

# Is scarcity of resources a valid legal defence?

Barbara Sibbald

Is that CT scan too expensive? Is the waiting list too long? Cancer treatment too scarce? Physicians may blame cut-backs when their patients encounter difficulties receiving medical treatment, but the law could well hold them accountable for the standard of care their patients receive — a standard that hasn't changed despite cuts in funding and resources.

Judging from recent legal cases in Canada, the UK and US, concludes lawyer Tom Curry, the decline in health care resources is opening a new area of potential legal liability for physicians. Doctors should pay attention to the warning, because Curry works for McCarthy Tétrault, the giant Toronto firm that handles many cases for the Canadian Medical Protective Association. During a February lecture at a University of Toronto medicolegal course for surgeons, Curry explained that restructuring presents several areas of concern for physicians.

## A duty to advise of alternatives?

Curry said physicians are responsible for ensuring that their patients are fully informed of their choices, in accordance with medical standards. A recent case involved a woman pregnant with twins who lived in a remote BC community that didn't have adequate health care resources to support this delivery.<sup>1</sup> She ended up delivering in the community and one of the babies suffered brain damage. Two physicians were found liable because they didn't tell the woman about the risk of delivering in the community. As a result, she couldn't make a reasonable and appropriate decision about where to await the onset of labour.

## Waiting lists

Curry said that when a court eventually hands down a decision on a case in-

volving waiting lists, it will be assessing physicians' responses to the lists. Unless it is the physician's assessment that nothing bad will happen if the patient waits, he said, "you should advise the patient of alternatives." Some physicians give such patients a specially prepared letter outlining their concerns.<sup>2</sup>

## Cost-containment defence

In their defence, physicians will say that to save money, criteria have been set for the use of certain diagnostic tests. For example, not every patient with a headache can have a CT scan. However, this defence was questioned in a recent BC death involving a ruptured aneurysm.<sup>3</sup> In addressing the impact of cost constraints on treatment decisions, Mr. Justice Spencer stated that "those [budgetary] constraints worked against the patient's interest. That is to be deplored."

In addition, these sorts of constraints should be considered carefully by those "responsible for the provision of medical care and those who are responsible for financing it." He stressed that in the event of a choice between a doctor's duty to a patient and that owed to the medical care system, the duty to the patient must prevail.

When staffing becomes a cost-containment issue, hospitals might decide to use part-time staff in an ER, or to shut an ER for part of the night. Thus far, said Curry, court decisions indicate that physicians must justify the level of care they provided. In other words, the standard of care must be up to community standards. Thus, hospitals may also be held responsible for injuries or death resulting from limited resources.

In *Granger (Litigation Guardian of) v. Ottawa General Hospital*, the court found the hospital vicariously liable for the negligence of a nurse who was

pushed beyond her capabilities and forced to operate without adequate supervision.<sup>4</sup> In the case, the RN did not pass on her concerns regarding readings on a fetal monitor.

## More than 1 campus?

In a precedent-setting case in the UK, which involved a 3-site hospital, a judge found that limited resources at 1 of the sites was not a defence for inadequate care.

In *Bull v. Devon Area Health Authority*, only 1 site had emergency services.<sup>5</sup> A woman delivered twins at the wrong site and the second child suffered an asphyxiation injury. The health authority argued that it was trying to do the best job possible with the limited resources available, but the court did not accept the defence of limited resources. "In other words," said Curry, "Don't tell us this is the best you can do if the best is not good enough."

Both US and UK decisions show the court's disapproval of treatment decisions that take cost into consideration when making medical decisions.

For more information, see Curry T. Are cuts to health care funding changing the legal standard of care? *Advocate Quarterly* 2000;22:337-75.

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## References

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2. Lightstone S. Waiting-list worries cause Calgary MDs to prepare letter for patients. *CMAJ* 1999 (2);161:183.
3. *Law Estate v. Simice* (1994), 21 CCLT (2d)228 (BCSC), aff'd [1996] 4 WWR 672, 111 WAC 89 sub nom. *Law Estate v. Ostry*, 17 BCLR (3d) 1 (CA).
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