

A MESSAGE FROM RICHARD M. BOGOROCH

This issue focuses on medical malpractice litigation and will canvass the legal principles involved in this litigation. Medical malpractice cases are among the most difficult lawsuits before the courts. They often involve complex and difficult medical, scientific and factual issues and bring with them serious financial risks. Lawyers acting on behalf of Plaintiffs are often faced with leading medical experts who are reluctant to involve themselves in this litigation for personal, professional and social reasons in even the most meritorious of cases.

One cannot underestimate the difficulties facing Plaintiffs counsel. Our firm takes great pride in acting for the victims of medical and hospital malpractice. We take our responsibilities very seriously and know that the commencement of a medical or hospital malpractice lawsuit will set in motion a bitter and protracted legal battle. Doctors and nurses, quite rightly, take their reputations very seriously and defend vigorously each and every lawsuit. No physician, no nurse, no hospital administrator wants his or her reputation or competence questioned, their judgment second guessed or be required to justify actions that took place many years ago. However, in a free and democratic society, no one is above the law and it is our role to vigorously pursue justice on behalf of every person who has been aggrieved by a medical or hospital mistake. They have the right to compensation for their misfortune.

“Learn to do well: seek judgment, and relieve the oppressed...plead for the widow”.

— PROPHET ISAIAH (CHAPTER 1, 1:17)

It is an honour and a privilege to seek justice for those who have been the victims of a medical mistake.

The prophet Isaiah (Chapter 1, 1:17) said something over 3,000 years ago which is appropriate for all lawyers: “Learn to do well: seek judgment, and relieve the oppressed...plead for the widow.” It is that injunction which motivates



RICHARD M. BOGOROCH

RACHEL J. URMAN

us. It compels us to work tirelessly on behalf of those who have been injured, afflicted or aggrieved.

Let there be no mistake about it; medical malpractice cases are **difficult** and **expensive**. In order to ensure that victims of medical or hospital mistakes have access to justice, **we will spend our own money and use our own resources**. If there is no recovery, **we do not get paid**.

Recently, I with two associates, Linda Wolanski and Tripta Chandler had the honour and privilege of representing Edward and Dorothy Van Dyke. Their medical malpractice case commenced in 2003 in Brampton. The case is under appeal and so my comments must be limited. Mr. Van Dyke who was administered an antibiotic, Gentamicin, which resulted in the total loss of his vestibular (balance) function, was awarded over \$1.1 million in damages together with what are known as substantial indemnity costs of over \$300,000.00. Substantial indemnity costs are costs paid by the defendant and cover a large portion of the legal fees incurred by the plaintiff. Those of you wishing to read about this decision, can find it at our website www.bogoroch.com or visit the Canadian Legal Information website at www.canlii.com. If you do not have access to the internet but wish to receive copies of the decision, you should email the editor at info@bogoroch.com and a copy will be sent to you.

My associate, Rachel Uрман, helped in the writing of this newsletter and for her assistance I am grateful.

BY RICHARD M. BOGOROCH
& RACHEL J. URMAN

“It is unwise to be too sure of one’s own wisdom. It is healthy to be reminded that the strongest might weaken and the wisest might err.”

— MAHATMA GANDHI,
INDIAN POLITICIAN

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BOGOROCH
& ASSOCIATES

Barristers and Solicitors

A passion for justice.
A commitment to excellence.



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Medical Malpractice Litigation

Medical malpractice claims arise when medical treatment or a health practitioner's failure to treat a medical condition results in a negative outcome such as a worsening condition, personal injury or death. Such claims are among the most sensitive because they call into question professional judgment and skill. Moreover, because they require in-depth knowledge of the standard of medical care, appropriate medical interventions and the relationship between the negligence and the resulting injury, they are also extremely complex and challenging.

EVERY MEDICAL MALPRACTICE CASE INVOLVES THREE MAIN ISSUES:

- Determination of the **standard of care** and whether that standard has been breached;
- Determination of the **causal relationship** between the breach of the standard and the harm suffered (known as **causation**); and
- Quantification of **damages** (the amount of monetary compensation available to the person or persons who suffered the harm).

At **Bogoroch & Associates**, we begin each medical malpractice case with a thorough investigation to determine first, whether there is indeed a case, and second, whether it will be worthwhile, from a financial point of view, for the client to pursue the case.

✓ STANDARD OF CARE

The first step in a medical malpractice case is to determine the **standard of care with respect to the diagnosis or treatment concerned**. We do this by obtaining all the relevant medical records and retaining an expert. The expert's field of expertise must match that of the defendant health practitioner.

For example, if the case concerns a cardiologist's failure to diagnose a heart condition, we retain a cardiologist as our expert. This cardiologist reviews the

medical records, advises us on the standard of care and provides an opinion as to whether the defendant cardiologist breached that standard. If the defendant cardiologist practices in a teaching hospital, it is important that our expert also work in a teaching hospital.

If, on the other hand, the case involves a general practitioner's failure to diagnose the same condition, we retain a general practitioner as our expert. We may, and generally do, bolster the case by obtaining a further opinion from a cardiologist or another specialist but the key opinion is always that of a doctor (or other health practitioner). This is because, if the case goes to trial, the judge or jury will determine the standard of care based on the standard applicable to a doctor or other health practitioner in the same speciality as the defendant.

When the expert advises us that the standard of care was indeed breached we know we have overcome the **first hurdle** in the litigation process. Of course, **counsel for the defendant doctor** will likely obtain one or more expert opinions that there was no breach of the standard of care which leads to a battle between the experts, if the case goes to trial. Thus, once we have one "**green-light**" opinion on this issue, we bolster our case by retaining other experts.

✓ CAUSATION

In order to be successful in a medical malpractice law suit, it is not enough to establish that the defendant

DEFINING STANDARD OF CARE

Experts are necessary to establish the required standard of care for a health practitioner. For example, if the case concerns an orthopaedic surgeon's failure to diagnose a fractured ankle, we retain an orthopaedic surgeon as our expert. The orthopaedic surgeon reviews the medical records, advises us on the medical standard of care expected and provides an opinion as to whether the defendant orthopaedist lived up to that standard.

If, on the other hand, the case involves a general practitioner's failure to diagnose the same condition, we retain a general practitioner as our expert.

What does Standard of Care mean?

Doctors, lawyers, accountants, like all professionals, must meet a standard of conduct equivalent to a reasonably competent professional practitioner in their field.¹ One of the most quoted statements describing the standard of care is found in a 1956 Ontario Court of Appeal decision styled *Crits v Sylvester*. In that decision, Mr. Justice Schroeder said as follows: "*the legal principles involved are plain enough but it is not always easy to apply them to particular circumstances. Every medical practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of*

breached the standard of care. We also **must demonstrate that the breach caused the harm** suffered by the plaintiff. Again, this requires an expert opinion. Usually the opinion is provided by the same expert who commented on standard of care. Sometimes, however, an additional expert is required. This is true of cases involving negligent diagnosis and/or treatment of an infectious disease or cancer. Such cases often require consultation with a microbiologist or an oncologist regarding issues of causation, since questions of causation may be beyond the expertise of an expert whose specialty matches that of the defendant.

Establishing causation is essential, since the law permits recovery in a civil action only where the plaintiff demonstrates a causal link between the negligence and the injury or harm suffered. The standard of proof is the civil standard which is “proof on a balance of probabilities”. If a physician, nurse etc. was negligent but the plaintiff cannot prove that the negligence caused the harm sustained, the case cannot be won.

When our expert or experts advise us that, in their opinion, the breach of the standard of care did in fact cause the harm suffered, we know that we have a case. This does not mean that we will win the case, but it gives us an excellent reason to pursue the litigation. Again, counsel for the defendant will probably obtain expert opinions that the breach, if there was one, did not cause the harm, leading to another battle between the experts, if the case goes to trial. Thus, we bolster our case by retaining other experts on this issue.

✓ DAMAGES

Once we have determined that we have a case in negligence based on our medical expert opinions, we begin to build the case for damages – in other words, the compensation available to the plaintiffs (the parties who have suffered harm). An assessment of damages is broken down into several components:

- Damages for pain & suffering (either physical or emotional);

care. He is bound to exercise that degree of care and skill which could reasonably be expected of a normal, prudent practitioner of the same experience and standing and if he holds himself out as a specialist, a higher degree of skill is required of him than of one who does not profess to be so qualified by special training and ability.”

¹ The standard is an objective one. The physician is compared objectively against a reasonable medical person; the comparison is not made in isolation but in reference to the circumstances at the material time. See in this regard, Picard and Robertson, *Legal Liability of Doctors and Hospitals in Canada*, third edition, at page 184.

- Damages for loss of income or loss of earning capacity;
- Damages for past and future care and rehabilitation;
- *Family Law Act damages* for i) loss of care, guidance and companionship; ii) value of nursing and other services provided to the injured family member.

The calculation of damages for pain and suffering is based on the case law of the Supreme Court of Canada, and application of the principles set out by the Supreme Court of Canada, by the Ontario courts and, to a lesser extent, courts in the other provinces. The maximum a plaintiff can receive for pain and suffering, for the most serious injuries such as quadriplegia or severe brain injury, is approximately \$296,000. In our **next issue**, we shall discuss how damages in personal injury cases are determined by the courts.

To determine the quantum of damages available for loss of income or loss of earning capacity, we retain a variety of experts including forensic accountants, actuaries, and economists as the case requires.

In determining the quantum of damages for past and future care and rehabilitation, we retain medical doctors who can comment on care and rehabilitation needs as well as life expectancy, occupational therapists and other experts to prepare future care costs reports and accountants and actuaries to quantify or calculate the cost of the care.

It is clear from the above overview of the issues involved in a medical malpractice case that a great deal of work and time is required to determine whether one has a case and whether that case is worth pursuing. If we decide to pursue a medical malpractice case, the major steps in the litigation are as follows:

- **Issuing a Statement of Claim** which starts the action in the court;
- **Serve the Statement of Claim** on the Defendants and Receive a Statement of Defence;
- **Mandatory Mediation** is an attempt to settle the case out of court with the assistance of a neutral party, the Mediator. This step is required by the court – we generally ask the court for permission to delay the mediation until after examinations for discovery;
- **Examinations for Discovery and Documentary Discovery** are examinations under oath of all defendants and plaintiffs in an effort to learn more about the facts of the case pertaining to negligence, causation and damages; the testimony is recorded verbatim by a reporter; documentary discovery is ongoing and involves the exchange of documents of relevance to the case including written expert reports;
- **Pre-Trial Settlement Conference** is another court-mandated attempt to highlight the issues in

LIMITATION PERIODS

Effective January 1, 2004, there are new, unified limitation periods applicable to lawsuits in Ontario. The *Limitations Act, 2002*, now in force, consolidates 69 limitation periods into one statute. This law marks the first major reform of Ontario’s limitations law in more than 100 years.

The *Act* introduces a basic limitation period of two years after damage has been discovered to launch most lawsuits. The lawsuit is commenced by issuing a Statement of Claim, and the time limit of two years starts to run from when the person harmed knew or should have known that:

- the injury, loss or damage had occurred,
- the injury, loss or damage was caused by or contributed to by an act or failure to act (omission),
- the act or omission was by the person against whom the claim is made, and
- a legal proceeding would be an appropriate means to seek remedy for the injury, loss or damage

To obtain a copy of this legislation visit: www.e-laws.gov.on.ca/DBLaws.Statutes/English/02124b_e.htm

dispute and discuss a possible settlement in the presence of a judge who also provides his or her assessment of the strengths, weaknesses and monetary value of the case;

■ Trial

Bogoroch & Associates assesses each medical malpractice case carefully, **not only** at the beginning of the case, but at **all stages in the litigation process**. If, at any time, it appears that the case is **unlikely** to be won, we **advise the clients accordingly** and give them an opportunity to decide how they wish to proceed. This is important because of the huge **financial and emotional commitment** required by clients.

Our firm has had considerable success and satisfaction representing victims of medical malpractice cases and what we have achieved was brought about by **discipline, dedication, perseverance, resourcefulness and a commitment to see justice done.**

For more information about medical malpractice cases at Bogoroch & Associates, please contact us at info@bogoroch.com.



Legal Lexicon

DEFINITIONS OF COMMON LEGAL TERMINOLOGY

Legal Causation: Legal causation is subject to complex rules. One of the leading formulations for determining causation is the “but for” test. Professor Linden so aptly puts it “[I]f the accident would not have occurred but for the defendant’s negligence, thus conduct is a cause of injury...(I]f the accident would have occurred just the same, whether or not the defendant acted, this conduct is not a cause of the loss. Thus the act of the defendant must have made a difference.” (*Linden: Tort Law, 7th edition* (2001), p. 109-110)

Limitation Periods: Legal deadlines for commencing lawsuits. A lawsuit filed after the deadline will be dismissed as “statute barred”. It is therefore very important to consult a lawyer promptly after any personal injury or medical mishap. Most car accident cases are subject to a **two year limitation period**. Until recently, most medical malpractice cases involving doctors and other regulated health professionals were subject to a one year limitation period from the time the injured person knew or ought to have known of the facts giving rise to the alleged malpractice. As of January 1, 2004, the time limit for incidents after January 1, 2004, is generally two years (*see side bar on page 3 for further details*).

Qualification of damages: A determination of the amount of monetary compensation available to the person or persons who suffered the harm.

Recent and Upcoming Speaking Engagements Calendar



Bogoroch & Associates are honoured to have the opportunity to speak to groups & organizations on matters of legal interest. Below is a list of recent & upcoming speaking engagements:

DECEMBER 2-3, 2003: Richard Bogoroch presented on the subject of “Shoulder Dystocia and Obstetric Liability: Effectively Avoiding Litigation”, at the Patient Safety and Risk Management in Obstetrics & Obstetric Malpractice conference in Toronto. A group of top legal and medical professionals presented the latest medico-legal developments and advances on patient safety and obstetric malpractice.

FEBRUARY 26-27, 2004: Richard Bogoroch presented on the topic of Mediating and Settling Claims for Damages at the 2nd National Forum on Litigating Damages conference in Toronto sponsored by The Canadian Institute. A select

group of personal injury lawyers from across North America presented at this forum. Please visit our website at www.bogoroch.com for a copy of Richard's paper.

JUNE 10-11, 2004: Richard Bogoroch will be presenting at the Canadian Institute's program on Auto Insurance Claims Litigation. This seminar provides up-to-the-minute, practical information on litigating auto insurance claims, including how Bill 198 and recent regulations are affecting auto insurance claims and litigation, the essentials of effectively mediating auto insurance claims and more. Richard Bogoroch will speak on “Making the Best Use of

Your Expert Witness,” providing a live demonstration of the courtroom experience.

If you or your organization would like a member of our team for a speaking engagement, kindly contact either **Mary Battaglia:** at (416) 341-5606 or by email at mbattaglia@bogoroch.com, or **Carrie Fine** at (416) 341-5625 or by email at cfine@bogoroch.com.

NEXT ISSUE

Coming up
in our next Newsletter

June 2004:
How Damages
are Determined

THOUGHTS ON THE MEANING OF LIFE

*“We must always change,
renew, rejuvenate ourselves;
otherwise we harden.
Optimism is the faith that
leads to achievement.
Nothing can be done without
hope and confidence”.*

— HELEN KELLER

*“No one can make
you feel inferior
without your consent”.*

— ELEANOR ROOSEVELT
(U.S. FIRST LADY 1933-45 AND
WIFE OF U.S. PRESIDENT,
FRANKLIN DELANO ROOSEVELT)

The information in this newsletter is not, nor is it intended to be, legal advice. You should consult a lawyer for individual advice regarding your own situation. Use of this newsletter does not create a solicitor/client relationship between Bogoroch & Associates and the reader.

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