)

Trends in Malpractice Litigation

- ◆ This 10 year decrease in malpractice claims has been most pronounced in obstetrics and surgical specialties

(CMPA 2007 Annual Report: Ottawa, 2008, at 10)

Malpractice Litigation Frequency

- ◆ Number of lawsuits commenced against doctors in Canada?

928 (in 2007)
917 (in 2006)
904 (in 2005)

(CMPA 2007 Annual Report: Ottawa, 2008, at 9)

- ◆ Of these, approximately 30% will result in compensation.

(CMPA 2005 Annual Report: Ottawa, 2006)

Adverse Events in Canada

- ◆ Every year, 185,000 patients in Canada suffer an "adverse event" during their hospital stay
- ◆ These "adverse events" are associated with between 9,000 and 24,000 preventable deaths each year

G. Ross Baker *et al.*, "The Canadian Adverse Events Study: The Incidence of Adverse Events Among Hospital Patients in Canada" (2004) 170 CMAJ 1678

Efficacy of the Malpractice System

What percentage of patients injured by negligence receive compensation?

- ◆ Less than 10%

J.R.S. Prichard, "Liability and Compensation in Health Care" (Toronto, 1990), at 17

- ◆ Perhaps only 2%

E.I. Picard & G.B. Robertson, "Legal Liability of Doctors and Hospitals in Canada (4th edition: Toronto, 2007), at 532"

A "World-Class" Model?

"While the CMPA can rightly claim (in terms of curtailing overall costs) that 'Many other nations consider the Canadian medical liability system to be a world-class model', one must seriously question the efficacy of a system which compensates so few who are entitled to it."

E.I. Picard & G.B. Robertson, "Legal Liability of Doctors and Hospitals in Canada (4th edition: Toronto, 2007), at 532

Possible Reasons?

- ◆ Financial
- ◆ Emotional

The Financial Barriers

"Medical negligence claims are expensive to prosecute. They are not for the weak-kneed. Almost invariably, they are complex and time-consuming and must be prosecuted vigorously. The list of competent lawyers agreeable to representing a plaintiff in a medical negligence action is a short."

Dybongco-Rimando Estate v. Lee, [2003] O.J. No. 534, per Justice Quinn at para. 61 (S.C.J.)

The Contingency Fee “Panacea”

- ◆ Claims of less than \$100,000 are routinely discouraged by legal counsel

J.R.S. Prichard, “Liability and Compensation in Health Care” (Toronto, 1990), Appendix A at 104

- ◆ Liability for disbursements
- ◆ Liability for the Defendants’ Legal Costs

Recent Examples of Legal Costs

- ◆ costs for a 165 day trial - \$2 million

Marchand v. Public General Hospital Society of Chatham, [1996] O.J. No. 4420 (Gen. Div.), aff’d but varied as to costs (2001), 51 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 66

- ◆ costs for a 97 day trial - \$975,000

DeJong Estate v. Owen Sound General and Marine Hospital, [1999] O.J. No. 4369 (C.A.)

- ◆ costs for a 33 day trial - \$809,000

Dybonco-Rimando Estate v. Lee, [2003] O.J. No. 534 (S.C.J.)

The Emotional Impact on Patients

- ◆ Medical malpractice litigation often has profound psychological and stressful consequences for plaintiffs

e.g. L.H. Strasburger, “The Litigant-Patient: Mental Health Consequences of Civil Litigation” (1999) 27 *Journal of the American Academy of Psychiatry and the Law* 203

The Emotional Impact on Doctors

- ◆ Studies are consistent in showing that doctors who are sued report feelings of anger, distress, and a sense of being personally attacked

e.g. P. Bark et al. "Impact of Litigation on Senior Clinicians: Implications for Risk Management" (1997) 6 Quality in Health Care 7

S. C. Charles et al., "Physicians Self-Reports of Reactions to Malpractice Litigation" (1984) 141 American Journal of Psychiatry 563

The Emotional Impact on Doctors

- ◆ The experience of being sued "was like going through the emotions of death and dying. We felt shock, denial, anger, and finally, acceptance"

L. Cohen, "Code of Silence Hardest Part of Being Sued, FPs Say" (1999) 160 CMAJ 97

The Emotional Impact on Doctors

- ◆ These emotions apply regardless of the outcome of the litigation
- ◆ Doctors involved in malpractice litigation often report feelings of being isolated from colleagues and unsupported by institutional management

P. Bark et al. "Impact of Litigation on Senior Clinicians: Implications for Risk Management" (1997) 6 Quality in Health Care 7

The Emotional Impact on Nurses

- ◆ Studies show similar findings

"I experienced disbelief, anxiety, low self-esteem"

K. Larson, "The Psychological Impact of Malpractice: The Lived Experience" (2006) 33 Nephrology Nursing Journal 140

Stress and Adverse Events

- ◆ Physicians reported increased anxiety about future errors (61%), loss of confidence (44%), sleeping difficulties (42%), reduced job satisfaction (42%), and harm to their reputation (13%) following errors.

A.D. Waterman et al., "The Emotional Impact of Medical Errors on Practicing Physicians in the United States and Canada" (2007) 33 Joint Commission Journal on Quality and Patient Safety 467

See also C.P West et al., "Association of Perceived Medical Errors with Resident Distress and Empathy" (2006) 296 JAMA 1071

The Need for Support for those Who Make a Mistake

- ◆ The empirical evidence is overwhelming that health care providers who are involved in causing an adverse event are left with a strong feeling of isolation and abandonment from their colleagues and institution

e.g. Editorial, "Medical Error: The Second Victim" (2000) 320 British Medical Journal 726

V. Giannetti, "Medical Errors: The Hidden Victim" (2003) 20 Clinical Research and Regulatory Affairs 425

Conclusion

- ◆ The role of financial risk as a deterrent to patients obtaining compensation
- ◆ The emotional impact of litigation on both patients and health care providers
- ◆ The emotional impact of adverse events on health care providers, and the need for collegial and institutional support

The research assistance of Elizabeth C. Robertson, project manager/research associate at the Health Law Institute, University of Alberta, is gratefully acknowledged
