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INFECTION CONTROL LAWSUITS: GETTING SUED FOR NERVOUS SHOCK

It is one of your worst nightmares. Public health officials get a complaint from one of your patients. They storm into your office and shut you down for having inadequate infection control practices. Bad as that may sound, it gets worse. They then send a letter to ALL of your patients, notifying them of the shut down and advising them to get treated or tested for Hepatitis B and C and HIV. And when the media finds out and publishes stories of your angry patients,[1] well… that my dentist friends, is a practice killer. And that's irrespective of the real extent to which diseases can be transmitted through improper cleaning of re-usable dental instruments and equipment (which is apparently very low).

Next comes the class action lawsuit. That lawsuit will allege, among other things, that the owners and dentist operators at your practice were negligent in failing to properly follow infection prevention and control protocols, failing to properly train and supervise staff, and failing to warn patients about exposure to communicable diseases in a timely fashion.[2]

Now, even if such allegations are proven, the issue then turns to whether the plaintiffs suffered compensable damages. And here's where things get interesting. What if the patients didn't test positive for any infectious diseases after they were told to get checked and did so? Absent real physiological or significant financial harm, plaintiffs will claim damages based on nervous shock, which is also known as psychological harm. In other words, they will ask a court to compensate them for the psychological trauma of being told of the possibility of infection and the uncertainty as to their condition – despite the tests all coming back negative.

So to what extent will a Canadian court award damages or approve class action settlements for nervous shock and psychological harm in these circumstances?

Let's find out…

SUING FOR NERVOUS SHOCK

Healey v. Lakeridge Health Corp.[3] is one of the leading cases in Ontario on suing for nervous shock in the situation described above. That case involved 2 patients with active tuberculosis who attended an Oshawa hospital in 2003 and 2004. The hospital notified 4,402 patients who came in contact with those infected patients. Despite no cases of tuberculosis being diagnosed, a class action was started by uninfected patients. They asked for $7,500 a piece for nervous shock and psychological harm as a result of being told that they may have been exposed to, and that they should be tested for, tuberculosis.

The Ontario Court of Appeal reaffirmed the lower court's decision and dismissed the class action.

The Court reviewed the jurisprudence on recovering damages for nervous shock in negligence cases where there was no physical injury and found that claimants "are required to show that they suffer from a recognizable psychiatric illness".[4] This was a high threshold. The injury claimed must be of sufficient

gravity and duration to qualify for compensation. Such injury must rise above the ordinary annoyances, anxieties and fears that people living in society routinely accept. Minor and transient upsets do not constitute personal injury and do not amount to damage.[5]

The Court noted that there were strong policy reasons for imposing such a high threshold on recovering for nervous shock. The Court wrote: "It seems to me quite appropriate for the law to decline monetary compensation for the distress and upset caused by the unfortunate but inevitable stresses of life in a civilized society and to decline to open the door to recovery for all manner of psychological insult or injury. Given the frequency with which everyday experiences cause transient distress, the multi-factorial causes of psychological upset, and the highly subjective nature of an individual's reaction to such stresses and strains, such claims involve serious questions of evidentiary rigour."[6]

Turning to the facts of that particular case, the Court found that the evidence fell short of meeting this threshold and dismissed the class action.

More recently, however, in ***Saadati v. Moorehead***,[7] the Supreme Court of Canada examined the law on recovering damages for nervous shock in negligence cases and removed the requirement that there be a recognizable or recognized psychiatric illness. The Supreme Court reiterated that claimants must show that the disturbance they suffer is serious and prolonged and rises above the ordinary annoyances, anxieties and fears that come with living in civil society. While expert evidence will assist in determining whether a mental injury has been established, it is not necessary to show that their condition carries a certain classificatory label. In other words, a judge "should be directed to the level of harm that the claimant's particular symptoms represent, not whether a label could be attached to them".

CLASS ACTION SETTLEMENTS

By way of background, class actions are designed to streamline the litigation process by allowing an identifiable class of plaintiffs to join together in one lawsuit because they share common issues. Since class actions litigation can be prolonged and prohibitively expensive, the parties tend to settle early on in the process – particularly after a court has ruled that a lawsuit can be certified and proceed as a class action.

Importantly, class action settlements must be approved by the court. While these early settlements don't necessarily speak to the merits of the claims alleged or damages, they do give some insight into the size of settlements that have been awarded.

What follows is a review of some Canadian class action settlements that have centred around nervous shock from alleged inadequate infection control practices:

In ***Anderson v. Wilson***,[8] an Ontario class action settlement, class members who were notified of possible exposure to Hepatitis B at five medical laboratories that provided ECG testing and who tested negative received **$1,000 each**.

In ***Rose v. Pettle***,[9] an Ontario class action settlement, class members who had been notified of exposure to serious skin diseases because of the use of unsterilized acupuncture needles and who tested negative for Hepatitis and HIV received **$560 each**.

In ***Rideout v. Health Labrador Corp.***,[10] a Newfoundland class action settlement, class members who were patients of a gynecological clinic that used improperly sterilized equipment and who tested negative for infection received **$450 each and their spouses $100 each**.

In ***Fakhri v. Alfalfa's Canada Inc.***,[11] a B.C. class action settlement, customers of a grocery store who were notified of exposure to Hepatitis A and encouraged to be inoculated with Immune Serum Globin and who did not contract the disease received compensatory cash payments ranging from **$150 to $300**.

In ***Vezina v. Loblaw Cos.***,[12] an Ontario class action settlement, the customers of the defendant grocery store who were notified and encouraged to be vaccinated because of exposure to Hepatitis A received a compensatory payment of **$150**.

In ***Farkas v. Sunnybrook & Women's College Health Sciences Centre***,[13] an Ontario class action settlement, class members who were notified that biopsy equipment used during their respective procedures might not have been properly disinfected to prevent any transmission of diseases, including HIV, Hepatitis B and Hepatitis C received at least **$943.85** (depending on the number of claimants) and each spousal class member received approximately **$100**.

CONCLUSION

Yes, there is a high legal threshold for recovering damages for nervous shock. And yes, there have been relatively low payouts approved in class action settlements in these circumstances. But that doesn't change the fact that dentists must be ever vigilant in their infection control practices so that public health doesn't end up sending those letters to patients, advising them to get tested for infectious diseases. The reputation harm (particularly once the media and social media get wind of it) can be fatal for a dental practice and the practitioners. In a forthcoming article, I will discuss infection control lawsuits that involved the spread of diseases to patients.

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1 For example, one parent wrote the following in an online Google review for Guelph Dental Associates (site accessed: September 20 2017): "Would give no stars if possible. My daughter is was a patient here. We had no problem paying a much higher rate for a paediatric dentist, feeling like it would give her a safe and secure experience. Now we get a letter from public health saying that patients of this clinic should be tested for Hepatitis and HIV, as they weren't properly sterilizing equipment. 17 health code infractions. Closed by order of public health. When and if they reopen, please DO NOT TAKE YOUR CHILD TO THIS DENTIST. Google it, lots of media coverage of the closure."

2 See for example, Katelyn Lowe et al. v. Dr. Meikle Dentistry Professional Corporation c.o.b. Guelph Dental Associates et al., Statement of Claim, paragraph 18.

3 [2011] O.J. No. 231.

4 Ibid., at para. 60.

5 Ibid, at paras 62-64.

6 Ibid., at para. 65.

7 2017 S.C.C. 28.

8 [January 2, 2002)] MacKinnon J. (Ont. S.C.J).

9 [2006] O.J. No. 1612 (Ont. S.C.J.).

10 [2007] N.J. No. 292 (N.L. T.D.).

11 [2005] B.C.J. No. 1723 (B.C. S.C.).

12 [2006] O.J. No. 2509 (Ont. S.C.J.).

13 [2009] O.J. No. 3533 (Ont. S.C.J.).