



## MEDICAL MALPRACTICE

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### MEDICAL ERRORS: A PHYSICIAN'S DUTY TO TELL THE TRUTH - THE WHOLE TRUTH.

Medical errors are not uncommon. They occur far more frequently than most people realize. A 2012 report estimated that 40,000 Canadian patients die every year as a result of medical error – that is the equivalent of 80 jumbo jets crashing every year – one every five days or so. According to the same report, the actual total number of deaths is undoubtedly higher because of the high rates of non-reporting. In addition to those who die, there are hundreds of thousands of Canadian who are harmed from health care delivery.

When medical errors occur in the provision of health care, physicians have an obligation, both legally and ethically, to disclose the medical errors to their patients. But all too often, this does not happen, and the cause of a patient's poor outcome following surgery or other medical treatment remains unknown. Patients may assume their injury is simply a result of their underlying medical condition, or the manifestation of one of the risks of the procedure/treatment which can occur for unknown reasons. Often, it is not until litigation has been commenced that the patient finally learns the truth about the cause of his or her injury.

The purpose of this article is to examine the physician's duty to disclose medical errors when they occur, and to examine the consequences that flow from a physician's failure to make adequate disclosure.

### A PHYSICIAN'S ETHICAL DUTY

The foundation of a physician's ethical duty is to act in his or her patient's best interests. This entails a clear obligation on the part of the physician to disclose any potential medical error or harm that may have occurred during medical treatment to the patient. This duty has been codified in the Canadian Medical Association's ("the "CMA") Code of Ethics as follows:

#### Responsibilities to the Patient

##### General Responsibilities

14. Take all reasonable steps to prevent harm to patients; should harm occur, disclose it to the patient.

### A PHYSICIAN'S LEGAL DUTY

A physician also has a positive legal duty to inform his or her patient of any medical errors that occur while treating the patient. This duty stems from the fiduciary nature of the physician-patient relationship. The physician-patient relationship is one based on trust – the trust of a patient (with inferior knowledge and power) in their physician (with superior power



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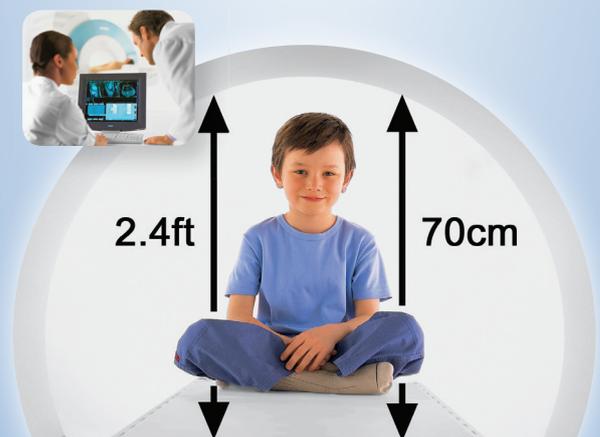
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and responsibility) - that their physician will exercise that power in the patient's best interests, and *only* in the patient's best interest.<sup>2</sup> Physicians accordingly have an obligation to act with utmost good faith and loyalty to their patients, and must not allow their own personal interests to conflict with their professional duty.<sup>3</sup>

## STANDARD OF DISCLOSURE

While a physician has a clear ethical and legal duty to disclose medical errors to his or her patients, a question that often arises is, how much information is a physician required to disclose? Is it sufficient for a physician to acknowledge the poor outcome and offer an apology or must the physician describe, in detail, what went wrong and why? Must the physician go so far as to admit that they breached the standard of care?

To put the physician's duty to disclose medical errors into proper context, it is useful to consider a physician's obligations of disclosure to the patient prior to the medical treatment, which is stated in the CMA's Code of Ethics as follows:

### **Responsibilities to the Patient**

#### **Communication, Decision Making and Consent**

21. Provide your patients with the information they need to make informed decision about their medical care, and answer their questions to the best of your ability.
22. Make every reasonable effort to communicate with your patients in such a way that information exchanged is understood.

The courts have also addressed a physician's obligation to provide information to patients prior to medical treatment by stating that a physician has an obligation to disclose to the patient all of the risks which a reasonable person in the position of the patient would want to know, the benefits of the proposed medical treatment, as well as the alternatives, and to do so in plain language that the patient can understand. This standard of disclosure goes well beyond the more limited paternalistic approach to disclosure which existed prior to the Supreme Court of Canada decisions in *Hopp v. Lepp*<sup>4</sup> and *Reibl v. Hughes*<sup>5</sup> and is firmly grounded in the notion of patient autonomy.

If a physician has an obligation to advise a patient of all potential risks arising from the *proposed* medical treatment which the reasonable person in the position of the patient would want to know, then it follows that the same standard of disclosure applies with respect to what *actually* occurred during the medical treatment. There is no principled reason why it should not.<sup>6</sup>

Therefore, in determining whether or not a physician has met his or her duty to disclose a medical error or harm which may have occurred during medical treatment, one should broadly ask, "what would the reasonable person in the position of the patient want to know?"

Viewed from this perspective, it is clear that a physician's duty to disclose extends beyond an apology or mere expression of regret.<sup>7</sup> It requires the physician to tell the patient in factual terms what harm, or potential harm may have occurred during the procedure. It requires a level of candor and specificity.

The duty to disclose applies regardless of whether or not the

patient asks any questions about what happened.<sup>8</sup> It extends to circumstances where the patient is no longer under the care of the responsible physician at the time the medical error is discovered.<sup>9</sup> The fact that the error has been corrected, and disclosure would not affect future medical care, does not relieve a physician of his or her obligation to disclose the error.<sup>10</sup>

Noting the error in the patient's medical records or disclosing the error in the context of a s. 51 Review does not relieve the physician of his or her obligation to disclose the error to his or her patient, or patient representative.<sup>11</sup>

The duty of disclosure further applies in circumstances of complications which arise in the absence of negligence.<sup>12</sup> For example, in *Emmonds v. Makarewicz*, the defendant surgeon left a large number of gallstones in the plaintiff's abdominal cavity, which had spilled during removal of her gallbladder. The court found the spillage of the gallstones was not negligent, nor was the decision to leave them in the abdominal cavity. However, in addressing the allegation that the defendant surgeon should have informed the plaintiff of the retained gallstones, the court found the defendant was negligent in failing to inform the plaintiff of their existence.

Simply put, a physician's duty to his or her patient is to tell the truth - the whole truth, about what actually occurred during their medical treatment.

While the duty to disclose is broad, it has thus far been limited to disclosing factual information, and has not been extended to require the physician to express an opinion regarding whether or not he or she was negligent in the treatment provided. Indeed, while the Canadian Medical Protective Association has adopted a policy of encouraging factual disclosure of any potential medical errors or harm that may have occurred during medical treatment, it cautions physicians to avoid using the words "negligent" or "fault" or to reference a failing to meet the standard of care.<sup>14</sup>

## CONSEQUENCES OF FAILING TO DISCLOSE

When a physician fails to disclose an error that occurred during a medical procedure, the physician is effectively placing his or her own self-interest (the desire to avoid a lawsuit, a complaint to the College of Physicians and Surgeons, or possible embarrassment) ahead of the best interests of the patient and the patient's right to know. This violates the position of trust the physician is in, and constitutes a breach of the physician's fiduciary duty to the patient.

Notwithstanding the inviolate nature of this trust-based relationship, a physician's failure to disclose a medical error does not, in and of itself, result in legal liability for damages. In order to be successful in obtaining compensation, it is necessary to establish a causal connection between the breach of the duty to disclose the medical error or harm and the injury which the plaintiff has suffered. For example, when the failure to disclose has caused a delay in the plaintiff's ability to obtain medical treatment to correct the problem, any injury flowing from this delay (eg. additional pain and suffering) is compensable.<sup>15</sup> Where the failure to disclose the medical error did not cause any additional injury,

no damages will flow from this breach, other than potentially an award of pre-judgment interest to compensate for the delay in bringing the action.<sup>16</sup>

It is also important to consider whether a physician's failure to disclose a medical error which occurred during the first surgery will vitiate the consent obtained for a subsequent, or corrective surgery performed by the same physician, as the patient did not have access to complete information when consent was given.<sup>17</sup> This is largely a fact-driven analysis.

In some circumstances, a physician's failure to disclose a medical error will attract both aggravated and punitive damages.<sup>18</sup> The cases which have attracted such damages involve an element of active concealment of the medical error. In *Shobridge v. Thomas*, the defendant surgeon discovered during a second surgery that he had left an abdominal roll measuring six feet by six inches in the patient's abdomen during the first surgery. The defendant surgeon failed to advise the patient of this discovery (he simply advised her that he thought he may have "fixed the problem"), and failed to record it in his operative record and consultation reports to other treating physicians. He further instructed the nurses not to disclose this finding in the chart or to the nursing supervisor. The court concluded that "[t]he only possible interpretation of [the defendant surgeon's] action ... is that he was covering up his own failures in order to avoid legal responsibility".<sup>19</sup> The Court awarded the plaintiff \$25,000 in aggravated damages and an additional \$20,000 in punitive damages.

Similarly, in *Gerula v. Flores*, when the defendant surgeon discovered that he had erroneously operated at the wrong level of the plaintiff's spine, he altered the medical record respecting the preoperative diagnosis pertaining to the first surgery (aligning it with the surgery he performed) and then proceeded to obtain the plaintiff's consent to a second surgery without ever disclosing the error to him. The court held that the alteration of medical records was more than mere negligence and that it alone justified an award of punitive damages in the amount of \$40,000.<sup>20</sup>

Conversely, where there is an absence of such active concealment, the courts have declined to order punitive damages. In *Vasdani v. Sehmi*, the defendant surgeon also erroneously operated at the wrong level of the plaintiff's spine. When he discovered his error a year later, he failed to take steps to contact the patient (who was then under the care of another physician) to advise him of the error. He did not actively try to cover up the error in any way. The court characterized his failure in these terms,

[t]here are few who are ready and willing to admit error, and perhaps even fewer among lawyers and doctors. But all that is a long way from the conduct which attracts an award of punitive damages, which are to be awarded, if at all, only where the conduct of the defendant "...is sufficiently outrageous to merit punishment, as when it discloses malice, fraud, cruelty, insolence or the like."<sup>21</sup>

## CONCLUSION

A physician's duty to tell the truth to his or her patient about a medical error or potential harm that may have occurred dur-

ing medical treatment lies at the core of the physician-patient relationship.

Everyone makes mistakes. To err is human; to disclose, divine, and required by law. V

- 1 Susan McIver & Robin Wyndham, *After the Error: Speaking out about Patient Safety to Save Lives* (Toronto: ECW Press, 2013) at ix – xii.
- 2 *McInerney v. MacDonald* (1990), 66 DLR 94th 736.
- 3 *Ellen I. Picard & Gerald B. Robertson, Legal Liability of Doctors and Hospitals in Canada, 4th ed.* (Toronto: Carswell, 2007) at 5. (1980), 112 DLR (3d) 67 (SCC).
- 4 (1980), 114 DLR (3d) 1 (SCC).
- 5 See analysis in *Stamos v. Davies*, 52, OR (2d) 10.
- 6 *The Apology Act* [SBC 2006] chpt 19 allows a physician to offer an apology without admitting fault or liability.
- 7 *Vasdani v. Sehmi*, [1993] OJ No. 44.
- 8 *Supra*, If the patient's care has been transferred, the responsible physician has the responsibility of contacting the patient to disclose the relevant information.
- 9 *Shobridge v. Thomas*, 1999 CanLII 5986 (BCSC).
- 10 s. 51 of the *Evidence Act* [RSBC 1996] chpt 124 provides that certain information disclosed to a properly
- 11 *Shobridge v. Thomas*, 1999 CanLII 5986 (BCSC).
- 12 *Febr v. Immaculata Hospital*, 1999 ABQB 865; V.A.H. v. Lynch, [1998] AJ No. 819 (Q.B.).
- 13 CMPA "How to apologize when disclosing adverse events to patients – Duties and Responsibilities", published September 2006/ Revised May 2008.
- 14 *Supra* note xii.
- 15 *Supra* note viii.
- 16 *Gerula v. Flores*, [1995] OJ No. 2300 (CA).
- 17 *Supra* note x; *supra* note xvii.
- 18 *Supra* note x at para 94.
- 19 *Supra* note xvii.
- 20 *Supra* note viii.
- 21 *Supra* note viii.

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