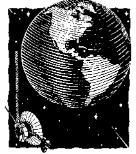

Code of silence hardest part of being sued, FPs say

Lynne Cohen

Most Canadian family physicians never practise obstetrics, and for perfectly justifiable reasons. The number-one reason for avoiding the field — its worrisome potential for legal action — recently became a punishing reality for 2 Ottawa FPs who lost a widely publicized, 4-and-a-half-year court battle surrounding a wrongful-birth malpractice suit. The case ended in 1996 with a $3-million award for the family involved.

However, this story is different. Not only did these doctors never consider quitting obstetrics despite their experience with the courts, but they are also speaking out about what it is like to fight a losing battle in court. Silence, they say, takes a huge toll on the doctors who have to fight court battles that last years.

The case involving Dr. Gary Viner and his partner, Dr. Arlene Rosenbloom, centred on 2 young brothers with Duchenne-type muscular dystrophy. Their parents launched the lawsuit based on their "legal regret" that the children had been born. They said they should have been referred for genetic counselling.

Being served with notice of such a lawsuit would have driven many family physicians from obstetrics, a field they are already leaving in droves, but not these two. "I think of obstetrics as part of the mandate of the family doctor," explains Viner, who has delivered the same message in a lecture to doctors at the Ottawa Civic Hospital's Family Medicine Unit. "It would be like giving up medicine just because I got sued."

Rosenbloom, who provides most of the pre- and postnatal medical care in their partnership, was insulted by the gut reaction of many friends and colleagues. "Many people asked me if I was going to continue to work in the same way. . . . I did not understand why people would ask this."

They probably asked because they had trouble imagining themselves delivering babies during this type of legal ordeal, which concluded in December 1996 with a jury award worth $3 million.

In retrospect, says Rosenbloom, the experience "was like going through the emotions of death and dying. We felt shock, denial, anger and, finally, acceptance. At some point, we were able to make sense of the case."

The litigation began in July 1992 when a Notice of Action was delivered to the physicians' office. It warned that a suit was being launched on behalf of the parents and 2 children, who were then 2 and 4 years old.

"How dare they"

"I was horrified," recalls Viner.

"I was in shock," adds Rosenbloom, who had become "fairly close" to the boys' mother because they had been pregnant at the same time.

In his lecture at the Civic, Viner explained why the doctors were shocked by the legal notice. "What could I have possibly done wrong?" he wrote in bold letters for the overhead screen. He also noted his "puzzlement" because one of the plaintiffs was still a patient. "How could they do this? How dare they."

After reviewing the Statement of Claim that was served in mid-August, he felt the family had "impossible expectations" and asked himself: "Why [are they] wasting everyone's time?"

The allegations included the stock phrase found in most malpractice suits: they had failed to meet the current "standard of medical care," a standard that is always set high but never at the level of perfection.

The claim stated that Viner and Rosenbloom should have referred the mother for genetic counselling early during her first pregnancy in 1987. By then, 6 years after premarital genetic counselling had shown she faced only a 1% chance of passing muscular dystrophy on to her male children, medical advances had made testing much more accurate. The claim said that if the pregnant woman had been referred to a specialist before her fetus was 20 weeks old, she would have terminated her first pregnancy and avoided any problems.

The doctors immediately called the Canadian Medical Protective Association (CMPA), which wins about 80% of malpractice cases that go to trial. Their initial meeting with CMPA officials took place 2 months later and they soon had their first meeting with lawyers retained by the association.

"The lawyers gave us reassurance and support," says Viner, who was optimistic right until the jury delivered its verdict. "They were supportive and said it would all be OK."

The Statement of Defence, which Viner calls "our opportunity to set the record straight," contributed signifi-

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Drs. Arlene Rosenbloom and Gary Viner: lifting the veil of silence

cantly to the defendants' confidence. At the examinations for discovery in August 1993, the two FPs finally met their opponents' attorney face to face, and Viner's optimism was severely, if temporarily, tested by an "aggressive" lawyer who tried to "undermine our confidence and self-assurance."

The next step, the 3-year wait until the trial, required huge amounts of patience. "Sometimes we couldn't help but hope that it would all go away," says Rosenbloom, "that somehow it would get sorted out and end."

The hearing was scheduled, postponed, rescheduled and cancelled. It was finally held in the town of Perth, 100 km west of Ottawa, in May 1996.

The long pause turned out to be a blessing for the defendants because it gave them time to settle back into the routine of full-time practice and to reflect on their situation. "This case had nothing to do with our competency," says Viner. "The college was never involved. I believe the case was literally to fund the needs of the children. The parents had no choice but to sue — they directed no anger or rancour toward us."

Although odds are good that most physicians will be named in a malpractice suit at least once, most of the cases never end up in a courtroom. For instance, 1399 medical malpractice suits were launched in Canada in 1997 but in the same year only 108 trials began. "We had the worst case," says Rosenbloom. "We lost at trial. This can happen to doctors who make an obvious error and it can happen to those who don't. It can happen to doctors who don't even know they have done anything wrong. It's part of the business of being a doctor, and it's the system."

Reaching this understanding was the hardest part of the entire ordeal for Rosenbloom. "I thought, 'How could I be sued? I am a good doctor. I communicate well. I am cautious and caring. I keep up with medical knowledge.' All that ended up being worth nothing in terms of preventing the lawsuit."

Fortunately, they were able to put the lawsuit out of their minds while at work. "You have to be professional," says Viner. "You develop skills so you don't carry burdens from one experience to another."

Their families handled the situation differently. Rosenbloom says her husband, who is also a physician, agonized about the lawsuit's technicalities. "We kept it under wraps, though, so the children were not upset."

Viner, the optimist, says his family was aware of the case "but I didn't talk about it much, except to say there was this nuisance with no validity to it."

The shame, the stigma

Both doctors found it very difficult to follow CMPA orders not to discuss the case around colleagues, friends and patients. "The secrecy has to stop," says Rosenbloom. "I am sure the CMPA has its reasons, but the silence brings out the shame and you feel the stigma. I am not saying you have to go and tell the world, but it would have been good to be able to talk to a few trusted colleagues. Maybe there should be a network of doctors who have been sued who can help others deal with it."

During the 3-week trial, the partners suffered for one another. Rosenbloom was first on the witness stand and the adjectives she uses to describe the interrogation techniques she faced range from rude and hostile to argumentative. "Gary told me later that he was drenched in sweat during my testimony. It was actually much harder on him than it was on me."

The two also found the media attention "overwhelming." The press turned out to be both a blessing and a curse. Rosenbloom says an initial article in the *Ottawa Citizen* "was not too bad, but after that the coverage got quite negative and we were upset. [The media] didn't tell the whole story, only snippets."

On the positive side, the publicity lifted the veil of silence. "It got everything out in the open, so all our patients and all the doctors in the hallways knew what was happening and why we were not at work."

Best of all, the publicity triggered an outpouring of emotional support, which stunned the doctors. "It was tremendous," she says. "We got cards, flowers and calls from patients and doctors and friends."

Although they are relieved that the case is finally over, they want to use their experience to help other doctors facing the same problems. "I called our lawyer when our case was over to offer my help," says Rosenbloom. "Any physician [defendant] who is having a hard time coping can call me."

Lynne Cohen is an Ottawa journalist.