

FEATURE



## FOCUS ON MEDICAL MALPRACTICE

# Odds improving for plaintiffs in ‘David v. Goliath’ cases

Increased willingness of Canadian Medical Protective Association to settle called ‘step in the right direction’ by medical malpractice lawyers



**MANY PERSONAL INJURY** cases can fit the “David versus Goliath” analogy, but none more so than those that take on the Canadian Medical Protective Association.

“There’s a real problem with accessing justice in medical malpractice cases,” says Sloan

Mandel, a partner at Thomson Rogers, who has been practising in this area for more than 24 years. He estimates he receives 150 to 200 calls a year from people who want to sue their doctors or hospital, but because of the nature of medical malpractice cases — such as the

cost of prosecuting them — he conducts “an extensive preliminary examination” on less than 10 of them, and he moves forward with half that amount as potentially viable suits.

“That’s not to say that, out of 200 people that call, only four have been the victims of medical malpractice — but only four might actually have access to justice,” Mandel says.

Because the cost of prosecuting a medical malpractice case is so much greater than a more typical personal injury case, “you really get into a Dave and Goliath battle where, if a malpractice case is going to go to trial, it’s almost impossible to prosecute it through to completion without spending hundreds of thousands of dollars. Even if you have a viable \$200,000 case, the cost of prosecuting it is likely to be disproportionate to the amount at issue,” Mandel says.

Michael Shannon, a partner at Morse Shannon LLP, says he takes on around 10 well-vetted cases a year, but he receives a call or two a week on average. He says it’s important to meet face to face with the people who come to the firm for help, even if it’s just to explain to them why he can’t take on their case.

“It may be because there’s no liability, or there may be liability but the damages can’t justify taking it on a contingency fee, and most people don’t want you to take a case unless you can take it on a contingency fee,” Shannon says. “We have to be very careful in

the cases we vet because we can go bankrupt very quickly — if you take two or three bad cases, the next thing you know you're facing bankruptcy. You've got to be very careful on these cases."

The Canadian Medical Protective Association supplies and pays for the lawyers that defend the doctors in medical malpractice lawsuits and funds any patient compensation. In its most recent annual report, it says the CMPA has paid out \$260 million in compensation to patients proven to be injured through negligence, and the actuarial estimate for the provision for all accumulated outstanding claims was \$3.8 million. It lists resolved legal actions, with eight decided in favour of the plaintiff, 53 in favour of the physician, settlement achieved in 276 of the cases and 441 cases fell under the heading "dismissed/discontinued/abandoned."

Darryl Cruz, a partner at McCarthy Tétrault LLP, who argues cases for the CMPA, says the

resources, it can afford to lose.

"The CMPA does take some hard lines and, sometimes, you're not sure if it's a particular lawyer or the law firm that's taking it, because some firms seem to be a bit more reasonable to deal with than others," he says.

Cruz says there's been no change to the way the CMPA — and the lawyers who do the work — approach settlements.

"The approach has always been that if a case is indefensible and needs to be settled, we try to settle it and we try to settle it as early as we can," he says, noting that the number of settlements over the years has been stable.

Mandel says he had a few cases in 2019, however, that settled — a couple even before discoveries — which he calls a step in the right direction.

"It's something I've certainly seen more of in my last five years than my first five," he says. "Whether that's because there's been a change in perspective at the CMPA or wheth-

He also points to an increase in public attention to things such as taxpayer money going to the CMPA and increased costs for medical malpractice suits.

"These things are putting pressure on the CMPA and the government to have them deal with these cases as opposed to having a scorched earth policy like they used to," he says.

Cruz argues that with so many files out there, "if you're sitting in one place, it might seem like there are more settlements than in the past, but I don't think that's true on a macro level."

"To me, there have been no major changes in settlement discussions between plaintiffs and defendants in this area," he says.

There has been acknowledgement of and discussion about some of the issues unique to medical malpractice cases, including government inquiries such as the "Report to Ontario Ministry of Health and Long Term Care Re: Medical Liability Review," conducted by Justice Stephen Goudge.

One way Mandel can think of to address the high cost of medical malpractice litigation is for the CMPA to be a more active participant in the process. Unlike motor vehicle accident cases or slip and fall cases, decision-makers from the CMPA are usually only represented by their lawyers at pretrials or mediations, processes designed to help streamline cases and make them more cost effective — and even achieve settlement in many circumstances.

"What happens is the patient's message is communicated either directly or by the patient's lawyer to a defence lawyer, who in turn communicates that message to an adjuster or the CMPA claims examiner, who in turn then communicates that message to a committee," Mandel explains. "Sometimes, important subtleties are lost in a game of broken telephone."

He says that, even when there's agreement among counsel, it can take months to get a yes or no to the settlement of a claim — or even the settlement of an issue in a claim — and that process in and of itself can often cause inefficiency, waste and added cost.



**"There's a real problem with accessing justice in medical malpractice cases."**

Sloan Mandel, Thomson Rogers

statistics speak for themselves — medical cases will settle if there's a good reason to do so, and they settle a lot.

"The CMPA pays out more money than any other litigant in Canada a year on settlements because of the number of claims against doctors," he says.

The association has more than 100,000 members — more than 40,000 of them in Ontario — and the doctors pay thousands of dollars in annual fees. It has also been funded by taxpayer money since 1987, a fact that has been criticized by lawyers and the public alike over the years.

Shannon notes that when an entity has billions of dollars, compared to an injured person who doesn't have anywhere near those

er my filter is so much more strict or whether these cases were just so indefensible objectively, I can't tell you. But I was pleased that there were cases involving medical malpractice that were capable of resolution before discovery — it's just that they are too few and far between."

Shannon has also identified a trend of more openness to settlement, which he also attributes partially to the fact that cases are vetted extensively and only those where the lawyers are very confident in the strength of the case are taken on.

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While not a complete solution to the David and Goliath dynamic, Mandel says a requirement for more active participation by CMPA members in the mediation and pretrial process would be a start.

Shannon agrees it would be helpful if there was a person at a pretrial from the CMPA who was a willing participant “rather than

just hiding behind a phone. It would be of some assistance, I think, in moving the process along.”

Mandel says none of this is to disparage his opposing counsel in these matters. The CMPA have some of the best counsel, but “they talk about broken telephone for a reason. Even the best counsel can fall victim to inadvertent

loss of subtleties in an important message.”

Cruz says this is a typical process, noting, “In civil litigation, parties have lawyers and all the settlement negotiations, when there are lawyers appointed, go through the lawyer.”

Lawyers who take on medical malpractice cases can only do so much to address the inequities in the system. Both lawyers agree a rigorous vetting process and a harsh filter when agreeing to take on cases is their best defence.

“What I hope is that, when I’m dealing with the CMPA and their counsel, they know if I’m on the file [that] it’s already gone through a rigorous filter — so let’s try to get to the end point as quickly as possible,” Sloan says. “That’s me and my practice and the experience of 24 years of having to fight Goliath. That’s not really a solution for the 196 people I said I can’t help.”