

IS THE PRESENT EXPOSURE TO PROFESSIONAL LIABILITY  
IN HEALTH CARE CASES CONTRARY TO GOOD MEDICAL CARE?

REMARKS BY

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"IS THE PRESENT EXPOSURE TO PROFESSIONAL LIABILITY IN HEALTH CARE CASES CONTRARY TO GOOD MEDICAL CARE?"

I could not possibly expand upon the extensive analysis presented by Professor Baudouin - so what I would like to do in this short time is to raise some comments, questions and major concerns which have developed from my involvement in the health care field and as a Plaintiff's Solicitor in medical malpractice cases.

I think the present liability trend is a threat to our canadian health care system and to our economy. If it continues, it could destroy the quality of health care in this country.

\* Malpractice law suits are escalating. A 30% increase between 1984 and 85. 900 cases in 1985 alone.<sup>1</sup>

\* The awards have likewise increased. In 1985, \$14.2 million was paid in damages by the CMPA (The Canadian Medical Protective Association).<sup>2</sup> The average award in 1984 was \$88,000.00 dollars compared to \$7,700.00 in 1970.<sup>3</sup>

And then there is the recent Ontario Supreme Court case, Giannonè V. Weinberg<sup>4</sup> - The highest award to date: \$3.7 million dollars to a ten year old girl whose arm was partially amputated in a cast/gangrene case - more about that in a moment.

\* Physicians' insurance fees are increasing at an unprecented rate. Not yet

to the U.S. extreme of 70 to 100 thousand dollars plus annually but let's look at the principles. In Canada the highest risk category-anaesthetists, neurosurgeons, orthopaedic surgeons and obstetricians will pay premiums of over \$8,000.00 next year - compared to \$2,000.00 dollars in 1984.<sup>5</sup>

\* Hospitals too are faced with increasing costs; demands by the public and physicians for the latest medical technology; closure of hospital beds and cutbacks; and dramatic increases in insurance premiums (for example, \$52,000.00 to \$254,000.00 in one year).

Health care institutions are already starting to merge - to save costs - the most recent example being Toronto Western and Toronto General Hospital. I question whether we will see more self-insuring in the future - as has occurred by necessity by many prominent American Health Care Institutions.

I am very concerned that the negative aspects of the liability trend will erode the quality of health care in Canada.

We have the opportunity to learn from the American experience, notwithstanding the differences in our legal and health care systems. Let's look at it for a moment.

The American Medical Association has reported that the cost of defensive medicine - whereby physicians for liability protection - are ordering additional tests and procedures - is \$15 billion a year.<sup>6</sup> This has added \$5.00 dollars a day to every hospital stay and \$3.00 to \$4.00 dollars to every visit to a physician.<sup>7</sup>

In addition, there is what is called the "hidden side" of the malpractice story where, because of the high costs, physicians have eliminated the high risk part of their practice. Approximately 70% of all obstetricians and gynecologists in the U.S. have been sued, 20% of them, three or more times.<sup>8</sup> In Florida, 25% of obstetricians and gynecologists no longer do deliveries and 30% are considering discontinuing their practice according to a recent study.<sup>9</sup> Malpractice carries with it far reaching implications--over and above the frequent multimillion dollar damage awards. It is resulting in diminished access to care; a decrease in the quality of care; and a tremendous increase in costs.

This is also occurring in Canada. Recently, I learned that a part-time anesthetist in a Nova Scotia community hospital has decided to go into general practice - because of the expected \$6,000.00 increase in his insurance fees and the high risks of his speciality. This leaves the hospital with one surgeon but no anesthetist. Several other specialists and general practitioners doing obstetrics have voiced the same intent and not just in idle conversation.

Last year, one of my medical students conducted a survey of Halifax physicians on the issue of malpractice - how it is affecting their practice; suggestions for change, etc. I would like to share with you some comments.

- There was a consistent response that physicians are practising defensive medicine in order to try to protect themselves against liability.

- There was also a consensus of a growing tension between the medical and legal profession.

- It was suggested by several physicians that better internal policing and disciplinary actions were required by the medical profession and provincial medical boards.
- Internal hospital committees established to address the issue of incompetency of physicians were generally termed inadequate.
- Of note as well was the need and request for more programs to assist physicians with medical-legal questions including but not limited to malpractice.
- There was also increasing fear of performing in high risk areas and the wish to avoid such areas of medical practice entirely.

I agree with the comment made by a trustee of the American Medical Association "The reason for malpractice is malpractice".<sup>10</sup> Certainly public expectations of what constitutes good health care have increased, given the advances in medical technology and knowledge. And there is public acceptance of litigious behaviour, including law suits against health care professionals.

I am not suggesting that the quality of health care in Canada is generally less than it was five or ten years ago. This would fly in the face of rapid medical advances. Yet it is my opinion that the quality of health care does suffer and will continue to suffer with the combination of escalating health care costs, problems with funding, closure of hospital beds, staff cutbacks, the practice of defensive medicine, exorbitant awards and the 'modus operandi' within the health care field given the constant threat of litigation.

The Canadian Medical Association has termed the landmark \$3.7 million Giannone<sup>11</sup> award as "astronomical"<sup>12</sup> and certain aspects of it "absolutely obscene".<sup>13</sup>

As mentioned, this case involved partial amputation of the arm of ten year old Antonella Giannone, when a physician failed to diagnose gangrene under her cast. Time does not permit a detailed discussion here but the assessment of damages requires a close look:

- \$125,000.00 for general damages
- \$953,867.00 for prosthetic devices
- \$161,274.00 for housekeeping help after she reached age 18
- \$75,000.00 for professional management fees
- \$26,000.00 for pre-judgement interest, and
- \$1.6 million for income tax.

In commenting upon this case and especially the tax implications, the President of The Canadian Medical Association has suggested that the Canadian Government is making a profit on the pain and suffering of Canadians.<sup>14</sup> This may or may not be valid, but a point which should be considered in the overall drastically needed comprehensive study involving representatives from all groups concerned including the insurance industry, with respect to the malpractice crisis in Canada. Not everyone would refer to this as a 'crisis'

but if it has not yet reached that definition, I suggest that we are very close to it.

I'd like to bring to your attention another point if we look at the Giannone award. Here a 10 year old girl with a resulting partial amputation of her arm received 3.7 million dollars. Why should the estate of a 10 year old who dies as a result of malpractice likely receive only 5 or maybe \$10,000.00? How can we possibly reconcile such a discrepancy? The problem lies in lack of law reform and lack of consistency across the country in the Fatal Accidents or other legislation to equitably compensate.

I have the privilege and also frustration to represent the family of a 3 year old boy who died as a result of an alleged overdose of anesthetic as well as pre-operative medication and negligence in the administration of an anesthetic. Notable lawyers - and even a prominent judge - tried to discourage me - telling me I would be wasting my time - that the case was not worth taking because there wasn't enough money in it. Where have legal ethics gone? And should the life of a child not be worth more than a few days income of a specialist, if proven to be negligent? Medical malpractice should be compensable and equitable, "just and reasonable".<sup>15</sup> Our health care system - and our country - cannot afford disproportionate and exceedingly high damage awards.

Another major concern which I have under the present tort system concerning liability in the health care field is the lack of accessibility of patients to obtain compensation. Malpractice litigation is extremely expensive especially with the necessity of expert witnesses.

I share Professor Baudouin's opinions as to the need to re-evaluate the justice system in this regard and particularly the alternatives - be it resolution through independent experts, arbitration panels or otherwise.

I have encountered this problem in my own practice. One case involved a meritorious claim where a young fellow had a gallbladder operation, his bile duct was negligently transected, he developed severe complications and almost died. My client could not afford to proceed with the case - and solicitors can't automatically finance these cases. The physician involved who shouldn't have attempted the surgery in the first place, let alone correct it - moved from one small community in Nova Scotia to another in rural Ontario, where he continues to practice.

I would like to share with you what I consider to be two more major weaknesses under the present system.

- In health care institutions, quality assurance programs are often very onerous. Staff spend a large part of their time doing paperwork as opposed to treating patients. This is a common complaint. Yet even the paperwork is often inadequate. For example, in quality assurance committees or mortality committees, documentation is often incomplete. With the exception of a few provinces such as British Columbia, reports are not privileged although the need for amendments to provincial legislation has been endorsed by the Canadian Medical Association, the Canadian Bar and the Canadian Hospital Association.

Yet records must be complete in order to achieve optimal quality of care. Some solicitors have even advised hospital administrators to destroy records of



committee meetings for fear of subpoena in court. Such a practice flies in the face of the objectives of quality assurance programs and in my opinion, the evidence laws in Canada must be amended in order to benefit - not thwart the quality of health care in our institutions.

COMMUNICATION --

It is well recognized that communication between a physician and a patient is the best way to avoid a malpractice suit. I have seen many meritorious claims which are not pursued because the patient does have a rapport with his or her physician. Unfortunately however this element of communication and trust appears to be seriously breaking down.

The same applies to communication between the medical and legal profession. It is becoming increasingly dichotomized.

Physicians should be talking more--not less--to their patients and the same applies to the medical and legal professions.

- From my experience, 99% of injured plaintiffs initially sue not for monetary gain but to prevent someone else from being similarly injured. This may seem strange - but I think true, as this information is inevitably volunteered to me in the first interview with my clients. I seriously question whether the present legal system is fulfilling its responsibility to these patients, and to the public.

Are there any positive aspects of the present health care liability situation?

Believe it or not, even I recognize these - but in case you haven't concluded, I think the negative aspects outweigh these positive ones!

1. Firstly, increased questioning by patients and requests for more second opinions.
2. Secondly, I think physicians are giving their patients more information, since Reibl V. Hughes<sup>16</sup> and Hopp V. Lepp<sup>17</sup> the landmark cases on informed consent.
3. Health care institutions are recognizing the legal importance of quality assurance programs, the objective of which is to improve quality of care and which are required by the Canadian accreditation body. The courts are placing more emphasis on accreditation standards and quality assurance programs. And hospitals, since the landmark 1980 Yepremian<sup>18</sup> case are recognizing their increased legal accountability.
4. I also see increased protection of the confidentiality of patient records, particularly since the Krever Commission Report in 1980.<sup>19</sup> Further changes in the law will be required however, especially in this age of computer technology.
5. The Charter of Rights is and will have more and more impact on health care cases. (A few issues are the right to refuse treatment; the rights of the mentally and physically handicapped; and, restrictions on hospital appointments and privileges.); and -
6. Ethical issues, by necessity, are being addressed and many health care institutions are - fortunately - establishing ethics committees or some other

type of mechanism to help physicians and families solve medical-legal, ethical dilemmas such as withdrawing treatment.

In closing, I hope that I will leave you with a few questions and concerns as to where we are - and where we are going.

In view of identifiable weaknesses and defects in the legal system, it is my opinion that a study of the present tort system and the alternatives - be it no fault or compulsory arbitration or another alternative, should be actively pursued - beyond the Slater Report<sup>20</sup> and specifically involving health care and medical malpractice. It involves the health care and legal profession as well as the insurance industry and certainly government as well. For their resentment and escalating costs, it appears to me that each body is taking an adversarial position without firstly looking within their own infrastructure to improve the situation, and secondly, without working together.

A comprehensive study is urgently needed and should be a priority. While commendable, the Canadian Medical Association's recently announced task force on health care liability,<sup>21</sup> in my opinion, is not sufficient. Suffice it to say - this will not accommodate the concerns of other parties with obvious vested interests.

Our objective must be to make every effort to improve the quality of health care in Canada. We must not let it deteriorate. We must act now and it's time for the medical and legal profession to become partners in this objective and not rivals. As Mr. Justice Allan Linden recently remarked "...the legal system can make a contribution to the quality of health care in this country.

In other words, it can be considered as part of the health care team."<sup>22</sup>

There is much to be accomplished in terms of study, possible tort reform, education within health care disciplines and the legal profession as well as inter-disciplinary education.

In the interests of the Canadian economy and quality of health care in this country, the time to re-evaluate, and act is NOW .

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