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MEDICAL MALPRACTICE ▸

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Does Failure to Disclose a Medical Error Amount to Liability?

This is the final part of our 8-part series on the anatomy of a medical negligence claim within which we review the following topics:

- The Doctor-Patient Relationship and Duty of Care (*the Verdict* Issue 163 – Winter 2019)
- Consent (*the Verdict* Issue 164 – Spring 2020)
- Standard of Care (*the Verdict* Issue 165 – Summer 2020)
- Defences to Standard of Care (*the Verdict* Issue 166 – Fall 2020)
- Causation – Basic Principles (*the Verdict* Issue 167 – Winter 2020)
- Causation – Application (*the Verdict* Issue 168 – Spring 2021)
- Expert Evidence (*the Verdict* Issue 169 Summer 2021)
- **Disclosure of Errors**

Introduction

In this series we have reviewed the law as it relates to a health care provider's duty of care to their patient as well as an analysis of the standard of care required of health care providers and the various defences available. We have delved into the murky waters of causation – which, while recently clarified by the Supreme Court of Canada remains confounded by the rapid pace of medical and technological advances. At the heart of it all is the patient and the court's increasing recognition of patient autonomy and the importance of informed consent. We reviewed the standard of disclosure required as well as the unique causation issues that arise in the context of claims based in lack of informed consent. Finally, in recognition of the critical role of expert evidence in proving medical negligence claims, we reviewed the common law and statutory rules relating to the admissibility of expert evidence.

We conclude this series with a topic that looms in the background of all medical malpractice cases – and that is the physician's duty of disclosure to their patient when things go wrong.[1] When medical errors occur in the provision of health care, physicians have an obligation, both legally and ethically, to disclose such errors to their patients.[2] But all too often this does not occur, and the cause of a patient's poor outcome following surgery or other medical treatment remains unknown until it is discovered by a subsequent healthcare provider, or more commonly, until it is uncovered through the process of litigation.

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.

As with any claim based in negligence, to be successful a plaintiff must meet four requirements:

1. The defendant must owe the plaintiff a duty of care;
2. The defendant must breach the standard of care;
3. The plaintiff must suffer an injury or loss; and
4. The defendant's conduct must have been the actual and legal cause of the plaintiff's injury.[3]

Does a Physician owe a patient a duty of care to disclose medical errors?

Typically, where a physician has participated in the care of a patient, a duty of care arises.[4] The duty of care is wide reaching and includes a duty to disclose any medical errors or adverse events that occur while treating the patient (*Stamos v. Davies* (1986), 21 D.L.R. (4th) 507 (H.C.J) "*Stamos*"). 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 and responsibility) - that their physician will exercise that power in the patient's best interests, and *only* in the patient's best interest (*McInerney v. MacDonald* (1990), 66 D.L.R. (4th) 736). 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.

In other words, fear of getting sued is not a valid reason to withhold information from a patient. Further, the duty is a continuing one, meaning 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 (*Vasdani v. Sehmi,* [1993] O.J. No. 44, "*Vasdani)*. The duty to disclose is also a positive one which applies regardless of whether or not the patient asks any questions about what happened.[5]

It is also worth noting that in addition to this legal duty, a physician also has an ethical duty to act in the patient's best interests. This entails a clear obligation on the part of the physician to, "disclose to the patient if there is a risk of harm or if harm has occurred."[6]

What is the Standard of Care?

Having established that a duty of care exists on the part of a physician to disclose a medical error to a patient, the next step is determining what is required in order for the physician to meet this duty – in other words, what is the required standard of care? 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. It is clear that prior to medical treatment, 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.[7] This standard of disclosure goes well beyond the more limited paternalistic approach to disclosure which existed prior to the seminal Supreme Court of Canada decisions in *Hopp v. Lepp* (1980), 112 D.L.R. (3d) 67 (SCC) and *Reibl v. Hughes* (1980), 114 D.L.R. (3d) 1 (SCC) and is now 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.

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 the standard of disclosure extends beyond an apology or mere expression of regret. 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 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. For example, in *Shobridge v. Thomas*, 1999 CanLII 5986 (BCSC) "*Shobridge*", the defendant surgeon failed to inform the plaintiff that the source of her abdominal infection was an abdominal roll which he had unknowingly left in her abdominal cavity during an earlier surgery. He simply advised the plaintiff that he thought he may have "fixed the problem". One of the defendant surgeon's explanations for failing to disclose the retained abdominal roll was that, having removed the abdominal roll during the subsequent surgery, "the cause of the problem had been removed; the physical damage had been done; and failing to inform [her treating physicians] did not compromise her treatment". The court rejected this rationale. Further, the fact that the error has been noted in the patient's medical record or disclosed in the context of a hospital quality assurance review also does not meet the standard of disclosure required as this does not ensure disclosure to the patient. (note s. 51 of the *Evidence Act* [RSBC 1996] chpt 124 protects certain information from disclosure to the patient.)

A physician also has a duty to disclose errors or adverse events which occur in the absence of negligence. For example, in *Emmonds v. Makarewicz*, 2000 BCCA 573 (CanLII) "*Emmonds*", the defendant surgeon accidentally caused a large number of gallstones to spill into the plaintiff's abdominal cavity during removal of her gallbladder. The court found the spillage of the gallstones was not negligent, nor was the decision to leave some of them in the abdominal cavity. However, the court found the defendant was negligent in failing to inform the plaintiff of retained gallstones.

It is also important to consider that a physician's failure to disclose a medical error which occurred during the first surgery may vitiate the consent obtained for a subsequent, or corrective surgery performed by the same physician, on the basis that the patient did not did not provide informed consent to the subsequent surgery (*Gerula v. Flores*, [1995] OJ No. 2300 (CA) "*Gerula*").

While the standard of disclosure 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 *(Fehr v Immaculata Hospital*, [1999] A.J. No. 1317).

Did the Breach of the Standard of Care Cause an Injury?

A physician's failure to disclose a medical error does not, on its own, result in legal liability for damages. In order to be successful in establishing liability in negligence, an injury must have arisen and there must be a causal connection between the breach of the standard of care and the injury which the plaintiff has suffered.

For example, in *Stamos*, the defendant physician accidentally punctured the plaintiff's spleen during a lung biopsy and failed to disclose this medical error to him following the procedure. The Plaintiff was discharged home, only to return the following day in significant pain. The patient underwent surgery, during which a significant amount of blood was found in the patient's abdomen and his spleen was removed. The court found that while the defendant owed a duty of care to the plaintiff to disclose the accidental injury to his spleen, and that his limited explanation of what occurred during the lung biopsy fell below the standard of disclosure required, this breach of the standard of care did not lead to liability because it did not cause an injury. The court found that plaintiff's pain and the need for the removal of his spleen were caused by the initial intra-operative injury and not by the failure to disclose it and resultant delay in repair surgery.

On the other hand, in *Emmonds*, the failure to disclose the spillage of gallstones into the plaintiff abdomen was found to be a breach of the physician's duty of disclosure which the court found did cause an injury – namely, an additional three years of misery for the plaintiff as it delayed surgical revision and reinforced the view amongst the plaintiff's medical team that her complaints of pain were all in her head. Accordingly, liability was found and damages awarded.

Implications of Active Concealment of Medical Error

In some circumstances, a physician's failure to disclose a medical error will attract both aggravated and punitive damages.

> **The cases which have attracted such damages involve an element of active concealment of the medical error.**

As described above, in *Shobridge* the defendant surgeon discovered that he had left an abdominal roll in the patient's abdomen during an earlier surgery. The defendant surgeon failed to advise the patient of this discovery. He further actively concealed this error by failing to record it in his operative record and consultation reports to other treating physicians and instructing the nurses not to record it in their charting or disclose it 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". The Court awarded the plaintiff $25,000 in aggravated damages and an additional $20,000 in punitive damages.

Similarly, in *Gerula*, 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 preoper-

ative 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 elevated this case to one involving more than mere negligence and awarded of punitive damages in the amount of $40,000.

Conversely, where there is an absence of the type of active concealment seen in *Shobridge* and *Gerula*, the courts have declined to order punitive damages. In *Vasdani*, 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, at para 40:

> [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".

Conclusion

In conclusion, while there is a clear duty on the part of physicians to disclose medical errors to their patients, and a broad scope of disclosure required, liability will only flow in those unique cases where the failure to disclose a medical error caused additional harm - physical or psychological. If the medical error is found to have been a negligent one, any alleged additional harm caused by failing to disclose the medical error will often be causally connected to the underlying negligence, meaning it does not add any value to the claim. However, in cases where the medical error was not a negligent one, failure to disclose it may give rise to a cause of action where none would otherwise exist. It is also important to consider the implications of failure to disclose a medical error on the issue of discoverability in assessing a plaintiff's limitation period.

1 While this paper will focus of the physician-patient relationship, the principles apply to other health care professionals.
2 The phrase medical error is used broadly to refer to all unexpected adverse outcomes irrespective of negligence.
3 Robertson and Picard, Legal Liability of Doctors and Hospitals in Canada, 5th ed. (Toronto: Thomson Reuters 2017) at 268.
4 For a more detailed discussion of the nature of the duty of care see Donaldson, "The Doctor-Patient Relationship and Duty of Care – How Wide Should the Net be Cast?" *the Verdict*, Issue 163, Winter 2019, p. 27.
5 see Robertson, G "Fraudulent Concealment and the Duty to Disclose Medical Mistakes", Alberta Law Review, Vol. 25, No. 2, p. 215 at p. 218.
6 The Canadian Medical Association Code of Ethics.
7 For a more detailed discussion see Raab, "The Evolution of the Law on Informed Consent", *the Verdict*, Issue 164, Spring 2020, p. 29).