COMMON EXPERTS IN MEDICAL MALPRACTICE ACTIONS:

Try it, You'll Like It!

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Medical malpractice litigation in Canada used to be a relatively tame pastime. Then came no-fault motor vehicle insurance, growth in the size of the legal profession and the perception/reality of healthcare cut-backs. In the last 10 years, my firms's client, the Healthcare Insurance Reciprocal of Canada, a not-for-profit reciprocal that provides indemnity for malpractice claims to a number of health facilitites across Canada, has experienced a significant rise in the number of claims.

However, it is not easy to succeed on behalf of a patient in a medical malpractice claim. Of the 2077 claims advanced by patients since HIROC's inception in 1987 and not passed on to counsel, payments were made in only 146. Of the 1828 claims referred to HIROC's lawyers, payments were made in only 296.

Failure is a virtual foregone conclusion unless the patient can lead evidence from a qualified expert who is prepared to express an unequivocal opinion that the treatment provided fell below a reasonable standard of care. Even then, patients and their lawyers can be assured that the defendants have enormous resources and first-rate connections to identify and retain experts who will give contradictory opinions. Those who work in this area on a regular basis will probably agree that 1) cases in which there is clear medical negligence usually settle relatively early; 2) cases in which the medical negligence is not clear will be vigorously defended and are in many ways a crap shoot.

Who is an Expert?

The purpose of the expert is to provide

> *...basic information to the court necessary for its understanding of the scientific or technical issues involved in the case. In addition, because the court alone is incapable of drawing the necessary inferences from the technical facts presented, an expert is allowed to state his*

> *opinion and conclusions. His usefulness in this respect is circumscribed by the limits of his own knowledge*[0].

In *Regina* v. *Abbey,* the Right Honourable Brian Dickson stated that

> *With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate*[2].

In the case of a medical expert, the expert "...does not establish facts like the usual witness, but expresses an opinion on the health of the patient from the symptoms observed or from facts related by the patient. The opinion in turn is based upon the doctor's special knowledge and training in the subject about which he will testify. While the court may not have the ability to form a medical opinion, the final decision lies with the court or jury to accept or reject the medical opinion[3]."

Limits on How Many Experts are Retained

The cost of retaining an expert represents a significant component of the cost of medical malpractice litigation. For many plaintiffs, the prohibitive cost associated with retaining experts may limit how many experts are retained. Limits on expert witnesses are not only based on economics. Section 12 of the *Evidence Act* states:

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2. [0] John Sopinka and Sidney Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974).

[2] [1982] D.L.R. (3d) 202 (QL).

[3] Arthur J. Meagher, Q.C., Peter J. Marr & Ronald A. Meagher, *Doctors and Hospitals: Legal Duties* (Toronto; Butterworths, 1991).

> *Where it is intended by a party to examine as witnesses persons entitled, according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon either side without the leave of the judge or other person presiding*[4].

However, it is not unusual in a medical malpractice case for more than three experts to testify. There may be experts on more than one aspect of liability. For example, in an obstetrical case, a nurse may testify on the obstetrical standard of care of the nurses, an obstetrician may testify on the obstetrical standard of care of an obstetrician, there may be an expert with respect to resuscitative attempts by the anaesthetist following delivery and there may be another expert who will examine the conduct of the paediatrician who cared for the infant plaintiff. Parties may call competing experts and deliver follow up reports. In many cases, a court will be prepared to hear from more than one expert per side in relation to a specific liability issue.

It is also quite common in a medical malpractice case to have experts on the issue of causation, i.e. did the alleged negligence cause or contribute to the complaints made by the patient in the litigation? Another dimension of causation may be the issue of informed consent, i.e. did the alleged failure to inform the patient of a material risk cause or contribute to the damages? In other words, would the patient have consented to the procedure even if the material risk had been explained?

Lastly, there is the issue of damages. This is an aspect of the evidence that is quite familiar to personal injury practitioners. We all know that the list of damages experts can seem endless: rehab, housing, life expectancy, occupational therapy, actuaries, economists, home care etc.

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[4] R.S.O. 1990, c. E23.

In a complicated medical malpractice proceeding, it is not uncommon to have somewhere between ten and twenty experts testify. Even in what seems, from the start, to be a relatively straightforward medical malpractice case, the growth in the number of experts and the number of opinions can seem diabolical.

Choosing the Appropriate Expert

One cannot overstress the importance of selecting and adequately instructing the appropriate expert witness. It is not adequate to simply send to an expert written materials upon which he or she will render a report. Many witnesses, even those who have been involved in court proceedings before, will need instruction, or at least a refresher, on what they are being asked to do. Rendering an opinion on the standard of care in a malpractice proceeding is quite different than preparing a report designed to show a history, diagnosis and prognosis for a particular patient. The principles are much different and the expert must understand, at law, what he or she is being asked to do.

In my experience, many experts who have been retained on behalf of patients do not appreciate that he or she must be prepared to testify, under oath, that a fellow practitioner has practised below a reasonable standard of care. In some cases, experts will make oral comments that are critical of a health practitioner's practice, but be disinclined to use the same language in a written report. In other cases, an expert will use language that is critical, but will fail to say the magic words: "Dr. X fell below a reasonable standard of care". In some instances, an expert report will state the magic words, but the expert will not understand their true meaning. This may come out in cross-examination when the expert agrees that there are other respected professionals who abide by a different standard that is equally acceptable.

While it is inappropriate, in my view, for counsel to ghost-write an expert's report, it is not

inappropriate for counsel to meet with an expert and ensure that the expert is apprised of all the material facts, that the expert understands the medical and legal implications of the opinion being sought and that the written product is an accurate reflection of the expert's evidence, and lastly, that the evidence is of a sufficient kind and quality to meet the threshold for proving medical negligence.

No one should doubt that some experts are better than other experts. The ability to explain complex concepts to a judge or jury and the willingness to devote a sufficient amount of time to the flurry of activity that is going to occur close to the time of trial are absolute prerequisites. Retaining an expert with the right temperament is almost as important as retaining an expert with the right opinion.

Sometimes mistakes are made when the expert retained is not in a position to opine on the appropriate standard of care. Can an orthopaedic surgeon comment upon the standard of care exercised by a family physician who sees a patient in the emergency department with a broken leg? Can an obstetrician comment on the standard of care exercised by a family physician who delivers babies as a part of his practice? Can a surgeon comment on the standard of care of a surgical nurse? In *Robinson* v. *Sisters of St. Joseph of the Diocese of Peterborough in Ontario*, it was held that:

> *There is no general rule that a specialist can offer an opinion as to the applicable standard of care governing medical treatment provided by a general practitioner or that the specialist cannot offer an opinion as to whether the general practitioner met the applicable standard. The admissibility of the specialist's opinion depends on the subject matter in which that opinion is offered and the specialist training and experience, surely, there are treatments and procedures which are common to the practices of general practitioners and specialists alike.*[5]

[5] *Robinson* v. *Sisters of St. Joseph of the Diocese of Peterborough in Ontario*.[1999], O.J. No. 530 (Ont. C.A.) (Q.L.).

In effect, there may be overlap between certain practice areas. However, even this, in a hotly-contested medical malpractice case, will be controversial. The best practice, in my view, is to make sure, at the beginning, that the expert retained to comment on the standard of care is the best possible match for the practitioner whose conduct is the subject of criticism.

The 90 and 60 Day Rules

Rule 53.03 (1) of the *Rules of Civil Procedure* stipulates that a party who intends to call an expert witness at trial shall serve, not less than 90 days before the commencement of trial, a report signed by the expert. Rule 53.03 (2) of the Rules stipulates that a party who intends to call an expert witness at trial to respond to the expert witness of another party shall serve, not less than 60 days before the commencement of trial, a written report.

This is a relatively recent rule. Until several years ago, a party could deliver expert reports ten days before trial. Last minute delivery of expert reports ten days before trial often in resulted in an adjournment as it was impossible to respond at the last minute to the multitude of expert reports one one or both sides often encountered. The new rule was designed to ensure that expert reports were delivered long before trial to promote settlement and to allow proper preparation for trial. However, this continues to be an area in which there is a practice-based override to the contents of the rule. First, it remains unclear as to what is a 90 day report and what is a 60 day report. Does the plaintiff have an obligation to deliver reports 90 days before trial so that the defendants can respond 60 days before trial? Many defence lawyers think that since the onus is on the plaintiff to prove malpractice, the plaintiff should lay down its cards first so that the defence can decide whether to fold or call. Many judges and counsel think there ought to be an “exchange” of reports so that the plaintiff will not be disadvantaged by having its reports scrutinized by the defence before their experts commit themselves. In practice, the late delivery of reports usually leads to a situation in which counsel can either elect to proceed with the late reports or have the trial adjourned. Although the trial may be adjourned

with an order of costs against the delinquent party, most counsel recognize that any award of costs is unlikely to compensate their client for the costs that will be incurred in having the trial adjourned, and for that matter, the disappointment of not proceeding after waiting many years and gearing up to do so. On a practical basis, it is not unusual for the trial to go forward with late reports and have counsel delivering reports and responding reports up to and into trial.

When to Retain an Expert?

For plaintiff's counsel, there is a single, unassailable answer: before you do practically anything else. For defendants, the answer may not be any different, although in many cases, they have the luxury of their clients' insight into the issues of medical negligence that arise in the case. Almost every action for medical malpractice will be won or lost on the issue of expert evidence. To incur the cost of commencing an action and proceeding to examinations for discovery, without the benefit of expert advice, is nothing other than poor lawyering. While the lawyer may have expertise in the law, he or she is unlikely to have medical expertise. Too often, as defence counsel, we see cases in which a plaintiff has commenced an action, carried out lengthy examinations for discovery and set the action down for trial without having a workable expert opinion in hand. In my view, even if there are certain facts which will not be known until examinations for discovery have taken place, sitting down with an expert and canvassing the type of questions that need to be asked and potential areas of vulnerability or strength in the defence is invaluable. In many cases, all of the material facts are contained in the medical records and one will learn very little at discovery that one does not already know. In those cases, early consultation with an expert is paramount. To be the unwitting victim of a medical misadventure that occurred without negligence is the product of bad luck. To be the plaintiff in a

medical malpractice action in which there was a medical misadventure, but no negligence, is the product of bad advice.

Privilege

Rule 31.06 of the *Rules of Civil Procedure* provides that a party at discovery may obtain disclosure of the "findings, opinions and conclusions of an expert" unless the findings opinions and conclusions were made or formed in the context of the litigation and a party being examined undertakes not to call the expert as a witness at trial.

My strong impression, for which I have no empirical data, but which I feel confident is correct, is that this Rule is more honoured in the breach of it. The usual, response, from both plaintiff and defence counsel, to the question as to whether there are any findings, opinions and conclusions of an expert are

- "Nothing formal."
- We have consulted an expert, but have no opinion.
- I will provide my expert opinions when you provide yours.
- I will take that under advisement.
- Nothing in writing.

None of these answers is responsive to the Rule or the question. It is unfortunate, in my view, that the Rule does not seem to have its desired effect as I believe it would focus discovery and lead to an early resolution of meritorious and unmeritorious claims.

An Attractive Alternative

The “duel of experts” is an unfortunate aspect of medical malpractice litigation. In many cases, the experts are known to one another. Their views deviate slightly if at all in relation to what constitutes a reasonable standard of care. There are many experts who are well known to both plaintiffs and defence counsel and who are considered ethical and objective by both sides and who would be prepared, if properly instructed, to provide a neutral evaluation on the issue of liability, damages and causation. Particularly with the assessment of damages, there is a significant amount of duplication in the production of competing expert reports. Even if there are strong differences in relation to certain aspects of a damages claim, many other aspects can be settled and the compromise on both sides to arrive at a “reasonable figure” may cost less, in the long run, than a long run-running battle to achieve a result that is at one or the other end of a range. In most cases, a trial judge is going to find the middle of the range. This is something that a respected expert, who is instructed to provide a neutral evaluation, can do early on and at far less expense.

One initiative that has been proposed by the Holland Access to Justice in Medical Malpractice Group is the use of common experts, particularly in relation to damages issues. The Holland Group recognizes that the increasing costs of medical malpractice litigation in recent years is attributable, at least in part, to the ever greater amount of time and money devoted to obtaining leading expert evidence with respect to damages issues. Counsel who act for both plaintiffs and defendants recognize that in each area of damages determination, there are several Canadian experts who, by reason of their experience, expertise and integrity, are retained on behalf of both plaintiffs and defendants and whose opinions are respected equally by both sides.

In that light, the Holland Group has suggested that plaintiffs and defendants in medical malpractice litigation should consider the joint retention of damages experts who will provide an opinion that is neutral and fair to both sides. The characteristics of such a retainer has been summarized in the following Statement of Principles:

b. in assessing damages, priority must be given to ensuring that the plaintiffs' reasonable needs will be met;

c. the ability of the medical community in particular and of society in general to provide funding to provide funding to compensate plaintiffs in medical malpractice litigation is inevitably finite, with the result that Panel experts must, in complying with principle a., bear in mind factors of cost efficiency;

d. experts must devote sufficient time and expense to each retainer to ensure that their reports are as accurate and complete as reasonably possible, however, those experts are also expected to bear in mind the fact that the entire purpose of this exercise is to reduce the cost of medical malpractice litigation;

e. experts should devote a high level of priority to medical malpractice damages retainers and should provide reports pursuant to those retainers as promptly as reasonably possible;

f. subject to the above-noted principles, an expert who provides services at relatively low cost will be preferred over one who does not.

In summary, it is the expectation that experts who are jointly retained will provide "competent, complete and intellectually honest reports in a timely and cost-effective manner". At the present time, the Holland Group is attempting to identify and to make available a list of experts who are considered by leading members of the plaintiffs and defence bar to be neutral and appropriate experts for a joint retainer. It is anticipated that these experts will be identified shortly on the Holland Group website

(www.theHollandGroup.org) This is only one of a number of initiatives contemplated by the Holland Group and designed to achieve increased access to justice and equitable, affordable and timely resolutions.

It has also been suggested that, in due course, once a workable system is in place in relation to the joint retainer of damages experts, that a similar "bank of experts" can be developed and used in the areas of liability and causation.

Attached as Schedule "A" to this paper is a statement of principles applicable to damages experts in medical malpractice litigation along with standard form terms and confirmation of engagement. This form is also available on the Holland Group website.

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SCHEDULE "A"

Statement of Principles Applicable to Damages Experts in Medical Malpractice Litigation

It has become clear that the increasing cost of medical malpractice litigation in recent years is attributable, at least in part, to the ever greater amount of time and money devoted to obtaining and leading expert evidence with respect to damages issues. Furthermore, the clients and lawyers involved on a consistent basis in medical malpractice litigation have come to realise that in each area of damages determination, there are several Canadian experts who, by reason of their experience, expertise, and integrity, are retained on behalf of both plaintiffs and defendants, and whose opinions are respected equally by both sides.

Discussions among clients and lawyers representing both plaintiffs and defendants in medical malpractice litigation have led to a recognition that the experts generally acceptable to both sides exhibit certain characteristics that give credibility to their opinions and efficiency to their retainers. These characteristics can be summarised in the following Statement of Principles:

a. in assessing damages, priority must be given to ensuring that the plaintiffs' reasonable needs will be met;

b. the ability of the medical community in particular and of society in general to provide funding to compensate plaintiffs in medical malpractice litigation is inevitably finite, with the result that Panel experts must, in complying with principle (a), bear in mind factors of cost efficiency;

c. experts must devote sufficient time and expense to each retainer to ensure that their reports are as accurate and complete as reasonably possible, however, those experts are also expected to bear in mind the fact that the entire purpose of this exercise is to reduce the cost of medical malpractice litigation;

d. experts should devote a high level of priority to medical malpractice damages retainers and should provide reports pursuant to those retainers as promptly as reasonably possible;

e. subject to the above-noted principles, an expert who provides services at relatively low cost will be preferred over one who does not.

By way of summary, counsel retaining damages experts in medical malpractice litigation expect that those experts will provide competent, complete and intellectually honest reports in a timely and cost-effective manner.

Terms and Confirmation of Engagement

I confirm that I am retaining you on behalf of _____ to provide an expert opinion and, if requested, an expert report, with respect to [field of expertise] in the above-noted manner.

I further confirm that this retainer is expressly subject to your agreement to abide by the Statement of Principles above. You should assume that your failure to comply fully and fairly with these Principles will result in the termination of this retainer.

Finally, I confirm that you will bill your services with respect to this retainer on the basis of _____ .

Please sign one copy of this letter in the space indicated below and return it to _____ to confirm your acceptance of the terms of this retainer.

_____ _____

Date [Name of Counsel]

I hereby accept this retainer and agree to comply with the terms of the retainer as described above.

_____	_____
Date	[Name of Expert]