OTLA Ontario Trial Lawyers Association

OTLA Submission to College of Physicians and Surgeons of Ontario

Draft By-Law Amendment: Posting of Quality Assurance Committee SCERPs

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OTLA welcomes the opportunity to comment on Phase 2 of the College of Physicians and Surgeons of Ontario (CPSO) Transparency initiative. As with the Phase 1 consultations, OTLA believes that the dialogue between the CPSO and public has been enhanced as a result of these continued consultations.

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 more than 1,600 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 has reviewed the draft Phase 2 Transparency initiative with a view to considering whether or not they achieve an appropriate balance between protecting the public on the one hand, and privacy of its physician members on the other.

It has been and continues to be OTLA's position that public protection and safety are the cornerstones for transparency and accountability.

It was this belief in transparency and accountability that lead OTLA to call for a public inquiry into the quality of medical evidence used in court. Too many motor vehicle accident victims find that they are victims as well of a system of medical assessments that are tailored for partisan purposes and permitted to flourish in a climate of secrecy and a lack of accountability.

OTLA supports the proposed amendments which would see all SCERPs be published on the Public Register, regardless of the CPSO committee form which they arise, as this would promote greater transparency and accountability. The CPSO requires a physician to undergo a Specified Continued Education or Remediation Programs (SCERP), "in a moderate-to-high risk situation."[1] Currently, only SCERP orders from the Inquiries, Complaints and Reports Committee (ICRC) are published on the Public Register.

[1] Draft By-Law Amendment: Posting of Quality Assurance Committee SCERPs

In order to provide useful supportive submissions, OTLA has reviewed "mission statements" for various CPSO committees including QA, ICR, Discipline, Fitness to Practice, and Education. Moreover, OTLA has reviewed the responses presently received by the College.

For ease of reference and discussion, we have summarized the essential functions and differences between the QA and ICR committees.

According the CPSO website, the Quality Assurance (QA) committee "develops, establishes, and maintains programs and standards of practice to assure quality of practice of the profession and standards of knowledge and skill, and programs *to promote continuing competence among physicians*" [emphasis added].

Section 80.1 of the *Health Professions Act*, Professional Code indicates: QA is to ensure or promote continued education and professional development pertaining to competence and quality of care; changes in practice; standards of practice; technology, and entry requirements. It involves self peer and practice assessments. The assessment is confidential and does not flow to another committee. The type of assessment generally involves a review of office practice and patient records.

If the assessment indicates unsatisfactory knowledge, skill or judgment; then, QA does have the option of using a SCERP or having a voluntary undertaking by the physician to complete certain conditions or terms. Alternatively, the matter can be referred to ICRC for professional misconduct, incompetence or incapacity. Generally, voluntary undertakings are used in lieu of SCERPs. Presently, SCERPs and undertakings, within the context of a QA recommendation, are not disclosed to the public.

In contrast, the ICR committee has a more formal investigative process generally arising from specific patient complaints. The ICRC can refer the matter to the Discipline or the Fitness to Practice committees; or impose other terms including requiring a SCERP. The committee cannot refer the matter to QA.

Again, in contrast, ICR decisions are available to the public through the CPSO's Public Register, which fosters accountability and transparency.

When one reads the various CPSO Practice guides, the Professional Code or the Legislation pertaining to physicians' standards of practice; it is quite evident that certain principles are embodied. The words used, which include "public interest", "transparency", "impartiality", "fairness", "quality of service," and "patient safety," form the basis of promoting a high level of medical competence related to the fiduciary duty between physician and patient, and promoting/maintaining patient confidence and safety.

However, principles and words are not effective unless transparency and accountability are maintained. Similarly, transparency and accountability cannot occur unless the CPSO has effective and efficient Committees that review and assess standards of practice.

The concern for physicians is that QA should only be seen as having an educational purpose or a remedial peer review, and not a reprimand or discipline review. Many of the physicians who responded to the proposed amendments, on the CPSO site, voiced concern that disclosing any term imposed by QA would be tantamount to “undue punishment” or “doctor bashing.” In some cases, they suggest that it could pertain to matters that are not relevant to patient care.

One example provided by doctors was a potential complaint about “poor patient charting”. Should the preceding be seen as “professional misconduct” and disclosed to the public by QA? Or is it simply poor office management that requires a caution or undertaking to do better?

One of the CPSO’s practice guides (Medical Professionalism and College Policies) defines the profession in terms of “compassion, service, altruism and trustworthiness.” The elements of “Service” and “Trustworthiness” pertain to patient and public responsibilities and to the promotion of patient safety and patient confidence.

Some office administration matters do in fact involve patient safety, care and treatment. Poor or inadequate patient charting can have a direct impact on the patient and the physician. Many patients are treated at clinics or multi-physician settings. Proper charting assists physicians at numerous levels. More importantly it impacts consistency in patient treatment and investigations.

The office process or practice with respect to “referrals” is also a patient safety issue. With the prolonged waiting periods between family doctor referral and specialist assessment getting longer each day; it is important to have a proper system in place for follow up or urgent referral.

Patient trust, confidence, safety and treatment benefit from transparency and accountability. However, not all administrative office practice is relevant to the preceding. Where a significant finding affecting the standard of practice is made by the QA committee, it is OTLA’s position that those findings, be it in the form of a SCERP or voluntary undertaking, should be published on the Public Register. This is in keeping with the goal of transparency and accountability.

Non-disclosure of a SCERP, undertaking or any matter that pertains to a patient’s or to a future patient’s care and treatment (whether an administrative matter or not) will have significant impact on public safety and public confidence. The harm arising from the preceding outweighs any benefit of physician privacy.

In addition to the reasons for posting SCERPS on the Public Register, it is also OTLA’s position that “voluntary undertakings” negotiated through the QA committee also be published on the

Public Register. OTLA understands that not all matters before the QA committee relate to public safety. However, those matters that do relate to public safety may never be disclosed if the physician and/or the QA committee prefer an "undertaking". To enhance transparency and accountability, it is OTLA's recommendation that such "voluntary undertakings" also be publically disclosed.

The protection of the public is achieved by open processes and full disclosure by the CPSO. Public trust and understanding of the College and regulation of its members can only be achieved if this occurs. OTLA accepts that some level of protection of a physician's privacy interest is warranted. However, the balance in establishing and applying these proposed transparency amendments to the By-Laws must favour public disclosure of information. The requirement that all SCERPs and voluntary undertakings be published on a physician's profile on the Public Register will enhance the public's trust in the CPSO.