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# Canada's First Malpractice Crisis: Medical Negligence in the Late Nineteenth Century

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# Canada's First Malpractice Crisis: Medical Negligence in the Late Nineteenth Century

## **Abstract**

This article describes and explains the first Canadian medical malpractice crisis. While malpractice had emerged as a prominent legal issue in the United States by the mid nineteenth century, Canadian doctors first began to express concerns with a growth in malpractice litigation in the late nineteenth century. Physicians claimed that lawsuits damaged reputations and forced them to spend lavishly on defending themselves. Doctors blamed lawyers for drumming up spurious lawsuits and argued that ignorant or malicious jurors tended to side with plaintiffs. Evidence, however, points to additional factors that contributed to litigation. Medical professionals in rural areas sometimes avoided lengthy travel, leading to allegations of malpractice when patient health declined despite calls for attendance. As the number of doctors increased in Canada, some physicians may have encouraged negligence suits against their competitors. Late nineteenth-century claims to professionalism also played a role. Patients came to expect better outcomes, especially in orthopedics, which dominated most of the reported instances of malpractice in the period.

## **Cover Page Footnote**

I am honoured to publish an article in this special issue of the Osgoode Hall Law Journal. I had the pleasure of taking two courses from Doug Hay during my M.A. in History in 1998-1999. Doug kindly encouraged me to publish a paper on juries prepared for one of those courses in the Osgoode Hall Law Journal. This began my work on the history of jury system that eventually became my PhD dissertation and then my first book: *A Trying Question: The Jury in Nineteenth-Century Canada* (Toronto: University of Toronto Press and the Osgoode Society, 2009). I would also like to thank Doug for an offhand comment he made to me during my M.A. In the course of giving me feedback on my jury paper, he told me that I wrote 'like a lawyer.' I realized that this was an invitation to avoid technical writing and to, instead, try to capture the imagination and interest of readers. I fear that I have often failed Doug on that account, but I would take this opportunity to say that I still think about his comment every time I sit in front of my computer or mark up a draft article in a coffee shop. The Social Science and Humanities Research Council of Canada and the Faculty of Graduate Studies and Research at Saint Mary's University financially supported this research. I owe thanks to the research assistants who contributed to this article: Magen Hudak, Noelle Yhard, and Samantha Bourgoïn.

## Special Issue

Law, Authority &amp; History: A Tribute to Douglas Hay

# Canada's First Malpractice Crisis: Medical Negligence in the Late Nineteenth Century\*

R. BLAKE BROWN<sup>†</sup>

This article describes and explains the first Canadian medical malpractice crisis. While malpractice had emerged as a prominent legal issue in the United States by the mid nineteenth century, Canadian doctors first began to express concerns with a growth in malpractice litigation in the late nineteenth century. Physicians claimed that lawsuits damaged reputations and forced them to spend lavishly on defending themselves. Doctors

\* An earlier version of this article was presented at the Law/Authority/History: A Tribute to Douglas Hay symposium to mark the retirement of Douglas Hay. The symposium took place on 5 and 6 May 2016 at Osgoode Hall Law School and the York University History Department, Toronto.

† Associate Professor of History and Atlantic Canada Studies, Saint Mary's University. I am honoured to publish an article in this special issue of the *Osgoode Hall Law Journal*. I had the pleasure of taking two courses from Doug Hay during my M.A. in History in 1998-1999. Doug kindly encouraged me to publish a paper on juries prepared for one of those courses in the *Osgoode Hall Law Journal*. This began my work on the history of jury system that eventually became my PhD dissertation and then my first book: *A Trying Question: The Jury in Nineteenth-Century Canada* (Toronto: University of Toronto Press and the Osgoode Society, 2009). I would also like to thank Doug for an offhand comment he made to me during my M.A. In the course of giving me feedback on my jury paper, he told me that I wrote 'like a lawyer.' I realized that this was an invitation to avoid technical writing and to, instead, try to capture the imagination and interest of readers. I fear that I have often failed Doug on that account, but I would take this opportunity to say that I still think about his comment every time I sit in front of my computer or mark up a draft article in a coffee shop. The Social Science and Humanities Research Council of Canada and the Faculty of Graduate Studies and Research at Saint Mary's University financially supported this research. I owe thanks to the research assistants who contributed to this article: Magen Hudak, Noelle Yhard, and Samantha Bourgoïn.

blamed lawyers for drumming up spurious lawsuits and argued that ignorant or malicious jurors tended to side with plaintiffs. Evidence, however, points to additional factors that contributed to litigation. Medical professionals in rural areas sometimes avoided lengthy travel, leading to allegations of malpractice when patient health declined despite calls for attendance. As the number of doctors increased in Canada, some physicians may have encouraged negligence suits against their competitors. Late nineteenth-century claims to professionalism also played a role. Patients came to expect better outcomes, especially in orthopedics, which dominated most of the reported instances of malpractice in the period.

Cet article décrit et explique la première crise liée à la faute professionnelle en médecine au Canada. Tandis qu'aux États-Unis, la faute professionnelle devient une question juridique importante dès le milieu du XIXe siècle, les médecins canadiens ne commencent à s'inquiéter de la hausse du nombre de litiges pour faute professionnelle qu'à la fin du XIXe siècle. Les médecins affirment alors que les procès nuisent à leur réputation et les forcent à dépenser des sommes excessives pour se défendre. Ils accusent les avocats d'intenter des poursuites fallacieuses et soutiennent que les jurés ont tendance, par ignorance ou par malveillance, à se ranger du côté des plaignants. Toutefois, d'autres facteurs ont à l'évidence contribué à ces litiges. Dans les régions rurales, les professionnels de la santé cherchaient parfois à s'éviter de longs trajets, d'où des allégations de faute professionnelle lorsque la santé des patients se détériorait malgré les demandes de consultation. Parallèlement à l'augmentation du nombre de médecins au Canada, certains docteurs ont pu encourager des requêtes pour négligence à l'encontre de leurs concurrents. À la fin du XIXe siècle, les revendications en matière de professionnalisme ont également favorisé la hausse des litiges. Les patients en sont ainsi venus à attendre de meilleurs résultats, notamment dans le domaine de l'orthopédie, où se concentraient la plupart des cas signalés de faute professionnelle au cours de cette période.

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**IN LATE AUGUST 1904**, Dr. Simon John Tunstall delivered his presidential address to the annual meeting of the Canadian Medical Association in Vancouver. Dr. Tunstall, born in Quebec in 1852, had studied at McGill University before moving to British Columbia, where he practiced in several communities before settling in Vancouver and developing an excellent reputation. Though a highly successful doctor at the peak of his career, he issued a dire warning to the physicians in attendance. He emphasized the need for “assisting and protecting members of our profession from wrongful actions-at-law, to which we are all of us at all

times liable.”<sup>1</sup> Such actions, he warned, were brought by “irresponsible persons” or by “unscrupulous persons for the purpose of obtaining money under threats of injury to our professional character.”<sup>2</sup> Lawsuits, “though wholly groundless and undeserved, may have the most disastrous effects upon his career and pocket.”<sup>3</sup> By “wrongful actions-at-law,” Dr. Tunstall meant medical malpractice tort suits arising from allegations of harm, stemming from physicians’ failure to exercise ordinary skill and care in treating patients.<sup>4</sup> Dr. Tunstall’s concerns were not unusual at the turn of the century—they were, in fact, typical during the first medical malpractice crisis in Canada. The existence of a malpractice crisis might come as a surprise to most medical and legal historians, as the story of medical

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1. Simon J Tunstall, “President’s Address” (1904) 33:10 *Montreal Medical Journal* 690 at 693; See also, Simon J Tunstall, “President’s Address—Canadian Medical Association, 1904” (1904) 29:10 *Canadian Practitioner and Review* 475 at 475-82; “Medical Association,” *The Globe* (26 August 1904) 5; “Themes Talked of By Physicians,” *Daily Colonist* (26 August 1904) 1.
  2. *Ibid.*
  3. *Ibid.*
  4. The degree of skill and care the justice system expected depended on several factors. Courts, for instance, eventually held specialists to a higher degree of care. In some American states, courts held country doctors to a lower standard of care in recognition that they had less access to the most modern methods of treatment, but Canadian courts did not enunciate a similar principle in the nineteenth century. For example, Chief Justice William Glenholme Falconbridge of the Ontario High Court of Justice noted locality as a factor in some American medical malpractice cases, but asserted that the ease of communications and access to large centres of education in Ontario made him hesitate to lay down a similar law. Proof of a bad result of medical care did not, by itself, provide evidence of negligence. There was, to quote Justice Falconbridge, “no implied warranty on the part of a physician or surgeon that he will effect a cure.” *Town v Archer*, 4 OLR 383 at para 18, [1902] OJ No 163; or, in the words of Chief Justice William H Tuck of the New Brunswick Supreme Court in 1898, “A medical man does not in point of law guarantee the recovery of his patient.” *James v Crockett* (1898), 34 NBR 540 at para 5, 1898 CarswellNB 34 [*James*]; for overviews of the broad principles of malpractice in this period see AJ Murray, “Malpractice” (1898) 10:3 *Maritime Medical News* 85 at 85-89; JS Bentley, “The Relation of the Physician to the Law” (1910) 22:2 *Maritime Medical News* 44 at 44-51; R Vashon Rogers, *The Law and Medical Men* (Toronto: Carswell, 1884) at 55-81. For general overviews of the law of tort in Canada and England in this period, see Arthur Underhill, *A Summary of the Law of Torts; or Wrongs Independent of Contract*, Canadian ed (Toronto: Canada Law Book, 1900); JF Clerk & WHB Lindsell, *The Law of Torts*, Canadian ed (Toronto: Carswell, 1908).

negligence in Canada has received little attention.<sup>5</sup> Jacalyn Duffin's assertion in 1993 that "there are few histories of medical malpractice in North America"<sup>6</sup>

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5. The only published works that deal with the history of medical malpractice in detail are a case study by Peter J Mitham, a history of the Canadian Medical Protective Association produced by a medical student and published by that association, and a recent study of interwar malpractice. Peter J Mitham, "'Very Truly and Undisturbedly Yours': Joseph Workman and a Verdict of Malpractice against John Galbraith Hyde" (1996) 13 *Canadian Bulletin of Medical History* 139-49; Iain McCormick, *Practical Sympathy: The Malpractice Trial of Dr. J.M. Conerty and the Formation of the Canadian Medical Protective Association* (Ottawa: Canadian Medical Protective Association, 2002); R Blake Brown & Magen Hudak, "'Have you any recollection of what occurred at all?': Davis v. Colchester County Hospital and Medical Negligence in Interwar Canada" (2015) 26:1 *Journal of the Canadian Historical Association* 131. There are some studies, however, that consider coroners' inquests, which examined the death of patients because of allegedly poor medical treatment. See e.g., "The death of Sarah Lovell and the constrained feminism of Emily Stowe" (1992) 146:6 *CMAJ* 881 at 881-88; Jacalyn Duffin, "In View of the Body of Job Broom: A Glimpse of the Medical Knowledge and Practice of John Rolph" (1990) 7 *Canadian Bulletin of Medical History* 9. Legal studies include little on the history of medical malpractice in Canada. See Gilbert Sharpe, *The Law & Medicine in Canada*, 2nd ed (Toronto: Butterworths, 1987); Jocelyn Downie, Timothy Caulfield & Colleen M Flood, eds, *Canadian Health Law and Policy*, 4th ed (Markham, ON: LexisNexis, 2011); HE Emson, *The Doctor and the Law: A Practical Guide for the Canadian Physician*, 3rd ed (Toronto: Butterworths, 1995); Colleen M Flood & Bryan Thomas, "Canadian Medical Malpractice Law in 2011: Missing the Mark on Patient Safety" (2011) 86 *Chicago-Kent L Rev* 1053. There has also been a lack of critical inquiry into all areas of Canadian tort law by legal historians. For examples of existing work, see James Muir, "Instrumentalism and the Law of Injuries in Nineteenth-Century Nova Scotia" in Philip Girard, Jim Phillips & Barry Cahill, eds, *The Supreme Court of Nova Scotia, 1754-2000* (Toronto: University of Toronto Press and the Osgoode Society, 2004) at 361-91; Jennifer Nedelsky, "Judicial Conservatism in an Age of Innovation: Comparative Perspectives on Canadian Nuisance Law, 1880-1930" in David H Flaherty, ed, *Essays in the History of Canadian Law Volume 1* (Toronto: Osgoode Society, 1981) at 281-322; R Blake Brown & Noelle Yhard, "'The harshness and injustice of the common law rule ... has frequently been commented on': Debating Contributory Negligence in Canada, 1914-1949" (2013) 36 *Dal LJ* 137; Peter Karsten, *Between Law and Custom: "High" and "Low" Legal Cultures in the Lands of the British Diaspora - The United States, Canada, Australia, and New Zealand, 1600-1900* (Cambridge, UK: Cambridge University Press, 2002).
6. Jacalyn Duffin, *Langstaff: A Nineteenth-Century Medical Life* (Toronto: University of Toronto Press, 1993) at 221.

remains essentially true in Canada, though several scholars have since analyzed the history of medical malpractice in the United States.<sup>7</sup>

This article, part of a larger study that seeks to address this lacuna in Canadian legal and medical history, explores debates in English Canada over medical negligence in the late nineteenth century. Given the lack of existing scholarship in Canada, it tackles several foundational questions in the history of malpractice during this period, in particular when, where, and why medical negligence emerged as an issue.<sup>8</sup> As will be shown, the Canadian medical profession long considered malpractice to be an 'American' problem, but by the last third of the nineteenth century doctors, especially in Ontario, expressed serious and sustained concerns with malpractice suits. Doctors railed against a perceived increase in litigation, claiming that lawsuits damaged reputations and forced them to spend lavishly on defending themselves with little chance of recovering their legal costs from most plaintiffs. Doctors blamed lawyers for drumming up spurious lawsuits, and argued that jurors, especially the jurors in rural areas and small towns, tended to side with plaintiffs. Evidence, however, points to the importance of other factors encouraging litigation beyond those identified by doctors. Medical professionals in rural areas sometimes avoided lengthy travel, leading to allegations of malpractice when patient health declined despite calls for attendance. As the number of doctors increased in Canada, some physicians may have encouraged negligence claims to drive out local competition. Late-nineteenth-century claims to professionalism also played a role. Patients came to expect better outcomes especially in orthopedics, which dominated most of the reported instances of malpractice in the period.

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7. For examples of American work, see Kenneth Allen De Ville, *Medical Malpractice in Nineteenth-Century America: Origins and Legacy* (New York: New York University Press, 1990); James C Mohr, *Doctors and the Law: Medical Jurisprudence in Nineteenth-Century America* (New York: Oxford University Press, 1993) [Mohr, *Doctors and the Law*]; Allen D Spiegel & Florence Kavalier, "America's First Medical Malpractice Crisis, 1835-1865" (1997) 22:4 *Journal of Community Health* 283; Chester R Burns, "Malpractice Suits in American Medicine Before the Civil War" (1969) 43 *Bulletin of the History of Medicine* 41; James C Mohr, "American Medical Malpractice Litigation in Historical Perspective" (2000) 283:13 *Journal of the American Medical Association* 1731 [Mohr, "American"]; Neal C Hogan, *Unhealed Wounds: Medical Malpractice in the Twentieth Century* (New York: LFB, 2003); For a study of malpractice in Britain, see Kim Price, *Medical Negligence in Victorian Britain: The Crisis of Care under the English Poor Law, c.1834-1900* (London: Bloomsbury, 2015).

8. This article does not address medical malpractice under Quebec civil law.

## I. AN AMERICAN PROBLEM

Until the late nineteenth century, few commentators in Canada expressed much concern with malpractice litigation. While the *Canada Medical Journal* declared in 1868 that “[a]ctions for malpractice have become too frequent in Ontario,”<sup>9</sup> most others downplayed the danger such actions posed for doctors. Malpractice lawsuits occasionally occurred, according to the Canadian Medical Association president in 1873, but they were “not, fortunately, of frequent occurrence.”<sup>10</sup> Medical journals only sporadically mentioned malpractice, and few cases appeared in law journals, law reporters, or newspapers.

Newspapers and medical journals did, however, frequently include discussions of American cases and trends in medical negligence. Bizarre, frightening, or blatant instances of malpractice in the United States often received attention in Canada, such as when doctors in the United States faced a malpractice allegation because they amputated the wrong finger of a patient unconscious after receiving chloroform.<sup>11</sup> Such cases reflected popular concerns with the dangers of new medical procedures, but also highlighted the perceived legal differences between the United States and Canada, especially Americans’ perceived litigiousness. Malpractice litigation had become common in the United States beginning in the 1840s, such that suits became a “prominent and permanent”<sup>12</sup> feature of American medical life. Contemporary American critics of malpractice believed that such cases had first emerged in western New York then spread to other eastern states. A number of Canadian commentators demonstrated awareness of, and concern with, American trends. As early as 1846, the *British American Journal of Medical and Physical Science*, published in Montreal, included a discussion of a New York malpractice case.<sup>13</sup> Three years later, it published a lengthy critique of malpractice in the United States; the author criticized jurors, conniving lawyers, ignorant judges, and irregular practitioners willing to give questionable evidence against regular doctors.<sup>14</sup> Some Canadian commentators perceived frequent

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9. (1868) 5:6 *Canada Medical Journal* 278.

10. “Dr. Grant’s CMA Presidential Address, at St. John” (1873) 2 *Canada Medical and Surgical Journal* 103, in McCormick, *supra* note 5 at 12.

11. *Kingston News* (5 May 1869) 2.

12. De Ville, *supra* note 7 at 224.

13. “Case of Mal-practice” (1846) 2:5 *British American Journal of Medical and Physical Science* 138 at 138-39.

14. William M Wood, “Thoughts on Suits for Malpractice, suggested by certain Judicial Proceedings, in Erie County, Pennsylvania” (1849) 5:8 *British American Journal* 216 at 216-18.

malpractice suits as a normal part of the American medico-legal landscape. In 1871, for instance, the *Kingston News* remarked on the “ordinary run of suits for malpractice against doctors” in the United States, and opined that in one case “an eminent medical man was put to great annoyance and expense for the best and most humane attention which he could bestow.”<sup>15</sup> Sometimes, Canadian medical periodicals mentioned American developments as a warning of what might occur in Canada. For example, in 1852 the *Canada Medical Journal* noted a malpractice case in Toronto and worried that “it appears that the Yankee custom of suing [*sic*] for mal-practice is commencing.”<sup>16</sup> Almost two decades later, the *Canada Medical Journal* noted the continuing legal troubles of American doctors: “we notice that the Profession in the United States” has “not escaped the worry, annoyance, and expense incident to trials of this description.”<sup>17</sup> Medical malpractice litigation, in short, was a Yankee phenomenon, best to be avoided in Canada.

Explaining absence is always difficult, yet one can speculate that several factors played a role in the delayed concern in Canada with malpractice litigation. A willingness of judges to accord physicians respect perhaps stymied the efforts of plaintiffs to bring successful suits. Judges in medical negligence cases often expressed strong faith in the respectability and professionalism of doctors. In 1873, for example, Justice Thomas Galt of the Ontario Court of Common Pleas suggested that doctors who had used their best skill should be able to practice without fear of lawsuits. Medical practitioners had “hard work and very little thanks,” he noted.<sup>18</sup> In *McQuay v Eastwood*, Justice Matthew Crooks Cameron of the Ontario High Court of Justice, Common Pleas Division overturned a jury’s finding of malpractice and noted that the defendant was “a practitioner of long standing with a very favorable reputation.”<sup>19</sup> In another case, Cameron stated his assumption that doctors always did their best—it was “in the interest of every medical man on account of his professional reputation, to do the very best he can for a patient.” When he took “the trouble to visit the patient,” it was “hardly credible that when at the bed-side he would not do all that, in his judgment, ought to be done for the relief and cure of the patient.”<sup>20</sup> The comments of Ontario Justice Thomas Ferguson in *Lymburner v Clark and Hopkins* also illustrate this generally positive judicial view of doctors. Justice

15. “Suits for Malpractice,” *Kingston News* (17 May 1871) 4.

16. “Canada Medical Journal,” *Canada Medical Journal*, 1:4 (June 1852) 244.

17. “Suits for Malpractice,” *Canada Medical Journal*, 6:8 (February 1870) 376.

18. “York Spring Assizes,” *The Globe* (5 April 1873) 2.

19. *McQuay v Eastwood*, 12 OR 402 at para 18, [1886] OJ No 67.

20. *VanMere v Farewell*, 12 OR 285 at para 21, [1886] OJ No 56; See also his comments in “Jury Disagrees Again,” *Daily British Whig* (29 March 1886) 3 [“Jury Disagrees”].

Ferguson found for the defendants in this malpractice suit, in large measure because of the evidence presented by other physicians. “As a rule,” noted Justice Ferguson, “when a doctor is sued for negligence, and other doctors come forward and say that they would have adopted the treatment that he pursued, the court says that he cannot be convicted of negligence.” The evidence of physicians of the “highest respectability,” “of good health,” and of “high education” meant that Justice Ferguson decided there was “no conclusion that I can arrive at but that the case fails.”<sup>21</sup> Many judges also often referred to doctors as “gentlemen,” thus according their evidence, even if self-serving, much respect.<sup>22</sup>

Other commentators in the mid nineteenth century offered policy rationales for restricting the opportunity for patients to sue doctors. In 1855, “Medices” argued in the Toronto *Globe* that doctors should not be held responsible for any fault of judgment, “however gross it may be,” so “long as he acts according to the best of his judgment, however bad that may be.”<sup>23</sup> Medices noted that physicians had a self-interest in providing excellent care since only their reputation ensured a good livelihood. Medices also questioned the wisdom of leaving it to the public to evaluate the quality of a physician’s treatment, since a “man who is too modest to call himself a judge of a horse pronounces, without hesitation, on the capabilities of a physician.”<sup>24</sup> This helped explain why there was “not a physician in the province who has not been accused of killing some of his patients.”<sup>25</sup> Medices noted that malpractice cases might lead doctors to avoid acting out of fear of court proceedings: “It is evident, therefore, that a cautious man will rather *let his patient die* than be accused of killing him. He will *do nothing* rather than have it said he *did too much*. If the physician is compelled to practice with *a rope round his neck*,” Medices concluded, “the public may rest assured the evil will fall upon *them*.”<sup>26</sup>

A debate in the Toronto *Globe* in 1868 suggested further support for limiting the opportunities of patients to complain before the courts. “W.O.E.”

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21. “Lymburner v. Clark and Hopkins” (1902) 36:1 Canada Lancet 14 at 14-15; On this case see also “Suit for Malpractice” (1902) 27:5 Canadian Practitioner and Review 282; Also see C Freeman, “Fracture of the Skull, with a Complicated Fracture of the Left Fore-Arm—Recovery with Unavoidable Results” (1881) 6 Canadian Journal of Medical Science 48.

22. The presiding judge in *Armstrong v Bruce*, for example, suggested that the defendant doctor was “a skilled gentleman,” and a “gentlemen of the medical profession.” *Armstrong v Bruce*, 4 OWR 327 at para 9 [1904] OJ No 370.

23. “Medical Responsibility,” *The Globe* (20 August 1855) 792.

24. *Ibid.*

25. *Ibid.*

26. *Ibid* [emphasis in original].

from Whitby argued that “I, for one, do think that an action for mal-practice ought never to be brought against a surgeon, who is legally qualified, and who has done his best, though perhaps not some other man’s best.” Like Medices, W.O.E. warned that malpractice cases discouraged doctors from acting. W.O.E. also blamed patients for picking their physicians without care, perhaps making a selection based on the ethnicity of the doctor or his rates. Finally, W.O.E. pointed out that physicians naturally disagree about some aspects of proper treatment, but that this should not be held against doctors. W.O.E. rejected any effort to characterize the relationship between the doctor and patient as a contractual one. If the patient employed the doctor to do work “without any specific bargain, and [the doctor] had done his best,” the patient was “bound to accept his work and pay for it, unless, indeed, it could be shown that the workman was an unskilled pretender to the art, who had deceived by his false professions.”<sup>27</sup> The *Globe* responded to, and disagreed with, W.O.E. It expressed less faith in licenced practitioners, since they were “sometimes rash, foolish and dissipated,” and because people in need of aid were “not very competent judges of a doctor’s reliability, and have very little choice in an emergency.” Absolute immunity from lawsuits should not be granted to physicians, concluded the *Globe*, since that would “give free course to rash experimenting and presumptuous [*sic*] ignorance, from which no party would suffer more than the profession itself.”<sup>28</sup>

While Canadian commentators expressed little concern with malpractice cases before the late nineteenth century, negligent treatment of patients undoubtedly occurred. Available sources make estimating the extent of malpractice extremely difficult, however. Many opportunities existed for an allegation of poor medical treatment to be dealt with before a patient and doctor found themselves in court, thus leaving little or no record. If a patient complained to his or her doctor, the doctor might convince the patient that the treatment had been appropriate. If the patient remained unconvinced, he or she might go to another physician without pursuing legal action. Or, the doctor might offer to reduce or waive his fee in exchange for the patient not seeking legal redress. A case from 1886 illustrates the negotiations that could occur between patients and doctors. A female patient complained that she had received poor treatment. She consulted with other doctors and applied liniments to the area, but also returned to her original doctor and reportedly stated that “if he would cure her she would not say anything about her previous treatment.”<sup>29</sup> When she failed to improve the case went to

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27. “Medical Responsibility,” *The Globe* (30 October 1868) 2 [“Medical”].

28. *Ibid* at 2.

29. “High Court of Justice,” *Daily British Whig* (27 March 1886) 3 [“High Court”].

trial and twice juries failed to agree.<sup>30</sup> Many cases also likely settled, leaving little evidence for the historian to detect, although it is easier to trace cases that went to court but settled prior to judgment. For example, press coverage tells us about a dispute in 1895 in which Dr. Henry B. Nicol settled after almost a full day at the Court of Assize in Simcoe County, Ontario. The doctor agreed to pay \$2,250 and all costs for a malpractice claim made on behalf of an infant for the treatment of a fractured arm.<sup>31</sup> If the case went to trial and resulted in a judgment, the press might discuss the litigation, but law reporters rarely included trial cases in the nineteenth century. Malpractice suits usually only appeared in law reporters if they were appealed and happened to interest the editors of the reports.

The same problems of evidence have bedevilled scholars of American malpractice. Some have relied exclusively on the number of appellate cases appearing in law reporters to estimate the level of malpractice litigation, “despite obvious drawbacks” of relying on this evidence, including changing levels of appellate reporting over time.<sup>32</sup> A more appropriate approach is employed by Kenneth Allen De Ville. He notes that “there is no accurate way to calculate the absolute number of malpractice suits,” but employs newspaper reports, legal journals, medical periodicals, and reported cases to illustrate broad trends in the frequency of such litigation.<sup>33</sup>

## II. A CANADIAN PROBLEM

While calculating the extent of malpractice litigation is difficult, a range of sources suggest that concern with malpractice litigation grew substantially in Canada by the 1880s. Law journals and law reporters began to include case reports detailing instances of medical negligence. The medical profession, which had an obvious pecuniary interest in this area of the law, expressed plenty of concern. Articles detailing malpractice disputes became a common feature of Canadian medical journals. Journals published in Ontario were especially vocal, perhaps suggesting a greater number of malpractice suits in that province, although journals from other parts of the country still raised concerns. In 1881, the *Canada Lancet* of Toronto declared that suits “for malpractice are the opprobria of surgical practice.”<sup>34</sup>

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30. “Jury Disagrees,” *supra* note 20 at 3.

31. “The Fall Assizes,” *Northern Advance* (31 October 1895) 1; “Autumn Assizes,” *Northern Advance* (7 November 1895) 1.

32. Mohr, *Doctors and the Law*, *supra* note 7 at 111.

33. De Ville, *supra* note 7 at 2.

34. “Suit for Malpractice” (1881) 14:2 *Canada Lancet* 61 at 61.

A perception that the problem was escalating led the *Lancet* to suggest in 1896 that more and more practitioners faced lawsuits, whereas in the past surgeons “had a practical monopoly of the unpleasant experience of being sued for malpractice.”<sup>35</sup> Ontario was the perceived hotbed of this growth in such litigation. The president of the Canadian Medical Association, Dr. George Ross, lamented in 1888 that malpractice suits were “lamentably common in certain sections of this country,” though in other areas, he gladly reported, few such cases occurred and in “some favoured localities are practically unknown.”<sup>36</sup> In 1891, the president of the Ontario Medical Association (and soon to be dean of medicine at the University of Western Ontario), Dr. W.H. Moorehouse, complained of malpractice suits, “which of late years have been so numerous.”<sup>37</sup>

Doctors and medical journals lamented the various harms they felt these suits inflicted. A prominent concern was the high cost of offering a defence. Doctors lost time at work prepping for and attending court, paying lawyers, and covering the expenses of expert witnesses to give evidence that approved of courses of treatment. Litigants frequently called upon other doctors, as many cases illustrate. In one New Brunswick case, doctors “from all parts of the country and Nova Scotia were called to give evidence.”<sup>38</sup> The *Hamilton Evening Times* described one trial in which “a vast array of medical talent” appeared on both sides.<sup>39</sup> Well-established doctors had the resources to conduct court battles (although being an established physician may have had a negative consequence: money made them a tempting target). A doctor of lesser means might be forced to settle or to abandon hopes of appealing an unfavourable trial verdict, forcing him to pay costly judgments because, according to the *Canada Lancet*, “some malicious or ignorant persons saw fit to prosecute him.”<sup>40</sup> Doctors also complained about expenses incurred in preparing for cases that plaintiffs dropped before trial. “Here is the great hardship,” noted the *Canadian Journal of Medical Science* in 1880 in discussing such a case. The doctor was “put to all the costs he could in procuring counsel, bringing lay and professional witnesses to the place of trial when, all at once the plaintiff, or the plaintiff’s counsel, finds he has no case, and withdraws the suit.”<sup>41</sup> Even if the doctor won at trial, he often incurred substantial costs.

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35. “Medical Malpractice” (1896) 28:10 *Canada Lancet* 374 at 374.

36. George Ross, “Presidential Address” (1888) 17:4 *Montreal Medical Journal* 250 at 250.

37. WH Moorehouse, “An Abstract of the President’s Address, Delivered Before the Ontario Medical Association” (1891) 16:12 *Canadian Practitioner* 271 at 271.

38. “New Brunswick,” *British Colonist* (8 February 1888) 3.

39. “A Curious Case,” *Hamilton Evening Times* (30 September 1865) 2.

40. “Malicious Prosecutions for Malpractice” (1886) 19:2 *Canada Lancet* 70 at 70.

41. “Malpractice Suits” (December 1880) *Canadian Journal of Medical Science* 364 at 364.

If a jury failed to agree and a second trial took place, or if the case proceeded to the appeal courts resulting in the ordering of a new trial, expenses escalated quickly. For example, according to one doctor in 1887, an Ontario physician spent one thousand dollars to defend a suit, but the jury could not agree, meaning that the doctor faced the threat of a new trial that would cost him even more money.<sup>42</sup> One thousand dollars was a substantial sum for a late-nineteenth-century physician. Historians have found it challenging to determine the wealth of doctors in the period, but most agree that the modest incomes of patients, the necessity of house calls, delinquent accounts, and the geographic dispersion of patients treated by rural doctors meant that most physicians could only squeeze out, at best, a comfortable income. A young William Osler made less than two thousand dollars per year in the late 1870s in Montreal, for example. Even the relatively prosperous doctor James Langstaff is estimated to have only billed about three thousand dollars in 1880, meaning that a single legal case could drain away a large portion of a year's work.<sup>43</sup>

Physicians had to dig into their own pockets to pay any awards. Judgments ranged in size, but the threat of potentially devastating awards loomed in many cases. For example, in Brantford in 1862 Dr. E.T. Bown faced a lawsuit claiming four thousand dollars in damages, although the court ultimately awarded the plaintiff eight hundred dollars.<sup>44</sup> In *Key v Thomson*, an 1867 case from New Brunswick, a jury awarded twenty-five thousand dollars in damages, although an appeal court set the verdict aside for improper rejection of evidence and for excessive damages.<sup>45</sup> More typically, courts awarded only a portion of the damages

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42. "Ontario Medical Association" (1887) 19:11 *Canada Lancet* 329; See also "Stickles v. Drs. W.F. Bryans and G.B. Smith, of Toronto" (1905) 2:2 *Queen's Medical Quarterly* 216 ["Stickles"].

43. Michael Bliss, *William Osler: A Life in Medicine* (Oxford: Oxford University Press, 1999) at 95; RD Gidney & WPJ Millar, *Professional Gentlemen: The Professions in Nineteenth-Century Ontario* (Toronto: University of Toronto Press, 1994) at 38-39; Duffin, *supra* note 6 at 46-58; David AE Shephard, *Island Doctor: John Mackieson and Medicine in Nineteenth-Century Prince Edward Island* (Montreal: McGill-Queen's University Press, 2003) at 19-21.

44. "A Surgical Case," *The Globe* (8 October 1862) 2; for another example of a sizable award, see *Daily British Whig* (4 October 1884) 1 (\$850 for loss of a foot).

45. *Key v Thomson*, 12 NBR 295, 1868 CarswellNB 28 [Key]; Milo A McClelland, "Alleged Malpractice in the Treatment of Frostbite," Case Comment on *Kay v Thompson* [sic], *Civil Malpractice: A Treatise on Surgical Jurisprudence* (New York: Hurd and Houghton, 1877) at 321-327; "An Important Decision," *Perth Courier* (6 September 1867) 2.

claimed.<sup>46</sup> No mutual protection society existed in nineteenth-century Canada to pool funds to pay for legal expenses. Also, hospitals had no legal obligation to pay for the costs of malpractice suits fought by hospital doctors. The Toronto General Hospital thus refused to reimburse Dr. G.S. Ryerson for the costs of a malpractice suit brought against him by one of the hospital's patients, despite pleas from Ryerson's lawyer for financial assistance.<sup>47</sup>

The losing party in the court action could be ordered to pay costs, but doctors complained they were unable to receive compensation from poor patients. The inability of doctors to secure costs sparked considerable consternation. The *Canada Lancet* noted that courts refused to make patient-plaintiffs pay because typically "the party bringing the suit is financially worthless."<sup>48</sup> The *Canadian Practitioner* often made this point. It lamented that even if a physician won at trial "he may either whistle or sing psalm tunes for his costs without the slightest prospects of collecting them."<sup>49</sup> The expense of malpractice suits occasionally led to efforts to fundraise for doctors. Some Ontario physicians, for instance, raised money to assist a doctor whose patient had died after receiving chloroform. The *Canadian Practitioner* launched an appeal for contributions to assist the doctor, which became known as the Leslie Fund.<sup>50</sup>

The medical profession also complained about the indirect financial suffering experienced by doctors embroiled in malpractice cases. Suits risked damaging the reputations of doctors, thus harming their ability to attract and keep paying patients. Late-nineteenth-century newspapers still carried extensive coverage of local court cases, meaning that malpractice allegations that went to trial received a public airing that, at best, was embarrassing, and at worst, drove patients to

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46. For examples of large claims, see "Alleged Malpractice," *Winnipeg Free Press* (23 May 1883) 1; "Alleged Malpractice," *Daily Colonist* (9 February 1889) 4; *Newmarket Era* (10 May 1889) 1; "Suing a Doctor," *Woodstock Sentinel-Review* (21 March 1893) 2; "Our Toronto Despatch," *Newmarket Era* (24 March 1893) 2; *Stouffville Tribune* (24 March 1893) 7; "Our Toronto Letter," *Newmarket Era* (22 January 1897) 2; *Acton Free Press* (25 March 1897) 2.

47. JTH Connor, *Doing Good: The Life of Toronto's General Hospital* (Toronto: University of Toronto Press, 2000) at 148.

48. "The Liabilities of Hospital Trustees" (1897) 29:8 *Canada Lancet* 423 at 423 ["Liabilities of Hospital"]. In 1882, the *Canada Lancet* approved a judge's decision to prevent a case from going to a jury for "if it should go to trial, the hard earnings of a diligent practitioner will have to be spent in defending himself against a man worthless in every sense of the word." "Vexatious Litigation" (1882) 14:5 *Canada Lancet* 158.

49. "Alleged Malpractice Case" (1887) 12:12 *Canadian Practitioner* 403 at 403.

50. McCormick, *supra* note 5 at 13-14; "The Hamilton Case" (1888) 13:2 *Canadian Practitioner* 64; For another example see "A Medical Defence Association for Ontario" (1899) 32:4 *Canada Lancet* 223 ["Medical Defence"]; "The Malpractice Suit Against Dr. Conerty" (1901) 34:7 *Canada Lancet* 435.

other practitioners. Newspapers often noted the public interest in malpractice cases. The *Hamilton Evening Times*, for example, reported a “good deal of interest” in a case in which three doctors allegedly colluded to hide a medical mistake.<sup>51</sup> In 1889, the *British Colonist* of Victoria, British Columbia noted that a malpractice suit against a doctor from New Westminster was “exciting a great deal of interest.”<sup>52</sup> The use of other physicians as witnesses for plaintiffs meant that the diagnoses and treatments offered by doctors could be second-guessed publicly. Many trials featured, as in one 1895 case, “a great number of prominent physicians”<sup>53</sup> criticizing or supporting the original diagnosis and treatment. The reputation of established doctors might be able to sustain a few allegations of negligence. So, while the *Globe* suggested that a finding against a doctor would not destroy his reputation (“[f]ortunately for him, his reputation is too well established to be injured by it”<sup>54</sup>), for others the harm undoubtedly had lasting effects. The potential damage malpractice claims posed to a doctor’s standing thus remained a concern through the nineteenth and early twentieth centuries, and critics of malpractice law claimed that this indirect cost motivated many physicians to settle with possible litigants. Dr. A.J. Murray of Fredericton Junction, New Brunswick made this point in a speech to provincial doctors in 1897. While a civil suit caused financial loss to any losing defendant,

in the case of the physician or surgeon a most cruel and lasting hardship results, for he depends upon his reputation and professional standing to gain a livelihood for himself and family, and when his reputation has been assailed and called in question an irreparable loss has been sustained. He has been struck in a vital spot, and no matter how ably he defends his cause or how successfully he may meet the issue, the charge which could not be sustained in law has circulated outside of and beyond the jurisdiction of the trial-court to work its subtle influence against his character, integrity and professional attainments.<sup>55</sup>

Medical journals constantly reiterated the same argument. According to the *Canadian Practitioner* in 1884, the “annoyance, the loss of time, the personal inconvenience, and the probable loss of prestige from the mere fact of his skill being questioned, even though triumphantly vindicated, cannot be compensated for by any monetary consideration.”<sup>56</sup>

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51. “A Curious Case,” *supra* note 39 at 2.

52. “Alleged Malpractice,” *British Colonist* (9 February 1889) 4.

53. “Autumn Assizes,” *supra* note 31 at 1.

54. “A Surgical Case,” *supra* note 44 at 2.

55. Murray, *supra* note 4 at 88-89. See also “Medical Defence” (1900) 29:10 *Montreal Medical Journal* 795-98 [“Medical Defence Montreal”].

56. “A Malpractice Suit” (1884) 9:6 *Canadian Practitioner* 183 [“Malpractice Practitioner”].

Threats to reputations sometimes motivated public debates over alleged wrongdoing. This occurred after a case came before the Divisional Court in Streetsville, Ontario. A ten-year-old boy had suffered severe injuries when a wagon ran over him. The boy ultimately died, and the physician who had provided treatment, Dr. Woods, demanded payment in court from the boy's family for unpaid medical bills. The defendant father refused to pay, alleging that Dr. Woods had negligently failed to diagnose a fracture. After the *Canadian Champion* drew attention to the case, another doctor, Dr. John Crombie, leapt to Dr. Woods' defence. He felt it important to speak up because the initial press report, "if left uncontradicted," would have had "a tendency to greatly injure Dr. Woods in the neighborhood in which he practices."<sup>57</sup> This defence elicited a public reply detailing Dr. Woods' allegedly negligent treatment of the boy, and, after a verdict for the doctor, a final letter, whose author "hoped the verdict of the jury may allay that prejudice which the mere circulation of such a charge is calculated to produce," and would have the effect of "increasing the public confidence in his ability, and of establishing more firmly than ever his reputation as a physician."<sup>58</sup>

The financial and reputational costs of malpractice suits often led medical professionals to respond ferociously to patients who made such claims. In doing so, they frequently disparaged plaintiffs in colourful terms as charlatans, complainers, blackmailers, or unprincipled folk simply looking to avoid medical bills. The *Canada Lancet* called one litigant "a swindler in the plainest terms" in 1881.<sup>59</sup> The *Canadian Practitioner* in 1884 complained about "every crippled pauper" with nothing to lose and everything to gain in bringing a lawsuit, even when it was against "the man who may perhaps have saved his life,"<sup>60</sup> and fifteen years later asserted that most malpractice plaintiffs were "paupers who have received treatment without charge."<sup>61</sup> The editor of the *Kingston Medical Quarterly* lamented the damage done to the reputations of physicians by "irresponsible parties" who "previously had received the best of care from a surgeon and had at the same time neglected to pay his small fee."<sup>62</sup> A member of the Ontario Medical

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57. "Correspondence," *Canadian Champion* (7 April 1870) 3.

58. "Correspondence," *Canadian Champion* (26 May 1870) 2. See also *Canadian Champion* (24 March 1870) 1; "Correspondence," *Canadian Champion* (28 April 1870) 5.

59. "Dr. McLean's Malpractice Suit" (1881) 14:3 *Canada Lancet* 93 at 93.

60. "Proposed Amendments to the Ontario Medical Act" (1884) 9:12 *Canadian Practitioner* 379 at 380.

61. "Hough v. Forrest" (1897) 22:2 *Canadian Practitioner* 142 at 143.

62. "A Case of Colles Fracture Ending in Litigation" (1900) 4:2 *Kingston Medical Quarterly* 58 at 63 ["Colles"].

Council, Dr. William Allison, asserted that the plaintiff in a malpractice case was typically “some miserable creature, with scarcely the coat on his back or even the will to earn it.”<sup>63</sup> The disparagement of plaintiffs sometimes continued in the courtroom. In an 1886 case, the defence lawyer, during his cross-examination of the patient-plaintiff, moved his hand “as if turning a crank”<sup>64</sup> to suggest that the plaintiff held unshakable, but erroneous, beliefs. Such public pronouncements regarding the motivations of patient-plaintiffs may have reflected an honest assessment of the merits of cases, or been emotional responses to perceived slights. Doctors may also have employed such rhetoric to bully unhappy patients and discourage them from launching, or continuing, lawsuits.

Given the attitude expressed about many plaintiffs, the medical profession dismissed most suits as vexatious. In commenting on a Georgetown, Ontario case, Dr. C. Freeman suggested that a father had been happy with the medical treatment his severely injured son received until billed, at which time he “manifested his high appreciation and admiration of the doctors’ skill and great attention to his son by instituting a most vexatious suit.”<sup>65</sup> The *Canadian Journal of Medical Science* congratulated a doctor upon the “termination of a most vexatious and unrighteous prosecution.”<sup>66</sup> The *Canadian Practitioner* asserted in 1884 that ninety-nine out of one hundred malpractice cases had no basis while the *Canadian Medical Review* complained of “uncalled for criticism and violent attacks” on physicians laid on the “most unjust grounds.” Malpractice claims “had no other foundation to rest upon than malice,”<sup>67</sup> the journal concluded. Editors of medical journals thus took pleasure in reports of litigants failing to sustain their lawsuits. This ‘us versus them’ attitude also led medical journals

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63. “To the Medical Electors of Kings and Queen’s Division” (1885) 10:4 *Canadian Practitioner* 128 at 128. For other examples, see “A Medical Defence Association for Ontario” (1899) 32:4 *Canada Lancet* 223; “Stickles,” *supra* note 42 at 216-17.

64. “High Court,” *supra* note 29 at 3.

65. Dr. Freeman lambasted the unfairness of the justice system: “It is certainly an outrage on the profession, that the unprincipled men who desire to evade the payment of a just and honorable debt, should be permitted to put any surgeon to such extraordinary annoyance and expense without giving security for costs.” C Freeman, “Fracture of the Skull, with a Complicated Fracture of Left Forearm—Recovery, with Unavoidable Results” (1883) 13:7 *Canada Lancet* 194 at 195.

66. “Malpractice” (February 1881) *Canadian Journal of Medical Science* 60 at 60. See also “Jenkins v. Cotton” (1897) 22:2 *Canadian Practitioner* 141 [Jenkins].

67. “The Case of Dr. Fred C. Stevenson” (1895) 2:2 *Canadian Medical Review* 57 at 57.

to offer hearty congratulations to doctors who defeated former patients in the courtroom.<sup>68</sup>

At the same time that they criticized plaintiffs, physicians asserted in the court of public opinion that their profession deserved protection from lawsuits. In making this case, doctors described their profession as a gentlemanly pursuit, undertaken with honour for the benefit of all of society. According to Dr. Charles Richard Shaughnessy of Saint John, the physician was “indeed one of the most highly valued benefactors of mankind.”<sup>69</sup> Doctors provided valuable services to the public, sometimes at little or no cost, such as when physicians assisted people injured in accidents with no promise of compensation. Dr. A.J. Murray connected the value of doctors to the need for laws that benefited the profession in his 1897 address to New Brunswick doctors: “The practitioner many times responds to a call for medical and surgical aid from a sense of duty alone—without assurance or hope of reward, and assuredly without intent on his part to commit an injustice.” In Dr. Murray’s view, it seemed “fitting and proper that the public should zealously guard their benefactors and enact such laws as will serve for their protection.”<sup>70</sup>

Interesting is what was left unsaid in discussions about malpractice. Rarely did physicians or medical journals acknowledge that doctors might actually have caused harm by treating patients negligently. They generally refused to admit that claims may have come from perfectly scrupulous people who had sufficient money to pursue a lawsuit to receive compensation for harms caused. Instead, they dismissed almost all suits as spurious. The *Canada Lancet* declared in 1897 that “actions for malpractice are almost invariably speculative suits,” and “it has rarely, if ever, been proved that the patient has been either neglected or maltreated.”<sup>71</sup> Only in the most egregious cases did medical professionals acknowledge wrongdoing. One such example occurred after Dr. William Brock of Bismarck, Ontario had to pay nine hundred dollars for insisting that his patient’s shoulder was not dislocated only to have other doctors later confirm the dislocation. “There can be no doubt that he committed a grave error in judgement,” admitted the *Canadian Journal of Medical Science*, although the journal still insisted that

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68. See e.g. “Malpractice Practitioner,” *supra* note 56 at 183; “Malpractice Suit” (1884) 16:10 *Canada Lancet* 326; “Malpractice Suit” (1884) 17:2 *Canada Lancet* 61 [“Malpractice Suit 17:2”]; “Trial for Malpractice” (1886) 11:2 *Canadian Practitioner* 52; “Malpractice Suits” (1897) 5:2 *Canadian Medical Review* 53; “Jenkins,” *supra* note 66 at 141–42.

69. Charles Richard Shaughnessy, “The Physician’s Professional Rights and Duties” (1902) 14:12 *Maritime Medical News* 429 at 429.

70. *Murray*, *supra* note 4 at 88.

71. “Liabilities of Hospital,” *supra* note 48 at 423.

“he was doing his best for his patient,” and “the price demanded for his error appears to us very high.”<sup>72</sup> Even rarer was any consideration of the effects of a doctor’s negligence on the long-term health, career, or personal happiness of a patient.

### III. CAUSES: SOCIAL AND MEDICAL CONTEXT

Several factors contributed to the timing and extent of the debate about malpractice suits in Canada. Historians of American malpractice trends point to urbanization as contributing to more litigation. They argue that the relationships between local doctors and patients in rural areas may have limited the number of suits, while patients in growing urban centres, who often lacked long-term relationships with doctors, may have felt less restraint in suing. Urbanization may also explain the growing concern with malpractice in Canada in the last decades of the nineteenth century, a time when the percentage of Canadians living in cities and towns grew rapidly. However, small towns and rural areas also created conditions that led to allegations of malpractice. In particular, doctors in rural areas sometimes sought to avoid lengthy travel to conduct follow-up visits with patients, especially when road and weather conditions were poor. If complications emerged, patients occasionally sued. Two cases can illustrate this tendency. In *Field v Rutherford et al*, a patient with a dislocated shoulder alleged negligent treatment because his physician had not travelled five miles to check on the injured man and adjust his sling.<sup>73</sup> In *Key v Thomson*, the plaintiff, John Key, was a superintendent of a copper mine in New Brunswick. On 23 December 1865 he lost his way home from work in the snow and was severely frostbitten on his hands and feet. Dr. Robert Thomson, who resided nine miles away, came and treated Key on 24 December. Key experienced great suffering and sent for Dr. Thomson repeatedly, but Dr. Thomson responded only by sending medicine and did not visit again until 6 January. Key’s suffering continued, yet Dr. Thomson waited another twelve days to attend again. Key finally employed other doctors

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72. “Suit for Malpractice” (1882) 7:5 Canadian Journal of Medical Science 174 at 174. In 1891, the president of the Ontario Medical Association, WH Moorehouse, also made an admission. He noted that “as medical men are like every other class of the community, and therefore liable sometimes to become careless and run over their work without giving it the careful consideration which is necessary to insure success, some of these actions for malpractice may be well-founded.” Moorehouse, *supra* note 37 at 271.
73. *Fields v Rutherford et al*, 29 UCCP 113, [1878] OJ No 267; *Rickley v Stratton* (1912), 4 DLR 595, 22 OWR 282; In another case, Michael Ellard sued a doctor after the doctor had been called for, but refused to attend, his ailing wife. The doctor had instead sent medicines. “The Spring Assizes,” *Barrie Examiner* (22 April 1897) 5; Duffin, *supra* note 6 at 36.

to amputate his hands and part of his feet. Dr. Thomson's refusal to travel to see Key became a key element in the resulting legal struggle.<sup>74</sup>

Increasing competition among doctors may have been more important than urbanization in sparking lawsuits in Canada. While counting the exact number of doctors in a jurisdiction is difficult, historians suggest that the number of physicians increased substantially in Canada in the last decades of the nineteenth century. For instance, census data for Canada West/Ontario indicates an increase from 886 doctors in 1861 (one for every 1576 residents) to 2,266 in 1891 (one for every 933 Ontarians).<sup>75</sup> Competition resulted, and patients in even relatively small communities found, sometimes for the first time, that they had a choice in local physicians. A consultation with the patient of another doctor offered the opportunity to poach the patient by disparaging the treatment of the other physician.<sup>76</sup> Giving evidence for a plaintiff may also have been a means of undermining a medical competitor (though of course some doctors likely simply felt compelled to give evidence because of a sincere belief that a patient had received poor treatment).<sup>77</sup> During their testimony, some doctors asserted that they would have provided better treatment, thus using a very public forum to assert their professional superiority. Medical journals occasionally alleged competition as a factor stimulating malpractice cases. The *Canada Medical Journal* asserted in 1852 that the "majority of these suits are entered upon, at the instigation of rival practitioners."<sup>78</sup> In his 1888 Canadian Medical Association presidential address, Dr. George Ross of Montreal, complained about doctors who worked with plaintiffs to undermine competing physicians. Malpractice suits were "originated and fomented by unworthy physicians, who adopt this means of harassing and injuring a competitor."<sup>79</sup> This was seen as particularly problematic since doctors who gave evidence for plaintiffs only encouraged litigation by other patients.

The Canadian medical profession's efforts to establish a reputation for professionalism in the mid to late nineteenth century also, ironically, may have

74. Key, *supra* note 45; McClelland, *supra* note 45 at 321-27; *An Important Decision*, *supra* note 45 at 2.

75. Gidney & Millar, *supra* note 43 at 396.

76. Duffin, *supra* note 6 at 31-32; Mitham, *supra* note 5 at 140.

77. Some people suggested that doctors tended to stick together. According to the *Globe* in 1870, professional etiquette amongst physicians made it difficult for a patient to sue his or her doctor. The *Globe* advised a correspondent not to bother suing a physician because "as a profession doctors hang together." In part, this explained why "any respectable attorney," would advise against bringing a malpractice action, which would be "a useless waste of money." "Answers to Correspondents," *The Globe* (2 August 1870) 2.

78. (1852) 1:4 *Canada Medical Journal* 245 at 245.

79. Ross, *supra* note 36 at 250.

contributed to an increase in litigation. Regular doctors attempted to drive out ‘quacks,’ or, in the alternative, incorporate other kinds of practitioners, such as homeopaths and eclectics, as occurred in Ontario. Professional bodies empowered to license, regulate, and discipline formed, and local and national associations became established, including the Canadian Medical Association in 1867. The result of professionalization, however, was that patients raised their expectations for positive outcomes, and sometimes sued when poor results occurred.<sup>80</sup>

Advances in medical treatments, particularly in orthopedics, also contributed to a spike in lawsuits. Physicians in the mid nineteenth century became quite skilled in setting fractures that previously would have been treated by amputation.<sup>81</sup> Orthopedics remained an inexact science, however, and patients were often left with crooked, short, or sore limbs. Initially this was deemed normal and acceptable, within limits. Suing for an egregious injury occurred in one of the earliest reported cases in British North America, *Kelly v Van Cortlandt* (1848), when a labourer sued his doctor after treatment left his broken leg so deformed that he was unable to work. At trial, several physicians alleged that the defendant doctor employed a poorly constructed “Amesbury apparatus” to immobilize the leg, erred in using short splints, and failed to give the patient enough attention.<sup>82</sup> By the late nineteenth century, patients came to expect better results, and sometimes sued when treatment left limbs disfigured beyond the changing

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80. Kim Price, “The Art of Medicine: Towards a History of Medical Negligence” (2010) 375 *The Lancet* 192; Jacques Bernier, *Disease, Medicine and Society in Canada: A Historical Overview* (Ottawa: Canadian Historical Association, 2003) at 10-11; Gidney & Millar, *supra* note 43; Colin Howell, “Reform and the Monopolistic Impulse: The Professionalization of Medicine in the Maritimes” (1981) 11:1 *Acadiensis* 3 at 3-22; Colin D Howell, “Elite Doctors and the Development of Scientific Medicine: The Halifax Medical Establishment and 19th-Century Medical Professionalism,” in Charles G Roland, ed, *Health, Disease and Medicine: Essays in Canadian History* (Toronto: Hannah Institute for the History of Medicine, 1984) at 105-122. The efforts of regular physicians to assert their professionalism vis-à-vis other medical practitioners also led doctors to celebrate when ‘quacks’ fell into legal trouble. For instance, in 1861 the *British American Journal* took pleasure in noting that an American court had awarded a \$10,000 damage award for the negligent treatment of a young woman’s eye against a practitioner who had claimed during his time in Canada to be connected to the ‘Ophthalmic Hospital’ of New York, “which had no existence save in his own imagination.” The result “should be a lesson to him and all others of his stamp, that they should not meddle with matters which they do not fully understand.” “Dr. Cadwell,” (1861) 11 *British American Journal* 523 at 523-24.
81. Harold Ellis, *The Cambridge Illustrated History of Surgery* (Cambridge, UK: Cambridge University Press, 2009) at 151-55.
82. The jury found for the defendant in this case. “Medical Jurisprudence” (1848) 4:3 *British American Journal* 76. For another early malpractice suit resulting from an attempt to address a fracture, see “Toronto Fall Assizes,” *The Globe* (11 October 1855).

definition of “normal.” In 1883 a Mr. Robertson sued his doctor, H.A. Bonnar of Chelsea, Ontario, after recovering poorly from a fractured thigh, which was allegedly just three-quarters of an inch shorter (although the angle of the bone was also off and the patient suffered stiffness in his knee).<sup>83</sup> Malpractice suits also occurred when physicians allegedly placed splints and bandages too tightly on fractured limbs, thus causing abrasions and infections. Other patients blamed doctors when bones simply failed to knit. At a time when many Canadians still made a living doing physical labour, deformed limbs risked future income. The great propensity of patients to sue after receiving treatment for fractures led Dr. J.S. Bentley to warn the Saint John Medical Society in 1910 that physicians should get assistance in setting bones as this “class of cases” was “most apt to result in malpractice suits.”<sup>84</sup>

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83. The jury failed to agree. “Malpractice Suit 17:2,” *supra* note 68 at 61; “Mal-Practice Suit” (1884) 9:10 *Canadian Practitioner* 316. See also an 1862 Brantford, Ontario case in which a doctor faced a lawsuit after his treatment of a young patient with a fractured thigh bone left him with a crooked leg up to two and half inches shorter than before the injury. “A Surgical Case,” *supra* note 44 at 2.

84. Bentley, *supra* note 4 at 49. Cases also resulted from the failure or inability of doctors to successfully diagnose and remedy dislocations. See *e.g.* *James*, *supra* note 4; *Stamper v Rhindress*, 41 NSR 45, 1906 CarswellNS 215. In the early twentieth century advances to surgical practice created new situations leading to negligence actions. Anaesthetics, developed in the mid-nineteenth century, facilitated more advanced surgeries. The development of antiseptic surgery in the 1860s helped prevent infections. Doctors eventually also developed aseptic techniques (such as the sterilization of instruments). These developments meant that body cavity surgery became increasingly common and doctors began to describe surgery in scientific terms—that is, with results that could be replicated. These developments raised patients’ hopes for successful treatment. More ambitious surgeries, however, increased the possibility of error and led to new situations that eventually became the bases of lawsuits. Brown and Hudak, *supra* note 5; Charles G Roland, “The First Death from Chloroform at the Toronto General Hospital” (1964) 11:4 *Canadian Anaesthetists’ Journal* 437; Akitomo Matsuki & Elemér K Zsigmond, “The First Fatal Case of Chloroform Anaesthesia in Canada” (1973) 20:3 *Canadian Anaesthetists’ Journal* 395; Ellis, *supra* note 81 at 73-124; Owen H Wangansteen & Sarah D Wangansteen, *The Rise of Surgery: From Empiric Craft to Scientific Discipline* (Minneapolis: University of Minnesota Press, 1978) at 275-325; JTH Connor, “Listerism Unmasked: Antisepsis and Asepsis in Victorian Anglo-Canada” (1994) 49:2 *Journal of the History of Medicine and Allied Sciences* 207; De Ville, *supra* note 7 at 219-20; Charles G Roland, “The Early Years of Antiseptic Surgery in Canada” (1967) 22 *Journal of the History of Medicine and Allied Sciences* 380; Martin S Pernick, *A Calculus of Suffering: Professionalism and Anesthesia in Nineteenth-Century America* (New York: Columbia University Press, 1985).

#### IV. CAUSES: THE LEGAL SYSTEM

Late nineteenth-century doctors and medical journals blamed lawyers for contributing to malpractice litigation. In the United States, the growing number of lawyers in the Jacksonian period had meant that lawyers hustled for business and saw malpractice as a potentially lucrative market. Often working on contingency, American lawyers pushed the boundaries of medical negligence to develop novel claims.<sup>85</sup> The Canadian legal profession did not experience a Jacksonian moment in which many ill-trained lawyers entered the profession and rapidly competed for business. However, the number of lawyers increased substantially in many parts of Canada in the late nineteenth century. Between 1881 and 1891, the Ontario bar grew by 25 per cent (while the provincial population grew by just under 10 per cent), then another 17 per cent between 1891 and 1901 (compared to just a three per cent increase in the province's population). A similar trend occurred in Nova Scotia. While fifty-six lawyers joined the bar in the 1850s, 114 joined between 1870 and 1879, 123 the next decade, and 156 between 1890 and 1899. As a result, the lawyer-to-population ratio changed substantially. While Nova Scotia had one lawyer for every 2,094 residents in 1861, by 1901 there was one lawyer for every 1,273 Nova Scotians. Many of the new lawyers set up practices in rural areas and small centres, and it seems plausible that the growing size and dispersion of the profession might have contributed to an increase in the number of malpractice suits.<sup>86</sup>

Medical journals certainly felt lawyers were to blame. The *Canada Lancet* criticized hospital patients who received medical care then launched lawsuits “under the guidance of a pettifogging lawyer.”<sup>87</sup> The *Lancet* lambasted the “shyster lawyer” who became involved in malpractice suit, calling him an

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85. Peter Karsten, *Heart versus Head: Judge-Made Law in Nineteenth-Century America* (Chapel Hill, North Carolina: University of North Carolina Press, 1997) at 191-99; De Ville, *supra* note 7 at 195-96; Mohr, “American,” *supra* note 7 at 1735; Mohr, *Doctors and the Law*, *supra* note 7 at 116.

86. Christopher Moore, *The Law Society of Upper Canada and Ontario's Lawyers, 1797-1997* (Toronto: University of Toronto Press, 1997) at 147-48, 171; Philip Girard, *Lawyers and Legal Culture in British North America: Beamish Murdoch of Halifax* (Toronto: University of Toronto Press and the Osgoode Society, 2011) at 71; *Ibid.*, “The Roots of a Professional Renaissance: Lawyers in Nova Scotia, 1850-1910” (1991) 20 *Man LJ* 154; *Ibid.*, “The Maritime Provinces, 1850-1939: Lawyers and Legal Institutions” in DeLloyd J Guth & W Wesley Pue, eds, *Canada's Legal Inheritances* (Winnipeg: Canadian Legal History Project, 2001) at 386.

87. “The Liability of Hospitals for Malpractice” (1895) 27:10 *Canada Lancet* 313 at 313.

“even more unscrupulous and despicable creature” than the litigating patient.<sup>88</sup> The *Canadian Medical Review* similarly complained of lawyers who were “only too willing to take charge of cases, however doubtful these cases may be, and advise their clients into legal proceedings, as pure speculation.”<sup>89</sup> Such speculative suits caused damage, as the *Montreal Medical Journal* noted in 1900, since “through the machinations of disreputable lawyers” doctors could be tied up in lawsuits for months.<sup>90</sup>

The medical profession believed lawyers, in helping bring malpractice suits, only encouraged more spurious litigation when defendants settled claims. According to the *Kingston Medical Quarterly*, “once let it be known to the public that all anyone has to do in order to force a settlement from a practitioner, is to enter an action for mal-practice,” then “there would be no end of such actions by irresponsible parties whose aim is money, not justice.”<sup>91</sup> Medical journals thus discouraged settlements and called for ferocious resistance to all cases. The *Canadian Practitioner*, for instance, emphasized the masculinity of doctors who fought rather than settled malpractice suits, complementing a doctor for “manfully holding his ground.”<sup>92</sup>

The Canadian medical profession also blamed juries for the malpractice problem. Juries faced substantial criticism in much of Canada in the second half of the nineteenth century. While the jury system had come to British North America as a key plank of English legal culture, after the establishment of responsible government in the 1840s juries seemed less necessary as a bulwark against state oppression. In addition, because jurors were drawn from local communities, and were intended to represent community values, they created opportunities for citizens to express community agency. This was long perceived as a strength, but in the late nineteenth century juries came under attack *because* they represented local views. Many judges, lawyers, and politicians, infused by the liberal spirit of the age, believed that the justice system had to be rational and certain. They accused jurors of possessing local biases that made legal decisions

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88. “Medical Defence,” *supra* note 50 at 223.

89. “Malpractice Suits,” *supra* note 68 at 53.

90. “Medical Defence Montreal,” *supra* note 55 at 796.

91. “Colles,” *supra* note 62 at 63

92. “Trial for Malpractice,” *supra* note 68 at 52. “Every such action lost or compromised in any way encourages others to go to law with their grievances,” the Queen’s Medical Quarterly warned in 1905, “or to attempt to extort money by blackmail.” “Stickles,” *supra* note 42 at 217. See also “Malicious Prosecutions Lancet,” *supra* note 40 at 70.

unpredictable. There was also a sense that juries in civil suits had a tendency to side against parties with deep pockets, such as corporations.<sup>93</sup>

Critics of juries in medical malpractice litigation drew from these ideas in arguing that the jury system encouraged unfounded lawsuits. As early as 1862, the *British American Journal* criticized a jury that had found against a doctor and asserted that the case “exemplifies in a striking manner the readiness with which Juries mulct the unfortunate surgeons who may fall into their hands.” The journal hoped the doctor would appeal, since a higher tribunal would be “less influenced by private feeling,” and exhibit “a greater sense of justice.”<sup>94</sup> Commentators dismissed the long tradition of juries as a bulwark of liberty. The *Canadian Practitioner* condemned juries in 1887: “we already entertain a very supreme contempt of court as far as trial by jury, that fossilized bulwark of English liberty, is concerned.”<sup>95</sup> To emphasize the alleged ignorance of jurors, commentators sympathetic to physicians often noted when a jury found in favour of a plaintiff despite a judge’s charge favouring the doctor.<sup>96</sup> Journals also second-guessed juries. In 1884, for example, the *Canadian Practitioner* discussed a malpractice case, and concluded that the jury should have found for the doctor. The jury, however, “with their usual wisdom displayed in such cases, thought differently.”<sup>97</sup> Individual doctors sometimes went on the record with similar claims. In 1886, Dr. Edwin G. Knill, an elderly Ontario doctor, argued that a recent case in which a jury found against a physician “illustrates the unfair treatment our profession receives at the hands of a jury.”<sup>98</sup>

One perceived problem was a lack of expertise of juries in evaluating malpractice cases. Medical journals portrayed jurors as ignorant and incapable

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93. R Blake Brown, *A Trying Question: The Jury in Nineteenth-Century Canada* (Toronto: University of Toronto Press and the Osgoode Society, 2009); Paul Romney, “From Constitutionalism to Legalism: Trial by Jury, Responsible Government, and the Rule of Law in the Canadian Political Culture” (1989) 7 LHR 121; Paul Romney, *Mr Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature, 1791-1899* (Toronto: University of Toronto Press and Osgoode Society 1986) at 290-311; RCB Risk, “This Nuisance of Litigation: The Origins of Workers’ Compensation in Ontario” in David H Flaherty, ed, *Essays in the History of Canadian Law, Volume II* (Toronto: Osgoode Society, 1983) at 445-46.

94. “Alleged Mal-practice—Jury Trial—Damages £200” (1862) 3:10 *British American Journal* 315 at 315.

95. “Alleged Malpractice,” *supra* note 49 at 402.

96. See e.g. “Malpractice Suits” (1885) 17:11 *Canada Lancet* 345.

97. “Malpractice Case—McLure vs. Grant” (1884) 9:11 *Canadian Practitioner* 351 at 351.

98. “Malicious Prosecutions Lancet,” *supra* note 40 at 70; “Malicious Prosecution for Malpractice” (1886) 11:11 *Canadian Practitioner* 357.

of understanding medical procedures. The *Canada Lancet* alleged that jurors too often assumed that doctors could heal any injury: both “judges and juries too often fail to understand that surgeons cannot always overcome natural defects.”<sup>99</sup> Critics thought that jurors lacked the requisite expertise to competently consider medical malpractice cases. According to the *Canadian Practitioner*, “[w]hen the case goes to a jury the defendant is left at the mercy of a body of men who have about as much knowledge of the intricacies of difficult medical and surgical cases as the average public school-boy has of Sanscrit.”<sup>100</sup> The modest social status of jurors accentuated the critique of juries. In discussing another case, the *Practitioner* argued that the “average farmer, who so frequently acts on our juries, does not, as a rule, possess the required knowledge.”<sup>101</sup> The alleged result was an uneven application of legal rules. Dr. William Bayard extensively critiqued the jury system in his 1895 presidential address to the Canadian Medical Association. He lamented that conflicting medical testimony “too often places upon the court and jury who are not educated upon medical subjects the responsibility of deciding who is right and who is wrong.” Bayard called for expertise, not local knowledge: “[h]ere the evidence of the expert would largely assist in arriving at a proper conclusion.” He believed that something had to be done, for “often we see verdicts given for want of proper knowledge, devoid of reason and common sense.”<sup>102</sup>

Some judges acknowledged a tendency of jurors to find against doctors. In 1869, in *Jackson v Hyde*, the Upper Canada Court of Queen’s Bench considered an appeal of a jury verdict ordering a surgeon to pay \$250. The patient claimed that the defendant doctor had unnecessarily amputated his arm above, rather than below, the elbow. The doctors who gave evidence confirmed the necessity of amputation above the elbow, leading Justice Adam Wilson to suggest that it was “notorious there are many cases in which jurors are not the most dispassionate or most competent persons to try the rights of parties,” and that “an action of this kind comes within the class to which I have alluded.”<sup>103</sup> In another case, Justice Matthew Crooks Cameron of the Ontario High Court of Justice, Common Pleas Division outlined some of the problems of using juries in medical negligence cases. He closed his address to the jury by “urging the jurors not to be swayed by

99. “Suit for Malpractice,” *supra* note 34 at 61.

100. “Alleged Malpractice,” *supra* note 49 at 403.

101. “A Case of Alleged Malpractice” (1891) 16:10 *Canadian Practitioner* 237 at 237.

102. William Bayard, “President’s Address” (1895) 24:3 *Montreal Medical Journal* 166. For more criticism of the lack of expertise of jurors, see “Hamilton Case,” *supra* note 50 at 64-65.

103. *Jackson v Hyde*, 28 UCR 294, at para 19 [1869] OJ No 74; For a report of the trial, see “County Assizes,” *The Globe* (27 October 1868).

sympathy,” for “justice had to be done.” In Justice Cameron’s view, jurors tended not to give doctors fair treatment and were “prone to listen to the sufferings of persons and had given unfair and unjust decisions against physicians.”<sup>104</sup>

Some contemporaries argued that more than ignorance led to verdicts against doctors. They suggested malice on the part of some jurors driven by class antagonisms—that is, that jurors punished physicians because of their high social standing and financial resources. In discussing jury verdicts in malpractice cases, for instance, the *Canada Lancet* invoked major working-class movements of the period: “Heaven help the professional man whose interests are at the mercy of Patrons, Grangers or Knights of Labour!”<sup>105</sup> There is little concrete evidence to support these suspicions. An Ontario case from 1897, however, offered one piece of evidence. At the appeal court, evidence was introduced that a juror had suggested to a witness how to factor in the relative wealth of the defendant doctor (Dr. Harvey) and the plaintiff (whose family was named Laughlin) in giving testimony. According to the witness, the juror said that the witness “must remember that the Laughlins were poor boys and that I was to consider their poor old mother” for “if they lost the case they would be ruined.” On the other hand, Dr. Harvey “was a rich man,” and “if he lost \$4,000 or \$5,000 he would not feel it.” As a result, the juror advised the witness “not to say anything that would hurt them, the Laughlins, if I could help it.”<sup>106</sup>

## V. CONCLUSION

The emergence of medical malpractice litigation in the last decades of the nineteenth century, while attracting little academic attention, had major long-term implications for the history of Canadian law, medical practice, and the medical profession. Historians have long noted the efforts of Canadian doctors to work together to pursue their own self-interest. For example, the story of how regular doctors attempted to elbow out other kinds of medical practitioners has

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104. “Jury Disagrees,” *supra* note 20 at 3. In *Fawcett v Mothersell*, Chief Justice William Buell Richards of the Upper Court of Common Pleas noted the difficulties doctors faced in helping patients recover from fractured bones because of the distance they had to travel, the lack of assistance some patients had during recovery, and the tendency of patients to disturb bandages to ease their discomfort. As a result, “judges are generally desirous of impressing on juries the necessity of construing everything in the most favorable way for the defendant when such actions are brought against a surgeon.” 14 UCCP 104, [1864] OJ No 138.

105. “Medical Malpractice,” *supra* note 35 at 375.

106. *Laughlin v Harvey*, 24 OAR 438, at para 9 [1897] OJ No 50.

been studied for decades.<sup>107</sup> Doctors, however, not only attacked other kinds of practitioners and healers. The first malpractice crisis also led them to try to improve their legal position vis-à-vis patients. They argued that the disease of malpractice litigation was spreading from the United States, and had to be stopped. To do so, they sought to prevent the use of juries in malpractice cases. The medical profession would also advocate for statutory changes to protect doctors, including changes to limitation periods.<sup>108</sup> Perhaps most importantly, in 1901 a small group of doctors formed what became the Canadian Medical Protective Association, an organization that pooled resources to fight lawsuits. This organization paid elite lawyers to represent physicians, voraciously fought legal claims on the assumption that penniless patients attempted to extort doctors, and lobbied legislatures for more legal changes to deter litigation. Unlike American physicians, Canadian doctors would prove successful in creating a national organization that sought to reshape statutory law and common law to their benefit.

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107. Gidney & Millar, *supra* note 43 at 85-105; Peter L Twobig, "The 'Celebrated Indian Herb Doctor': Francis Tumblety in Saint John, 1860" (2010) 3:2 *Acadiensis* 70; Colin Howell, "Reform and the Monopolistic Impulse: The Professionalization of Medicine in the Maritimes" (1981) 11:1 *Acadiensis* 3.
108. John McLaren briefly discusses the introduction of special limitation periods for the negligence of physicians. John PS McLaren, "Of Doctors, Hospitals and Limitations—'The Patient's Dilemma'" (1973) 11:1 *Osgoode Hall LJ* 85.

