Malpractice concerns lead to unprecedented cooperation as CMPA, CMA seek answers

Features

Chroniques

Steven Wharry

En bref

L'ASSOCIATION MÉDICALE CANADIENNE s'est associée à un groupe de travail réunissant des représentants de l'AMC et de plusieurs de ses divisions provinciales pour examiner le régime d'assurance faute professionnelle médicale au Canada. La démarche vient un an après la publication d'un rapport sur les pratiques de l'ACPM. Steven Wharry examine le déroulement des événements entre temps.

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The Canadian Medical Protective Association (CMPA) is working hard to head off potential rifts within its membership as a result of increases in fees for several "high-risk" specialties.

One year after Charles Dubin, Ontario's former chief justice, released his widely publicized report on CMPA practices and recommended measures such as uniform fees for malpractice protection (see *CMAJ* 1997;156:685-7), the organization has joined a working group that includes representatives from the CMA and several of its provincial divisions.

Dr. Robert Burns, a working group member, says its goal is to pursue suggestions for tort reform contained in Dubin's report and elsewhere. Burns, executive director of the Alberta Medical Association, said a second thrust is to consider CMPA funding. "There are legitimate and significant threats to the ability to provide services unless something is done," he said. "That very real threat, and the costs and concerns accompanying it, is one reason why the profile of this issue is now high enough that the potential exists to get something done."

Dr. Stuart Lee, the CMPA secretary-treasurer, says the existing fault-based system used in malpractice cases, designed to compensate patients injured by medical treatment, must be overhauled to contain costs. "The court awards are driving up the cost of malpractice protection," said Lee. "The real tragedy is that access [to care by physicians] is being affected by the increase in malpractice protection fees."

Everyone knows that obstetricians have been hit hardest by the most recent increase — their 1998 fees increased by 24%, to roughly $29 000 — but Canada's orthopods and neurosurgeons aren't far behind. Lee said the CMPA is concerned that the huge fee disparities — an FP who performs some obstetrics faces CMPA fees of just under $5000 in 1998 — will mean fewer physicians will be prepared to provide "high-risk" services.

"We have received some calls and letters from physicians who say 'I can't practice without them [high-risk specialists].' If we are agreed that we are all in this together, we need to find a way to help each other out."

Helping one another out is one thing, but most of the 1100 CMPA members surveyed in September flatly rejected paying a uniform fee so that the burden of insuring their higher-risk colleagues would be shared. However, 74% of respondents agreed that the government should be lobbied to reform the tort, or fault-based, system of compensating patients.

Although the number of obstetrical cases where fault is found has remained fairly steady in the 1990s — fault is found in about 10 cases a year out of the 40 suits brought forward — the average settlement jumped from $1 million in 1989 to more than $2 million in 1996.

Lee said that even though the likelihood of being sued has remained fairly

Dr. Stuart Lee: access to care is being affected.

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constant throughout the decade, people's expectations of physicians have not, especially when it comes to obstetrical cases. "Everybody wants a normal baby — that's to be expected. What we have lost sight of is that, for reasons known to God, some aren't."

Dr. André Lalonde, executive vice-president of the Society of Obstetricians and Gynaecologists of Canada (SOGC), expanded on this theme during a recent meeting of the CMA Committee of Affiliated Societies. "We're dealing with problems like cerebral palsy and asphyxia, and that is why the costs [of legal awards] are so high," he said.

The SOGC recently developed an intense, 2-day training course to update obstetricians on the latest standards of practice, but Lalonde said the problem is not limited to physicians' skills. "Right now we do not have a very good tool to asses the fetus in utero," he said. "The technology is just not there."

He thinks risk-management programs should be prerequisites for receiving malpractice insurance, as is the case in some American states. Lalonde also cautioned that factors such as flat fees for deliveries, increased CMPA dues and threats by provincial governments to end reimbursements for those dues are causing an exodus from his specialty.

Can we talk?

Lee stresses that ways to put an end to rising CMPA fees will likely only be found through collaboration between the medical profession and governments. "Governments can be part of the solution," said Lee. "In this case we are on the same side and it is definitely in their interest to help address these problems."

That is why the CMA and representatives from several provincial medical associations invited the CMPA to join a joint working group to establish specific proposals for tort reform. The group, chaired by John Laplume, executive director of the Manitoba Medical Association, will conduct a complete review of tort-reform options and study other issues such as provincial and territorial reimbursements.

The reimbursement process, which Dubin said should continue, has tempered the impact of CMPA dues increases, but governments continue to consider cutting them a way to save money. "The Dubin report served a very valuable purpose by educating governments and the public that the CMPA is not simply sitting on bags and bags of money," said Lee of his association's reserves, which stand at more than $1 billion. "The challenge now is to make them aware that we either have to cut costs or increase physicians' ability to pay them."

Private insurance?

As the CMPA struggles to solve its fee problems, at least 1 private insurance company is stepping forward as a for-profit alternative to the physicians' mutual defence organization. In late December, the ENCON Group mailed information packages to Ontario physicians that offered "coverage highlights" and a rate schedule divided into 9 categories of practice.

The trade-off is simple. Instead of unlimited malpractice award protection, as is provided by the CMPA, ENCON limits the amount it will pay on a physician's behalf. In exchange, doctors pay fees that are substantially lower than the CMPA's.

Jim Hylands, senior vice-president of Seabury & Smith, administrators of the ENCON program, says that even though this program has existed in Quebec since 1981, until now there has been no demand for it elsewhere.

"We felt that this just might be the appropriate year to launch the program outside of Quebec, given the controversy over the escalating costs in the CMPA program," said Hylands. "Technically it has been available, but we just had not heard any noise about there being a demand for it."

He knows of no other private companies that have joined the malpractice-protection market in Canada but predicts this will change, especially if CMPA dues continue to rise and governments continue to balk at reimbursing part of those fees. "It's the old supply-and-demand equation," said Hylands. "If there is no demand, insurance companies won't provide the product. If there is enough demand, you'll see increased competition to provide coverage."

Hylands said private malpractice-insurance programs enjoy numerous competitive advantages over the CMPA, not least of which is the backing of huge multinational parent companies. Seabury & Smith is owned by Marsh and McLennan, a large US-based Fortune 500 company.

"The CMPA talks in terms of having to build up a reserve fund, but when you're dealing with international insurers with $70 or $80 billion in assets, that reserve fund is already in place and they don't have to collect it from each individual doctor."

In describing the benefits of ENCON, Hylands admitted the program is not identical to the CMPA's. For instance, program administrators could decide not to provide coverage for specialties or practice types deemed "undesirable" or unprofitable, something the CMPA does not do. However, he said this coverage does provide a "reasonable alternative for any doctor looking for a reduction on costs."

How do prices compare?

At first glance the rates offered by ENCON appear to be a bargain. For coverage with a single-incident limit of $3 million, obstetricians will pay $19 712 a year, with an aggregate limit of $6 million. The fact that average awards for "bad-baby" cases have surpassed $2 million probably explains why the vast majority of physicians still opt for the CMPA's unlimited coverage. ?