

ADDRESS TO THE CANADIAN INSTITUTE
FOR THE ADMINISTRATION OF JUSTICE

Vancouver Conference

October 29 to November 1, 1986

H.A.D. OLIVER, Q.C.

JURY QUESTION: Is the present exposure to professional liability in health care cases contrary to good medical care?

The medical profession has embarked upon a campaign for drastic changes in the legal system. That campaign is spearheaded by the American Medical Association which has launched a multi-million dollar publicity campaign in the United States. That campaign, needless to say, has the support of the medical profession in Canada and this debate must be seen against that background. The doctors tell us that there is a crisis in the area of medical malpractice claims and that this is essentially an affordability crisis. Certainly, the cost of liability insurance has risen dramatically in every area of life and all professions have been faced over recent years with substantial increases in liability coverage. For many years doctors and lawyers too were regarded as an elite, a privileged class, whose advice was accepted without question, whose opinions were treated with great deference, and who ran their own professions without any interference by government, patients, clients, or other members of the great unwashed.

The rise of consumerism increased standards of public education and a general enhancement of public awareness of every aspect of human activity has resulted in the consumers of professional services suddenly daring (and very properly

so) to question professional advice given to them and professional services rendered to them and to ask when things went wrong whether the advice was good advice and the services were competent services. When I started to practice my profession some forty years ago, any presumptuous puppy who asked such questions would be put firmly in his place by the professional establishment; those happy days are gone. Insurers writing professional liability coverage tell us that there is a crisis and that they are losing money; that professional liability premiums collected by them are less than the payments they have to make for successful professional liability claims and that they are losing millions. What they don't tell us is that until very recently their business was a very profitable one; that they invested their vast annual surpluses in stocks and real estate and that the income from these investments still runs into the billions of dollars.

We are told that the crisis in the area of malpractice claims is caused by the Courts and the legal profession; but there are two other obvious candidates for "crisis maker" - the insurance industry and the medical profession itself. The root cause of medical malpractice claims is nothing other than medical malpractice. The only sure way to end the debate is not to attack the rights of patients who seek protection or compensation in the face of medical negligence but to eliminate the wrongs caused by sloppy practice and procedure. A system of compensating victims of medical negligence is fundamentally sound. It is the same system that applies to every type of negligence, be it by motorists or builders or ships' captains or lawyers or architects and it has served us well. It deters carelessness and it has safeguards against unreasonable awards. Why should the doctors be allowed to opt out from this system? Their

negligence claims are tried by trained Judges, learned, experienced and independent, skilled in the weighing of evidence and in the determination of the reliability of witnesses, both lay and professional, who testify before them. They are no more trained in medicine than in engineering or accountancy or architecture or navigation or in any of the host of specialized problems which come before them day after day. But they are people of learning and profound experience of human conduct and misconduct trained in determining the truth, trained to listen to the witnesses appearing before them and to determine the truth on the basis of their evidence. What would the doctors substitute for that system which has served us well for a thousand years? A system by which an all medical tribunal makes its findings of negligence? All those who have had anything to do with "malpractice" or medical negligence cases are well aware of the extreme reluctance of any doctor to criticize any of his colleagues. Even in very obvious negligence cases it is frequently impossible to find doctors who are prepared to give evidence with the victim in Court and it becomes necessary to bring in medical witnesses from abroad. This well established conspiracy of silence does not create confidence in the ability of an all medical tribunal to adjudicate as between negligent physician and the victim of his negligence.

Should one substitute a "no fault" system with claims adjudicated by a body like the Workers Compensation Board? It would be difficult to find any significant number of injured workers, doctors or lawyers, who have ever had dealings with the Workers Compensation Board who feel that that or a similar body could be relied upon for a fair and just determination of such claims and it can scarcely be held up as a model to be emulated. Nor is a no fault scheme

the answer. I am, I hope, a skilled and experienced and reasonably learned and careful practitioner of my own profession, yet careful as I am by instinct and training I can assure you I am even more careful by the knowledge that society in the person of the Chief Justice and his Judges and of the jurors who represent the collective wisdom of society are constantly watching all I do and that if I fail in the heavy duty resting upon me I can and will be sued for damages. We are told that under existing scheme lawyers contribute to the difficulties of the medical profession by undertaking cases on a contingent fee basis. I can assure you that this is not so. The contingent fee has been described as "the poor man's key to the Courthouse"j. A medical negligence action is a complex and costly proceeding. The existence of the contingent fee system in this jurisdiction is a strong guarantee against unfounded malpractice actions being commenced. A lawyer who is consulted by a patient who wishes him to undertake such an action on a contingency basis will examine the case with the greatest of care before undertaking it; well knowing the enormous evidentiary hurdles he faces, the great difficulty in procuring excellent witnesses, the expense of financing their fees and the cost of untold hours of preparation and trial. The lawyer realizes that only if the case succeeds will he be paid for his services or his out-of-pocket expenses and I can assure you, speaking for my own firm, that in only one of twelve alleged medical negligence cases in which we are consulted is a claim put forward. We make that decision in full awareness of the damage done to the reputation of any professional person who is sued for professional negligence, but also of the fact that no doctor is a guarantor of a successful outcome and that even where there is the likelihood of medical negligence it is frequently incapable of proof on a balance of probabilities.

We are told that the present risk of being sued leads some doctors to practice so-called "defensive medicine". To this I reply that one doctor's "defensive medicine" represents another's "careful health care" and that to the extent that defensive medicine constitutes improved health care it is to be encouraged. We must ask ourselves if we were the patient would we wish to undergo, and if necessary pay for, the additional clinical tests which we are speaking of. If the answer is yes, then that should not be categorized as defensive medicine. If doctors were more careful to explain to their patients what was going on and to seek their patients informed consent to such procedures, then this problem would not arise at all. If the doctor were to say to us, "I believe that this further procedure is totally unnecessary and unlikely to benefit you in any way and I only propose to undertake it so that you cannot sue me afterwards", I think that most of us would agree that we do not wish to undergo that test.

Although advocates of radical restrictions on the rights of patients argue that it is the cost of defensive medicine which bears the true price tag of the so-called medical malpractice insurance crisis, it should also be noted that defensive medicine properly and reasonably practised cannot only benefit the patient, the patient's recovery, but can also save money. Examples of procedures which constitute defensive medicine are sponge counts, fetal monitoring, providing written or taped information to patients, obtaining written informed consent, referrals for specialists' examinations, specialists' consultations, testing and diagnostic procedures, monitoring procedures, staff presence at examinations. It is surely up to the good sense of the individual practitioner with guidance from his professional body to determine when one or more of these is absolutely

necessary, reasonably necessary, or not necessary at all. If an individual doctor overloads the treatment of a patient with unnecessary procedures, it might constitute grounds for an investigation by his professional body but where insufficient procedures are utilized to diagnose and treat a patient and harm results, the doctor may very well be found to be negligent. It is exceedingly rare for a doctor to lose a patient because of excessive caution required by society through our Courts. What the requirement for a high standard of caution does do is to increase the cost of practice which ultimately is borne not by the doctor but by the patient.

Are there any of us who would advocate a bare bones alternative - the el cheapo medical clinic, basic medicine without frills, where the patient contracts out of all professional liability by the doctor in the manner of one buying a ticket for a ride on the Scream Machine - I think not.