Malpractice costs soar, you get the bill
Doctors' lawyers get big financial boost from taxpayers, but what about patients?

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STAFF REPORTER

After six years Karen Escobar is wondering when the doctor who botched an operation that almost killed her is going to pay for his mistakes. In the hours after Dr. Errol Wai-Ping performed a hysterectomy she lay bleeding in a hospital bed as nurses raced to save her. She lost copious amounts of blood in what a medical expert described as “abysmal” care.

The ordeal cost her dearly. She suffers bouts of anxiety, depression and nightmares. She's afraid to trust other doctors, including for her children. A psychiatrist has diagnosed her with post-traumatic stress.

Wai-Ping — an obstetrician-gynecologist who had amassed a multitude of patient complaints and lawsuits against him dating back to 1992 — lost his licence in 2004, pleading no contest before a disciplinary panel of the College of Physicians and Surgeons of Ontario. The panel reviewed the cases of 47 women, including Escobar, and declared Wai-Ping incompetent in each case, noting his complication rate for some procedures was 20 times the provincial average.

Escobar, 31 at the time of the operation, is suing him for medical negligence. She is among 375 women who launched a $25 million malpractice lawsuit in 2001 against Wai-Ping and the Ajax-Pickering hospital where he worked for nearly a decade. He has since settled with three women — two of them just last week — and continues to defend other actions in court. The case has already dragged through the courts for almost five years, beset by court delays, failed attempts for mediation and appeals filed by lawyers defending Wai-Ping and paid for by the Canadian Medical Protective Association.

It illustrates what victims and their lawyers say is an unjust system that pits patients against a rich physicians' defence fund — financed largely by Ontario taxpayers — that offers no accountability in how it spends the money and gives doctors little incentive to settle.

"The fundamental message here is accountability," said malpractice lawyer Paul Harte, Escobar's lawyer. "There has to be accountability in the way the Canadian Medical Protective Association spends public tax dollars."

While the overall cost of court awards climbs, so have legal costs. In 2004, for example, the CMPA paid lawyers $115 million to defend Canadian doctors in legal matters.

Meanwhile, the number of lawsuits is dropping an average of 5 per cent a year.

"Everybody on the street knows that doctors will be defended to the wall. But very few people on the street know they're paying for that," said Toronto lawyer Amani Oakley, who handles malpractice cases against physicians.

In an agreement stretching back 20 years, the provinces and territories have subsidized doctors' malpractice premiums by as much as 95 per cent. The arrangement between the Ontario government, the CMPA and the province's 24,000 doctors is an acknowledged cost of public health care, recognition that doctors would be crippled by malpractice insurance premiums in a system in which the government caps their fees for treating patients.

"This is a way of ensuring all physicians have coverage at a reasonable price," said OMA president Dr. Gregory Flynn. "If we were to eliminate the subsidy program there would be some groups of physicians whose insurance would rise so dramatically they would have to consider giving up their practice."

But the premiums, which are set by and paid to the CMPA, have risen sharply. In 1986, the province's taxpayers paid $12 million. This year the figure is $185 million and next year it will be $210 million — while each doctor's premium contribution remains fixed at
the 1986 rate. The accumulated costs to Ontario taxpayers over the past 10 years is more than $1 billion, according to Ministry of Health figures, and the province accounts for almost half the CMPA's premiums from across the country.

In 1996, former health minister Jim Wilson cancelled the subsidy when the cost rose to $52 million that year. But obstetricians threatened to stop delivering babies and other high-risk specialists said they would stop performing risky operations. Wilson backed down and eventually resigned.

Today, the CMPA sits on a defence fund now flush with a $2.3 billion reserve.

Dr. John Gray, the CMPA's chief executive officer, said the premiums might seem high and reserve fund excessive, but "that money, as far as we're concerned, is essentially pre-spent. It will be paid out over the years as cases are brought to our attention."

Harte, a vocal critic of the subsidy program, has been lobbying Health Minister George Smitherman's office to audit the CMPA to ensure it is spending its money in the public interest. While the province receives all their private actuarial estimates upon which the premiums are based, Harte said the defence fund is unlicensed, unregulated and not subject to public scrutiny of their books.

Smitherman said yesterday that he will look at the issue.

"It's not like we ship a bunch of money down the line and don't have officials from the ministry engaged in determining that those are spent appropriately," he said. "But I can see how (patients) might have concerns. I think it's a very appropriate question to pose and accordingly it's one I'm going to do a little more work on."

Smitherman stressed the subsidy program allows the province to attract and keep doctors in a competitive environment, but critics question the overall benefit to patients.

"I'd like to shriek and scream about the money being spent here," said Sheila Thorne, who recalls the horror of watching daughter Karen hemorrhage and convulse before frantic medical staff rushed her back to surgery.

"I can't comprehend how this can be a logical use of our money. It's pure negligence in the medical system."

Some former patients have begun lobbying the government. Elizabeth Bisson, who underwent five surgeries that a medical expert said were unnecessary, recently wrote to her Oshawa MPP, Conservative Jerry Ouellette, demanding he force the Liberal government to review the subsidy program.

"These people who defend doctors don't have to account for where their money is coming from, and it's coming from us," Bisson said.

A doctor has a right to a defence. But at what cost?

`He's kicking me in the teeth and he's doing it with my money.' Elizabeth Bisson, who is being asked to pay legal costs of the doctor she sued.

Harte estimates that in five years Wai-Ping's defence has cost $2 million. He is being defended in the lawsuit by more than a dozen lawyers at the Toronto law firm McCarthy Tetrault, which bills the CMPA anywhere from $120 to $525 an hour, according to cost motions filed in court.

Mary Thomson, senior lawyer on the doctor's case, said she could not confirm the amount, but said the case's costs are based on an "economically sound model" that involves lawyers doing various jobs at different rates of pay.

"Our model is to have a strategy and complex areas of the case run by more senior lawyers like me. We then have very able, young lawyers who are able to manage court appearances and trials. Then we have more junior lawyers who help manage the paperwork, then below that we may have law clerks who do other functions," she said.

In May 2001, Harte launched the class action suit but has since opted to pursue cases individually after having been told by Wai-Ping's lawyers they would fight for cases to be heard on an individual basis.

Harte said he spent years obtaining medical and hospital records and talking to patients. The case stalled in 2004 when the sides couldn't agree on mediation talks, so early last year Harte filed 13 individual claims.

Instead of filing a defence, the doctor challenged the claims, calling them frivolous. He lost. Wai-Ping appealed to the Divisional Court and lost again. When Harte moved for a single judge to handle all cases, the doctor opposed that as well and lost once more.

Harte then filed for summary judgment on the 13 cases, asking a judge to settle them without the cost of a trial. Wai-Ping's lawyers asked for a delay of that hearing and lost.
Last fall Wai-Ping agreed to settle three cases out of court, while Harte opted to let two others go on to trial. Of the 13, that left eight cases — all alleging unnecessary hysterectomies — for Superior Court Justice Robert MacKinnon to review at a hearing in September. The judge, in his ruling, made it clear he wasn't impressed with Wai-Ping's feeble attempt at defending them. "The defendant doctor filed no affidavit of his own in any of the eight cases. He filed an expert medical opinion affidavit in only (three) actions," he said in a written decision in December. Lawyers for Wai-Ping argued they didn't have enough time to put the doctor's best foot forward, but MacKinnon didn't buy it. "I disagree. The defendant doctor and his lawyers have been aware of the plaintiffs' claims for several years," he wrote.

In his ruling, MacKinnon ordered that four of the cases go to trial. He ordered the other four be settled out of court, the first summary judgment granted for medical negligence in Canadian history. Wai-Ping is appealing that ruling, despite having given no defence of his own at the hearing. His lawyers argue a trial judge ought to decide if the women gave informed consent to their surgeries.

Karen Escobar's is among the four Wai-Ping is appealing. At last fall's hearing, Dr. Michael Shier, chief of gynecology at Sunnybrook and Women's Health Sciences Centre, swore an affidavit on her behalf. He told the court, contrary to Wai-Ping's assessment, her abnormal pap smear in no way showed she was in imminent danger of cancer and needed the hysterectomy in August 2000. He called the obstetrician's response to Escobar's life-threatening post-operative complications "abysmal."

"It is truly amazing that she survived this unnecessary ordeal," Shier said.

Elizabeth Bisson's case, meanwhile, was ordered to trial. A medical expert said she went through five unnecessary surgeries, including a tubal ligation at 19 and hysterectomy at 24. Wai-Ping also removed her ovaries, one of them because he mistook the ovary for a cyst. Each time she was laid up for months with infections. She went through menopause by the time she was 26.

"I've been waiting to go to court for five years, but they keep filing motions," she said.

Bisson said she could use the money. Her husband, Jeff, is learning disabled. She cares for him and 14-year-old daughter Kristina on his disability cheque of $1,400 a month. Their rent alone is $850 for a small apartment in Oshawa.

Bisson lost the motion to settle out-of-court on a technicality. Her affidavit omitted mentioning she learned Wai-Ping's care may have been negligent only after reading about him in a Toronto Star investigative series in 2001.

A patient has one year in which to file a negligence lawsuit in Canada, based on when they knew there was a problem, and her surgeries stretched back to 1992. All the women in the lawsuit came forward when the series was published.

Bisson accepted the loss graciously. She had begun to mentally prepare herself for a trial, comforted by the thought she would one day find justice, when her lawyer called recently and said Wai-Ping was asking her for $32,000 in legal costs.

"I couldn't believe they were sending someone on disability a bill. This gets me so emotional because there is no way I can afford it. It's going to stop my lawsuit in its tracks."

The worst thing, she said, is losing to a doctor who is using public money to defeat her.

"He's kicking me in the teeth and he's doing it with my money," she said.

For Escobar, the lawsuit is less about money than about morals and principles, trust and fairness, and about good health care.

"It's been six years for me now. I'd really like there to be some closure, for me and for everybody else. Most of all, I'd just like to make sure he doesn't practise medicine again."

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Keeping patients in the dark
Most patients will never know if a doctor's record is spotless or tainted

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Jim McKinnon had come to ask a question.

He sat quietly in a corner of the Toronto boardroom as members of the College of Physicians and Surgeons of Ontario discussed problem doctors at their annual general meeting. When the floor was opened to questions, McKinnon rose from his seat and headed to the microphone.

Within seconds, he was hustled out the door by two security guards. Only board members, he was told, could ask questions at the college's meetings.

All McKinnon wanted was to ask why the college was protecting Dr. Filomena Meffe, who it agreed "fundamentally mismanaged" his 44-year-old wife's care before she died suddenly in November, 1998. He wanted to know why the college's investigation of the gynecologist's care was kept secret and her public record remained squeaky clean.

But he never got the chance.

"They have no interest in hearing what the public has to say," he said later. "There is no way someone should die . . . and this bunch cover it up."

Tucked away inside the college's offices in downtown Toronto are the details of more than 13,000 investigated complaints against Ontario doctors lodged by patients or their relatives since 1994.

Of those, only a fraction - slightly more than 1 per cent - made it to the discipline committee, the only public forum to air complaints. The rest, including McKinnon's, are never heard of - except in stories like this.

The college keeps names, details and results of the remaining cases secret, arguing they are bound by confidentiality rules in provincial law.

But in a lengthy investigation, The Star compiled hundreds of those complaints, involving doctors from across the province. Many are emergency room mishaps, missed diagnoses, newborn deaths, and routine surgeries that resulted in life-threatening infections, hemorrhaging, strokes, heart failure, brain damage and, in some cases, death.

In McKinnon's case, his wife contracted a fatal infection following surgery for cancer in her fallopian tubes. She died three days after being discharged from St. Michael's Hospital in Toronto.

Complaints to the college involve family doctors and just about every kind of specialist. Yet, unless provincial legislation is changed, most patients will never know whether their doctor's record is spotless or tainted.

Under the Regulated Health Professions Act enacted in 1994, only those doctors the college deems grossly negligent, incompetent, guilty of fraud or sexual misconduct are sent to a disciplinary hearing. Every other complaint involving malpractice or medical error is dealt with behind closed doors.

Crystal Mota would have liked to have known there had been at least four complaints against Whitby obstetrician and gynecologist Dr. Errol Wai-Ping before he delivered her baby.

The infant, now a 17-month-old girl named Madison, was healthy. But something went terribly wrong after the birth on Dec. 8, 1999.

The doctor and nurses left Mota, her husband Fred and the infant alone in the operating room, the couple claims in a malpractice suit filed against Wai-Ping and the Ajax and Pickering Health Centre. Almost immediately Crystal began hemorrhaging.

"There was blood everywhere. It was like a war zone," said Fred Mota, a paramedic, who feared for his wife's life as she went into shock.

According to the Motas, the doctor returned and, realizing the problem, quickly delivered more of the placenta. Apparently, it wasn't enough.

The Motas allege they were forced to return twice to hospital with Crystal hemorrhaging and her abdominal stitches infected - the
day she was discharged from hospital, and again on Christmas Day when another doctor removed the remaining 25 per cent of the placenta.

Wai-Ping denies any wrong doing and is defending the civil action on grounds he did not fall below the required standard of care.

The Motas only found out after they filed their lawsuit and after being contacted by The Star that Wai-Ping had other complaints and two malpractice lawsuits filed against him.

``If I'd known he had these other complaints, I'd have never ever gone to him,'' Crystal said during an interview in their Oshawa home.

Comments like that worry Ontario doctors. They fear publicizing complaints will scare off patients and give even the best doctors an undeserved bad reputation. They point out that a good many complaints are frivolous, while others are open to serious misinterpretation if scrutinized by the general public.

Even now, with complaints kept secret, every doctor fears a complaint against them, says Albert Schumacher, past-president of the Ontario Medical Association.

``My membership will tell you . . . when they get an envelope from the college, which is quite distinctive - grey with purple writing on it - it produces the highest level of anxiety compared to anything that may happen that day,'' he said.

The college has always handled medical complaints in private, going back as far as the late 19th century when discipline against doctors was first introduced.

College leaders argue today that more is gained by counselling or retraining doctors, the overwhelming majority of whom are competent and dedicated physicians who, at times, need nothing more than a brushing up of their skills. Subjecting them to a public hearing and meting out licence suspensions rarely serves the public interest and does little for physicians who may have erred, but are not incompetent, they add.

The college is considered a leader in North America in programs aimed at assessing physician competence.

In the complaints process, a doctor whose treatment of a patient is ruled ``substandard'' by the complaints committee is not sent to the discipline committee but to another committee, called quality assurance. There, a decision is made behind closed doors whether to assess the doctor's practice.

Even those investigations can have damaging effects on a doctor, college officials say.

Dr. David Walker, former president of the college and now dean of the medical school at Queen's University, cites the experience of ``one of the finest physicians I've ever met,'' who seven years ago faced a complaint.

``The investigation was done very thoroughly by an independent assessor and it showed that he had gone above and beyond the usual in terms of his intellectual capability, his efforts for the patient, and despite all of his efforts, there was a nasty outcome,'' Walker said.

``That one thing seven years ago has rocked this guy. He's a sensitive, thoughtful, very clever, wonderful doctor. He will never be the same again. He doesn't trust himself. He's fearful of this kind of criticism ever happening again. In tough situations, he gets spooked.''

In the case of McKinnon's wife, Melinda Hamilton, the college found serious errors in Meffe's care. In a letter to McKinnon, the college said Meffe failed to ''fully investigate ongoing post-operative fever and gastrointestinal dysfunction'' and ''failed to fully investigate significant post-operative vaginal discharge.''

Speaking through her receptionist, Meffe refused to comment, citing patient confidentiality.

McKinnon's argument is that he won't know what action, if any, is taken since Meffe was referred to the quality assurance committee, often called the black hole - even by college officials.

Increasingly, however, pressure from patients is threatening to break this entire process wide open.

``We are wrestling with how far we can go in (disclosing complaints),'' says George Demery, a lawyer and co-chair of the college's complaints committee.

Physicians' reputations, he argues, should not be impugned by dismissed complaints, but neither should patients be kept in the dark
if an action, even a verbal caution, is brought against a doctor for inadequate care.

``We know there are doctors who have horrendous quality assurance records. There's no reason people shouldn't know this,'' said Demery.

As patients demand more accountability, the province is on alert to introduce legislative changes to the act that governs Ontario's 23 self-regulatory professions.

``The system is quite disappointing in Ontario,'' says Nicole Harder, who fought Wai-Ping in a 1995 college complaint and settled for an undisclosed sum in an out-of-court malpractice suit, then challenged the college itself.

Harder, a 37-year-old nurse, complained that Wai-Ping failed to remove her IUD as requested during a simple biopsy, performed an unnecessary hysterectomy, caused life-threatening hemorrhaging and blood poisoning and provided inadequate antibiotics.

Wai-Ping denied the allegations, but the college stated in its decision there were ``significant'' breaches in the standard of care and referred him to the quality assurance committee.

Harder said that wasn't good enough because she would never know what action, if any, would be taken involving Wai-Ping. It was all to be handled in secret.

``I wasn't asking for his licence to be taken away. I was asking for some serious retraining and education and some kind of internship to reassure me he was doing something differently,'' she said.

Harder appealed to the Health Professions Appeal and Review Board, a quasi-judicial government body that hears appeals of rulings against health professionals. Her lawyer, Paul Harte, argued Wai-Ping should go to a public hearing, but the board dismissed the appeal, as it does in more than 90 per cent of College of Physicians and Surgeons cases it hears.

``I'm not sure now who is assured there is going to be quality provided because I'm certainly not going to know the outcome,'' Harder said.

In a written response to questions posed by The Star and delivered through his lawyer Peter Neumann, Wai-Ping said this week he has ``taken a course on communication skills as a result of the Nicole Harder complaint.''

His comments were met with disbelief when Harder was contacted again this week. ``If that's true, I will be following up with the college. This is certainly not what they led me to believe was quality assurance in a documented file.''

Every year the college is swamped by complaints against doctors, and the numbers rose last year by more than 20 per cent.

The college says about 75 per cent of the more than 5,600 contacts last year were resolved over the telephone by seven intake officers. In every instance, a ``record of contact'' is kept for future reference and pulled when further complaints are made against the doctor.

Another 1,452 investigations were opened by the college's 31 investigators. With varied backgrounds - nurses, lawyers, psychologists, social workers, physiotherapists, doctors, health administrators - investigators collect and review documents in the case, and make a report to the complaints committee.

Investigators find many concerns are communication problems, says Demery, adding ``in some cases they get the sense we wouldn't be here if the doctor had apologized.''

If the complaint is still not resolved, it is sent to the nine-member complaints committee. Last year the committee delivered 878 decisions, 745 or 85 per cent of which were dismissed outright or with a caution to the doctor.

Once again, one of the cases was a complaint against Wai-Ping, filed this time by a Whitby woman named Shirley Jean Shirley.

Following a hysterectomy in December, 1998, Shirley complained she bled through her stitches the entire night and had to have her nightgown and sheets changed by nurses repeatedly. In the morning, the doctor restitched her abdomen. Then, over the next two weeks, she hemorrhaged so much she required a blood transfusion and developed infected blood clots that required another hospitalization.

Shirley had no idea there had been other complaints against the gynecologist. The complaints committee members must have known however, because they had reviewed three other complaints two years ago and sent Harder's case, at least, up to the quality assurance committee.
In Shirley’s case, they privately counseled Wai-Ping about providing inadequate antibiotics, a problem identified in Harder’s case three years earlier.

“I asked how many complaints does a doctor need against him before something is actually done. I never got an answer to that,” Shirley said.

Part of the problem is the complaints process often takes a year or two and, in many cases, longer if a patient decides to appeal. In Harder’s case, Wai-Ping’s referral to quality assurance was put on hold until her case was dealt with at the health professions board. It took the board another year, until October of last year, to dismiss her appeal.

“The system is too inefficient,” says Harte, a malpractice lawyer who has represented patients and physicians alike.

A classic example, he said, is the case of Dr. Ronald Wilson, former chief of neurology at Centenary Health Centre.

The Scarborough neurologist is being sued in a highly publicized class action lawsuit by more than 1,000 patients allegedly infected with hepatitis B after receiving electroencephalograms (EEGs) at six clinics he operated in Scarborough, North York and Ajax. A public health inspector’s report in 1996 linked the outbreak, and one possible death, to an infected technician and inadequate safety controls at the clinics.

Not wanting to overwhelm the college, Harte says only 18 patients filed complaints in 1996.

“This is now five years later. He still has not faced a discipline hearing.”

The complaints committee referred Wilson to the discipline committee last summer, but a hearing date has not yet been set.

Wilson declined to comment when contacted last week by The Star.

If the college’s major barrier to accountability is secrecy, patients say their main roadblock to accountability is the national, doctor-run defence fund, the Canadian Medical Protective Association. Ontario doctors pay annual malpractice fees ranging from $1,100 to $60,000 to guard against complaints and civil suits, although roughly 70 per cent is reimbursed by the provincial government. So from the moment a complaint is filed, the doctor is offered legal advice and, if necessary, a lawyer whose fees are fully covered.

Patients, on the other hand, rarely have a lawyer unless they have also launched a civil suit. “Public money goes into this malpractice association and he gets representation. When I go to a lawyer, I have to pay,” says Lyn Logan, a 41-year-old Ajax woman who filed a complaint against Wai-Ping in 1998 and received a $250,000 out-of-court settlement in a malpractice suit. Logan underwent six surgeries altogether, mostly to repair damages resulting from the previous ones. Wai-Ping, she complained, performed an unnecessary hysterectomy that denied her the ability to have children. Later, he perforated her bladder and small bowel during a laparoscopy to investigate pain in her abdomen, resulting in serious life-threatening infection. She had more surgery, had blood transfusions and lost her ovaries, appendix, gallbladder and a portion of her bowel.

She asked that her case go to a discipline hearing at the college, but was told it was going to quality assurance.

“It’s the lack of accountability of doctors that’s really got me frustrated,” said Logan. “I don’t want a lynch mob. I don’t want a witch hunt. But at the same time what’s the point of going to the College of Physicians if they’re not going to do much?”

In his written response to The Star, Wai-Ping said he believes only the Logan case has been referred to quality assurance, which has not been resolved. He declined to comment further on any of the cases, other than to say any complaint is a “distressing experience.”

He continues to practise gynecology and obstetrics at his Perry St. office and at Ajax-Pickering hospital, and he noted there are “no restrictions on my practice or hospital privileges.” “Other than improvements or ‘upgrading’ I believe most physicians are amenable to, I do not feel that I have experienced any special ‘difficulties or problems’ in my medical practice that require upgrading,” he replied.

He emphasized a settlement in any civil case is not the same as an admission of liability.

This year an Ajax woman launched another malpractice suit against Wai-Ping, which he is defending. She also filed a complaint with the college a year ago, but it has not been resolved.

In all, The Star found at least six complaints against Wai-Ping. The college won’t comment on any of them, saying the matter is confidential.