

**POSITION PAPER OF THE HOLLAND GROUP
REGARDING ISSUES ARISING FROM A RECENT
ONTARIO SUPERIOR COURT OF JUSTICE DECISION
IN *MOORE v. GETAHUN*, [2014] ONSC 237**

The Holland Group's members are leading practitioners involved in medical malpractice cases throughout the Province of Ontario. From its inception, the Holland Group has been "multi-partisan" in the sense that its members include concerned practitioners from both the plaintiffs' and defence bars.

At inception, the highly respected late former Justice Richard E. Holland chaired the group. Since his passing in 2002, highly respected former Justice Coulter Osborne has chaired the group.

At this time there are five plaintiffs' counsel members and, since inception, there have been no fewer than five plaintiffs' counsel in the Holland Group.

There are also five defence counsel in the Holland Group and likewise there have been no fewer than five defence counsel members since inception. Four of the defence counsel practice with the four law firms representing the Canadian Medical Protective Association (CMPA) in the province, one of whom practices with the firm representing the CMPA both in the province and acting as the CMPA's general counsel nationally. The CMPA represents almost all of the physicians who are defendants in medical negligence proceedings in Ontario. The remaining defence counsel member practices with the law firm representing the Hospital Insurance Reciprocal of Ontario Corporation (HIROC) which represents approximately 81% of all not-for-profit healthcare facilities in Ontario and insures over 85% of the province's acute care beds.

A primary objective of the Holland Group throughout its existence has been to consider and discuss best practices in medical malpractice cases with a view to conducting these cases fairly and efficiently while maximizing access to justice.

The Holland Group is very concerned about the potential consequences of certain aspects of the recent decision in *Moore v. Getahun* in the Ontario Superior Court of Justice. To the knowledge of members of the Holland Group these aspects of the *Moore* decision have created widespread concern throughout the litigation bar generally (not only in Ontario but throughout Canada). In response to these concerns, focussing in particular on issues arising in the context of medical malpractice cases (consistent with its mandate) but recognizing the wider concern, the Holland Group is issuing this position paper to:

- (a) articulate its concerns arising from the *Moore* decision;
- (b) set out its consensus concerning best practices in certain areas touched upon within the *Moore* decision (which are, by and large, contrary to certain of the requirements articulated by the Court in the *Moore* decision); and
- (c) suggest a means of conducting aspects of cases potentially affected by the *Moore* decision pending the hearing of an appeal in that case (which to the knowledge of the Holland Group has been commenced).

Concerns

This position paper focusses on the aspects of the *Moore* decision dealing with the interaction between counsel and expert witnesses with respect to draft expert reports.

At page 11 of Justice Wilson's Reasons for Decision in the *Moore* case in paragraphs 47 through 52, and in particular in paragraphs 50 and 51, she concludes "**that counsel's prior practice of reviewing draft reports should stop**" and that "**discussions or meetings between counsel and an expert to review and shape a draft report are no longer acceptable.**" The trial judge goes on to say that "**the practice of discussing draft reports with counsel is improper and undermines both the purpose of Rule 53.03 as well as the expert's credibility and neutrality.**"

It remains for the Court of Appeal and subsequent trial courts to expand on the meaning of "...shape a draft report...". The Holland Group should be taken to be clear that any involvement of counsel that creates bias or compromises the independence of experts runs afoul of best practices and one's obligation as an officer of the court. Having said that, it is the view of the Holland Group that proper and effective advocacy requires counsel to test and critically evaluate the views of experts in the preparation of their reports for the purposes of testimony in court. Moreover, with due respect to the Honourable trial judge in *Moore*, this important aspect of advocacy does not conflict with the expert's duty to the court, the need to maintain neutrality, or the changes to Rule 53.30 recommended by Coulter Osborne and adopted in the changes to the Rules.

The passages cited, however, if interpreted and followed literally, would have the effect of impairing normal, reasonable and prudent litigation practices, would substantially increase the cost of litigation, would do a disservice to the Court in terms of hearing fulsome, well-organized and appropriate evidence, and ultimately would result in a chilling and significantly restrictive effect on access to justice. Ultimately the expert will satisfy the duty owed to the court and the requirements of Rule 53.03 by ensuring that the opinions expressed are consistent with the expert's clinical experience; the opinions are compatible with prevailing medical thought in literature and elsewhere; and, the expert can truthfully express those opinions under oath. Interaction with the expert in no way impairs the ability of the opposite side to test the veracity or reliability of the opinions expressed in cross-examination.

There are compelling reasons to promote the interaction between counsel and experts in preparation of reports, provided that interaction does not in any way offend the overriding duty of the expert to the court. For example;

1. Experts must understand that the issues must be considered in the context of the legal burden of proof, rather than the scientific threshold to which they are accustomed;
2. Before proceedings are commenced, it is crucial to have a verbal consultation with the expert to explore the merits of proceeding. Were that prohibited, in cases with merit multiple experts would be required in every case, dramatically increasing costs and in cases without merit, plaintiffs would incur the unnecessary expense of obtaining a written report. These costs reduce access to justice.
3. Counsel must ensure that the conclusions of the expert are founded upon an accurate understanding of the facts and are clear as to any assumptions;

4. Counsel must be able to test the reliability of the opinion before proceeding with an action or defence on the basis of the opinion. Counsel are unable to advise their clients of the merit of the claim or defence if hampered in their ability to test the opinion appropriately.
5. Counsel should explore any possible alternate conclusions to those reached by the expert and explore with the expert how they might respond to different theories to test the reliability of the opinion;
6. Counsel must ensure that the expert's opinion has appropriately considered and will appropriately withstand the opinions offered by experts on the opposing side;
7. It is important to ensure that the expert's report is sufficiently comprehensive both to explain the expert's views and to consider all material information potentially impacting on the opinion;
8. It is critical to ensure that the expert's opinion emanates from the expert's specific field of expertise and that he or she has not given opinions beyond that expertise;
9. It is also critical to ensure that the expert does not purport to determine contested facts (other than in the rare instance where science or medicine enables the expert to do so) so as not to usurp the function of the court.
10. Part of the exercise of the dialogue with the expert is for counsel to assess whether the expert is articulate, cogent and will make a compelling witness at trial.

The Holland Group believes that by prohibiting review by counsel of experts' draft reports and prohibiting discussions between counsel and experts concerning draft reports, at least the following undesirable consequences will ensue:

- (a) expert reports will frequently prove to be less comprehensive and focussed than is currently the case (at least where best practices are followed);
- (b) both counsel and experts will be considerably hampered to provide and develop expert evidence which is intended to be (and normally is) helpful to the Court in understanding complex issues; and
- (c) in order to ensure that an expert report appropriately covers necessary issues and to an appropriate degree, counsel may be compelled to retain a "shadow" expert, with whom counsel can communicate (as has been done to this point with the single retained expert), or risk counsel and experts missing important issues. This will considerably increase the cost of litigation, and limit access to justice. It is contrary to the very clearly articulated objective of the judiciary that costs of litigation should not be excessive and should remain proportional.

The Holland Group believes that there will be numerous other adverse consequences if the passages cited in the *Moore* decision reflect the state of the law (arising from Rule 53 amendments seeking to ensure the objectivity of experts), and that ultimately the Court and members of the public will suffer in terms of fairness, cost and access to justice.

Best Practices

All members of the Holland Group engaged in medical malpractice litigation currently review draft expert reports and discuss draft expert reports with their authors, with a view to ensuring that the finished product appropriately serves the many purposes of an expert report, including notice to opposing counsel, a sufficient recitation of the factual underpinnings and assumptions within the report and an explanation concerning the specific details and basis for the expert's opinion. The Holland Group's very firm consensus is that such communications are necessary to achieve the important purposes set out above.

The members of the Holland Group unanimously agree that it is inappropriate for counsel to persuade or attempt to persuade experts to articulate opinions that they do not genuinely hold, and that it is of paramount importance that the expert genuinely believes the opinion that he or she articulates both in the expert report and in the witness box. In some circumstances additional opinions bearing on the particular case not already articulated by the expert should be put to the expert to determine whether such views are compatible with their expert opinion.

The test again being that the additional opinions can be honestly held while fulfilling their duty to the court and their obligations under Rule 53.03.

As such, the Holland Group unanimously and firmly supports the practice, which it believes to be in the category of best practices, of counsel reviewing draft reports and communicating with experts as necessary to ensure the delivery of appropriate expert reports.

Recommended Practices Pending Appeal of *Moore* Decision

Recognizing that the *Moore* decision, like any decision of the Superior Court, is entitled to careful consideration and respect, the unanimous view and recommendation of the members of the Holland Group is to continue the best practices described above pending a decision of the Ontario Court of Appeal in the *Moore* case. That is, Holland Group members intend to continue to review draft expert reports and to communicate with experts appropriately to ensure that expert reports filed in their cases are of high quality and ultimately of assistance to the parties and the Court.

Purported Justification of *Moore* Decision under Osborne Report

The *Moore* decision in part purports to justify its conclusions relative to counsel dealing with experts by reference to Justice Coulter Osborne's report *Civil Justice Reform Project: Summary of Findings & Recommendations*. As indicated, Coulter Osborne, in fact, currently leads the Holland Group (and has done so for a number of years). To the extent that the conclusions discussed above in the *Moore* decision purport to rely on Justice Osborne's report, it is Justice Osborne's view, shared unanimously by the members of the Holland Group, that the *Moore* decision misconstrues the findings in the report and reaches conclusions that were not intended in the report. **The changes to Rule 53.03 were intended to address concerns about bias in expert reports, but not stifle the important dialogue that occurs between counsel and experts.**

Intention of Holland Group to Intervene in Upcoming Appeal

Given its views described above, the Holland Group will seek leave to intervene in the upcoming appeal in the *Moore* case to express to the Court these views.