ONTARIO BAR ASSOCIATION

Medical Malpractice: A How to Guide

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WHO TO SUE: WHO ARE THE PROPER PARTIES?

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WHO TO SUE: WHO ARE THE PROPER PARTIES?

Plaintiff's counsel must consider several factors when determining who to include as defendants in a lawsuit. These factors may be influenced by the timing of the client's initial call, the timeliness with which relevant medical documents are requested and reviewed, and the expediency with which counsel retains experts to assist with drafting the Statement of Claim.

CLIENT'S INITIAL CALL AND THE LIMITATION DATE

When plaintiff's counsel receives an initial call from a new client and it appears that the limitation date to commence the lawsuit is imminent, there may not be adequate time for counsel to properly consider who to include as defendants in the lawsuit. Counsel's main concern will be protecting the plaintiff's right to start an action. Typically the caller will have the names of health care providers whom the caller says are the most responsible for causing them injury. However, there are other callers who can point their finger at a health care provider but they do not know the individual's name; for example, "It was the emergency room physician but I don't know her name."

Counsel must always protect the plaintiff's right to commence a lawsuit when there is not enough time to request and review the medical records. Therefore, counsel should include as defendants the names of the health care providers and facilities which the caller identifies as those that may be liable for causing the plaintiff's injuries. Also, counsel should include the names of other treating health care providers whom the caller has identified as having information but may not be liable. These defendants may be able to assist you in proving substandard care or causation.

Finally, counsel should consider which additional health care providers there might be who may be liable for the plaintiff's injuries or who may have information about the facts at issue in the case. These will be individuals who the plaintiff has not specifically identified but who counsel thinks may be important to include. If you question the plaintiff about these additional health care providers, you may be able to gather enough information to obtain their proper names.

Counsel should consider including unnamed health care providers as defendants if the plaintiff cannot identify these individuals and there is no time to gather the relevant medical records. Typically these defendants are named as "Dr. J. Doe I, Dr. J. Doe II, Nurse J. Doe I, Nurse J. Doe II" etc.

It is important to keep in mind that when you draft the Statement of Claim and you plead the facts of the case that led to the plaintiff's injury, you should include the unnamed defendants in the chronology of the facts. You should also include specific allegations of negligence against each of these unnamed defendants. The pleading should be clear to the reader as to what role each of the unnamed defendants played in the treatment of the plaintiff. When plaintiff's counsel eventually receives the relevant medical records, they will have to bring a motion to substitute in the proper names of the unnamed defendants.

In one case, *McArthur* v. *Dr. Kaal,*[1] the plaintiffs brought a motion to substitute in the name of one physician (Dr. Neil Lamont) for an unnamed defendant (Dr. John Doe I). In the pleading, plaintiffs' counsel identified Dr. John Doe I as an assisting surgeon in a colonoscopy procedure. Dr. John Doe I was also identified as providing follow-up care to the patient after complications from the colonoscopy. When the medical records were produced, there was no assisting surgeon in the colonoscopy but there was a physician who provided follow-up care, Dr. Neil Lamont.

Defence counsel on the motion argued the Statement of Claim was not specific enough to identify Dr. Neil Lamont as Dr. John Doe I and therefore the plaintiffs should not be allowed to substitute in his name for the unnamed defendant. Plaintiffs' counsel on the motion argued the pleading was specific enough or, in the alternative, that the plaintiffs should be allowed to <u>add</u> (rather than substitute in) Dr. Lamont as a defendant. The Court allowed Dr. Lamont to be added as a defendant. The Court stated that the addition of the defendant would not result in prejudice to the defendant physicians, the plaintiffs acted with due diligence in fixing possible liability on Dr. Lamont, the plaintiffs

[1] [2006] O.J. No. 1525 (ONSC).

gave a reasonable explanation as to why they did not retain counsel earlier on, and the Statement of Claim was clear that the plaintiffs were alleging negligence against other doctors at the hospital by the use of Dr. John Doe as a defendant.

The plaintiffs were permitted to add the defendant because, in the end, the physicians were represented by the same counsel and there was no prejudice established, and the pleading was specific enough to point a "litigating finger" at Dr. Lamont.[2]

The most important thing for plaintiff's counsel to remember when faced with time constraints for issuing a pleading is that it is easier to include too many defendants and release them at a later date than it is to add defendants (after expiry of the limitation period) based on the common law of discoverability.

HEALTH CARE PROVIDERS AND VICARIOUS LIABILITY

A key consideration for plaintiff's counsel is whether there are any employers who may be vicariously liable for their employees' substandard treatment of the plaintiff.

While a physician may be *personally* liable to an injured plaintiff, there may be cases in which the physician is an employer and will be liable because of the actions of his or her employees. This principle is referred to as *vicarious liability*. Employers are vicariously liable for torts committed by their employees during the course of their employment. If a doctor employs office staff or nurses who may be found liable for a

[2] For cases on substituting in the proper names of defendants, please see: *The Rules of Civil Procedure, Rules 26 and 5.04*; *Rakowski* v. *Mount Sinai Hospital* (1987), 59 O.R. (2d) 349 [Master]; *Moreau* v. *Northwestern General Hospital* (1988), 65 O.R. (2d) 128 [Master]; *Kitcher* v. *Queensway General Hospital* (1997), 44 O.R. (3d) 589 (C.A.); *Sego* v. *Sudbury (Regional Municipality) Police Force*, [1999] O.J. No. 901 (Gen. Div.); *Ormerod (Litigation guardian of)* v. *Strathroy Middlesex General Hospital* (2009), 97 O.R. (3d) 321 (C.A.); *Ortisi* v. *Doe*, [2011] O.J. No. 4048 [Master]. For cases on adding a party, please see: *The Rules of Civil Procedure, Rule 5.04*; *Ladouceur* v. *Howarth*, [1973] S.C.J. No. 120 (S.C.C.); *J.R. Sheet Metal & Manufacturing Ltd.* v. *Prairie Rose Wood Products*, [1986] A.J. No. 7 (C.A.); *Knudsen* v. *Holmes* (1995), 22 O.R. (3d) 160 (Gen. Div.); *Robertson* v. *O'Rourke* (1997), 14 C.P.C. (4th) 182 (Gen. Div.), affirmed [1998] O.J. No. 1999 (C.A.); *Mazzuca* v. *Silvercreek Pharmacy Ltd.* (2001), 56 O.R. (3d) 768, (C.A.); *Wong* v. *Adler* (2004), 70 O.R. (3d) 460 [Master]; *Spirito* v. *Trillium Health Centre*, [2007] O.J. No. 3832 (ONSC), affirmed [2008] O.J. No. 4524 (C.A); *Lloyd* v. *Clark* [2008] O.J. No. 1682 (C.A.); *Suarez* v. *Minto Developments Inc.,* [2009] O.J. No. 5554 [Master]; *Staats* v. *Jane Doe*, [2010] O.J. No. 617 (ONSC); *Skribans* v. *Nowek*, [2012] O.J. No. 339 [Master].

plaintiff's injuries, the doctor/employer should be named as a defendant in the action. Each doctor/employee relationship should be reviewed carefully because the doctor will usually not be found vicariously liable for the actions of an independent contractor.

Similar to a physician being found vicariously liable for a tort committed by an employee, so too will a hospital be found vicariously liable for torts committed by its employees. Plaintiff's counsel should always consider whether to name the hospital as a defendant. Counsel should consider whether there are health care providers employed by the hospital who may be liable for the plaintiff's injuries and, as a result, the hospital will be found vicariously liable for its employees' substandard treatment.

There are a number of employees in hospitals for whose actions the hospital may be responsible. The employees include nurses, physiotherapists, occupational therapists, pharmacists, laboratory technicians, ultrasound technicians, orderlies, and others. While physicians are not usually employees of the hospital, most residents are. Where a resident may be liable, the hospital should be named as a defendant.

Hospitals typically have a duty to employ competent staff and to monitor their continued competence, and to provide proper instruction and supervision. In addition, hospitals also have a duty to provide proper facilities and equipment, and to establish systems necessary for the safe operation of the hospital.[3]

If plaintiff's counsel believes the hospital did not have the appropriate equipment or that there might be systemic problems at the hospital, then the hospital should be named as a defendant.

ADVANTAGES AND DISADVANTAGES OF JOINING EVERYONE IN THE LAWSUIT

There are clear advantages and disadvantages of joining *everyone* in the lawsuit. By using the term "everyone", we are referring to health care providers or facilities that

[3] Picard, E. I. and G. B. Robertson, *Legal Liability of Doctors and Hospitals in Canada*, Fourth Edition, Toronto: Thomson Canada Limited, 2007, p. 460.

have relevant information, knowledge or belief as to the facts relating to issues of a particular case.

The primary advantage to naming everyone in the action is that you protect your client (and yourself) from missing a defendant who may ultimately be liable for the plaintiff's injuries. In addition, you are able to gather more information through the discovery process (both documentary and oral evidence) which makes it easier for counsel to identify with greater clarity the proper defendants. The more information you have, the easier it is to narrow the issues.

The main disadvantage of joining everyone in the lawsuit is the cost of attending examinations for discovery and examining a large number of defendants. In addition, it will likely take longer to get to the examinations for discovery because there are many schedules to coordinate. Likewise, the examinations for discovery may spread over many months because of scheduling difficulties and this causes a delay in moving the case forward. When examinations for discovery are spread out, counsel usually spends more time getting ready for examinations for discovery because you have to familiarize yourself with the documents and the issues for each discovery. There are added costs too of serving the pleading on a large number of defendants.

While the costs of including a large number of relevant parties in the lawsuit can be a significant disadvantage, the advantages however far outweigh any costs counsel has to spend in order to get all of the evidence required to prove the plaintiff's case.

WHEN THERE IS TIME TO INVESTIGATE A CLAIM

When plaintiff's counsel is not faced with a limitation deadline, due diligence should be used to investigate the merits of the case and to identify the appropriate individuals who should be named as defendants in the lawsuit.

It is trite to say but counsel should first request the relevant medical records soon after being retained. These records should include the treatment records of which the

medical malpractice action is based as well as any additional medical records which will assist in proving substandard care and causation.

How do you know which records to request? Each case turns on its own facts; for example, in one case, a married teacher with two children has mental health issues. Her attempt at suicide is stopped by her husband and she is placed in a mental health facility. Within one week of her admission, she hangs herself in the hospital with her own shoelaces. The family contacts counsel to find out whether there is merit to a medical malpractice action. The obvious records that counsel should request are the hospital records where the woman died and the Coroner's Investigation Statement and Post Mortem Examination Statement (if the Coroner was involved and a post mortem examination was performed). The hospital records will provide the identities of the treatment providers. The hospital records will provide the chronology of treatment this woman had and will help you in determining whether the standard of care was met. The hospital records will also identify the defendants. The Coroner's documents will outline the cause of death which will assist you in proving causation.

Additional records that may help identify defendants in the above case include the deceased's family physician's records, records from previous health care providers in the mental health field, or records of hospitals that provided treatment to this lady prior to her hospital admission during which she died. By comparing previous treatment plans to the treatment plan the deceased received prior to her death, you may be able to identify defendants whose treatment differs markedly from previous treatment from which the deceased benefitted.

WHEN THERE IS TIME TO RETAIN AN EXPERT

A luxury not often afforded plaintiff's counsel is the new client who retains you with enough time to receive and review relevant medical records and to retain an expert to provide advice on who to sue. When an opportunity like this arises, plaintiff's counsel should retain one or two experts to assist. First, the expert(s) will provide an opinion on whether there is merit to a medical malpractice action. Second, if there is merit to a

lawsuit, the expert can assist you in identifying the defendants. Third, the expert can assist you in identifying which parties should be included to obtain discovery evidence. It will not always be necessary to include defendants only for discovery purposes but if it is necessary, then counsel should do so in order to protect the plaintiff's interests.

SHOULD PARTIES BE ADDED JUST TO OBTAIN DISCOVERY EVIDENCE?

In medical malpractice cases, plaintiffs' counsel are at a distinct disadvantage from the outset because not many physicians will speak with counsel to discuss what happened to the plaintiff. Plaintiffs' counsel gather their information from their clients, from the relevant medical records, through their own research, from treating health care providers, and from their medical-legal experts. It is my experience that treating physicians are becoming more and more reluctant to speak with plaintiffs' counsel even if they are told they are not named as defendants in the lawsuit.

In a recent case I was involved in, a woman was treated in an emergency department of a community hospital. When her condition deteriorated, she was transferred to a tertiary facility for emergency surgery. By the time the woman arrived at the receiving hospital, it was too late to save her life. It was clear from the records that the treating surgeon did everything he could to save this woman's life. It was clear from the records that the treating surgeon was not liable for this woman's death or for her family's damages.

I contacted the treating surgeon in writing. I asked him to speak with me about the treatment he provided. I also wanted to ask him questions about his availability to perform surgery earlier in the day had this woman been transferred to him sooner. I made it clear in my letter to him that he was not named as a defendant in the lawsuit. I made it clear in my letter to him that I did not want a report in writing. I requested a face-to-face 30-minute meeting. The surgeon's office contacted me and told me the doctor would meet with me. Dates and times for the meeting were discussed. Prior to the meeting taking place, the doctor's office called me and said the doctor would not meet with me. He spoke with the CMPA and he was told he should not meet with me

and whatever questions I had should be put in writing and he would respond in writing. Neither my client nor I were prepared to pay the doctor for a written report. We were prepared to pay the doctor for a 30-minute meeting.

Since the doctor would not cooperate, I considered including him as a defendant in the lawsuit. He had important information that would assist the plaintiff in proving causation. Fortunately I had enough time to retain an expert who answered most of the questions I had for the surgeon. However, there were still too many unanswered questions that only the surgeon could answer. I therefore included the surgeon as a defendant.

In another recent case I was involved in, a man was diagnosed with macular degeneration. His ophthalmologist prescribed the recommended medication and dose. The pharmacy incorrectly filled the prescription. Through my own research I was able to determine the two medications looked the same and had the same consistency. The ophthalmologist would not be able to tell by observing the syringe that the medication inside was not what he ordered. The syringe was labeled with the drug the ophthalmologist ordered. The ophthalmologist injected the medication into the man's eye. There was an immediate reaction to the medication. Shortly after, the man lost complete sight in that eye. It was clear from the records that the pharmacy technician and pharmacist were responsible for the mix-up. It was also clear from the records that the ophthalmologist had a discussion with the manager of the pharmacy after the incident but the records were deficient as to the details of that discussion. It was clear from the records that the ophthalmologist was not responsible for the man's vision loss. It was not clear from the records if the pharmacy was part of the hospital where the ophthalmologist performed the injection or if the pharmacist owned it or some other entity owned it. It was likely the ophthalmologist would have this information. The ophthalmologist would also have important information about the facts in this case including how the medication mix-up occurred. His handwritten notes were not easy to decipher.

I contacted the ophthalmologist in writing. I told him I did not want to include him in the lawsuit because I did not think he was liable for the plaintiff's injury but I wanted to ask him some questions about what happened. He told me he would have to contact the CMPA before speaking with me. A little while after that, the doctor offered to meet with me to discuss the incident. We met and we went over the chronology of events that I prepared from the records. The physician explained his handwritten notes to me. He provided the names of the pharmacy technician and the pharmacist. He told me the pharmacy was located in the hospital and the hospital employed the pharmacy technician and the pharmacist. He offered to cooperate with me throughout the litigation process. He offered to prepare a written report for the plaintiff on the issue of causation and I retained him to do that. I never named the ophthalmologist as a defendant in the lawsuit.

It is part of my regular practice to contact treating health care providers who do not appear to have any exposure to liability in an effort to speak with them about the events in question.

WHEN THE CLIENT DICTATES WHICH DEFENDANTS NOT TO NAME

There may be occasions when the plaintiff will advise counsel which health care providers they do **not** want to sue. This situation may occur when the plaintiff has a close relationship with their family physician or their treating specialist. If this happens, counsel should explain whether they think the health care provider should be included and the reasons why. Counsel should make it clear to their client, if it is the case, that their lawsuit may fail if the physician is not named as a defendant and why. This legal advice should be provided orally and in writing so counsel is satisfied the client understands the possible ramifications of not including the physician. If, after counsel explains the importance of including the physician in the lawsuit, the plaintiff still refuses to allow counsel to name them, then counsel should obtain those instructions in writing.

CONCLUSION

The greater the amount of time you have prior to drafting your Statement of Claim, the more thorough should be your understanding of the issues in the case. Counsel should come up with a concise list of defendants if time allows a complete investigation prior to drafting the pleading. Counsel should attempt to cast as narrow a net as possible. A boilerplate pleading may be taken as a sign of your lack of preparedness or your lack of understanding of the case. While sometimes a less than fulsome pleading is unavoidable, plaintiff's counsel must do what they can to protect their client's interests by naming the proper defendants.