


MEDICAL MALPRACTICE

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Lindsay McGivern is an associate lawyer at Pacific Medical Law. Lindsay obtained her law degree from Dalhousie University in 2014 and was called to the Bar in 2015. Her practice is focused on representing patients who have suffered injury as a result of medical malpractice. Lindsay articled at a civil litigation defence firm before moving to Pacific Medical Law. Working on both sides of civil litigation has allowed her to have a broader perspective and given her a better understanding of the different approaches taken by plaintiff's and defence counsel.

Paul McGivern is a senior litigator acting exclusively in plaintiffs' medical negligence and infant injury litigation cases. His practice focusses on complex catastrophic cases, especially infant birth trauma cases. Paul has been selected for inclusion in The Best Lawyers in Canada since its inauguration in 2007 and in 2016 was named the "Lawyer of the Year" for medical malpractice. He brings to his practice a unique background of 17 years as medical malpractice defence counsel. He has been lead counsel in hundreds of medical malpractice claims before every court level in BC and in the Supreme Court of Canada.

THE FINANCIAL BURDEN OF MEDICAL MALPRACTICE LAWSUITS

Medical malpractice cases have a well-deserved reputation for being both very difficult and very expensive. In their book, *A Practical Guide to Medical Malpractice Litigation,* Judge Heather Lamoureaux and Brian Devlin, QC describe the field this way:

> … The lawyer who seeks to successfully represent plaintiffs in the highly specialized field of medical negligence litigation must attain additional skills far beyond those of the ordinary civil litigation lawyer… Medical malpractice litigation demands an extraordinary investment of time, money and willingness to assume considerable risk. Few lawyers are willing to take these cases as the potential barriers to successful resolution are considerable. Indeed, medical negligence litigation represents a unique challenge for the lawyer for a number of reasons.

Many of the difficulties involved in medical malpractice litigation are associated with the skill and time required to learn the medicine involved in each case, craft an argument and present your medically complex case in a way the judge will understand. However, the financial toll of running a medical malpractice case is equally difficult.

Most doctors in Canada are members of the Canadian Medical Protective Association (the "CMPA") – a member-funded organization that provides defence for physicians involved in medico-legal matters. The CMPA was incorporated by an Act of Parliament in 1913, and since that time has amassed significant expertise and a substantial defence fund ($2.7 billion as of 2009). These resources are made available to assist physicians named in lawsuits or complaints to their Colleges. The funds are used to pay defence counsel, expert witnesses and damages. In 2009, the CMPA spent $115 million on legal costs and $12 million in expert fees.

The CMPA takes a very hard line on these cases because being named in a lawsuit can affect not only a physician's reputation, but also his or her ability to obtain admitting privileges in a hospital. In turn, that can affect a physician's ability to earn an income. Many people have experience with settling claims with insurance com-

panies and expect that the CMPA will handle medical malpractice claims in a similar way. The CMPA is not an insurance company, and does not operate on the same principles. The protection of the professional integrity of physicians is key to their operations - it is imbedded in their mission statement and guides most of what they do. The $2 billion the CMPA has amassed in its defence fund is earmarked for defending physicians. If the CMPA judges a physician's conduct to be defensible, it will vigorously defend the physician, to the Supreme Court of Canada if necessary. The CMPA is prepared to spend more money on defending a case than they might have to pay in a judgment. To further ensure they are able to provide the most effective defence for their members, the CMPA retains a small number of highly skilled lawyers to conduct their defence. In British Columbia, the majority of this work is conducted by a small number of lawyers at Harper Grey. All of that combined means that the CMPA has the resources and the mandate to mount a significant defence on behalf of a physician. The CMPA is not in the business of settling a case just to make it go away – they are prepared to defend to the end, and have the resources and access to the expertise necessary to do so.

The commitment of the CMPA to defending their members is even more evident when you consider the statistics. The latest statistics released by the CMPA indicate that out of the total number of legal cases resolved by the CMPA in 2015 only 0.45% resulted in a legal judgment in favour of the plaintiff. There are a higher number of settlements but that number is still only ~39% of the cases concluded in the year. The CMPA statistics show that of the 96 cases that proceeded to trial in 2010, only 15 resulted in a judgment against the physician. In that same year, there were 278 cases settled and 526 dismissed, discontinued or abandoned. Similarly, in 2011, only 68 cases proceeded to trial, only 13 of which resulted in a judgment against the physician. In that year, there were 293 cases settled and 533 dismissed, discontinued or abandoned. These statistics confirm, at a glance, the high-risk nature of this type of litigation. All of this means that there are significant financial risks that must be considered before starting a medical malpractice lawsuit, including a financial risk/benefit analysis.

Medical malpractice claims are exceedingly expensive to run. Except for the rare occurrence where the medical error is a non-technical matter or so obvious that a layperson may be expected to have knowledge, all medical malpractice claims require expert evidence to prove both a breach of the standard of care and causation. Judges do not know the medicine or the intricacies of the medical procedures and will therefore not infer negligence without expert evidence. Often, numerous experts with different qualifications are required for each case (doctors, nurses, technicians etc). In addition to the liability case, experts are also needed to opine on the cost of future care and other damages issues. The need to obtain at least one report from 15 different experts is not unusual. With the hourly rates charged by medical practitioners, the costs of obtaining these opinions add up rather rapidly. The disbursements associated with a typical medical malpractice lawsuit can range from $50,000 to $200,000.

As in other areas of the law, the more seriously injured the plaintiff (and therefore the greater the care requirements) the larger the damages claim. Unfortunately, for most catastrophically injured parties, the cost of care requirements consume all their resources. Many plaintiffs, particularly parents of injured children, are struggling financially on account of the expenses associated with providing for their needs. It is a reality of this area of the law that most plaintiffs cannot afford to divert their limited funds to this process, especially with all the uncertainties involved. The result of this is that, for the most part, medical malpractice lawsuits must be run on a contingency fee basis and the lawyers must carry the disbursements for the duration of the action. Often, the plaintiffs are not in a place where they can cover the cost of these disbursements without judgment in their favour so the lawyers must be prepared to absorb these costs in the event of an unsuccessful claim. Obviously, the contingency fee arrangement also means that the lawyers, in the event of a loss, will not be paid for the time spent running the file.

There is an emerging option for reducing risk: litigation insurance to protect parties against adverse costs and\or disbursements (depending upon the coverage purchased). This is an option that has been in use in motor vehicle litigation for some time. Some insurers are now providing coverage for medical malpractice claims. If the claim is unsuccessful, no fee is payable and the insurer will cover the adverse costs and\or disbursements up to the amount of indemnity purchased (again depending upon the coverage provided). If the claim is successful, however, a fairly substantial fee is usually required. Insurers are much more reluctant to offer this kind of protection for medical malpractice litigation due to the risks involved, and it is typically offered on a case by case basis. In the medical malpractice context, litigation insurance is both very difficult to obtain and can be very costly.

All in all, medical malpractice litigation is very risky. The costs associated with proceeding with medical malpractice actions are considerable and expenditures can be great. The outcomes are never certain. The high costs involved in running medical malpractice files means that losses come with a huge financial toll.