JURIES

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Don obtained an undergraduate degree from the University of Alberta in 1981 and a law degree from the University of Victoria in 1984. He was called to the Bar of British Columbia in 1985 and now has represented clients in the courts of B.C. for over thirty years. During this time he has successfully obtained several multi-million dollar settlements and verdicts for seriously injured people from B.C. and throughout Western Canada. His sense of accomplishment is derived from verdicts and settlements which improve the lives of his clients. To this end, every year Don attends or presents at advanced trial advocacy and medical malpractice conferences throughout Canada and the United States. His extensive trial experience, network and training relieves pressure to settle if a more appropriate amount is obtainable through either jury trial or trial by judge alone.

Success in mediation is all about achieving justice while permitting the plaintiff to participate and have some control over the process. However, one must remember that justice can only be achieved when those without power are put on an equal footing with those who have power. Plaintiffs are on equal footing at mediation *only* if represented by counsel ready, willing and able to proceed to trial, unless the defendants offer a fair settlement. Success at mediation is most dependent on trial readiness.

The fact that the client has engaged trial-ready counsel on a contingency fee basis is not always enough to correct the power imbalance between the individual and the well-funded defendant. In medical malpractice actions, the financial power imbalance is particularly acute. The civil jury trial process is generally more effective than bench trials in levelling the playing field for the victims of medical malpractice.

In the great majority of cases in which a Canadian physician is named as a defendant, the unseen but dominant litigant is not a true insurer. Rather, a mutual defence organization, the Canadian Medical Protective Association (CMPA), picks up the cudgels for the doctor.

No policy of insurance or contract exists between the CMPA and the member physician. Coverage and assistance is governed by the CMPA's bylaws, which do not require the CMPA to provide assistance in any particular case. However, requests by member physicians are rarely denied. Requests from member physicians are received and managed by CMPA staff physicians, working together with carefully selected law firms and highly skilled counsel. The CMPA even has extended coverage for punitive damages to its members.[1]

The principal objective of the CMPA is "to support, maintain and protect the honour, character and interest of its members." For this reason, it settles only when it is abundantly clear that the medical work performed by the physician was considerably substandard. It sets out to protect the doctor's reputation by defending the case regardless of cost, an approach termed by the CMPA as the "vigorous defence."[2]

The financial efficiency of a vigorous defence approach matters little to the CMPA respecting any individual defence case. The CMPA has reserves of nearly $3 billion. The deterrent effect created by such deep pockets and a vigorous defence approach reduces the number of claims generally. The upshot for the public is that often legitimate claimants are unable to obtain counsel and valid suits are not brought forth.[3]

The success of the CMPA's vigorous defence approach is without dispute. In 2013, only 70 medical malpractice cases involving physicians as defendants proceeded to trial in all of Canada. Fifty-one resulted in verdicts for the defence. Adding the 19 successful cases for the plaintiff to the 288 settlements obtained in that year, just 307 of an estimated 70,000 Canadians who experienced a preventable, serious injury were in receipt of compensation for medical malpractice

committed by health professionals. The number is staggeringly small. Only about three of every 700 Canadians recover some measure of damages for preventable, serious injuries suffered while receiving medical care.[4]

An annual CMPA membership grants member physicians access to expert advice and legal counsel if facing discipline by the College of Physicians and Surgeons, or if wishing to challenge hospital privileges by health authorities. The CMPA even will assist its member physicians when ministries of health undertake audits of a physician's billings. The effect is that the CMPA has been keeping bad doctors in business for years.

In Ontario, it took the herculean efforts of counsel such as Paul Harte and Amani Oakley and a team of investigative reporters at the Toronto Star to end the carnage of CMPA-defended physicians Errol Wai-Ping and Richard Austin, among others. Former obstetrician Wai-Ping, for example, settled 225 medical malpractice cases in one year alone. As part of a class action against him, involving 375 plaintiffs, the College of Physicians and Surgeons declared Wai-Ping incompetent, having a complication rate for some procedures 20 times higher than the provincial average.[5]

This paper does not argue against the existence of the CMPA, or the immense privilege enjoyed by physicians in comparison to every other Canadian profession. It does, however, urge a levelling of the playing field. Individual victims of medical malpractice are faced with a formidable power imbalance. Some of the problem lies with government. However, what we as counsel can do is embrace civil jury trials and do our part to correct the problem.

The first reason to serve a jury notice and work hard to keep the jury is that medical defendants do not want juries. It would be speculation to say why this is so, but suffice it to say they have done the research and must see great advantage for them with bench trials over jury trials.

Also, jury verdicts are handed down in a day or two, whereas trial judges typically reserve for six to 12 months. Superior court judges, always with an eye to the court of appeal, recognize that medical defendants appeal adverse verdicts with great vigour. All the while, detailed reasons offer up much for medical defendants to work with in constructing their appeals.

Medical defendants know such delays are of great benefit to them. Medical malpractice cases are extremely expensive and the wait for justice is especially trying on plaintiffs who usually haven't the emotional or financial resources to take cases to trial.

Consider the three birth trauma cases resulting in cerebral palsy which were tried to verdict in BCSC in 2009-2010. Each plaintiff had been successful at trial. However, it took a further three to four years on average for the cases to wind their way up to the Supreme Court of Canada, with an end result of all three trial verdicts being sustained. This additional delay invariably takes a toll on the parents of profoundly disabled children. Such parents already faced an especially onerous task each day attending to the needs of their children. Raising children is hard enough - add a profound disability to the mix. Sometimes, marriages don't survive.[6]

On the other hand, the delay and additional stress make it win/win for the medical defendants, whose "vigorous defence" approach is geared toward seeing to it that if a plaintiff wins at trial, the plaintiff's victory is a Pyrrhic one.

Given that jury verdicts are difficult to appeal, the flavour of the week for medical malpractice defence counsel is now to push for juries to give reasons. This is a slippery slope and defeats the democratic process in the jury room. Individual jurors often have different reasons for coming to the same result. As Mr. Justice N. Smith said in Huang v. Stogryn at par. 15,

….to ask a jury to state the basis of their findings in this context is to ask that they be unanimous on the reasons for those findings. I know of no authority that would permit a jury to state that some number of them found a breach of standard on one basis and some others found a breach of standard on the other basis. To ask that would come perilously close to asking the jury to reveal what went on during their deliberations, which they are not permitted to do.[7]

Medical malpractice defence counsel are also very adept at turning straightforward concepts into ones which cause judges to work excessively to comprehend. A few years ago, a very senior jurist remarked during submissions by med/mal defence counsel: "this is starting to sound a lot like those car crash cases in the old days in which counsel would advance expert evidence suggesting the cars could not have collided, yet here we were looking at photos of smashed cars at the scene."

Juries hang onto core principles of justice. They have little patience for sophistry. They expect clarity. When counsel sheds more heat than light, they stop listening. A trial judge will struggle mightily to understand when defence counsel does such things as string together unnecessary, purposely confusing medical jargon:

> *Well M'Lord, the plaintiff has not adduced evidence of an association between antenatal hemorrhage, tachysystole, and oligohydramnios. There was no bradycardia on intermittent auscultation regardless of the maternal heart rate, which we've heard is lower than the fetal. The abruption was an obstetrical misadventure and the anoxic insult is a mystery.*

Juries actively roll their eyes when med/mal defence counsel speak in such terms, and this does not bode well for defences which peel back the layers of the onion to absurd lengths on standard of care and causation issues. I recall sitting in the courthouse with a seriously disabled adult client some years ago as all four defence counsel, clad in their 18th century barrister robes, approached down the hall. My client very aptly remarked: "Here comes the fog."

In a bench trial, defence lawyers and judges understand and run with the concept that the worse you hurt someone, the

less you have to pay. It is cheapest if the patient dies, but if you shorten life expectancy, that's good too. When this defence pitch is thrown, jurors see it to be well outside the strike zone. Jurors see their jobs as being other than an accounting exercise and thus can "decide hard cases without making bad law."[8]

Generally, the jurisprudence is driven by defence theories such as the "lost years" deduction. If we had a solid history of jury trials in med/mal cases, query whether this bizarre concept would be part of the law today. Imagine defence counsel making the argument to a jury that the negligent defendant should reap the savings for money not spent due to years lost as a result of their negligence.

None of these reasons are about sympathy. The time for sympathy is long over by the time a case comes to trial. People get sympathy from family and friends; we go before a jury to get justice. Justice must be readily adaptive and contextually sensitive. This can only occur when justice comes up from the people rather than down from the top. The law is shaped by the coordinated effort by powerful groups such as the CMPA and the executive branch of government through its legal departments.

Civil juries are essential for the simple fact that people "gravitate toward standards of justice that best serve their own interests. For all its impartiality, law is not above prejudice and preference. That is why it must remain subject to practical judgment, or risk losing its spirit."[9]

Citizens on juries are consumers of medical services. They are sensitive to safety standards such as the rules of the road applied to the practice of medicine.

As plaintiffs counsel we are charged with the responsibility of obtaining redress for innocent victims of medical malpractice. To this end, we would be well-served to embrace the civil jury. Too many British Columbians are being hurt. Not enough are seeing justice done. V

1 Harte, Paul. 2006. "Know Thine Enemy." *ATLA Education Reference Materials, Vol. 1*. Seattle, WA: Thomson West. 421-429.

2 Canadian Medical Protective Association. 2010. *Medico-Legal Handbook for Physicians in Canada*. 7th Edition. Ottawa, ON: CMPA.

3 —. 2014. "2013 Annual Report: Financial Information." *The Canadian Medical Protective Association*. https://www.cmpa-acpm.ca/financial-information.

4 —. 2014. "2013 Annual Report: Performance Report." *The Canadian Medical Protective Association*. https://www.cmpa-acpm.ca/performance-report.

5 For complete list of investigative reports, search lawyers "Paul Harte" or "Amani Oakley" in the online archives of the Toronto Star: http://pqasb.pqarchiver.com/thestar/search.html.

6 Jodi Locke O'Brien et al. v. Mirella Rochelle Steinebach, an infant by her litigation guardian ad litem May Jean Steinebach et al., 2012 CanLII 16666 (SCC). See also Cojocaru *v.* British Columbia Women's Hospital and Health Centre, 2013 SCC 30, [2013] 2 S.C.R. 357 and Ediger *v.* Johnston, 2013 SCC 18, [2013] 2 S.C.R. 98.

7 Huang v. Stogryn, 2007 BCSC 1986 (CanLII).

8 Bouck, John C. *Exploding the Myths: An Insider's Look at Canada's Justice Systems*. Edmonton, AB: Juriliber, 2006.

9 Thiele, Leslie Paul. *The Heart of Judgment: Practical Wisdom, Neuroscience, and Narrative*. Cambridge, UK: Cambridge University Press, 2010.