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Class-action lawsuits medicine's newest legal headache

The legal news for Canada's physicians has been bleak for years: 1 in 25 physicians was named in a new legal action in 2000 and the number of malpractice cases proceeding to trial doubled between 1995 and 1999. Now, the country's first medical malpractice class-action lawsuits give them something new to fret about. One has already been certified — it received approval to proceed from the courts after a 4-year fight — while lawyers in the second case are still seeking certification. And even though class actions are a new phenomenon for Canadian health care, the Canadian Medical Protective Association (CMPA) has already identified them as one of the major challenges facing it (*CMAJ* 2001;165[2]:204).

The suit that has been certified is a $100-million class action against Toronto neurologist Ronald H. Wilson and his technologist. Together, they operated 6 electroencephalography clinics in the Toronto area. The principal allegation is that Wilson and his technologist failed to follow proper sterilization procedures and, as a result, triggered an outbreak of hepatitis B (*CMAJ* 2000; 162[8]:1127-31). To put the suit's size in perspective, the CMPA paid awards totalling *$100 million* in 1999; this covered every award paid on behalf of its 60 000 members. This probably explains why the CMPA fought certification of the suit all the way to the Supreme Court of Canada, where leave to appeal the earlier ruling was denied.

In May 2001, a $25-million class action was filed against Dr. Errol S. Wai-Ping, the Rouge Valley Health System (which includes the Ajax-Pickering Hospital where Dr. Wai-Ping practised) and the College of Physicians and Surgeons of Ontario. The suit alleges that Wai-Ping provided substandard care that included performing unnecessary hysterectomies and failing to remove surgical instruments from patients (**www.hartelaw.com/Waiping/links.html**).

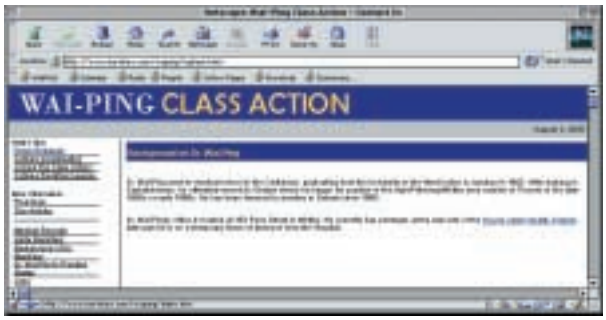
The suit further alleges that the college is guilty of "gross negligence and acting in bad faith for failing to properly investigate and act on almost a dozen patient complaints filed against Dr. Errol Wai-Ping as far back as 1992."

Meanwhile, the hospital has been accused of "failing to protect patients when it knew or ought to have known that Wai-Ping had a reputation for substandard care." By June, 236 women had contacted lawyers about about joining the class action.

This suit has not been certified and is still at the most preliminary stage, but even a failed attempt at certification can devastate a physician's career because of the media coverage it receives. (Although the courts may not even allow the Wai-Ping case to proceed as a class action, Wai-Ping himself has taken a voluntary leave from his hospital.)

Class-action lawsuits have only recently started to gain popularity in Canada — recent examples are the tainted-water case in Walkerton, Ont., and the suit involving natives who attended Canada's residential schools. They are permitted only in Quebec, Ontario and British Columbia, although the Supreme Court of Canada recently gave the nod to class actions in other provinces by allowing one to proceed in Alberta, which has no comprehensive class-action legislation.

Their key advantage is "strength in numbers," since assembling a group of plaintiffs instead of a single plaintiff greatly expands the defendant's exposure to liability. Lawyers argue that defendants will treat a class action more seriously than a suit brought by an individual. Canadian courts have emphasized that class actions provide access to justice for those who would otherwise be unable to prosecute their claims (*Edwards* v. *Law Society of Upper Canada* [1994], 26 Carswell Practice Cases [3d] 116 [Ontario Class Proceedings Committee]).



Should individual physicians be worried about the new development? Probably not, even though the organization that insures them is.

Scott Ritchie, a litigation partner with the London, Ont., firm of Siskind, Cromarty, Ivey & Dowler, says the certification process hinges on 2 factors:

- Does the action raise issues common to the class members?
- Is a class action preferable to individual suits?

He says class actions provide access to justice for those who can't afford to pursue a case on their own. It also promotes "judicial economy" by handling many similar cases in a single court proceeding.

Paul Harte, a medical malpractice lawyer acting for the plaintiffs in both cases, acknowledges that he faces an uphill battle in certifying the Wai-Ping suit because the array of treatments and alleged complications experienced by the plaintiffs means that it may lack the "commonality of issues" necessary for certification.

Harte and Ritchie both say that the need for commonality will always make it difficult to use the class action successfully against individual doctors. However, commonality may be easier to prove against organizations such as a provincial college or a hospital, especially if it is alleged that they did not act to protect patients. If a class action isn't certified, plaintiffs can still sue a physician individually.

Harte says just the initiation of a class-action suit draws instant media attention, and this in turn attracts additional potential plaintiffs. "Being on the front page of the *Toronto Star* for 7 days in the past 2 months has been enormously therapeutic for my clients," he says. He adds that the media reports have allowed his clients to voice their concerns that the health system and its regulators failed them. "That coverage would not have happened without a class action." — *Susan Lightstone*, Ottawa