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The Intersections of Family and Estate Litigation

PART I

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MEDICAL MALPRACTICE ▸

The Risks and Rewards of Medical Negligence Law

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This article is the first in a series aimed at providing a detailed examination of the challenges and pitfalls in different types of medical negligence lawsuits. Each article will focus on specific injuries and will highlight the obstacles a plaintiff faces in bringing their case to a successful conclusion.

Introduction

The imbalance of knowledge and power between a health care provider and a patient is never more evident than when a patient believes they have been injured due to medical negligence. Add the discipline of law to the mix and it becomes clear why medical negligence cases have a well-deserved reputation for being intellectually challenging, laborious, and expensive. Patients who have suffered severe or catastrophic injuries while receiving health care often have the mistaken impression that it is impossible to win a case against a physician or other health care professional in Canada. While the odds may be stacked against them, in the right circumstances it is possible to successfully sue a health care provider in Canada.

Every medical negligence case is an opportunity to learn about a new area of medicine or to look at the issues in a new way. The lawyer taking on these cases must immerse themselves in complicated medical procedures and knowledge, even before the experts weigh in. This is because a significant understanding of the relevant medicine is necessary so you can ask the right questions and ensure the causation case can be made out. In addition, standard of care issues can be complex and a solid understanding of the complexities of the healthcare system is required. Care providers work in a team-based health care system where the questions of who, what, where, when and why, can become a gordian knot of overlapping responsibilities that must be teased out. The convergence of these issues makes for an environment that caused one court to note that:

> ... 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. ...[1]

The Impact of the Team-Based Approach in Medicine

As the provision of health care has evolved over the past decades, the court's view of the role of various health care professionals has also evolved. Historically the health care hierarchy was viewed as a pyramid, with medical doctors at the top, assuming overall diagnostic and treatment responsibility. This was followed by the nursing profession, with allied health care professionals forming the next layer and assistants and order-

lies at the base of the pyramid. This pyramid is flattening due in large part to efforts over the last two decades to bring all health care professions under umbrella legislation.[2] This revised legislative structure has been accompanied by expansion in the scopes of practice of many health care professionals. Now, the scopes of practice of regulated professions may have overlapping or shared activities and fewer exclusive practices. This, of course, has had an impact on the standard of practice expected of various health care professionals. As scopes of practice have expanded there has also been an increase in the team-based approach to delivering health care services. These collaborative approaches have been shown to improve health care quality and safety as well as patient outcomes.[3]

As a result of these changes in scopes of practice and the increase in team-based approaches to health care, the courts have had to examine the role of policies, procedures, and protocols along with the importance of communication in the context of the negligence of a member or members of the health care team.

These evolving roles may even call into question the precedential value of older decisions. A seasoned health care professional who is willing to act as an expert can be the key to understanding these important issues.

Expert Opinions – An Essential Component of Your Case

Solid expert opinions are the cornerstone of medical negligence cases and retaining the right experts is essential to winning your case. Not all physicians who provide expert opinions for personal injury cases are willing to assist on medical negligence cases where their colleagues may be defendants. The expert in a medical negligence case needs to be able to convey complex medical and scientific information to the trier of fact, both in writing and on the stand, in a way that can be understood by a layperson. Physicians who engage in teaching residents are often particularly good at describing and explaining medical issues. Preparing to discuss the case with your expert provides you with an opportunity to read the medical literature, textbooks and relevant policy statements so that you can understand the medicine well enough to evaluate your own expert's opinion. This is a vital step in the early stages of your investigations as you need to assess if your expert's opinion will withstand the scrutiny of an expertly run cross-examination.

Many physicians are willing to provide expert opinions for the causation claims in a medical negligence case. Causation issues are less likely to require the expert to write a report directly critical of a colleague. The challenge in finding a causation expert is often in finding the right expert. Sometimes the necessary opinions are from physicians who are highly specialized, and it is not uncommon to have to go outside of the province or the country to find a suitably qualified expert with a supportive opinion.

Connecting the dots from the breach of the standard of care to causation can be the most exciting part of working up your case. The right expert can make sure you understand the medical issues and evidence which will help you in your cross examination of the defendant and hopefully, obtain the admissions you need to prove your case. This exchange of knowledge is not a one-way street, and you will have to instruct the physician about their role in a lawsuit. They not only need to understand that their role is to assist the court rather than advocate for your client, but they may also need to adjust their general approach in their review of the case. Physicians trained in the scientific method will be accustomed to thinking about scientific certainty and may tell you that they can't be certain what caused your client's injuries. Of course, certainty is not the test the court relies on. The test requires the physician to opine on what *likely* happened on a balance of probabilities. Once your expert gets comfortable with that concept, they will be better positioned to assist you to advance your case and the court to understand your case.

Finding a health care professional willing to provide a standard of care opinion that is critical of the care provided by one of their colleagues can be more challenging. Here you often need to match not only the profession of the defendant but usually also their specialty. You may need a physician, nurse, midwife, pharmacist, physiotherapist or any of the other twenty-six regulated health care professions in BC to act as your expert. If a potential defendant practices in a highly specialized area of health care with a small number of colleagues in the province or the country, others in their field may be reluctant to opine on their conduct.

Health care professionals who are prepared to opine on the standard of care do so for a variety of reasons. Some welcome the learning opportunity and note that sometimes their own practice improves because of reviewing charts where there has been a bad outcome. Others view this work as upholding the standards of the profession, echoing in some ways the mission of the Canadian Medical Protection Association (CMPA) which is to protect the professional integrity of physicians and promote safe medical care in Canada. Case law can be a useful source for finding experts – a health care professional who has acted as an expert in the past may be willing to do so again. Reviewing the medical literature can help you identify who is publishing articles relevant to your

case. Those authors are sometimes willing to act as experts or may be able to recommend others who might be able to assist.

Expect a Vigorous Defence

Part of the reason these cases are complex for plaintiffs is that they are vigorously defended by highly skilled lawyers with years of experience and in some cases, unlimited funding. Whether the defendants are physicians, nurses, allied health professionals or the institutions they work in, they all have access to funds to pay for their defence and to pay out a settlement or judgment if necessary.

The CMPA is the member-funded mutual defence organization for physicians. In addition to its mission to protect the professional integrity of physicians and to promote safe medical care in Canada, the CMPA envisions itself as an essential component of the Canadian healthcare system.[4] Along with involvement in research to promote safe medical care in Canada and physician education, the CMPA assists physicians with legal advice and funds their legal defence if they become a defendant in a lawsuit.[5] Patients who have suffered an injury due to medical negligence are sometimes interested in litigating solely "for the principle of the thing" which is not usually a viable basis on which to start an action. The CMPA, on the other hand, does have the resources to litigate cases on principle rather than on an economic basis. The organization is able to retain any number of experts and some of the most experienced professional negligence defence lawyers in the country to defend physicians. This fact, combined with their mission to protect the professional integrity of physicians, results in their policy to defend the defensible.[6] The CMPA is prepared to spend more money defending a case than they might have to pay in a judgment. All of these factors can create significant hurdles for a patient considering launching a medical negligence lawsuit.

The CMPA publishes an annual report that documents the changing patterns of negligence lawsuits against physicians. Medical negligence claims against physicians have been dropping over the years from a high of approximately 2.5 claims per 100 members in the mid 1990s down to 0.71 claims per 100 members in 2020. This is a decrease in the number of claims of 48% in the last 25 years. Despite this drop in claims, until 2015 the number of claims paid out through settlement or judgment had remained somewhat stable; between 300 and 400 a year, perhaps suggesting that less meritorious claims were being advanced less often.[7] Recent data reveals a further drop in plaintiff success, with an average of 286 claims being paid out in each of the last five years.[8]

These numbers, of course, do not tell the whole story about medical negligence claims. Statistical information on the liability of hospitals, nurses and other hospital employees is generally not available. Health care professionals who are in private practice such as dentists, physiotherapists and pharmacists are insured

through professional liability insurance providers that are not required to report their statistics publicly. Nonetheless, a vigorous defence can be expected for any health care professional named as a defendant in an action, and a "vigorous prosecution" will be needed to succeed in a claim against a hospital or any of these health care professionals.

None of these gloomy statistics are to suggest that medical negligence cases cannot be won by the plaintiff. It simply emphasizes the importance of careful case selection, based on the opinions of your experts on the prospect of success.

Imbalance of Resources

Physicians, healthcare facilities and the employees for which they are vicariously liable make up most of the defendants in medical negligence cases. All of these defendants have access to significant resources to fund their defence.

As of December 31, 2020 the CMPA held approximately $5.7 billion in assets; $3.9 billion of which is held as a provision for outstanding claims. [9] Healthcare facilities are usually publicly funded not-for-profit-organizations and carry insurance to provide legal defence and indemnity if required.[10] These insurers are well resourced and very experienced and effective at defending the organizations they insure.

Medical negligence matters can rapidly become inordinately expensive and the plaintiff who has suffered an injury is rarely able to cover those costs. Usually, it is the firm taking on the case that bears the financial risk. Although litigation insurance is available for motor vehicle litigation, in the medical negligence context it is both difficult to obtain and can be very costly for the plaintiff.

To illustrate the financial risks to a plaintiff, taking a birth injury case to trial in BC can cost anywhere from $250,000 to $300,000 for disbursements alone. Most of these costs are for the necessary expert opinions, and in many ways, these are "fixed costs." Every case requires a number of experts to opine on the standard of care, causation and damages. What is variable is the potential compensation. Clearly a careful financial risk-benefit analysis is required before taking on a case. Unless the plaintiff's injuries are life-altering or catastrophic, the damages claim may not be large enough to tip the scales in favour of starting an action, particularly given that statistically plaintiffs lose nearly two-thirds of the time.[11] Another consideration is that in Canada the loser pays part of the winner's costs, which can be a considerable additional financial burden. All of this needs to be factored in when considering commencing a medical negligence action.

Uphill Battle for Plaintiffs

Although CMPA's approach is to "defend the defensible", it is prepared to settle cases when the plaintiff's expert opinions are persuasive. Historically plaintiffs find themselves on the losing side of medical negligence lawsuits. From 2016 to 2020, an average

of 843 new actions were started each year. Of the 266 medical legal cases that went to trial in that five-year period, only 44 cases (17%) were decided for the plaintiff. Plaintiffs do fare better when settlements are factored in. In that same five-year period, 3,540 cases against physicians were resolved without going to trial. Of these 39% were settled with the plaintiff, while the remaining 61% were either dismissed, discontinued or abandoned.

In a 24-year review of medical negligence cases (1992 – 2016) in Ontario, plaintiffs lost more than two-thirds of the non-jury trials that were started. [12] Even when cases were appealed the plaintiff was less likely to be successful. During those 24 years, both plaintiffs and the defendant physicians appealed a roughly equal number of decisions,[13] but when a physician appealed it was allowed 37% of the time with 75% of those resulting in a judgment in favour of the physician and in the remaining 25% a new trial was ordered. In contrast, only 12% of the appeals launched by plaintiffs were allowed[14] resulting in a judgment in favour of the plaintiff 43% of the time and in the remaining 57% a new trial was ordered.

Professor Erik Knutsen details the likely reasons for these results, noting that errors of fact were the most common reason for the Court of Appeal allowing an appeal. The most common error of fact was that there was insufficient evidence for a trial court to have found causation in favour of the plaintiff.[15] This occurred in 30% of allowed appeals, emphasizing the importance of having robust expert opinions conveyed in a way that the court can understand, to ensure you have laid a solid evidentiary foundation to prove causation.

Although Knutsen's data is not directly applicable to British Columbia, when combined with the CMPA statistics, it becomes clear that to improve the prospects of success for you and your client, careful case selection and a meticulous investigation are necessary before starting an action.

Conclusion

Medical negligence lawsuits are challenging and highly technical. They require expertise in medicine, the law and the complicated systems that health care professionals function within. Taking on a medical negligence case can be daunting. It can take years of building the knowledge base and relationships that are key to success. Pairing up with counsel who have experience in medical negligence cases can be a great way to get started. Knowledge of the healthcare system, medical processes, procedures and advances in medical technology is required. In addition, lawyers must build relationships with an array of liability, causation and damages experts to write the necessary expert reports. All of these factors combine to create a practice in law that is demanding, but there is nothing like the "eureka" moment when the medicine and the law mesh together to support a case with winning potential.

In this series of injury-based articles we will highlight cases in which many of these challenges and rewards are evident. Sometimes the plaintiffs were successful, sometimes not. By reviewing cases with similar injuries and comparing the results, we hope to illustrate how the plaintiff was able to succeed, and when they didn't, what strategies may have been available to them to improve their chance of success.

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2 Ries, Nola M. " Innovation in Healthcare, Innovation in Law: Does the Law Support Interprofessional Collaboration in Canadian Health Systems?" Osgoode Hall Law Journal 54.1 (2016) : 87-124.
3 *Ibid.*
4 CMPA, "Mission and Vision" (2021) online: <https://www.cmpa-acpm.ca/en/home>
5 Vanessa Milne, Sachin Pendharkar & Michael Nolan "Is Canada's medical malpractice system working?" (20 November 2014), online: <https://healthydebate.ca/2014/11/topic/cmpa-medical-malpractice/> at para 14.
6 Knutsen, Erik, "The Medical Malpractice Landscape in Ontario: Fact, Trends and Analysis of Trials and Appeals" (2017) 47:2 Adv Q 131 at 138.
7 Gerald B. Robertson & Ellen I. Picard, *Legal Liability of Doctors and Hospital in Canada*, 5th ed (Toronto: Thomson Reuters Canada Limited, 2017) at 658, 659.
8 2019 Annual report (cmpa-acpm.ca), CMPA - The CMPA 2020 Annual Report | Consolidated Financial Statements (cmpa-acpm.ca)
9 CMPA, "The CMPA 2020 Annual Report | Consolidated Financial Statements", online: *CMPA* <https://www.cmpa-acpm.ca/en/about/annual-report#section-number>.
10 *Supra* note 7 at 139.
11 *Supra* note 7 at 144.
12 *Supra* note 7 at 144.
13 *Ibid* at 146.
14 *Ibid* at 150.
15 *Ibid* at 152.