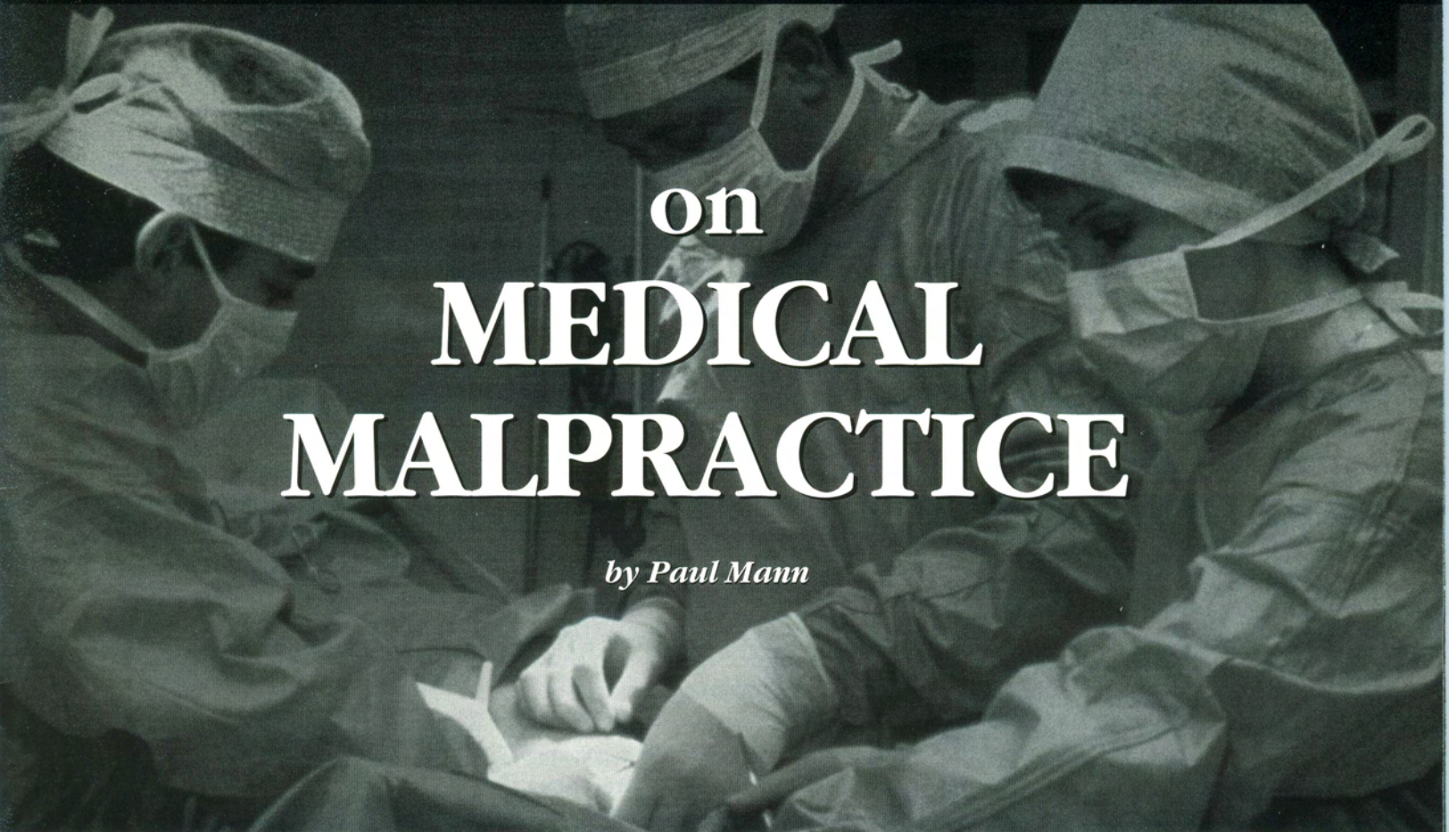


A Rogue Speaks Out



on MEDICAL MALPRACTICE

by Paul Mann

I am a sole practitioner. I carry on a medical malpractice law practice in a very small town (not on Bay Street or anywhere near Bay Street), and have done so for the last twenty years. I specialize in catastrophic loss in other personal injury cases.

There are No Rules

When you practice medical malpractice cases, there is only one rule and that rule is, "there are no rules."

There is no early production by the defence of their expert reports, there is no timely production of experts' reports by the defence, there is no meaningful dialogue short of a mediation or pre-trial by the defence of their position. They simply say "no, we didn't do it ... you can't prove it ... go to trial."

The reality of the situation far too often is that when you go to mediation as a Plaintiff, you have the feeling that you are being "raped" in that you are laying all of your cards on the table, showing all of

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your expert reports, bound, bradded, briefed, notarized, etc. to not only the mediator, but also to the defence. The defence unilaterally shows nothing and nods its head and says either "I'll seek instructions" or "I have no instructions" or "this is ridiculous, we're going to trial." No productions are forthcoming. An even worse scenario can occur at a pre-trial before a judge who has no interest or experience in medical malpractice cases.

Consequently, the legal forum in which medical malpractice cases are now tried should be completely altered and

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changed to at least make the playing field even. If there are no rules, there are no rules; but there must be boundaries, there must be end zones, there must be goal posts, there must be scores kept, there must be referees and linesmen.

A Dozen Do's and Don'ts

I make the following suggestions:

1. At the time of the initial interview, take a detailed clinical history, medical history, social history, educational history, and family history of your client. Know absolutely everything; everyone that she has ever seen, every doctor that she has ever seen, and write them all and ask for their clinical notes and records. If there is a particular doctor that your client thinks will assist or have more knowledge than all other doctors, ask for a written legal report.
2. Never, but never, produce the medical report to the defence.

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3. Collect all of the hospital records, clinical notes, charts, psychiatric records, original films (radiographs, pathology slides, etc.) so that you can have your own pathologists, radiologists, etc. review them in a timely fashion and return them to the hospital. It is amazing how, as the litigation progresses, these materials "go missing."

4. Do not be shy or hesitant to run up large disbursement accounts (including talking to partners about this) because these cases, quite candidly, cost a fortune in order to get to either mediation, pre-trial (to which I refuse to go), or trial. Advise them well in advance that you have an impecunious plaintiff and that your firm will be footing the bill. If your plaintiffs have the good fortune of owning a house, I would immediately get a mortgage on the house, much to their chagrin, where you will agree to pay the mortgage payments, but you will also have, say, 100,000.00 in your trust account. This may take off a lot of the burden and of course insulates your clients in the event that the case is lost.

5. I choose my experts very, very closely. In other words, do not choose your next-door neighbour because he happens to be a radiologist or a general surgeon. Choose the best you know in the field. If you do not know who to choose, the Ontario Trial Lawyers Association is compiling a list of experts, and I have my own list, as do most other lawyers practising in this area.

6. Stay away from the usual "prostitutes" (experts) who will tell you what you want to hear. If you need an orthopaedic surgeon, use a real orthopaedic surgeon. Use somebody who specializes in hip transplants when you have a hip transplant case. Use an orthopaedic surgeon who specializes in upper extremities when you have an upper arm extremity case. Use a pharmacologist (not a pharmacist) when you have a pharmacologic case.

7. Do not be afraid to call for help, or to call in people to assist as co-counsel. The truth of the matter is that the lawyers at McCarthy Tetrault are good lawyers, and they are not bad people; they just have a

mandated job to do as we all do. Any aspersions cast about the tricks that they do and anything that they do in litigating a case are probably only condoned through a "guide book" given to everyone who defends medical malpractice cases.

8. Do not be overwhelmed by the number of motions, the number of motions for undertakings, the number of motions for dismissal for lack of proceeding diligently, and so on. These people are experts at paper pushing. Generally speaking, I answer about one in ten letters and keep the rest tightly bound for use as logs during the winter.

*Never try a
medical malpractice case
alone.*

9. If you have a case, do not be afraid to proceed with it, but if you are unsure about your case, get an opinion from people who are knowledgeable. OTLA's Medical Malpractice Section is a good place to look.

10. Never, but never, try a medical malpractice case alone your first time. For that matter, never try a medical malpractice case alone. The cases are too complex, and the task of educating the court about not only the applicable law, but the applicable medicine, is too overwhelming for one lawyer. You will need to translate legalese and medicalese and all kinds of other "eses" into English in a logically consistent and mature way.

11. Do not rely on just one doctor. In other words, have backups for your doctors. In a case I recently finished, we had two causation experts, seven obstetricians and gynaecologists, four anaesthetists, three general practitioners, and two emergency specialists, all of whom gave us very supportive opinions and all of whom the CMPA, McCarthy Tetrault, Gowlings, et al. knew were realistic witnesses. How do I know that? I know that because the CMPA had used those witnesses on previous cases.

Know who your experts are and know who the defence will believe - and get those professionals first, and foremost. Thereafter, the CMPA cannot do so.

12. Be aware that you are going to have to hire future health care cost analysts, economists, actuaries, tax specialists, and others to prove "gross up."

Work Hard, Rest, Be Brave

Generally speaking, this sounds like a very daunting affair. Well, it is! You will need help, or if not, you will need to put in long, long hours; long, long weekends; and you will be doing a disservice to your other clients.

Make sure that you take a good number of breaks - physical, psychological, geographical, emotional, legal - to make sure your judgment has not run askew or that the well is not running dry.

Always, but always, have a theme of your case. The theme might be causation, or obstetrical substandard care, or failure to read a monitor strip, or failure to put in an implant, or improper dosages of medications. The theme will become very dear to you early on. The trick is to put

words to the theme so that ultimately you have a song that is absolutely, astoundingly beautiful. Each opus to the song is going to be a piece of your case - liability, causation, non-pecuniary general damages, *Family Law Act* claims, future health care costs, past losses, future losses, and so on. At the end, you are going to be a very happy person because you are going to have done a great service to your client.

Fear not the unknown - because you are always going to have help. You will always have a flashlight in your pocket to look down that long, dark tunnel known as medical malpractice litigation. The flashlight will have loads of batteries. And you will also have with you loaded bazookas, guns, machine guns, and the occasional stiletto.

Who supplies all of this for you? The Ontario Trial Lawyers Association.

Be brave of heart, go forward, understand that you are a gladiator, understand that you will be doing a service, understand that it will be a tough fight and you will win.

Cases are won on facts, cases are won on evidence, cases are won on ingenuity, but cases are not won on rhetoric. Cases are not won by some lawyer just standing up and saying "I'm not going to pay." So, gird your loins, prepare for battle, do battle, do it right, slay the dragon. Do not take the cases personally! Do not worry about the defence. Just worry about your case: how you are going to present it, who is going to testify, how it is going to come across, and how nice the music sounds.

Mandatory mediation for medical malpractice cases is probably a good idea. I think you get a better hearing by way of mediation than you do at trial.

One final tip before going into battle is to watch an Al Pacino movie (any Al Pacino movie) and I think you will get some idea as to the proper timbre that you are going to require in your voice to properly and adequately cross-examine the "experts" that the defence bring up to defend their cases. I heartily recommend *Scent of a Woman*, especially about the last twenty-five minutes. •