Waiting-list worries cause Calgary MDs to prepare letter for patients

Susan Lightstone

What is a physician's legal obligation when a patient with a threatening condition is placed on a waiting list? More to the point, does sending a letter about the waiting list discharge any duty the doctor may have to that patient? A group of Calgary physicians, concerned about the lack of legal clarity and frustrated from watching their patients languish on waiting lists, answered both questions recently by drafting their own letter.

The form letter developed by the Calgary Regional Medical Staff Association (CRMSA), which is for certain patients waiting for medical procedures, begins: "As your physician, I feel the length of the waiting time for [your] procedure involves some risk to you." The letter goes on to advise the patient of available options, including care at private centres in Alberta and outside of Canada.

Dr. Brock Dundas, the CRMSA president, advises members that the association believes doctors have a professional obligation to advise patients of any concerns they have about waiting times. Only certain patients need be informed, including those with potentially life-threatening conditions that are likely to worsen over the waiting period and apprehensive patients who are anxious because they have to wait. Informing the patient, the association maintains, "should address your legal obligation."

The letter was produced following a mock trial held during a recent meeting of the Canadian Cardiovascular Society. The trial involved a fictional 55-year-old man who died while awaiting elective bypass surgery. His family filed a suit against the physicians, the hospital and the government for failing to provide appropriate, timely treatment. The mock-trial judge ruled that liability rested solely with the physicians.

"What are doctors to do when resources are limited and something might go wrong because of that?" asks Vancouver lawyer Andrew Wilkinson. The law, he explains, does not provide a clear answer.

As it stands, the legal doctrine of informed consent requires the physician to tell the patient, without being questioned, not only the nature of the treatment but also any material risks and any special or unusual risks.

No legal precedent, but . . .

The issue of health care standards being compromised by the pressure to contain costs has never been litigated in Canada. Timothy Caulfield, research director at the University of Alberta's Health Law Institute, is surprised that there is no case law specifically on this point, but a 1994 case, *Law Estate v. Simice*, serves as an example of the direction Canadian courts may eventually head.

The case involved a 51-year-old man who died following surgery to prevent the rupture of an intracranial aneurism. "I must observe that throughout this case," wrote Mr. Justice Spencer of the British Columbia Supreme Court, "there were a number of times when doctors testified that they feel constrained by the British Columbia Medical Insurance Plan and by the British Columbia Medical Association standards to restrict their requests for CT scans. No doubt such sophisticated equipment is limited and costly to use. No doubt there are budgetary restraints on them. But this is a case where, in my opinion, those constraints worked against the patient's interest by inhibiting the doctors in their judgment of what should be done for him. That is to be deplored. I understand that there are budgetary problems confronting the health care system. I raise it only in passing only to point out that there were a number of references to the effect of the financial restraint on the treatment of this patient. I respectfully say it is something to be carefully considered by those who are responsible for the provision of medical care and those who are responsible for financing it."

These comments are not legally binding as a precedent on courts in Canada because they are considered "obiter dictum" — only an observation on a matter before the court, not part of the decision rendered in the case. (The case itself resulted in a finding of negligence that was not based upon scarce medical resources or waiting lists.)

Caulfield says the issue of whether cost containment and resulting waiting lists create any additional legal duty to inform patients and attempt to secure the best treatment reasonably available for them remains "a grey area of the law."

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80% of Albertans wait for health services

A survey of 10 300 people reveals that waiting times may be leading to stress, depression and more serious illness for Albertans. The Alberta Medical Association (AMA) survey, conducted between November 1998 and March 1999, indicates that 81.9% of respondents waited for health care services and 76.8% said their health or quality of life was affected by the wait.

"The message is clear," said AMA President Rowland Nichol. "Albertans have learned they cannot always count on their health care system to be there when they need it."

A summary of the survey results was distributed throughout the province in a tabloid insert called *Navigator 5* that appeared in major newspapers. Among the findings: 29.6% of respondents said they got sicker while they waited and 58.3% said the wait created extra stress for their families.

These results back up another AMA survey conducted a year ago. That independent survey asked Alberta doctors for their views of "actual" versus "reasonable" waits for specific, frequently needed medical services. Doctors reported that actual waiting times for both urgent and elective services, tests and procedures were more than 3 times what they believed was "clinically responsible."

"Canadian informed-consent jurisprudence can certainly be interpreted to support providing information concerning the risks associated with waiting lists," says Timothy Caulfield, research director at the University of Alberta's Health Law Institute. Courts apply an objective approach in determining whether a risk needs to be explained to a patient. "The question is whether this [waiting period] is something that a reasonable person in the patient's position would want to know," Caulfield concludes. "The question sort of answers itself, doesn't it?"

Disclosure obligations

But Canadian courts have not yet considered the issue of waiting lists, leaving doctors, lawyers and patients in a legal limbo fraught with policy implications. Caulfield advises that "courts have taken the patient's right to know very seriously and, as such, disclosure obligations imposed on physicians [by courts] have been expanding" in recent years to include the disclosure of nonmedical information relevant to treatment issues.

Wilkinson, a partner with Harper Grey Easton, maintains that the law should not grow further in this direction. Issues like waiting lists, he argues, are systemic problems outside a doctor's control. "I'd say to a doctor: 'You're supposed to provide medical advice. You're not a social worker or a hospital administrator.' It's onerous to say that doctors should act as an insurer, providing everything the patient needs. It's beyond the duty of any doctor."

Wilkinson says the law should not impose a legal obligation on a doctor to tell patients about waiting lists, but he adds that it is proper for physicians to inform patients — in a courteous way — that they may have to wait for treatment.

Letter inadequate

Caulfield argues that a letter to patients about waiting periods is not the appropriate way to discharge the legal duty a court might impose. "Ideally, this information should be provided to the individual patient during a visit to the doctor, as this allows the physician to tailor the information in a manner appropriate to the patient. For example, patients may have no money. Telling them [in a letter] that the procedure they need is available in the US at great expense could cause undue anxiety."

Wilkinson thinks the CRMSA letter is more about "a sense of frustration" than "covering butts." A recent survey of more than 10 000 Albertans by the Alberta Medical Association revealed that more than 80% of respondents had to wait for the health care services they needed and 76.8% said their health or quality of life had been affected because of the delay (see sidebar).

Dundas acknowledges that part of the message the CRMSA is sending to patients is simple and political: "You shouldn't have to wait this long for treatment." Caulfield thinks this type of letter "polarizes the public health care debate." However, even though he wonders if the letters "validate misperceptions" about the state of health care in Canada, he says "they do inform patients."

"People are worried we are putting more anxiety on patients," Dundas responds, "but I think if [patients] have an illness that's serious, this [letter] should come as a relief that someone is interested in expediting their care and making them fully aware of their options."

Susan Lightstone is an Ottawa journalist and lawyer.