Medical Malpractice Litigation: Myth or Growing Crisis?

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One of the most talked about issues in health care, and one that receives much media coverage and public attention, is medical malpractice litigation. Opinions on how well this litigation system functions differ, sometimes starkly, depending on who is being asked. In order to fully appreciate the extent and complexity of medical malpractice litigation this paper will consider the definition of medical malpractice as well as the laws and procedures followed in Canada. Moreover, trends in malpractice lawsuits for practicing physicians in the field of Cardiology will be used as a case study. Hopefully, by introducing the key organizations and parties involved and the important trends and indicators to watch, this paper will help the reader be more informed as a complex debate unfolds on the effectiveness of the current system.

One of the most talked about issues in health care, and one that receives much media coverage and public attention, is medical malpractice litigation. Broadly, litigation refers to the use of the courts to enforce a right, and request a remedy, by one party against another. In the context of medical malpractice litigation, the legal ‘right’ being enforced is the right of the public to competent medical care – care that is free of medical errors that could reasonably have been avoided.

Opinions on how well this system functions to protect this right differ, sometimes starkly, depending on who is being asked. For example, some physicians view such legal actions “as random events that visit unwarranted expense and emotional pain on competent, hardworking practitioners”. Similarly, within the North American healthcare industry (the hospital sector and insurance providers) there is wide agreement that medical malpractice lawsuits have become more of a burden than a way to ensure patient safety and punish errors and carelessness. Even some observers from outside the medical system express their concern that medical malpractice cases have been altered into some form of a “lawsuit lottery” whereby a few patients receive hefty compensation, while no reimbursement is given to the majority of patients injured by medical errors. Nonetheless, lawyers and the public, even with all the imperfections and equity problems, still view malpractice litigation as a way to regulate and control “a profession that is unaccustomed to external policing”. In fact, some lawyers perceive themselves as “champions of patient safety” who are fighting battles with the healthcare system on behalf of patients.

This complex and imperfect system of malpractice lawsuits has created a significant gap between the views of medical professionals and the views of their patients. While physicians believe they are being unfairly targeted, their patients hold the view that legal action is an effective way of policing their doctors. Legal questions that proceed to court inherently become adversarial, with lawyers for each side hired to defend the interests of those who have retained their services. The inherent adversarial nature of these legal contests cannot help but obscure the common goal of physicians and patients of improving patients’ health, which in turn may reinforce misconceptions and distrust and damage the doctor-patient relationship that is so important to effective medical care. The United States has 70 percent of the world’s lawyers, and five percent of the world’s population — a supply of one lawyer for every 265 people. Social observers who note the ways Canada is becoming more similar to the United States may see a cautionary tale with respect to increased litigiousness in Canada.

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the field of Cardiology will be used as a case study.

**What is Medical Malpractice?**

Although discussions involving malpractice litigation can involve complex legal technicalities, there is a fairly inclusive and widely agreed upon definition for medical malpractice. Much of the discrepancy in the views of the different parties to these disputes can then be understood as disagreement over which events and occurrences fall under this broad definition, and which do not.

Medical malpractice can be defined as an act or an omission by a health care provider that deviates from accepted standards of practice in the medical field and which causes injury or harm to the patient. Malpractice can result from negligence, professional misconduct, carelessness, and/or failure to use adequate levels skill or diligence while caring for a patient. To determine and establish an accepted standard of care, comparison is made to typical care offered by physicians in the community; in other words, comparison is made to standards applied within the same geographical area.

Another matter that falls under the category of medical malpractice is failure to get a patient’s informed consent. A physician must fully inform the patient about the nature of the diagnosed condition, the range of treatment options, and the known major risks of each. It is interesting to note that when a doctor informs a patient of the risks associated with a procedure or a treatment, they don’t have to explain all the possible risks. They are only responsible for explaining those risks that a ‘reasonable’ patient would want to know before making their decision. In addition, even if the practitioner does not provide their patient with all the information, the physician will not be liable if a ‘reasonable’ person in their position would have agreed to the proposed treatment or procedure anyway, even if the physician had given them all the information.

This extensive and broad definition of medical malpractice leaves many issues open to the interpretation of judges, juries, and lawyers. This leaves much room for inequality and inconsistency in judgments and compensation for patients. Physicians are taught to understand the considerable amount of uncertainty that accompanies diagnosis, and appropriate treatment, but members of the public may not fully appreciate that medicine is not an exact science, and that doctors are not able to make the correct diagnosis every time. Doctors may order the appropriate tests and procedures and follow the standard of care in a given location and still make either no diagnosis or, in some cases, the wrong diagnosis. If a physician does all that is in their power to help the patient, and still misdiagnoses a patient, are they liable, and is this considered malpractice? Depending on who interprets the laws and the definition of malpractice, a physician may in some cases be still taken to court even after following the appropriate standards of care.

It is imperfections such as the one mentioned above, which are a cause of concern for physicians and the health care industry. It is very important to keep in mind that because of medical uncertainty, doctors cannot be guarantors of the services which they render with one hundred percent certainty. A physician is, however, legally required to have the necessary knowledge and experience to perform the services in question. Further, doctors must exercise the skill and care that others in the community use when dealing with similar situations.

**The story in Canada**

The medical malpractice litigation crisis has not reached the severity seen in the United States. The complexity of the situation there will be discussed later in the article. In the meantime it is important to appreciate that taking legal action with respect to medical malpractice cases is much more difficult in Canada when compared to the United States and even the United Kingdom. In fact, “Canadian judges tend both to be more reluctant to find breach of medical standard of care, and to require more exacting proof of causation”.

In addition, defence of practicing physicians in Canada is skillfully managed and generously financed by the nonprofit Canadian Medical Protective Association (CMPA), a mutual defence association of physicians. The
CMPA, founded in 1901, is funded and operated on a not-for-profit basis by physicians. The organization has more than 71,000 members comprising about 95 per cent of the doctors licensed to practise in Canada. The CMPA will do all that is in its power and will invest heavily in defending any physician action that is in any way defensible. The organization’s main aim is to prevent the setting of medical malpractice precedents that could cause irreversible damage to the professional reputation of the medical profession as well as long term financial burdens. The CMPA’s contract with their member physicians is for unlimited coverage, with few exceptions. Some of the exclusions include cases involving ethical violations by a physician, such as sexual misconduct; in such circumstances the CMPA will not cover the physician but will provide them with defence counsel and advice.

In terms of medical malpractice litigation in Canada, there are a number of trends that need to be discussed. These trends include the rate at which legal action is taken against practicing physicians, and the cost of malpractice insurance in the country.

On the positive side, the CMPA has made it clear that legal actions against physicians have declined over the past decade from about 26 per 1000 members in 1996 to 13 per 1000 members in 2006. In other words, practicing Canadian physicians today are half as likely to be involved in medical malpractice lawsuits than they were 10 years ago. This maybe interpreted as resulting from a growing emphasis on patient safety and risk management by doctors, or it can be seen to have resulted from a more extreme approach of the CMPA in the past decade to preserve the professional reputation of medicine.

However, while the rate of litigation against Canadian doctors has been declining, there are other trends that are quite troubling. For instance, the cost of medical liability has increased significantly over the past decade, with annual damages and legal and expert administration costs rising from about $170 million in 1997 to more than $400 million by 2006. The median damage cost increased from about $30,000 in 1996 to nearly $100,000 in 2006.

In addition, the CMPA has identified a trend of “increasing intrusions on a physician’s right to due process in the name of patient safety”. However, these claims are subjective, may be biased, and are difficult to verify without the involvement of an independent entity that does not have special interest in the issue of medical malpractice litigation and their outcomes.

Another troubling trend, which does not seem to be affected by the decline in legal actions against physicians, is the rising cost of malpractice insurance in Canada. Over the past decade there has been a steep increase in the cost of malpractice insurance in the country that is beginning to have a significant effect on practicing physicians. It has been estimated that as of 2001, average insurance rates in Ontario had climbed by nearly 45%, while rates in Manitoba, Saskatchewan, and Alberta had had a more modest increase of 11% by the same year. And, since Canada in general, and Ontario in particular, has a worrisome physician shortage, the significant increase in malpractice insurance fees in some provinces may put these jurisdictions at a disadvantage when recruiting and retaining doctors. Although most specialties are being affected by the insurance fee hikes, some specialties such as Orthopaedics, Neurosurgery, and Obstetrics have been more significantly influenced.

These figures clearly support the view that there has been an increase in malpractice insurance fees in Canada and the awards in malpractice court decisions. However, contrary to popular belief and the selective media reports describing the high-profile, high-cost cases, the perception that Canadian doctors are making more mistakes and that they are more likely to get sued than in the past is false according to research conducted by the Canadian Health Services Research Foundation (CHSRF). In reality, the number of medical malpractice lawsuits filed in Canada peaked at 1,415 in 1996, and has been on the decline since. Furthermore, an increasing percentage of lawsuits that went to trial concluded with judgments in favour of the physicians, from 73% in 1994 to 82% in 2004.
Malpractice in Cardiology

After considering the general concerns with medical malpractice litigation in Canada, we will now go on with a brief overview of issues with medical malpractice in the field of Cardiology. Even though there is a plethora of information pertaining to medical malpractice litigation in general, it was very difficult to find Canadian data pertaining specifically to the field of Cardiology. However, the American College of Cardiology provides some information that can be used to get a general idea about what is happening within this field of medicine in North America.

Just as in other medical specialties, medical malpractice litigation has been a key area of concern for Cardiologists. Costs of medical malpractice insurance have been increasing rapidly, and the rates for doctors in Cardiology are consistent with those in other high-risk specialties. This has had a significant effect on the livelihood of such physicians, and has even forced some of them to leave their practice. This trend has been seen in the United States, but presumably the situation is similar yet probably not as extreme here in Canada. As for the causes behind this increase in premiums, they are presumably similar to other specialties in that they include “frivolous lawsuits and exaggerated monetary awards”, in addition to the exodus of some major insurance carriers from the market.

Future Outlook

At this point in time, the future outlook for physicians is bleak at best. Medical malpractice insurance premiums are still on the rise, and monetary awards in the cases where the ruling is in favour of the patient are rapidly increasing. The only bright side to all of this is the fact that there has been a decrease in the rates at which physicians are being sued. However, that has not been enough to slow down the trend of increasing insurance fees.

The question that comes to mind at this point is who really is responsible for the crisis? And if more than one party is responsible, then will any of them stand up and do something about it? Should the government attempt to reform the laws to better protect both doctors and patients? What is the evidence that patient safety is actually improved by the present system? Should the medical profession cease to be regulated by the physicians themselves? Should physicians accept a greater role by the government in policing the medical profession, in exchange for legal protection against frivolous and unreasonable legal actions? What if anything can be learned from other countries? These are all complex questions, with no simple answers. Hopefully, by introducing the key organizations and parties involved and the important trends and indicators to watch, this paper will help the reader be more informed as this complex debate unfolds.

References

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