HOLLAND GROUP

Access to Justice in Medical Malpractice

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Genesis of the Group

The Holland Access to Justice in Medical Malpractice Group promotes reforms in medical malpractice that will provide increased access to justice and equitable, affordable and timely resolutions.

The Group is founded upon the Prichard Report, proceedings of the 1998 Canadian Medical Protective Association Conference on Tort Reform, and papers on subject prepared by Margaret Ross.

In the fall of 1998, Robert Prichard and the Honourable R.E. Holland spoke at the Canadian Medical Protective Association conference about meaningful reform in the handling of medical malpractice. Members of both the Plaintiffs' Bar and the Defence Bar attending the conference expressed their overwhelming consensus that such reform was necessary if the public interest was to be served.

Following the conference, Mr. Holland kindly offered to host a meeting of concerned practitioners from both the Plaintiffs' and Defence Bars; as a result, the Holland Group was formed.

The Group has met several times to discuss the obstacles to equitable, affordable, and timely resolutions of medical malpractice claims. Several key themes have emerged, a few of which are discussed in this newsletter:

- future care costs settlements
- the cost and use of experts in litigation
- OHIP subrogation rights
- contingency fees
- limitation periods
- collection of collateral benefits
- early resolution of meritorious claims, and
- culture of malpractice litigation.

Civil Litigation – Medical Malpractice Law Seminar

Presented by the Holland Group, with the support of
CBAO (Health Law Section) & the Medico-Legal Society

30 November 2000, 9:00 a.m. to 4:30 p.m.
200 – 20 Toronto St. , Toronto

- The present state of the law and a code of tort reform for counsel involved in medical malpractice and hospital/healthcare litigation.
- A code of conduct to govern counsel and their principals in the prosecution, settlement, or trial of medical malpractice cases.

See page 4 to request more information.

Future Care Costs

Typically, malpractice awards are increased to compensate for income tax deducted from the investments made with the award, such investments being made in order to ensure that future care costs are payable. The Holland Group believes that such gross ups should be eliminated, in a manner that does not adversely affect injured Plaintiffs.

The Group has suggested the most intelligent approach to this problem would be to lobby for tax reform that would see income tax eliminated from income on sums invested to protect an injured claimant's future care. Although it was recognised that the best way to deal with the problem is legislative reform, we are not prepared to wait for such reform.

To eliminate the substantial added cost of a "gross up" without unfairly impacting on the Plaintiff's care, the Group has suggested the following methods of dealing with the added cost of gross up:

- utilize structure settlements for future care costs in all appropriate cases;
- index structures for future care costs in an appropriate and balanced manner in order to protect the purchasing power of the funds awarded for the care costs; and,
- assign the cost of guaranteeing the structure to those who will benefit from such guarantee.

Some concern has been expressed that given that health care costs are rising faster than the CPI, indexing future care costs to CPI might be unfair to Plaintiffs. The matter of structured settlements and indexing for future care costs is being explored by the Group.

Use of Experts

The cost of hiring opposing experts to address subjects such as future care costs and life expectancy can inordinately escalate the cost of litigation for all parties. Using one expert approved by both Plaintiff's and Defendant's counsel could reduce the costs. These experts, one of whom would be chosen by *both* parties to an action, would provide an opinion based upon joint instruction, and be paid jointly by both parties.

We would like to be able to provide a list of experts to other members of the Bar as experts amenable to working objectively for all parties. While there would be no obligation to hire experts listed on the panel, counsel who chose to do so would be assured that the expert would approach the assessment and report in a non-partisan manner.

To prepare this panel, we are seeking experts in the following categories:

- physiatry;
- neurosurgery, neurology, and paediatric neurology;
- orthopaedics;
- paediatrics;
- psychiatry;
- housing;
- economics;
- actuarial analysis in future care and life expectancy; and
- occupational, physical, and speech-language therapy.

We encourage you to contact us if you have worked with an expert whom you believe is non-partisan, or if you are an expert, and would provide an opinion based upon joint instruction. Please submit your recommendation jointly with a member of the opposing Bar. Our contact information is on the last page of this newsletter.

Choosing an Expert Witness

- The witness must have full qualifications in the area in which s/he is giving an opinion.
- The witness must have credibility with respect to his or her knowledge among his or her peers, proved, for example, by relevant research published in peer reviewed journals, by ongoing continuing education, and by quality assurance activities.
- In most circumstances, the witness should still be practising in that area, should show evidence of being familiar with the current relevant literature, and should have a reasonable understanding of the local conditions and facilities at the time of the incident in question.
- The witness should be able to refrain from giving specific opinions outside of his or her expertise. Experts should be able to advise: *(a)* of the spectrum of care considered reasonable by their profession at the time of the incident in question; and *(b)* of all the options in any clinical situation rather than only of the ideal option in the best of circumstances with the advantage of hindsight.
- A witness should not be an advocate for either party but should advise and educate on the scientific and clinical validity or otherwise of the evidence.

Adopted from Alastair MacLennan for the International Cerebral Palsy Task Force, "A Template for Defining a Causal Relation between Acute Intrapartum Events and Cerebral Palsy: International Consensus Statement" (1999) 319 British Medical Journal 1054.

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]

OHIP Subrogation

The Ontario provincial government, supported by federal grants, funds the health care system and, therefore, physicians' salaries and by extension, CMPA premiums.

For this reason, an argument can be advanced for dispensing with OHIP subrogation rights; that is, the right to require that an award include repayment of costs incurred by OHIP in providing medical care secondary to the tort. Such repayment raises the amount of the awards, and thus the premiums paid by physicians, which, in effect, are paid by the same provincial government that is seeking repayment.

Members of the Group have been writing letters to the provincial government and meeting with various representatives with the hope of convincing the Ontario government to abandon OHIP subrogation rights.We will keep you informed of any progress.

Statement of Principles

The Statement of Principles on page 3 of this newsletter has been developed by the Group as a list of recommended principles to which all damage experts retained jointly by counsel are expected to adhere. Counsel are invited and encouraged to use the principles and terms of engagement in whatever manner suits their purposes best.

Similar principles are being developed for retaining experts in causation and liability. Future editions of this newsletter will include those documents.

For more information, contact:

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or visit our website at http://www.TheHollandGroup.org

The Culture of Medical Malpractice Litigation

A defensive attitude exists in medical malpractice, and understandably so. Where other types of professional malpractice may revolve around issues of money, medical malpractice revolves around professional reputation and a potential link between legal actions and a physician's mobility rights and hospital privileges. Unfortunately, the cost of medical malpractice cases will continue to escalate and affect all parties unless coordinated efforts are made to identify and minimize those costs.

The Holland Group has started this newsletter and offers the upcoming CBAO seminar (see page 1) with the belief that the culture of medical malpractice litigation *can* change. Please help us with this project: share this newsletter with colleagues, attend our seminar, and join our mailing list (form below).

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To receive further information about the upcoming seminar and to receive future editions of the newsletter, please join our mailing list. Complete the following and send by mail or e-mail to: Project Co-ordinator, Holland Group, 11 Balaclava St., Kingston, ON, K7K 1J4, or via email to kmweisbaum@sympatico.ca.

NAME ....

FIRM/ORGANISATION ....

ADDRESS ....

TELEPHONE ....

FACSIMILE ....

E-MAIL ....

AREA OF PRACTICE ....