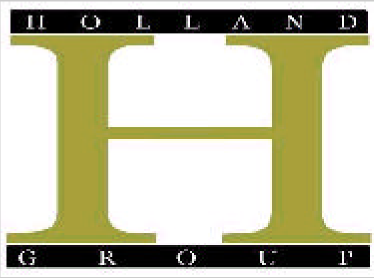
WINTER 2001



HOLLAND GROUP

Access to Justice in Medical Malpractice

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McCarthy Tétrault

Paul M. Mann
Barrister & Solicitor

John McLeish
McLeish & Associates

John Morris
Borden Ladner Gervais

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Lerner & Associates

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Oatley Purser

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Siskind, Cromarty, Ivey & Dowler

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Robert Roth
Sommers & Roth

Michael Royce
Lenczner Slaght Royce
Smith Griffin

Rino Stradiotto
Borden Ladner Gervais

In This Issue: Medical Malpractice, Liability and Damages

As part of the Canadian Bar Association of Ontario Continuing Legal Education Program, members of the Holland Group participated in a seminar on November 30th, 2000 entitled "Medical Malpractice: Liability and Damages." In a number of presentations to well over 100 attendees, Group members continued to highlight the need for change in the culture of medical malpractice litigation. This newsletter provides a sample of the specific topics addressed by Holland Group members and other presenters at the seminar. The full text of each paper is available on our website at:
http://www.thehollandgroup.org

Collateral Benefits

Collateral Benefits: State of the Law and Proposals for Reform (M. Royce, P. Hancock) The current law on the deductibility from a plaintiff's claim for damages for personal injury (*Ratych v. Bloomer* (1990), 69 D.L.R. (4th) 25 (S.C.C.); *Cunningham v. Wheeler* (1994), 113 D.L.R. (4th) 1 (S.C.C.)) indicates that what is required, at least, is attention to a primary rule with two corollaries: all benefits in the nature of indemnity payments must be accounted for and deducted in assessing compensation to a plaintiff for pecuniary loss in tort; where there is a right to repayment of indemnity, the payor must be entitled to recover, where the payor exercises its right, from the defendant; where the plaintiff has received indemnity payments and the payor either has no right of recovery or fails to exercise the right, the payments are to be deducted. This rule and its corollaries have the benefit of simplicity and, at a minimum, eliminate the *Bradburn* exception as it is applied to indemnity insurance.

Lump Sum Awards

Present Value Lump Sum Awards at Trial, (J.R. Morse, S. Godwin) As of January 2001, new rule 53.09 changes the legislated discount rates. The rule now tends to reduce awards to plaintiffs. While the discount rate has been adjusted to reflect past, current and projected future economic reality, it leaves open the issue of contesting management fees and productivity associated with wage increases relevant to loss of income and future care awards. To reduce the costs of using actuaries, plaintiffs and defendants may agree to a discount rate and multiplier in these areas.

Once the court makes the relevant findings concerning loss of income and future care costs, counsel should be able to agree on the lump sum awards and the respective heads of damage. If they do not agree, the parties could limit their costs by jointly retaining an actuary to undertake the calculations.

Structured Settlements

Section 116 of the Courts of Justice Act: Can Defendants Impose a Structured Settlement on the Plaintiff? (R. Roth) Section 116 of the *Courts of Justice Act* provides that structured settlements are mandatory where the plaintiff requests a gross-up for income tax. The structured settlement may be set aside if the parties consent that such an order should not be made, or if the court determines that it would not be in the best interests of the plaintiff to make such an order. Given the current market rate variation between interest rates and the discount rate prescribed in rule 53.09, defence counsel have sought to have the court impose a structured settlement while retaining to themselves any cost savings accruing where such structures can be purchased for less than the total of the award assessed for those heads of damages that attract the gross-up.

The strategy being put forward by the defence has significant monetary consequences and it is unclear whether the plaintiff or the defendant should retain the cost advantage of the structured settlement. Current Ontario case law indicates that neither the court nor a party can force the imposition of a scheme of periodic payments in lieu of a lump sum award. The cost of the structure, together with the cost of including a guaranteed period in the scheme, is payable by the defendant predicated on the present value assessment of damages and is not to be based on the reduced cost to purchase a structured annuity, which arises as the result of business and market considerations among competing life insurers.

Meritorious Claims

Meritorious Claims (C.S. Ritchie) The current malpractice litigation system provides redress for only a modest percentage of the persons suffering medical injury and requiring compensation. Accounting for legal fees, costs of the court system, and the time and energy of everyone concerned with the litigation, more than 50% of the money spent on malpractice goes to litigation expenses, not to compensation for injured patients. In addition, there is ongoing frustration with these issues, for example, in the tension between Rule 53, which requires that expert reports be delivered 90 days before trial with reply reports 60 days before, and with s. 52(2) of the *Evidence Act*, which speaks to a 10 day notice rule.

These issues may be addressed if plaintiffs and defendants identify meritorious cases early in the litigation process and use the techniques of joint medical opinion and mediation, in combination with arbitration. The costs of trials may be reduced by focusing on the real issues in dispute and, in appropriate cases, through bifurcating trials.

Parties may additionally reduce the time and costs associated with litigation by using an expert in whom both sides have confidence and who would subscribe to a “Statement of Principles Applicable to Damages Experts in Medical Malpractice Litigation” (see the “Precedents” section of the Holland Group website or the Fall 2000 newsletter). The parties could also benefit by starting modestly with damages issues such as future care costs and life expectancy.

Joint reports allow parties to retain the right to challenge the report through their own further expert evidence, if required. Other suggestions include ensuring a solid commitment by both parties to the mediation process by making a pre-mediation agreement to proceed to arbitration should mediation not be successful. In some cases, an agreement to bifurcate will make sense, addressing liability at trial and leaving damages to be resolved through mediation and arbitration.

Trials of Medical Negligence Actions

The Trial of Medical Negligence Actions (T. Curry) Although medical malpractice actions are often complex and difficult, they need not be inordinately lengthy or expensive. In order to ease the process, all parties must understand the essential elements of a claim for medical negligence and must actively pursue all means of reducing complexity and expense. Counsel must be aware that client expectations often drive bad cases forward, and that expert witnesses are essential to deterring claims that are too weak or impossible to prove.

As causation is a key element to prove in a medical malpractice case, practical considerations must be dealt with. The issue of causation must be examined early (Was there failure to disclose? Was loss caused by a commonly underlying medical condition? Were there other non-negligent causes?). A factual record must be developed that speaks to causation. Expert opinion must be sought on each of the elements of the causation argument. A consistent theory of causation must be maintained.

Costs may be reduced significantly by eliminating unnecessary witnesses and evidence. The use of common experts, admission of witnesses' statements and medical records by agreement, and efficient cross-examination and examination in chief prevent delays and unnecessary expenses.

Trials by Jury

The Trial of Medical Negligence Actions by Jury (J.R. Morse, S. Godwin). The right to trial by jury is an important substantive right of which a party ought not to be deprived except for cogent reasons. These reasons include legislative exceptions under s. 108 of the *Courts of Justice Act*, and judicial discretion under rule 47.02(2) of the *Rules of Civil Procedure*. The rule remains, however, following *Soldwisch v. Toronto Western Hospital* (1983), 43 O.R. (2d) 449 at 457, that if there is any doubt about whether or not to strike the jury, the motions judge must deny the application to strike. Whether or not this is done will depend in part on the complexities indicated by the evidence.

The most commonly cited reason for not trying a medical malpractice action with a jury is the complexity of the issues and technical nature of the evidence. Not all medical malpractice cases, however, involve complex evidence, and as the Court of Appeal noted in *Campbell v. Singal* (1989), 35 C.P.C. (2d) 284 at 291, appropriate aids can assist juries in understanding complex or technical evidence. The trial judge may also be of assistance in his or her charge by explaining the evidence that was not clear, or having the evidence read back to the jury. The complexity of the law applicable to a case may similarly be explained.

Common Experts

Common Experts in Medical Malpractice Actions: Try It, You'll Like It! (J. Morris) Section 12 of the *Evidence Act* limits the number of experts used at trial to three, unless leave is given to extend that number. It is not unusual, however, for complicated cases to involve between 10 and 20 experts on liability, causation and damages. For many plaintiffs, the cost of retaining experts may be prohibitive, although almost every case turns on the issue of expert evidence. It is, therefore, essential to choose an appropriate witness, one who can best comment on the standard of care for the practitioner whose conduct is in question. Despite the 90 and 60 day requirements of rule 53.03(1), the late delivery of expert reports is common. These and other factors often lead to an unfortunate "duel of experts." As well, in the assessment of damages, there is a significant amount of duplication in the production of competing expert reports.

There are, however, many experts, well known to counsel for both plaintiffs and defendants, considered ethical and objective by both sides, who would be prepared, if properly instructed, to provide a neutral evaluation on the issues of liability, damages and causation. Even if there are strong differences in relation to certain aspects of a damages claim, many other aspects can be settled. A compromise on both sides that arrives at a reasonable figure may cost less, in the long run, than a protracted battle to achieve a result that is at one or the other end of a range.

Limitation Periods

Limitations in Medical Negligence Actions (B. Legate) Already fraught with difficulty, it is expected that the area of limitations in medical malpractice litigation will be made more problematic by the proposed changes to the *Limitations Act*. This paper includes a review of cases, legislation, the delayed discoverability rule, the meaning of "incapacity" interpreted for the first time by the Court of Appeal, the interrelationships of delayed discoverability and capacity and reflections on the new draft legislation.

Visit Our Website

The preceding sections of this newsletter provide a synopsis of the papers presented at the Canadian Bar Association Continuing Legal Education seminar of November 30th, 2000, "Medical Malpractice: Liability and Damages." You will find the full text of each paper, as well as the Fall 2000 newsletter and more information about the Holland Group on our website:
http://www.thehollandgroup.org.

Use of Experts

One of the initiatives 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.

With this in mind, members of the Holland Group suggest that plaintiffs and defendants in medical malpractice litigation consider joint retention of damages experts to provide opinion evidence that is neutral and fair to both sides. These experts will provide objective, complete and intellectually honest reports in a timely, fair and cost-effective manner. The characteristics of such a retainer have been summarized in the Statement of Principles, published in the Fall 2000 newsletter, and available on the Holland Group website at:
http://www.thehollandgroup.org

Seeking Experts

At this 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. We hope to make this list available on the Holland Group website, and to develop a similar "bank of experts" in the areas of liability and causation.

We continue to seek experts in the following areas:

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

Please 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.

To submit your recommendation or for more information, please contact:

Project Co-ordinator, Holland Group
11 Balaclava Street
Kingston, ON K7K 1J4
(613) 546-0999
kmweisbaum@sympatico.ca
or visit our website at:
http://www.thehollandgroup.org

The Culture of Medical Malpractice Litigation

The Holland Group seeks to address the understandably defensive attitude that exists in medical malpractice litigation. A recent jury trial of a medical malpractice obstetrics case may provide some indication that the culture of litigation is changing for the better. In *Beresford-Last (Litigation Guardian of) v. Dworak* (November 21, 2000) the plaintiff infant was born with severe brain damage. The family alleged that the defendant nurses, hospital and physicians had failed to obtain the mother's informed consent to the treatment they provided and the procedures they performed. They resolved their differences with the nurses and hospital prior to trial.

Madame Justice Joan Lax of the Superior Court of Justice provided the legal portion of her charge to counsel in writing and gave them a day to review the charge and make comments. An enlightened and useful process frequently followed in the United States, giving counsel an opportunity to comment on the charge makes for increased clarity for the jury.

Although it is unusual to have this sort of case heard by a jury, the case demonstrates that even a complicated action, if it is well-presented by all counsel and carefully managed by an experienced trial judge, can produce a just outcome. The importance of this kind of innovation is reflected in the words of J. Robert Prichard, author of *The Prichard Report*, the document that is the foundation of the Holland Group:

"The benefits of experience in malpractice cases was stressed repeatedly before us. With good counsel and an experienced judge, all sharing a commitment to expedite the process, the cases are manageable, although often demanding. When any of these elements is lost, trouble begins."

For further information about the Holland Group 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/ORGANIZATION ....

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