

MEDICAL MALPRACTICE

Confronting racial bias in Canadian healthcare

Despite policy promises, racial bias persists in Canadian healthcare. Gluckstein's **Pinta Maguire** argues that mandatory data collection and legal advocacy are essential for progress

IN THE US, Black patients are more likely than Caucasians to have an above-the-knee amputation¹ when undergoing surgery to remove that limb. There's no medical reason for the discrepancy, which has a significant impact on future mobility, and it's only known because of the reams of evidence the US collects on patient care; in Canada, that data is harder to come by.

"We're a multicultural country and think because of that we're not racist; we still need to ask hard questions," Pinta Maguire explains. "Let's collect this information, drill down on how biases affect healthcare for our diverse population, and combat pockets of racism that are identified."

Data gaps and a push for accountability

Ontario received a snippet of that race-based data during the COVID-19 pandemic. Across the board, racialized individuals had poorer outcomes than Caucasians, even though the former group skewed younger and the virus was thought to be more deadly for older people. While it led to initiatives to support Black and Indigenous groups under Ontario's Anti-Racism Act, which stipulates that the government must improve equity in healthcare delivery, the snapshot laid the truth bare: there's a problem in Canada that's been ignored for a very long time.

Part of Ontario's mandate is collecting health information based on race. Unfortunately, it's voluntary and hospital uptake is lacking. Maguire is hoping that – along with more diverse voices in the upper echelon of the medical system – data collection will become mandatory.

"There are things lawyers can do to move the needle," Maguire says. "That includes advocating for our clients but also work outside of files, such as pushing politicians to mandate collection and identify trends."

Tiny cuts, lasting trauma

While racial bias is widely recognized and addressed in policing litigation and criminal sentencing, there's a notable lack of case law in the healthcare context. Maguire began explicitly naming racial bias in medical negligence claims relatively recently.

It manifests mostly in subtle ways via unconscious bias: whether a dismissive or paternalistic tone or assumptions about a patient's lifestyle or access to support, the results are hurtful at best and catastrophic at worst.

"These moments add up; for racialized patients constantly dealt these tiny cuts – or who experience a negative outcome – it's another form of trauma from an institution that's supposed to help," Maguire explains, adding that when she does assert it in a case, "the response is often to sidestep the issue."

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"Defence counsel typically focus on the incident resulting in harm and ignore or downplay the role of bias. It can also lead to the practitioner on the other side believing I'm accusing them of being racist. It's tricky."

Progress, pitfalls, and a path forward

As co-presenter of a seminar on racial bias and discrimination in healthcare at a medical malpractice conference earlier this year, Maguire realized not many fellow plaintiff-side practitioners are asserting these types of claims. But lawyers should consider every potential head of damage in a viable case.

If the client feels their care was affected by their race, review records for objective evidence; for example, differences in how the person's pain was recorded by the physician versus the nurse. Common racist tropes are alive and well – many medical students still believe that Black people don't feel pain the same way Caucasian people do – and a discrepancy in the hospital records can support a claim of racial bias.

Digging into what underlying biases may have affected the provided care and including them in civil claims is "the only way the courts will provide guidance about how things like the standard of care might be affected by cases where bias is present," Maguire notes.

Even if a situation doesn't meet the threshold to proceed, Maguire makes a point to inform people of their options, including complaints to the Human Rights Tribunal or the College of Physicians and Surgeons of Ontario. In short, there are many inroads to take in combating this issue.

"We have a long way to go, but through legal advocacy and systemic efforts, meaningful progress can be made," Maguire sums up. "If we shine a light on these issues, even when it's uncomfortable, we can move towards a health-care system that truly serves all Canadians." **CL**

¹ <https://pmc.ncbi.nlm.nih.gov/articles/PMC8733080/>