Holland Group – Best Practices

1. **Compliance With The Rules: While compliance with the Rules of Civil Procedure is obviously required, the Holland Group views the Rules as setting minimum standards, rather than best practices.** Counsel in medical negligence cases should work together to conduct litigation efficiently and effectively and the time limits and the "normal" steps in the Rules should not necessarily all be used in these cases. Instead, counsel should strive to get to the merits of every case while minimizing procedural battles.
2. **Case Management: Expanded case management should be considered in all medical negligence cases, particularly in complex matters**. It is expected that case management will bring many benefits to streamlining the action, including the avoidance of motions. Many case management meetings can be efficiently handled by telephone or video conference and should not require an attendance at Court. While judicial resources are not identical in each region, counsel should take advantage of all available opportunities to proactively advance cases. Given that the Court cannot identify matters requiring case management, it is up to the parties to make this determination.
3. **Avoidance/Elimination of Peripheral Defendants: Both sides should cooperate to identify and streamline any medical negligence case in order to reduce the number of defendants to those that are truly necessary.** In an ideal world, plaintiff's counsel will have a clear idea as to the "true" defendants at the outset of the case and only sue those defendants. Where the identity of the "true" defendants cannot really be determined prior to discovery, plaintiff's counsel should endeavor to streamline the litigation as soon as possible after discoveries are complete. Recognizing that the

plaintiff's counsel will necessarily frame the case, defence counsel should cooperate in narrowing the case as much as possible. If peripheral defendants are being released, the agreement needs to be clear that that the remaining defendants will not assert that the released defendants were negligent.

4. **Discovery Plans:** **Parties should make use of discovery plans and confer early in the action about production issues and organization of documents.** In particular, one party should assume responsibility for establishing a common numbering system, so that discoveries and all future steps proceed with common references. Defence counsel should assist, where possible, with obtaining information or transcriptions of illegible documents.

5. **Streamlining/Reducing Discoveries:** Counsel should consider a two-step discovery process where the apparently critical defendants are examined first, with a view to avoiding additional discoveries. Likewise, if plaintiff's counsel produces information about peripheral plaintiffs in advance (such as an FLA plaintiff with no evidence on liability who resides in another jurisdiction), oral examinations may be reduced or eliminated. **Discoveries themselves should be conducted as efficiently as possible and, in particular, a discovery on liability should rarely take more than two hours for any witness on either side.** While damages discoveries may take longer due to the amount of information required, counsel should endeavor to reduce these examinations as well, through the use of productions prior to discovery. Written discovery questions should be considered in relation to peripheral players and basic damages issues.

6. **Early Expert Assistance: Both sides should obtain early expert advice in order to identify and litigate only "true" issues.** Plaintiff's counsel should have some expert advice before even launching a claim, in order to give focus to the litigation and to avoid an overbroad action. Defence counsel should have some early expert advice, at least before discovery. Given the importance of causation to medical negligence cases, both sides should obtain early advice on this issue. These early retainers should be encouraged and should not result in procedural battles over whether one side or the other has "findings, opinions or conclusions" to produce.

7. **Early Delivery of Expert Reports: Expert reports should be delivered as early as possible following discoveries and, in particular, when counsel expects that the report will be relied upon.** While there may be occasions when counsel wants to wait to make that decision, depending on other reports, those occasions should be rare. Plaintiffs' counsel should recognize their obligation to frame the case and should deliver reports first in most cases. Correspondingly, Defence counsel should recognize their obligation, on receipt of Plaintiffs' reports, to respond in a timely manner. Both parties are responsible for expert evidence to be crystallized well in advance of any pre-trial or mediation. Thus, the 90 day/60 day standards in Rule 53.01(1) are minimum standards and do not reflect best practices. Moreover, parties should comply with Rule 53.03(2.2) and agree to a schedule for delivery of reports in accordance with that Rule.

8. **Early Consideration Of Damages And Proof Of Damages: The parties should have an early understanding of the foundations of the damages claim and the base reports (particularly with respect to future care costs) should be delivered early.** That said, the parties recognize that some damages evidence (ie. actuarial or accounting) can be left to later in the action, in order to avoid duplication or unnecessary costs. At trial, damages should be proved using the best evidence available, including

fact evidence from knowledgeable witnesses and, in particular, members of the plaintiff's treatment team. Counsel should be wary of experts providing omnibus opinions on damages that rely on hearsay. Moreover, damages experts should have qualifications that will withstand scrutiny.

9. **No Motions: Counsel should attempt to conduct all cases without the need for any motions.** While there will obviously be occasions when motions are required, the default setting should be to avoid all motions.

10. **Secure A Trial Date Early And Work To It: Both parties should deal with the court to secure the earliest possible trial dates and should work to those dates and not seek adjournments.** Adjournments of trial dates should only occur in relation to a substantive matter that cannot be addressed in the intervening time. Lawyer scheduling issues should not cause adjournments of these cases and it is incumbent on both sides to organize their trial schedules in a workable manner. Counsel on both sides should be open to evidence by video conference in appropriate cases, recognizing that attendance in person is preferred.

11. **Settlement Of Damages: In an ideal world, damages would be settled before any trial and counsel should work towards this result.** Where damages cannot be settled in their entirety, however, counsel should agree on those heads of damages that can be settled and eliminate those issues. No trial should proceed with all damages issues as live issues.

12. **The Right Number Of Experts: Only truly necessary experts should be retained and testify at a trial.** To the extent that counsel has retained extra experts, it is incumbent on counsel to identify for the other side if some of those experts will not be called. Such identification should occur early in order to reduce unnecessary preparation time. Consideration should also be given to the possibility of joint experts

on discrete damages issues. In short, duplication of experts and a multiplicity of experts should be avoided.

13. **Trial Management:** **Counsel should confer in advance of trial in relation to any and all trial management issues, with or without the assistance of a judge.** Counsel should strive to minimize the length of the trial and consider such things as agreed upon times for opening and closing statements and the elimination of oral testimony on issues that can be argued based on written documents or reports. The early appointment of the trial judge is to be encouraged and parties should meet with the trial judge in advance of the trial in order to address any anticipated issues. There should be an a chronology of important events, a joint book of documents, an agreement on authenticity, and a brief of the expert reports. There should be a discussion about any other potential exhibits. All briefs should be available for the Court electronically.
14. **Demonstrative Evidence:** A party wishing to make use of demonstrative aids should disclose those aids more than 30 days before trial. If the opposing party has an objection to that evidence, they should advise counsel more than 14 days before trial.
15. **Identification of Witnesses:** Parties should identify all of their proposed witnesses more than 2 weeks before trial. For any witnesses who have not been discovered or have not delivered an expert report, parties should provide a summary of their anticipated evidence, also more than 2 weeks before trial.
16. **Efficient Examinations:** **Direct examinations and cross-examinations should be efficient and witnesses should not be in the witness box for many days.** While there will be exceptions for major fact witnesses or experts, the vast majority of witnesses should be completed in three hours or less. While it is recognized that oral direct examination is valuable and should be the normal approach, there may be

occasions when affidavits or expert reports can be substituted for the direct examination and counsel should keep this opportunity to shorten the case in mind.

17. **Written Argument and Immediate Closings:** Each side should provide a written argument at the conclusion of the evidence and be prepared to make oral arguments immediately. Delays increase the cost and take away from the immediate impact of the evidence. When a trial starts, it should be moved rapidly towards a conclusion.
18. **Maximize The Use Of The Court Day:** Counsel should plan to put a new witness in the box immediately on the completion of the prior witness. Leisurely schedules (one witness a day, with the evidence ending at 3:00) may be easier to manage but they are not efficient. We need to maximize the precious Court time that the system provides.
19. **Agreed Statements Of Facts:** Every case includes many undisputed facts. Those facts should be agreed upon and memorialized in advance.
20. **Expert Witness Objections Should be Identified:** If a party wishes to challenge the admissibility of an expert witness or to reduce the scope of the testimony, these concerns need to be raised as early as possible in advance of trial. The objecting party should identify the nature of the objection and give the other side the opportunity to respond or to replace the expert. If an issue of this kind needs to be argued, it should be identified for the court by the time of the pre-trial.
21. **Organization Of Medical Records And Section 35/52 Issues:** Rarely is there a dispute about the relevant primary records. Counsel should agree on one party preparing court copies and the cost should be shared. Counsel should work together so that the records are presented in a sensible order and manner for the court. If there are issues about opinions contained in the primary records, those issues need to be identified and sorted out prior to trial. If particular points need to be argued, the impugned records should be marked and identified as containing disputed text.

22. **Expanded ADR:** Counsel should canvass opportunities for ADR (both mediation and, perhaps, arbitration) on an ongoing basis (at appropriate stages and when relevant information has been obtained). ADR should not be considered as only a route to the settlement of the entire action and should be used to narrow issues and to prioritize items in dispute. That said, ADR should not be used automatically and it should only be employed when the parties feel that it will assist in advancing the matter. Private arbitration to resolve a case, or specific issues, may be worthy of consideration in certain situations.