SUBMISSION OF THE MEDICO-LEGAL SOCIETY OF TORONTO TO THE HONOURABLE COULTER OSBORNE, QC

CIVIL JUSTICE REFORM

The Medico-Legal Society of Toronto (MLST) is a voluntary association of doctors and lawyers. It was founded in 1950 to promote medical, legal and scientific knowledge, cooperation and understanding between the medical and legal professions in the interest of justice and in the best interests of patients and clients. Its members have extensive working experience in the litigation of medico-legal issues primarily in personal injury and wrongful death cases.

MLST agrees with the emerging consensus that reforms are required to improve access to justice, improve efficiency and reduce delays. MLST believes that these objectives can be accomplished by improvements in the use of expert medical witnesses, a re-definition of the over-riding principle governing the operation of the courts and the increased use of dispute resolution mechanisms prior to the institution of litigation.

There are two major types of litigation in which controversy between experts typically arises. They are health care malpractice litigation and personal injury litigation. In both types, there may be a dispute over the extent of the injury and/or the need for future care. In personal injury litigation, there may also be a dispute over the available coverage under various types of disability insurance policies.

<u>Health Law Litigation</u>

With respect to malpractice litigation, MLST disagrees with the standard assertion that such litigation is always complex and therefore not capable of early assessment and resolution. The available data suggest otherwise. Approximately two-thirds of medical malpractice cases are dismissed on consent or are abandoned prior to trial because they

lack merit. A further twenty-eight per cent are settled by payments to injured persons prior to trial. In the result some 92% of medical malpractice cases do not go to trial.[1] However, this 92% still requires the expenditure of substantial resources in order to bring them to a conclusion. These cases typically go through expensive pleadings, documentary discovery and/or oral discovery processes. In all of them, lawyers make a determination, well after considerable time and resources have been spent, that the cases are either without merit or indefensible. It is obvious that there must have been some “fact finding” made by the lawyers in order to come to this determination. However, at what cost to the health care system and health care professionals? The health care system is already doing the most that it can with limited economic resources. Legal costs are increasing. Health care practitioners and the public cannot afford to have health care practitioners engaged in unnecessary legal processes. There must be a way of getting these cases out of the system at an early stage.

Health care practitioners are required to keep proper notes of their care. If there has been error in the delivery of health care, they have an obligation to disclose that error to the patient.[2] It has been the experience of the physician members of the MLST that in a clear majority of cases, there is a sufficiency of information in the health care record to enable an expert to arrive at opinion on the quality of care. This suggests that an expert reviewing a case for either a plaintiff or a defendant should be able to make a determination based on the review of the records alone in the majority of cases. There is therefore available data from the health care record on which an independent expert can make a reasonable judgment before an action is commenced.

[1] A History of the Canadian Medical Protective Association, 1901-2001
[2] CPSO, Disclosure of Harm, Policy #1-03, May/June, 2003

There are several practices which work against the early resolution of health care malpractice cases:

- Some say that all cases must be "fully investigated" on a "no stone unturned" basis.
- Some lawyers representing potential plaintiffs continue to believe that such claims may be settled on a "nuisance basis".
- Experts are retained on bases which do not take into account the correct legal test of negligence, causation and proof of damage.
- Reports are not exchanged until very late in the proceedings.

These practices can no longer be permitted. Health care and civil justice resources are scarce. The medical negligence tort system remains a fault-based system of compensation. In Ontario, it is largely funded by the public.[3] Therefore, payments to victims and to the lawyers for both plaintiffs and defendants come out of the public health care budget to a large extent. There is not enough money in the health care budget for an approach which does not encourage the early assessment and resolution of such litigation.

Patients, health care providers, lawyers and insurance providers representing health care providers must recognize that society cannot afford to take all cases to discovery and trial. Despite the argument in the Prichard report in favour of a hybrid fault-no fault system, the provincial and federal governments have not seen fit to fund

[3] OHIP Bulletin 4435, Malpractice Premium Reimbursement Program. Since 1986, OHIP has funded the increase in annual fees payable by doctors to the CMPA. As a result, at present, OHIP funds approximately 80% of the annual fees payable by physicians to the CMPA. HIROC, the major hospital insurance reciprocal, is funded by payments made by hospitals out of operating revenue. In the result, the public funds the insurance costs of potential defendants and funds "up front" the cost of defendants' defence service. Injured parties typically do not have these kinds of resources to commence claims.

and enact legislation which would permit such a system to exist. It is therefore concerning that there appears to be a continuing practice of lawyers who believe that it is acceptable to commence and continue lawsuits through to discovery without obtaining a review of the relevant medical records by a competent expert. Further, the practice of retaining experts who have a reputation for being "pro-plaintiff" or "pro-defence" must cease. The duty of the expert, regardless of who retains him or her, must be redefined as being a duty to report to the court fairly and accurately.

Expert Bias and Early Resolution

Physician members of MLST report that there is pressure from legal counsel to present the case in a manner that favours their position, no matter how objective one tries to be. This bias is inevitable due to the relationship the expert has with legal counsel. In cases where negligence is obvious, this is not an issue. In cases where so much seems to revolve around judgment, experts often know their own area well enough to be able to present a view favouring the position of legal counsel who retains them in ways that can appear totally unbiased. A good lawyer, even backed up by his/her own expert, may not pick up on the subtle nuances of facts of a case to detect this. Presenting an opinion to the court would remove this natural bias. The physician members of the MLST have noted the inherent investigator/expert bias problem in medical research. In large randomized drug trials, despite huge efforts to eliminate bias, studies funded by drug companies more often favour the drug in question compared to those studies funded by independent parties. The same phenomenon appears in studies on medical devices funded by one supplier or another. Recent changes to rules regarding the sponsoring of drug trials and medical device trials have been implemented in order to remove an inherent investigator

bias which is generated based on who retains the investigator. It is submitted that the same type of bias is inherent in the adversarial system in which the each side of the dispute retains its own expert.

MLST submits that new mechanisms must be put in place to minimize the inherent expert bias which is generated by who retains the expert. Further, the need for early resolution of medical malpractice cases addresses a need for economic efficiency and fiscal responsibility. It can be reasonably estimated that the majority of all health care dollars spent on insurance payments will be spent on legal fees and the administration of malpractice insurance facilities.[4] If 92% of all medical malpractice cases are either without merit or indefensible, then surely there must be a way of addressing these cases at an early stage so that at least some of these legal fees and administrative fees can be saved. It has been the experience of the lawyer members of MLST that if a case is indefensible, as a matter of practical wisdom, it should be settled at the earliest possible opportunity. There has been recent study of the impact of early offer tort reforms in the United States. Preliminary results of this study suggest that savings of between US$200,000 to US$500,000 per case can be achieved by early settlement offers.[5]

In simple terms, both professions can and must do better. Failure to do so will have profound implications for access to justice and future health care funding. Reasonable and reliable fact determination need not be accomplished exclusively by

[4] CMPA Annual Reports, 1995 to 2005. Between fiscal 1994 and fiscal 2005, 48% ($1,264,229,000) of CMPA's annual expenses ($2,596,372,000) represented payments made on account of awards and settlements. Of the remaining 52%, the bulk of the expenses were incurred to pay for legal fees and expert fees. If one assumes that 15% of awards and settlements represents a contribution to legal expenses of plaintiffs, then it can be reasonably estimated that over 50% of expenses goes to the payment of legal fees. HIROC, the major hospital insurance reciprocal, is funded out of the operating budgets of the major Ontario hospitals. Data from HIROC is not available but it can be reasonably assumed that legal fees paid to defend hospitals and its employees are substantial. A similar estimate was made by Professor Prichard in his report.

[5] Hersch et al., *An Empirical Assessment of Early Offers for Medical Malpractice,* May 6, 2006

discovery and trial in all cases. Based on a sufficiency of evidence, reasonable judgments can be made by experienced medical and legal practitioners about the likely outcome in the majority of claims.

Re-definition of the Duty of Experts

The MLST submits that medical experts should be required to certify in their reports prior to giving evidence that their duties are owed to the court and not to the particular party that has paid them.[6] There is a two-way obligation that must be recognized. Legal counsel must take time to explain clearly the legal standards applicable to the assessment of reasonable care, the burden of proof on causation and the standard of proof applicable to the assessment of future care costs and contingencies.[7] Experts should recognize that their duty is to provide independent advice to the court on the issues on which they have been consulted. Experts should recognize that their duty of fairness and impartiality requires that they resist attempts by counsel to get them to change or shade their opinions. A number of jurisdictions have prepared protocols governing the duty of experts and have imposed a duty on counsel to provide a copy of the protocol to the expert so that he or she will understand his or her role clearly. The hallmarks of experts' duties that emerge from these protocols appear to be as follows:

- Experts are under an obligation to provide the court with an independent and impartial opinion.
- This duty overrides any obligation to the person instructing or paying them.

[6] The MLST has conducted a survey of its members in order to prepare this submission. The results of the survey will be provided in confidence to Mr. Osborne. While time did not permit a representative number of members to respond, one trend which did emerge from the survey results was clear support for a re-defintion of the duty of an expert as being one of an over-riding duty to help the court.

[7] The MLST has for many years published its paper on the medico-legal report that provides guidance to doctors and lawyers concerning the instruction of experts. This document could provide a useful starting point for a protocol on the instruction of experts.

- The test of independence is that the expert would provide the same opinion if he or she had been instructed or retained by the other party to the litigation.[8]

Expert Bias

Bias has become a major source of inquiry, especially in personal injury litigation. Doctors are routinely subjected to a lengthy cross examination with respect to whether their practice is clinical or medical legal and what percentage of their medical legal practice is for plaintiffs or defendants. Sometimes such cross-examination on bias can take a day of court time. This takes doctors who do have a clinical practice out of their office for an inordinate and unnecessary amount of time.

Fairness requires that this issue be dealt with more efficiently. Efforts to re-define expert's duties should reduce the potential for bias and improve the balance in opinions expressed in reports. Time wasted on cross examination on bias can be reduced by the following:

- Limiting the time to cross examine on bias;
- Requiring a party who intends to challenge experts' credentials and neutrality to give notice of intention of same in advance of trial and prior to any pre-trial so that proper time can be allowed for cross-examination, argument and ruling by the court;
- If such notice is given, the issue of bias and qualification should be actively discussed at the pre-trial. The parties should be required to explore ways to

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[8] The Civil Justice Council of the United Kingdom, *Protocol for the Instruction of Experts to Give Evidence in Civil Claims; High Court Rules* (New Zealand), *Amendments 2002, Schedule 2, Code of Conduct for Expert Witnesses; Uniform Civil Procedure Rules 2005* (New South Wales), Rule 3, Divisions 2 and 3 and Schedule 7, Experts; *Uniform Civil Procedure Rules 1999* (Queensland), Part 5, Expert Evidence

> resolve the issue in whole or in part by open and frank discussion and production of the appropriate documents.

It is difficult enough for doctors to find the time to come out from their regular clinical practice and give evidence at trial without also being subjected to unnecessary cross examination with respect to their motivation, solely for the purpose of impressing a jury.

Joint Experts

MLST recommends the use of joint experts, especially in health law litigation.[9] Joint experts are likely of lesser value in personal injury litigation. This issue is discussed in further detail below. Preliminary data from the United Kingdom shows that joint expert witnesses are being used in 41% of cases.[10] MLST has identified three scenarios in which a joint expert may be helpful:

1. Cases of scientific complexity in which there is general agreement among scientists but the court needs to understand the science. A joint expert would probably be of great assistance to the court.
2. Cases of scientific complexity in which there is controversy among scientists. This is more difficult. The challenge is to ensure that the scientific community appreciates the legal standards of proof and causation and the court understands the controversy, the nuances and the "legitimate" debate or difference of opinion in the scientific community. A joint expert is likely valuable in defining and

[9] Another trend which emerged from the MLST survey results was support for the use of a joint expert to resolve apparent conflicts between opposing experts.
[10] Musgrove, Robert, *Lord Woolfe's Reforms of Civil Justice,* Summer, 2006, Advocates Society Journal, vol. 25, No. 1

explaining the scientific issue and the controversy. A judge would probably be able to decide the issue based on "gut instinct" or an educated guess.

3. Cases of factual controversy (e.g. factual conflict, exaggeration, malingering, etc.). A joint expert could assist the court by "mediating" the difference of opinion of two experts retained by each side and would assist the parties and/or the court in resolving the controversy from a scientific perspective. This is a more difficult situation for the joint expert but nonetheless the joint expert is useful.

MLST therefore submits that joint experts should be employed as a tool at an early stage of a claim. There are interests that need to be considered and a proper balance must be achieved. Lawyers representing injured persons may be under pressure to commence a proceeding because of limitation periods. Insurance providers typically insist that a proceeding be commenced before they are prepared to give their attention to a claim. If additional cost to the legal system is to be avoided, these practices must cease in a manner which enables the parties to preserve the right to make a formal claim and which requires insurance providers to respond once a notice of claim is given.

Joint experts should be appointed from a roster of experts maintained by the court or may be appointed on consent of the parties. It will be critical as to who maintains the roster and pays the joint expert. It has been the experience of our members who are involved in the neutral assessment system known as Designated Assessment Centres in personal injury cases that the payor of the system is viewed as having some inappropriate influence over members of the roster. It will also be critical to ensure that appropriate standards are put in place with respect to the selection of the individuals to go on the roster. Regulations under the *Courts of Justice Act* should be made to confirm that the

body that maintains, creates and supervises the roster cannot be sued if the expert is found to be negligent in his or her duty.

Creation of the *Health Law List* of the Superior Court of Justice

A special list of the Superior Court of Justice, similar to the Commercial List, should be created for health law cases. A dedicated team of judges should be assigned. Court time is wasted explaining and re-explaining basic medical concepts and techniques because of the absence of a specialized judiciary. Once notice of a claim is given, the parties should meet to discuss the case at an early stage to ensure that the claim is reasonably particularized and to arrange for the exchange of expert reports. If either party has not delivered an expert report, then the court should afford the party who has not consulted an expert the opportunity to obtain an expert report. Failing this, the court should have the power to require that the parties agree on a joint expert who will review the medical records and who will answer a series of questions to be settled by the presiding judge after receiving brief, written submissions by counsel. Failing agreement on the appropriate joint expert, the court will be able to appoint an expert from a roster of experts to be maintained by the court. Another useful tool, especially in cases of scientific complexity or controversy, would include encouraging the parties to appoint a panel of experts, one by the plaintiff, another by the defendant and a third by both. Consultation among the panel members in a format which would preserve due process should be encouraged.

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[11] The MLST has for many years published its paper on the medico-legal report that provides guidance to doctors and lawyers concerning the instruction of experts. This document could provide a useful starting point for a protocol on the instruction of experts.

[12] The Civil Justice Council of the United Kingdom, *Protocol for the Instruction of Experts to Give Evidence in Civil Claims; High Court Rules* (New Zealand), *Amendments 2002, Schedule 2, Code of Conduct for Expert Witnesses; Uniform Civil Procedure Rules 2005* (New South Wales), Rule 3, Divisions 2 and 3 and Schedule 7, Experts; *Uniform Civil Procedure Rules 1999* (Queensland), Part 5, Expert Evidence

MLST members are willing to make experts available for this roster. Following receipt of the report of the joint expert, a judge will meet with the parties, representatives of their insurance providers and their legal counsel for a settlement conference. The settlement conference judge should not be the trial judge but may, on consent, be assigned to be the case management judge. Attendance of all such persons should be mandatory unless a judge dispenses with such attendance. Failing settlement, the judge will make a recommendation concerning the making of an offer to settle. These proceedings will be subject to privilege and will not be disclosed except as follows:

1. The settlement recommendation of the judge will be available to the trial judge to address the issue of costs.

2. The joint expert report will be not be admissible in evidence in further proceedings but either party may call the joint expert or any other expert to testify in further proceedings. The fact that the joint expert prepared an earlier joint expert report shall not be disclosed in further proceedings.

The resolution of claims involving health care must also take into account a desire by all to ensure patient safety and high quality medical care. Early resolution of such claims should explore non-monetary means of resolution including apology without admission of fault and commitments to prevention of future error. This approach is far more consistent with modern obligations of health care providers to acknowledge error and take steps to improve care.

The Health Law List should be organized in a manner similar to the Commercial List with an appropriate practice directions and a users' committee. Members of the users' committee should include lawyers, doctors and other health care providers. The

users' committee should be considered a tool to enable the health care profession to prepare basic papers on core medical issues to educate the profession and the bench on health care procedures, as required. It should be noted that economists consult to the Rules Committee to advise the court on economic issues which affect the determination of damages. There is no reason why a similar role would not be appropriate for health care providers provided that their consultation papers are open to the public and litigants so that they can challenge the content of these consultation papers in any particular case. Like the Commercial List, the Health Law List would be an "opt in" system which users could access on a voluntary basis. The types of cases on the Health Law List would include:

- Proceedings which call into question issues of health care standards
- Proceedings under health care statutes
- Proceedings involving the provincial or federal health authorities
- Proceedings involving reviews/appeals from health care colleges
- Proceedings relating to hospital decisions re: privileges
- Proceedings relating to the provision of health care
- Proceeding relating to the giving or withholding of consent and/or treatment whether under a statute or otherwise
- Class proceedings commenced under the *Class Proceedings Act, 1992,* which raise health law issues
- Proceedings raising any issue of medical complexity or controversy but only on motion to the presiding judge of the Health Law List ("the basket clause").

The "basket clause" (also employed in the Commercial List regime) would enable litigants involved in personal injury litigation which raises issues of scientific complexity or controversry to access the special procedures and resources of the Health Law List as required.

Personal Injury Cases

Joint Experts/Panel of Experts

Personal injury litigation is different than health care malpractice litigation. By the time a case reaches trial, particularly in the cases involving motor vehicle accident claims (either third party or first party) many experts have been retained by the parties and significant funds have already been extended on the instruction, retention and arrangement of reports from those experts. Scientific evidence is rarely in issue in a personal injury trial. Normally there are credibility issues with respect to the nature and extent of the injuries. Experts usually rise or fall on how the jury or judge view the plaintiff. To add another layer of experts into this already expert-laden landscape would not assist the litigation process.

In such cases, we also do not see the value of requiring opposing parties, who have retained different experts, to consult with a single joint expert report for the purpose of a single, joint report for the court. This proposal does not appear to appreciate the nature of personal injury litigation and the extent that it relies upon lay witnesses and the credibility of the plaintiff. The medical issues in personal injury do not invite the same type of scientific examination related to causation or duty of care as does health care malpractice litigation.

Therefore, for personal injury cases, unless there is a consent by the parties or unless the action is brought into the Health Law List under the "basket clause", the MLST does not recommend the routine use of a single joint expert.

Medical Experts Participation in Pre-Trial Conferences

In personal injury actions, it would be the rare case where the attendance of a medical expert at a pre-trial conference would assist the parties to resolution. Normally the issue is not over what the injury is but how the injury affects the plaintiff in his or her day to day life or employment. The report of the expert is more than sufficient to allow the parties to fully understand their case. MLST feels that it would be an unnecessary burden on an already overburdened medical expert witness population to have them also be required to attend pre-trials. Further, in our view it would not make the system more accessible or more affordable but would do the opposite. Medical experts will not attend a pre-trial without a charge. Considering the time that is taken in pre-trials the expense would be significant for both parties. The attendance of medical experts on a pre-trial would appear to be of greater value in health care litigation and in cases where there is an issue of scientific complexity or controversy with respect to the cause and/or extent of the injury. MLST therefore does not recommend that experts be required to attend pre-trial conferences as a matter of routine but rather, that the presiding pre-trial judge be given the discretion to require the experts to attend depending on the facts of the case.

Permitting Oral or Written Examination for Discovery of Medical Experts

The MLST does not recommend oral or written examination of discovery of medical experts. There are two main reasons for this. Firstly it would be another unnecessary time challenge for the medical expert. Many of the doctors who provide

expert reports in personal injury cases maintain a full clinical practice whether in a hospital or in an office setting. These individuals are often the family doctor of the plaintiff or consulting specialists. The clinical notes and records that they are obliged to maintain and their reports should provide sufficient information that further oral discovery would not be required. It is already difficult enough to find doctors to treat individuals who have been involved in a motor vehicle accident and if they were aware that not only might they have to prepare a report but also attend an oral or written examination for discovery then the likelihood is that more will refuse to treat motor vehicle accident patients or even patients who have sustained a simple slip and fall.

The second reason that MLST disagrees with this recommendation is cost. If the mandate of the Civil Justice Reform Project is to make the courts more accessible and more affordable then that will not be reached by increasing the cost that the parties must incur prior to even getting to the courtroom door.

Other Solutions

MLST proposes that better solutions to deal with ensuring to deal with the use of expert evidence would include the following:

- Judges should be more consistent in enforcing the three experts rule;
- Time limits should be set on examination in chief and cross examination of expert witnesses;
- Parties should be encouraged through the pre-trial process to agree to file experts' reports without the necessity of calling each and every one as a witness. This process has worked well at the Financial Services Commission. In the result, cases that routinely would take ten days in a courtroom are completed in four to

five days by requiring the parties to file their medical reports and limiting the number of expert witnesses they can call.

- The rule which prohibits filing the expert's report and calling the expert to give viva voce testimony should be eliminated. In most cases, as a practical matter, the parties agree to file the report as an aide mémoire and call the expert. Most trial judges are sufficiently experienced to determine where the expert places his or her emphasis. However, the expert report could assist by documenting technical terms, providing definitions and providing background and context in the interest of saving court time.

Periodic Review of Damage Awards

In the case of injured children, the current system of compensation does not take into account the limits of medical science to accurately predict outcome until the child achieves his or her teenage or young adult years. In the case of persons who have suffered frontal lobe brain injuries, it may take several years following the occurrence of the injury before doctors can determine if the person's condition has stabilized. Despite calls for legislative reform extending back to 1978, nothing has been done to remedy this injustice.[13] There is a balance that must be achieved on this issue. On the one hand, the court should not be asked to assess damages once and for all until the child develops to the point that reasonable judgments can be made about what is needed to provide for future care for the rest of the child's life. Court should have the power to review an award in the future. On the other hand, insurers cannot be expected to maintain an open file indefinitely. The court should also have the power, once the child has developed

[13] *Andrews v. Grand & Toy Alberta Ltd.* [1978] 2 S.C.R. 229 at 236 per Dickson, J.

sufficiently so that reasonable judgment can be made, to terminate the right to request the court to review further.

Elimination of the OHIP Subrogated Claim

Another matter requiring legislative change is the antiquated subrogated right of the Ontario Health Insurance Plan to assert a claim for extra health care costs relating to a health care tort. This right is inefficient and economically unsound. Given the way in which health care payments and health care malpractice insurance is funded, these payments simply represent that same health care dollars being paid in a circle to the same person who is required to pay them in the first place with the added cost of administration and legal fees tacked onto the bill. They make no sense. The subrogated interest should be abolished.

Jury Trials

While jury trials continue to be used in a minority of medical malpractice cases, it is difficult to justify the costs and inconvenience of jury trials without amendments. In any case involving medical care, it is difficult to determine if the jurors understand the scientific information unless they are entitled to ask questions. This process has been permitted for many years in coroner's inquests. There is no good reason why it should not be permitted in a civil case.

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