Are MDs at risk when they don't offer patients new medical technologies?

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When emerging technologies and procedures aren't readily available to patients, who is responsible? More to the point, who could be sued because they weren't offered? Even though the venue for discussing these issues was the Toronto Vascular Surgery Symposium, held Mar. 22–24, the meeting probably contained lessons for many more physicians. It used the mock-trial format to present the potential problems, and concluded with comments from a justice of the Superior Court of Ontario.

"Canadians expect that physicians and hospitals will provide the best available treatment of the highest standards using the latest technologies," CMA President Hugh Scully, a cardiac surgeon, said as he introduced the topic. At the same time, physician fees have been capped and many Canadian hospitals are running deficits.

Meanwhile, medical knowledge is increasing at remarkable speed and patients and families have ready access to it thanks to the Internet and other media. In this climate, asked Scully, what are the responsibilities and liabilities of doctors, hospitals and governments?

Scully said many cardiovascular surgeons now routinely tell patients they have the option of seeking treatment in the US if they want their heart surgery more quickly.

The vascular surgery case discussed at this symposium involved a 75-year-old man with a large abdominal aortic aneurysm. Two physicians said the patient posed too high a risk for elective repair, but he was not told of a new, minimally invasive technique available in Canada but only on a compassionate basis. After he died, his family learned of the technique and launched a civil suit.

In the mock trial, the patient's cardiologist told him he had a 50% chance of dying with any intervention. The man had multiple medical problems, including chronic obstructive pulmonary disease and congestive heart failure.

The patient consulted a second surgeon, played by vascular surgeon Wayne Tanner of Toronto, who agreed with the cardiologist that the patient was at too high risk to undergo surgery. A month after the consultation, the aneurysm ruptured and the patient died.

Tanner had not told the patient about the possibility of endoluminal aortic grafting. "I didn't address it because they didn't ask about it and they had just come from a hospital where there were some trials — where it was used on an experimental basis," Tanner said. He was also worried that mentioning the procedure would "create false hope . . . there is no funding and our own hospital has never been approached." If the patient and his family had asked, however, Tanner said he would have discussed the procedure in detail.

The "prosecution case" was presented by Dr. Frank Veith, chief of vascular surgery services at the Montefiore Medical Center in New York City. Veith, a leading authority on endoluminal aortic aneurysm repair, said he had performed the procedure on patients "as sick or sicker" than this 75-year-old patient. He said the centre had a 5% death rate. (After the mock trial, Veith noted that the procedure was only now being subjected to rigorous trials in England and Holland to determine if the outcome was different from no intervention.)

At the outset of the mock trial, most of the 140 doctors in the audience felt the government was most liable, followed by the hospital, because the procedure was not readily available.

The perspective of hospital administrators was presented by Scott Rowan, president of the Hamilton Health Sciences Corporation. The independent-contractor status of the doctor shields the hospital, Rowan said. He pointed out that the 75-year-old man was never a patient of the hospital. In cases of this sort, he added, "I fear the risk will be predominantly shouldered by the doctors."

Meanwhile, ethicist Dr. Philip Hebert said that since most Canadians don't have access to the procedure, the patient was not treated unjustly. As well, clinicians are not responsible for access problems since they don't control new technologies. However, the "minefield" in the case concerns the disclosure — or failure to disclose — information about alternatives.

Madame Justice Ellen Macdonald confirmed that the government and hospital would not be liable "because they are shielded in the present state of affairs."

She said the physician-liability issue is not as simple, but concluded that it would "impose too high a standard of care" on doctors if they were found negligent because they did not advise patients that they had the option of going to Veith's hospital. "You can be comforted that the standard of care imposed on you is one that is reasonable, given the current environment."

Still, the judge said the case underscores the importance of good communication with patients, which is one of the best ways for doctors to protect themselves from claims. Meanwhile, tort law is too cumbersome to handle such cases and "we have to look at other ways to solve them."

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