Doctors' association accused of using aggressive 'scorched earth' approach to defending malpractice suits

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Halifax malpractice lawyer John McKiggan: "If they have a $50,000 claim, they can and will spend $250,000 to defend it," he says of Canadian Medical Protective Association-funded legal teams. Paul Darrow for National Post

Susan Ryan didn't exactly have dollar signs dancing in her eyes when she sued her doctor for malpractice: the Toronto woman filed the case in small-claims court.

She thought it was a less-formal venue that favoured "the little guy;" her opponent had other things in mind. The defence lawyer has fought the suit doggedly, making two pre-trial motions, filing thick binders of material and commissioning reports from a pair of expert witnesses, in answer to her charge that the MD failed to diagnose severe arthritis for eight painful years.

Ms. Ryan, the administrator of a small children's charity, managed last month to fend off a defence bid to have the suit thrown out of court, but any resolution remains far off.

"I hoped they might settle," she said. "[But] they said explicitly they have no intention of ever settling."

Ms. Ryan has come face-to-face with a power that virtually every Canadian plaintiff in a malpractice suit encounters, often with sobering results. Like most physicians, the doctor she is suing is represented by the Canadian Medical Protective Association (CMPA), a little-known, non-profit organization with vast funds at its disposal to defend health professionals accused of negligence.

And much of the liability premiums that have helped build up a $2.7-billion war chest come courtesy of Canadian taxpayers, with all but one province subsidizing to varying degrees the fees paid by the group's members.

Thanks to that financial might and a laser-like focus on members' interests, malpractice lawyers charge, the association battles most cases unrelentingly, producing what one Ontario judge called a "scorched–earth" approach.

While private, for-profit insurance companies behind other types of civil-law defendants (and doctors in countries like the U.S.) will settle out of court to save the cost of protracted litigation, CMPA-funded legal teams make no such calculation, plaintiff lawyers say.

"If they have a $50,000 claim, they can and will spend $250,000 to defend it," said John McKiggan, a Halifax malpractice lawyer.

"They're prepared to leave no stone unturned and to fight these cases to the bitter end," said Sloan Mandel, a Toronto lawyer. "They really are David-and-Goliath-type battles."

Susan Ryan Handout

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Malpractice suits "are litigated differently than any other case," echoed Barb MacFarlane, a Toronto lawyer with 20 years experience in the civil courts.

"Despite legislation and public awareness that is demanding more [health-care] transparency and accountability ... the defence of these law suits seems to be becoming more entrenched."

The result are major barriers to justice for patients harmed by the health-care system, charge plaintiff lawyers.

Canada does appear to dole out far less compensation to patients hurt by medical error than some similar countries. According to a 2005 study by the New York-based Commonwealth Fund, malpractice judgments and settlements averaged out to $4 per capita here in 2001 – compared to $10 in Australia, $12 in the U.K. and $16 in the United States.

The number of lawsuits filed by Canadians was also dwarfed by those other nations, each of which saw at least three times as many cases launched, the study said.

Doctors and CMPA officials, though, view the organization's uncompromising modus operandi in a much different light, arguing that it will settle with patients when a mistake was clearly made, but vigorously defend doctors it feels have performed professionally. Meanwhile, it proactively educates physicians on how to avoid errors.

Though liability is usually not admitted in out-of-court settlements, physicians would balk at an insurer that settled due to pure economic expediency, said Dr. David Keegan, a Calgary family physician.

"There is not a single Canadian who would want to carry the blame of failure, when in fact they didn't do something wrong," he said

Even if liability is not admitted, it is crucial to avoid settling with patients when a doctor is not obviously at fault, as both settlements and court judgments can trigger investigations by regulators and hospitals, said Dr. John Gray, the CMPA's CEO.

"It matters to doctors, it has consequences."

The malpractice debate is rooted in an unquestioned reality of all areas of civil law: the litigant with the deepest pockets has the upper hand. The field known to insiders as "med mal," however, has added challenges and irritations, plaintiff lawyers say.

Not least of those is that many provincial governments have decided to reimburse at least part of the premiums doctors pay. Ontario, for instance, pays 90% of the $49,000 in annual fees CMPA charges obstetricians.

"Most people think the doctors pay for their own defence ... or that that the doctor has paid the insurance premiums," said Mr. McKiggan. "But it's you and I that paid them."

Such subsidies were negotiated by provincial medical associations several years ago as malpractice costs started to rise faster than medicare fees paid to physicians, said Dr. Gray. It is probably the most transparent way to help physicians cover that cost, he said.

Dr. Keegan said he understands patients may feel angered by the subsidies, but said practitioners would likely start leaving jurisdictions that did not offer it.

Regardless, the CMPA is able to hire members of some of the country's most prestigious law firms. And those lawyers aggressively pursue every case, unless there is irrefutable evidence their doctor-client performed below the accepted "standard of care" and caused the patient's injury, malpractice lawyers say.

Canada appears to dole out far less compensation to patients hurt by medical error than some similar countries. Getty Images/Thinkstock

CMPA CEO, Dr. John Gray says it is a fallacy that the association rarely settles or unjustifiably drags out cases. Dave Chan for National Post

An Ontario Superior Court judge commented in a 2008 ruling that the CMPA-funded lawyers in a suit against an emergency doctor had pursued a "scorched-earth policy," challenging the plaintiff on every aspect of his case and making the trial – at 20 days – needlessly long. The patient still won, though.

Dr. Gray responds that it is a fallacy that the CMPA rarely settles or unjustifiably drags out cases. Of 894 malpractice lawsuits resolved in 2011, for instance, 293 were settled out of court, while 533 were dismissed, abandoned or discontinued. Of the small number that actually made it to trial, doctors prevailed in 55 of 68 cases.

And while the battles might have been lopsided in the past, the playing field has leveled in recent years, since most patients suing doctors hire their lawyers on a contingency-fee basis, he said. The lawyers earn a percentage of the compensation, rather than charging fees up front.

Yet settlements more often than not come after years of costly litigation, "on the courtroom steps" just before trial, in contrast to the speedier resolution common in other types of lawsuits, Mr. Mandel said.

He and other plaintiff lawyers say the net result of the CMPA's defence tactics – coupled with the relatively small awards allowed by

Canadian courts — is that many people with legitimate claims must be turned away: even if they won, they would end up losing money.

The percentage of doctors being sued for malpractice has actually fallen by almost half in the last 10 years, according to the CMPA's own figures.

'If they have a $50,000 claim, they can and will spend $250,000 to defend it'

Ironically, the economics of suing are worst when a young child or elderly parent dies. Because the deaths caused no negative financial impact – lost earnings being a major consideration when courts award damages – such judgments never top $50,000 and are often much less, said Mr. McKiggan.

"One of the hardest things is telling the parents who have lost a child due to medical error [that there is no point suing]," said Ms. MacFarlane.

The other challenge for malpractice plaintiffs is finding expert witnesses, the doctors who testify about whether a physician was negligent, and whether that poor performance hurt the patient. Courts require them, and most cases hinge on such evidence, said Dr. John Limbert, a Victoria, B.C.-based litigation consultant.

Plaintiff lawyers say they struggle to find someone willing to testify against a colleague amid a "culture of silence" and, when they do, are often confronted with two or three experts in response.

Dr. Gray balked at that complaint, however, saying that, if anything, it is the CMPA that has trouble finding expert witnesses in specialized areas, since the other side has had months longer to search. Regardless, the association counsels its members that they have an ethical obligation to provide legal testimony, without favouring one side or the other, he said.

They are also encouraged to be open with patients in admitting mistakes, part of the new thrust in health care to improve safety through frank discussion of errors, said Dr. Gray.

Yet people often decide to sue precisely because they could not get to the bottom of what happened, argued Mr. McKiggan.

"The typical reaction [in health care] is to circle the wagons and invoke the cone of silence," he charged. "Most of the people who come to me, they're not coming to me because they want money. They come to me because they are facing this wall of silence."

If there are flaws in malpractice law, how to fix them is less clear. Dr. Gray points to well-documented problems with the more generous American system as something to avoid.

U.S. malpractice premiums can top $200,000 and led to a crisis a few years ago in regions with particularly high fees. Some doctors in Florida's Dade County, for instance, left the area, declined high-risk patients and in many cases went without liability insurance entirely.

The Canadian health-care system's newfound attention to medical mistakes – often caused by systemic problems and not individual neglect – has actually led to a push away from assigning blame, said Susan McIver, whose new book on the topic, After the Error, was released this week. Although she included a chapter on litigation by Mr. McKiggan, she favours a "restorative justice" approach that brings parties together in a non-adversarial way.

"It's best to try to create an environment in which medical practitioners, health-care workers … are willing to come forward."

Another solution, used in New Zealand and some Nordic nations for decades, would be familiar to car-accident victims in some provinces: no-fault insurance.

Doctors and nurses are not assigned blame for mistakes, but if a patient appears to have been injured by medical treatment in New Zealand, for instance, they receive pre-set compensation – though typically much less than the most generous court judgments here.

Civil courts are sometimes effective, though, at changing bad behaviour, said Mr. McKiggan. He cited the 1980s tainted-blood scandal and the extensive reforms it produced, a process that began with malpractice suits.

Ms. Ryan said she just wanted to hold the sports-medicine physician she is suing accountable after he allegedly misdiagnosed her hip condition as a soft-tissue injury for almost a decade, prescribing costly and ineffective treatment at his own clinic.

Another specialist finally concluded she suffered from late-stage arthritis, possibly caused by a condition called FAI, and would need a double-hip replacement, major surgery that might have been avoided had the problem been detected earlier.

"I was devastated when I found out: the irreversibility of my condition," she said. "This should be a learning experience ... I don't want somebody else to go through exactly the same thing."

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