Meritorious Claims

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INTRODUCTION

The Holland Group was born largely out of frustration. In 1990 the *Prichard Report* made a number of important findings and expressed the view that absent significant reform in medical malpractice litigation, there would be a crisis in the health care system warranting radical reform. As the *Prichard Report* pointed out to the Deputy Ministers of Health,

> "By acting now, you enjoy access to more promising policy options, options that will grow more expensive and more difficult or even be foreclosed with the passage of time. You have the relative luxury of intervening before the full force of a liability crisis burdens the Canadian health care system, a luxury that will be remembered with nostalgia if you permit the opportunity to pass."

The frustration of which I spoke a moment ago was born out of the fact that most of the recommendations made in the *Prichard Report* have not been acted upon.

Two of the principal findings of the *Prichard Report* bear repeating because it is these two findings that the Holland Group seeks to address by changing the culture of the conduct of medical malpractice litigation.

1. "When account is taken of all of the legal fees, the costs of the court system, and the time and energy of everyone concerned with the litigation, in excess of 50% of all the money spent on malpractice goes to the expenses of litigation and not to the injured patients for the purposes of compensation."

1. " ... It is clear that the current malpractice litigation system is providing redress for only a modest percentage of the persons suffering medical injury and requiring compensation. I estimate that the percentage receiving compensation is certainly less than 10% of potential viable claims."

The Holland Group

R.E. Holland was a speaker at a 1998 Canadian Medical Protective Association Conference on Tort Reform and following the conference a number of defence and plaintiff's lawyers were expressing their frustration over access to justice issues and inaction on important tort reforms recommended by the *Prichard Report*. Someone casually mentioned that interested lawyers should meet to discuss and promote reform in this area before, as Robert Prichard put it, "that opportunity was permitted to pass".

The Culture of Medical Malpractice Litigation

The frustration expressed in the conversation following the conference might have remained unacted upon were it not for the kind offer made by R.E. Holland to not only become involved in the project but to act as host for the several meetings that we have now held. The culture of Medical Malpractice litigation was formed in the face of Rules that dictated service of expert reports ten days before trial. The practice too frequently was to withhold expert reports until the last minute. Although the Rules have been changed to require that expert reports be delivered 90 days before trial with reply reports 60 days before trial, the fact remains that there is a reluctance to deliver reports before the Rules dictate. The *Evidence Act* (Section 52(2)) still speaks to a 10 day notice Rule for filing medical reports and this provision has not been brought into step with Rule 53.

We recognize that to change the culture of last minute filing of expert and medical reports, we have to be committed to change in the public interest and we have to have a forum to continue the dialogue.

I should emphasize that while the committee has reached consensus on a number of issues that will be discussed today, where Medical Protective concludes that they have a viable defence, they will continue to defend those cases vigorously. The real question that we are addressing is how we can identify meritorious cases early in the litigation process and find ways to address those cases through the techniques of the Joint-Medical Opinion, mediation in combination with arbitration and generally reducing the costs of trials that cannot be resolved by limiting the issues to be tried by focussing on the real issues in dispute and in appropriate cases bifurcating trials.

The Battle of Experts

If there is any one initiative that holds considerable promise, it is in the area of expert evidence. In typical medical malpractice actions there are often two to three experts tendered on each of the contested liability and damage issues. It seems that for every expert one side calls, there is an expert who will contest that opinion available to the other side! We have greatly complicated and increased the expense of trials with the approach to expert evidence that seems to prevail currently.

The expert as a forensic advocate approach can best be illustrated by reference to an Australian case that was the subject of a book and later a movie by the title of "A Cry in the Dark". A young minister and his wife and newborn infant were camping not far from Ayers Rock. The parents stated that while they were at the campfire they saw a dingo enter the tent where they had placed the baby. The baby was not found and an inquest was held at which the version of events given by the parents was accepted. The prosecutor on that case found the parents who belonged to a fringe religious sect to be strange in the extreme and he believed that they had murdered their own child. The prosecutor was attending a legal conference in England and decided to take some of the evidence from the case for the purpose of obtaining an expert opinion on the question of whether or not the dingo could have carried the baby from the tent in its jaws. The forensic expert retained opined that it would not have been physically possible for a dingo to do what the parents alleged had been done and as the case went forward, expert evidence on the jaw structure of the dingo and the habits of the dingo were called at trial with the result that the mother was convicted. Appeals were taken to the Supreme Court of Australia without result. After all of the appeals had been exhausted, hikers at the base of Ayers Rock happened upon a dingo lair where they discovered the blanket that the baby had been wrapped in and some of the clothing. A further hearing before the Supreme Court of Australia resulted in the charges against the mother being withdrawn.

In another case here in Ontario, an expert witness from England was testifying on an infant compromise case. On cross-examination defence counsel asked to see the file that the expert had brought with him to the stand and discovered in that file another earlier opinion that was diametrically opposed to the opinion upon which he was testifying. In the latter case, the doctor felt justified in giving his opinion to the court because it was a "logically defensible" opinion even though it might not have been his personal opinion as to what had happened in the case. We hope through our initiative on the Joint Medical Opinion to see, to some extent at least, a return to a culture that sees an expert witness as independent, unbiased and providing an opinion which he or she believes is the correct opinion on the facts.

The Joint Medical Opinion

In appropriate cases and for appropriate issues, we recommend that the parties identify an expert in whom both sides have confidence and who would subscribe to the statement of principles set out in the Newsletter which you will have received.

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 damage issues. Furthermore, the clients and lawyers involved in 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 which 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, but 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]**

As part of this process, the Holland Group is trying to identify experts in various specialties who have the confidence of both the plaintiff's bar and the defence bar and would be prepared to accept such retainers. We are suggesting that we start modestly with damage issues such as future care costs and life expectancy and similar issues. We hope that with success in these damage areas parties will feel confident enough to apply the joint expert approach to the ultimate liability issues. As we stated in our Newsletter, we need your help to identify witnesses who have the expertise and credibility and who would be prepared to provide joint reports in accordance with the principles outlined.

Use of the Joint Report

Although we would hope that the production of a Joint Report would see the parties act on that joint opinion, it is recognized that the parties would reserve the right to challenge that report through other expert evidence. Obviously the party in whose favour the opinion has been rendered will see that the Joint Report is before the court including the fact that the Report was produced on joint instructions and with both parties sharing the cost of the report.

From the plaintiff's perspective, it is important that the client understands and agrees with the joint retainer process. I would recommend written instructions on this point. We would anticipate that many cases, or issues within cases, could be resolved through this joint retainer approach.

Before returning to the identification of the meritorious case which would see this process employed, there are some cautions that should be discussed. There are some cases where an opinion can be usefully provided from the medical records alone. In this category would fall opinions on life expectancy and where the record is considered to be complete an opinion in liability might even be proffered. However there are many cases where a Joint Opinion should not be sought until the facts have been developed through examinations for discovery.

Joint instructions will not be without their difficulty but as we move forward with this process, I am confident that we will develop the requisite skills to see us achieve significant savings in both experts' fees and legal fees.

Early Identification of Cases Capable of Resolution

There are many cases where the facts speak clearly and where plaintiff's counsel have an early competent opinion that speaks to a breach of a standard of care and to causation. I have always believed that counsel owe their clients the obligation to speak to opposing counsel early in the case to identify those cases which are amenable to settlement an those that are not. Because of limitation problems which you will hear more about later in the program, often claims are issued of necessity before their has been time to seek out a medical opinion on the question of standard of care and causation. Indeed, there are many cases which are begun for this and other reasons that languish for considerable periods of time and cause considerable anxiety and frustration. It makes no sense having unmeritorious claims cluttering up the system and it may well be that the Joint Medical Opinion would see many of these cases cleared from the lists at a

much earlier stage. Indeed, in cases that we have commenced to protect a limitation period, and then have obtained a subsequent opinion to the effect that the case lacks merit, we have offered to settle the case on a dismissal without costs basis.

Mediation in Combination with Arbitration

How many times have you gone to a mediation having spent considerable time and effort in preparing your mediation brief only to find out that the other side was not sufficiently committed to the process and you come away with the sense that all you have done is increase the expense of the action and armed your opponent. We believe that a useful way to obtain the appropriate commitment to the mediation process would be to agree at the front end that if mediation were not successful, the case would then be arbitrated. In this manner, not only do you obtain a sufficient commitment to the process but you are assured of a way to resolve the matter in a timely fashion should mediation fail.

Bifurcation

Not in every case, but in appropriate cases, bifurcation makes sense in terms of costs savings. Where the real issue is liability but where the damage work-up might take several experts and several weeks at trial, does it not make sense to bifurcate the trial and try out the real issue leaving damages to be resolved by mediation and arbitration? An agreement as to how damages could be resolved, if necessary, could be agreed to as part of the Agreement to Bifurcate.

Conclusion

While recognizing that it is difficult to change the culture of medical malpractice litigation, we believe that dialogue between plaintiff's bar and the defense bar can, and will, effect meaningful reform, cost savings and increased access to justice. The consensus that has been achieved in the Holland Group to date is very encouraging.

The stakes are high. As the Prichard Report stated, the failure to act may see changes imposed that no one will like.

CSR/ac
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"MERITORIOUS CLAIMS"

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