ONTARIO TRIAL LAWYERS ASSOCIATION

OTLA's Submission to the College of Physicians and Surgeons of Ontario (CPSO) Draft Transparency Principles

11/11/2013

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.

Our organization has over 1,400 members who 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.

OTLA welcomes the opportunity to comment on the Draft Transparency Principles. The dialogue between the College of Physicians and Surgeons of Ontario (CPSO) and public has been enhanced as a result of this consultation. OTLA recommends that the CPSO continue this dialogue in order to further foster public confidence in the CPSO's commitment to transparency.

The Principles as drafted, for the most part, are broad and general. As a result, OTLA recommends that the public and other stakeholders be provided a further opportunity to comment once these general Principles are formulated into draft guidelines or policies.

OTLA has reviewed the Draft Transparency Principles with a view to considering whether or not they achieve an appropriate balance between protection of the public on the one hand, and privacy of CPSO's physician members on the other.

Principles 1, 2 7 & 8 of the Draft Transparency Principles

It is OTLA's position that Principles 1 and 2 appear reasonable and strike an appropriate balance between the CPSO's duty to protect the public, and fairness or privacy to its members. It should be noted that many of the Transparency Principles are inherently expansive. The CPSO should prioritize which of the Principles are core values in achieving the goal of balance. OTLA recommends that the CPSO use Principles 1 and 2 as building blocks in developing future guidelines, policies, and directives for its physician members.

OTLA generally agrees that Principles 7 and 8, while somewhat generic, also achieve an appropriate balance.

Principles 3 & 4

Overall, these Principles appear appropriate, although with the qualifications set out below.

Presumption in favour of Disclosure

Historically, the public's perception has been that the CPSO wrongly favours the privacy of its members over public protection. The Transparency Principles appear to distort the principles upon which the *Regulated Health Professions Act* (*RHPA*) was premised. To suggest that there must be a balance struck between transparency and privacy is to raise the level of importance of privacy interests above what is mandated under the *RHPA*. There is nothing in the *RHPA* that places the physician's privacy on a higher or even level footing with the protection of the public. OTLA recommends that there should be a presumption in favour of disclosure. The information to be disclosed should be presumed to be of interest to members of the public.

Diluting of Quality and Amount of Information Disclosed

OTLA has reservations with what appears to be an emphasis on vetting information provided to the public. The use of words such as "relevant" and "information overload", and phrases like "[s]ingle events are also not necessarily predictive of future behaviour", are troubling. OTLA is concerned that these terms may be used to dilute the quality and amount of information that the CPSO chooses to disclose.

At Principle 4, there is a quote from the Health Professions Regulatory Advisory Council's (HPRAC) report "Adjusting the Balance" (March 2001) (the "HPRAC Report")[1]. The quote is made in support of the proposition that there should be limits to the types of information provided to the public. Without context, this quote is misleading. Page 91 of the same HPRAC Report states:

> HPRAC is of the opinion that so long as college hearings and investigations incorporate mechanisms that ensure due process for health professionals, **consumers should be able to have access to the significant results of the complaints and discipline proceeding. This will make the system more transparent and, thereby, build public confidence in the system. In addition, some consumers have said that such information may assist them to make informed decisions on their choice of a regulated health professional. HPRAC is of the view that such information may at a minimum assist them to verify the competency of a health professional**. [emphasis added]

At its core, the HPRAC Report favours accurate disclosure and not dilution of information to the public.

[1] For a full reading of the HPRAC Report, see www.hprac.org/en.reports/resources/RHPA_Review_2001_Report.pdf.

Information in the Age of the Internet

The CPSO recognizes that one of the needs for Transparency Principles at this time arises from the public's increased use of the internet. The public regularly accesses unregulated websites like RateMD to obtain information about physicians. The growth of these websites demonstrates an increasing public demand for this information. The CPSO should recognize that if public sentiment is that the CPSO is not providing reliable and accurate information, the public may gravitate toward these unregulated websites and potentially unreliable sources of information.

Further, if these Principles of Transparency and the need for transparency are inspired by the public's increased use of the internet and a growing interest in being informed as consumers, then there is no need to vet the information in the manner and to the extent currently proposed by these Principles. The internet gives the public access to large amounts of information in many different areas without special "protective" filters in place. There should be no special concern about how the public may access and process information concerning their healthcare providers.

Principles 5 & 6

Principles 5 and 6, including the supporting commentary, as currently drafted are of significant concern.

Balancing of Disclosure

Principle 5 suggests that remedial and educational objectives are better kept private. OTLA does not endorse this approach. Although there must be some balancing of the privacy interest of the physician with the public's right to know, where the remediation touches on areas that impact a physician's ability or judgment in providing healthcare, the physician's privacy interests must yield to the public interest. In this same vein, OTLA further recommends that a member of the public has the right to know if his or her physician has been ordered to take a course, write a commentary paper or have a preceptorship involving a substantive medical or clinical ability.

Significant findings of complaints and discipline proceedings should be available to the general public. This is consistent with the recommendations in the HPRAC Report and in keeping with the Principles of Transparency.

"Safe Harbours"

One of the rationales of Principle 5 is that health professionals need "safe harbours" to facilitate self-reporting to the college and openness during an investigation, as it is suggested

that this will ultimately translate into improved healthcare for the public. OTLA is skeptical that self-reporting would be impacted if the college moved towards more transparency. OTLA believes that the protection of the public and the integrity of the civil justice system should always be paramount.

Ultimately, the suggestion that transparency should be qualified or limited by "safe harbour" mechanisms is vague and inconsistent with the provisions of Regulation 856/93 (Professional Misconduct) made pursuant to the *Medicine Act*.[2] In particular, paragraph 1(1) 4.1 states that it is professional misconduct to practice medicine while "the member knows that he or she has deficient clinical ability".

The CPSO cites an article at footnote 12 to support the conclusion that "safe harbours" create an environment in which improvement can occur. OTLA's position is that this small review hardly justifies the CPSO's conclusions. If "safe harbour" mechanisms are to be used to trump public disclosure, the CPSO must use evidence-based medicine or definitive studies to justify this approach.

Insurer Examinations under the Statutory Accident Benefits Schedule

OTLA provided comments last year with regard to the CPSO consultation on Medical Expert Reports and Testimony. Since that time, there has been heightened concern with regard to the transparency of the conduct of physicians in the auto insurance realm in assessments and preparation of their reports. In addition to incidences of unqualified medical practitioners carrying out insurer medical assessments, there is a widespread perception that reports are often biased and that these assessors operate without fear of professional sanction in an environment that lacks transparency and accountability.

This has created fertile conditions where auto accident victims bear a disproportionate share of the consequences of this lack of transparency. It is the auto accident victims with serious, legitimate injuries that often go without adequate or timely treatment because of incomplete or biased reports. Further, even where these reports are found to be biased, it can take many years for victims to have their treatment and benefits reinstated. And, even if an assessor is found to have been biased, there is a considerable risk to future unsuspecting accident victims who will have no way of knowing that an assessor has a particular finding against him or her or a pattern of filing biased reports because "remedial cautions" are often buried in reports that never see the light of day.

[2] *Medicine Act, 1991*: Ontario Regulation 856/93 Professional Misconduct.

This is of great concern to automobile accident victims in Ontario. The college needs to address this problem as a top priority. Currently, there are insufficient disincentives or penalties to discourage these practices which adversely impact the rights of accident victims and erode public confidence in Ontario's automobile injury compensation system.

OTLA stresses that the automobile accident victims, not medical professionals, must be protected through enhanced transparency measures in connection with the conduct of insurer examinations. Substantiated complaints brought to the College, should be noted on the permanent record of that physician for the protection of the public and negative findings should be allowed to be used in subsequent cases.

Conclusion

The protection of the public is achieved by open processes and full disclosure by the CPSO. Public trust and understanding of the College, and effective regulation of its members, can only be achieved if this occurs. OTLA feels that the overriding concern in establishing and applying these Transparency Principles must, first and foremost, be the protection of the public and disclosure of information, not the protection of the physician's privacy.

OTLA welcomes the opportunity to provide comment at this early stage in the development of the Transparency Principles. We look forward to participating further in this process, in particular when the CPSO converts these Principles into guidelines, policies or directives for its physician members. It is important for public confidence in the CPSO that public consultation continues beyond this stage.