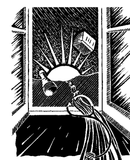
Resource allocation and physician liability

Karen Capen



Education

Éducation

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In Brief

LAWYER KAREN CAPEN SAYS FUNDING CUTBACKS THAT HAVE AFFECTED the services physicians can provide may cause legal problems for Canada's doctors. If cutbacks affect the care that is being provided, they should be discussed with the patient and noted on the chart. She says physicians have "good reason to be concerned" about increasing pressures that create an imbalance between health care resources and the demand and need for services. For some doctors, these have resulted in court cases.

En bref

KAREN CAPEN, AVOCATE, AFFIRME QUE LES COMPRESSIONS BUDGÉTAIRES QUI ONT TOUCHÉ les services que les médecins du Canada peuvent fournir pourraient leur causer des problèmes juridiques. Si les compressions affectent les soins fournis, il faut en discuter avec le patient et l'indiquer dans son dossier. Elle affirme que les médecins ont «raison de s'inquiéter» des pressions croissantes qui créent un déséquilibre entre les ressources consacrées aux soins de santé et la demande et le besoin de services. Des médecins ont été poursuivis en justice.

My last column pointed out that the allocation of scarce health care resources raises potential legal concerns for physicians (*Can Med Assoc J* 1997;156:49-51). In 1994 a British Columbia Supreme Court judge observed (*Law Estate* v. *Simice et al*) that the effect of financial restraint on the treatment of patients "is something to be carefully considered by those responsible for the provision of medical care and those responsible for financing it."

The judge, who acknowledged the need for budgetary restraint, nevertheless deplored the situation that arose in this case. "Those constraints worked against the patient's interest by inhibiting the doctors in their judgement of what should be done for him," the judge noted. (The case involved a ruptured aneurysm. One of the issues was the failure to perform timely scanning because of concerns related to the cost.) If anything, resource-allocation issues have become even more critical in 1997 than they were in 1991, when the incident occurred in British Columbia.

In another case, *McLean* v. *Carr Estate et al*, a patient who had fallen from an all-terrain vehicle died because of an epidural hematoma following admission to hospital. A CT scan had not been done upon admission, and his family sued the hospital and the treating physicians for negligence. The claim stated that omitting to perform a CT scan when admitting a patient with a serious head injury constituted a breach of the standard of care.

"I do not need to find that every bump on the head would have required a CT scan," the judge handling that Newfoundland case observed. But he added, with considerable emphasis, that "in the present case everyone agrees a CT scan on admission would decrease the risk of death resulting from a developing epidural hematoma. The question is one of the cost-effectiveness of precautions that could have been taken.

"It was allegedly too costly [in 1987] to do a CT scan on all head-injured patients. I was not, however, provided any evidence to establish that the cost would be prohibitive to scan, not all, but just patients whose skulls had had considerable force applied and who had a resulting skull fracture."

The questions cases like these pose are increasingly relevant and important to physicians.

The only clear course of action is that physicians must work to achieve a balance between allocating scarce resources and maintaining quality medical care.

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- To what extent should physicians consider, in the course of medical decision-making, decisions to limit services that are intended to accommodate budgetary restraints imposed on or by their health care institutions?
- Can physicians successfully defend against a claim of negligence by relying on evidence that limitations based on scarce resources, which affect decisions about diagnosis or treatment, are justified?

When trying to answer these questions, the issues to consider are relatively simple. What is the meaning of the duty of care that is imposed on MDs in the individual physician–patient relationship within the current atmosphere of health care cutbacks? What reasonable standard of care applies in any given patient situation?

There are few formal guidelines for physicians trying to deal with these concerns. In 1992, *CMAJ* published a letter from a physician which asked for reassurance from the Canadian Medical Protective Association (CMPA) that physicians "will not be held responsible for misadventures to our patients that are a result of rationing or other restrictive measures."[1] He suggested that the CMPA might "assist in the appropriate education of health administrators" in making resource-allocation decisions that support and enhance good medical practice.

The CMPA responded that resource-allocation decisions will inevitably affect medicolegal outcomes and ultimately the courts will have to determine physicians' liability if a case indicates that scarce health care resources contributed to a negative outcome.[2]

In the CMPA's winter 1995 *Information Letter*, lawyer Margaret Ross also addressed the issue. "Physicians must continue to be aware that their primary responsibility is to provide appropriate care for patients," she wrote. "For the foreseeable future, it is not likely to be sufficient for a physician to defend the failure to order a diagnostic procedure or to follow a particular treatment plan that was indicated in the circumstances on the basis that it was too costly to do so."

She added a further caveat: "Failure to raise objections or make concerns about patient care known to those responsible for making cost-related decisions may be taken by those decision-makers as being agreement, or at least acquiescence, with their decision."

Two elements of the analysis leading to a determination of medical negligence are relevant to physicians' daily practice: their duty of care to patients and the standard of care physicians should adhere to with every patient.

Once a physician–patient relationship has been established, the physician owes the patient a duty of care commensurate with the knowledge, skill and care used by other similarly trained physicians in good standing across the country. Physicians are not held to a standard that requires them to provide routinely the highest possible level of care.

In a 1971 case, the Supreme Court of Canada ruled that physicians must possess and use "that reasonable degree of learning and skill ordinarily possessed by practitioners in similar communities in similar cases." As well, they are expected to meet a reasonable standard of care as practised by a prudent doctor of the same experience and standing.

It is the physician's duty of care to advise and recommend to the patient the diagnostic procedures and courses of treatment that the physician thinks are most reasonable and effective given the patient's particular needs and circumstances. (This duty should include all procedures and treatments, not just the ones available in the patient's community.)

If a procedure or treatment is unavailable in the patient's community, a move or the next best approaches should be discussed.

It is very important to record these discussions in the patient record, including a description of recommended courses of action and alternatives and the course that was actually followed. Any discrepancies between what is recommended and what is done should be explained clearly.

In medical-malpractice cases, the standard of care is the issue that provides physicians with both the possibility of increased liability and the fundamental basis for protection in law. There is good reason today to be concerned about increasing pressures that create an imbalance between health care resources, the demand and need for services, and the extent of the public's information about and awareness of appropriate diagnostic and treatment opportunities.

The problem of suboptimal health care resources, facilities and services, and the extent to which the health system as a whole is managed will inevitably affect the nature and content of the physician–patient relationship.

Physicians must realize that until patients are more fully informed about the effect of cost containment on their care and treatment, physicians will bear the brunt of increased liability associated with efforts to reduce or reallocate spending at all levels of the health care system.

Several aspects of resource cutbacks or reallocations involve physicians directly. It is important to consider these issues if physicians are to minimize their legal liability.

- In spite of most doctors' limited involvement in allocating health and medical resources at the macro level, physicians are still considered to be the system's gatekeepers. Any decline in service delivery involving physicians will expose them to potential liability. In case law, the use or nonuse of diagnostic procedures that require scarce technologies is one example illustrating physicians' vulnerability. We have already seen successful lawsuits against physicians in cases in which tests were not ordered soon enough. Whether this trend continues may depend on whether physicians will be able to establish that their treatment decisions

have been made appropriately, given current limits on resources. If they are successful they may effectively modify the acceptable standard of care.

- The development of clinical practice guidelines (CPGs) is another consequence of the growing acceptance of the need for cost containment. CPGs have both supporters and opponents within the medical profession. Supporters say they improve care and limit the need to practise defensive medicine. Opponents argue that they may create unrealistic expectations in patients because the CPGs may have been created by people out of touch with the day-to-day realities of a busy practice in which resources and peer support are limited.
- Disclosure concerning the availability of health care resources is another factor that may expose physicians to increased liability. MDs should be aware that the duty to disclose in the context of the informed-consent rule may require them to discuss with patients treatment options that are not available. If some of the reasonable options are unavailable, physicians may have a broader obligation when securing the patient's consent.
- The equitable provision of health services will be affected by doctors' decisions to shy away from specialty services such as obstetric care that pose an increased risk of medical liability. Avoidance of these services will place added pressures on the physicians who do perform them. Physicians must inevitably deal with these threats of increased liability, along with added responsibilities toward their patients in the face of diminishing health care resources.

The only clear course of action is that physicians must work to achieve a balance between allocating scarce resources and maintaining quality medical care. Those who fail to do this may end up in court.

References

1. Davis WL. A survey of medical quality assurance programs in Ontario. [letter] *Can Med Assoc J* 1992;147:287-8.
2. Lee SB. A survey of medical quality assurance programs in Ontario. [letter] *Can Med Assoc J* 1992;147:288.