

OTLA Submission to the College of Physicians and Surgeons of Ontario

Disclosure of Harm

August 2, 2019

The Ontario Trial Lawyers Association appreciates the opportunity to make submissions to the College of Physicians and Surgeons of Ontario (the College) on its review of the policy on Disclosure of Harm.

The Ontario Trial Lawyers Association (OTLA) was formed in 1991 by lawyers acting for plaintiffs. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others, while at the same time advocating aggressively for safety initiatives.

Our mandate is to fearlessly champion, through the pursuit of the highest standards of advocacy, the cause of those who have suffered injury or injustice. Our commitment to the advancement of the civil justice system is unwavering.

OTLA's members are dedicated to the representation of wrongly injured plaintiffs across the province and country. OTLA is comprised of lawyers, law clerks, articling students and law students. OTLA frequently comments on legislative matters, and has appeared on numerous occasions as an intervener before the Court of Appeal for Ontario and the Supreme Court of Canada.

The goal of this review is to ensure that the College's policy on Disclosure of Harm, which was originally published in February 2003, continues to be current. The Disclosure of Harm policy "sets out the expectations of physicians in situations where a patient has experienced harm in the course of medical treatment".¹

OTLA's Position

OTLA fully supports the College's Policy, Disclosure of Harm, as currently drafted with some suggestions to ensure it is effectively utilized.

OTLA recommends that the College ensure better compliance with the policy. A significant portion of our membership represents victims of medical errors. In a trust relationship, such as that between physician and patient, an explanation or apology can often have a more significant compensatory effect than monetary damages. In the context of this type of relationship, an intangible loss, such as emotional distress or grief, cannot be fully assuaged by monetary compensation where victims have been injured not just economically, but also emotionally and psychologically.² In our experience, many patients are motivated to complain to the College or commence litigation in order to discover what happened to them in the course of medical treatment. As a result, OTLA recommends that the College better educate its members as to their ethical and fiduciary obligations to disclose harm as set out in this policy. Better compliance with the College's policy would likely reduce the overall number of such College complaints and legal actions which are purely motivated to get answers.

OTLA recommends the policy include a statement regarding failure to disclose harmful or no-harm incidents. Not only is it part of a physician's ethical duty to disclose such harm, but, as

¹ http://policyconsult.cpsso.on.ca/?page_id=11292.

² Alfred Allan, "Apology in Civil Law: A Psycho-Legal Perspective", *Psychiatry, Psychology, and the Law* (2007) 14:1, p.5 at page 6.

indicated previously, disclosure can actually increase patient trust and avoid complaints and/or litigation. In addition, the reporting of errors is fundamental to error prevention. Disclosure can promote future patient safety and create opportunities for learning. The College should indicate the possibility of sanction should a physician fail to report a harmful or no-harm incident to their patient.

In cases where a patient has died, OTLA is pleased to see the inclusion of disclosure to an estate trustee or to the person who has assumed responsibility for the administration of the estate.

Conclusion

OTLA thanks the College for inviting us to provide input on this initiative. OTLA supports the College's initiative to ensure physicians disclose harm to patients. OTLA would be pleased to discuss our position and recommendations further should the need arise.