

AMERICAN AND CANADIAN PRACTICE AND PROCEDURE IN MEDICAL MALPRACTICE LITIGATION— A PLAINTIFF'S PERSPECTIVE

H.A. Lamoureux Semenuk, Q.C.*, Nathan H. Smith**
Calgary, Vancouver

The Pritchard Commission Report expresses concern about the rising cost of medical malpractice claims, both from the plaintiff's perspective and from the perspective of rising insurance premiums. The authors of this article suggest that the rising cost of litigation from the plaintiff's perspective may in part be attributed to the lack of incentive to the parties to provide a full disclosure to one another as to the appropriate standard of care and as to particulars of the position of each party with respect to the claims of negligence. They conclude that in some measure the lack of incentive to provide full disclosure is a consequence of the current wording of the Rules of Court, which are intended to govern all actions and may not specifically address the peculiar problems of the medical malpractice lawsuit. The authors compare the Alberta and British Columbia Rules of Court with the rules governing malpractice actions in the State of New York and some of the federal Rules of Court applicable in the United States with a view to providing a comparative analysis of the function of the Rules of Court in these jurisdictions from the plaintiff's perspective.

Le rapport de la commission Pritchard s'inquiète du coût croissant des procès de négligence intentés aux membres de la profession médicale, que ce soit du point de vue du demandeur ou pour ce qui est des primes d'assurances. Les auteurs suggèrent que l'augmentation du coût des procès pour le demandeur provient en partie du fait que rien n'incite les parties en litige à discuter en toute franchise la norme de soins applicable et les détails de la position de chacune en matière de revendication pour négligence. Les auteurs concluent que la faute en est, dans une certaine mesure, à la rédaction actuelle du règlement des tribunaux qui n'est pas spécialement conçu pour les problèmes particuliers inhérents aux procès de négligence dans la profession médicale mais est d'application générale. Les auteurs comparent le règlement des tribunaux tel qu'il existe en Alberta et en Colombie-Britannique au règlement applicable aux affaires de négligence dans le domaine médical tel qu'il existe dans l'état de New York et à quelques règlements des tribunaux fédéraux des États-Unis, ce pour analyser le rôle que joue, du point de vue du demandeur, le règlement des tribunaux dans ces diverses juridictions.

* H.A. Lamoureux Semenuk, Q.C., of Semenuk . Hill . McKay, Calgary, Alberta.

** N. Smith, of Singleton, Urquhart, Macdonald, Vancouver, British Columbia.

This article is not intended as an academic treatise on practice and procedure. It is written in a practical vein by practicing trial lawyers in the hope that it will inspire fellow lawyers to use the current rules of court in an innovative manner to improve the plaintiff's chances of success in pre-trial interlocutory motions and that it may inspire some amendments to our current rules to reduce the expense associated with the medical malpractice lawsuit. The co-author, Heather Lamoureux Semenuk, gratefully acknowledges the expertise,

Introduction

After an exhaustive two year study the Pritchard Commission¹ has concluded that, contrary to popular belief, there is no crisis arising out of the number of successful medical malpractice claims. In fact, the Commission concluded that only a small percentage of cases proceed through to trial and judgment in favour of the plaintiff:²

... the sixth principal finding is that despite the growth in litigation, only a modest percentage of persons suffering avoidable health care injuries receive compensation. In 1987, despite over 200 million being spent on liability insurance, less than 250 injured patients received compensation of any kind from medical malpractice litigation whether by way of settlement or trial judgment. ...

The Pritchard Commission found that the complexity and expense of medical malpractice litigation was a significant factor often adversely affecting the outcome of plaintiffs' claims, and recommended that the Chief Justice in each province meet with the representatives of the bar with a view to reformulating the Rules of Court for medical malpractice litigation:³

Recommendation

43. Case Assignment, Disclosure of Medical Opinions and Pretrials.

We recommend that in each province a special effort be made to identify and manage medical malpractice cases with a view to resolving the cases more expeditiously and to ensuring that counsel for both plaintiff and defendant are obliged to move as expeditiously as possible to obtain and share expert assessments of the case. While the particulars of the precise steps for better case management will vary from province to province in accordance with local practices, we recommend at a minimum that a single judge be assigned to each medical malpractice case at an early stage, that opinions with respect to liability be obtained and disclosed early in the litigation process, and that any party in a medical malpractice case have the opportunity to request a pretrial hearing at any stage of the litigation with a view to obtaining earlier resolution of the case or narrowing of the issues or eliminating defendants who are not likely to be found liable.

44. Guidelines for Procedures

We recommend that consideration be given by the Chief Justice of the senior trial court in each province to inviting appropriate experienced legal representatives of plaintiffs and defendants to work with the court to develop guidelines for procedures for the proper processing of medical malpractice claims in that jurisdiction with the emphasis being placed on expedition, simplicity, disclosure, maximum opportunities for settlement and the avoidance of unmeritorious suits that continue longer than necessary.

advice and guidance provided by David B. Golomb, Chairman, Committee on Medical Malpractice, New York State, Trial Lawyers Association, New York. Heather Lamoureux Semenuk also acknowledges the invaluable research assistance of her articling student, Ann Kelly.

¹ Liability and Compensation in Health Care, J. Robert S. Prichard, Chairman, A Report to the Conference of the Deputy Ministers on Health of the Federal/Provincial/Territorial Review on Liability and Compensation Issues in Health Care (1990).

² *Ibid.*, p. 5.

³ *Ibid.*, p. 28.

If the Rules of Court are to be reviewed, then, from the plaintiff's perspective, the amendments contemplated should seek to accomplish several goals:

- (1) More comprehensive disclosure of full and complete particulars of the plaintiff and the defendant's case respectively, including disclosure of expert reports at an earlier stage in the litigation;
- (2) The right to written and oral discovery of the opposing party's case through the use of written interrogatories and oral examination for discovery;
- (3) Pretrial cross examination of the experts appearing for each party;
- (4) Greater and more comprehensive supervision generally of the process of pre-trial disclosure.

It is the authors' opinion that the failures noted by the Pritchard Commission with respect to the outcome of medical practice litigation are attributable in part to the deficiencies in pretrial discovery and disclosure, which in part flow from deficiencies in the current Rules of Court. This article is intended to present practical suggestions by reference to practice and procedure in some of the American jurisdictions which may prompt more expeditious and successful conduct of the medical malpractice case from the plaintiff's perspective. It will emphasize the comparison between the Alberta Rules of Court⁴ and the Rules of Court in practice in the State of New York,⁵ which has one of the most comprehensive systems regarding medical malpractice litigation, together with a comparative analysis of the British Columbia Rules of Court⁶ and the United States Federal Rules of Court.⁷ It should be noted that the article is written primarily from the point of view of the law and practice in Alberta, but it is hoped that the issues raised will be of interest in other jurisdictions.

I. *Commencement of Proceedings*

A. *Alberta*

In Alberta, the medical malpractice claim is not subject to any special rules as to the contents of the statement of claim or the statement of defence. Indeed, the Alberta Rules of Court which govern all pleadings generally do not lend themselves well to the technical particularity that may be required to disclose the plaintiff's claim and the defence of the doctor

⁴ Alberta Rules of Court, Alberta Reg. 390/68, as amended O.C. 2208/68.

⁵ Civil Practice Law and Rules, Laws of N.Y. 1962, c. 308, as amended, sometimes referred to as C.P.L.R. References throughout are to McKinney's Consolidated Laws of New York, Book 7B, and to Supplementary Pamphlets (1991).

⁶ British Columbia Supreme Court Rules, B.C. Reg. 221/90.

⁷ Federal Civil Judicial Procedure and Rules (West Publishing Co., 1990) (hereafter Federal Rules).

or the hospital. In most cases the statement of defence for the doctors will simply state:

... Except as hereinafter admitted, this Defendant denies the allegations contained in paragraphs ... through ... inclusive of the Statement of Claim ... The treatment given by this defendant to the plaintiff was skillful, competent and careful and within the accepted standards of the practice of family medicine in ... [a specific location] and elsewhere in Alberta. ...

The defence for the hospital will simply state:

... Save as expressly admitted and agreed to aforesaid, the defendant hospital denies each and every allegation of fact or negligence contained in the Statement of Claim insofar as they relate to the defendant hospital as fully and effectively as if the same were set forth herein and traversed seriatim. ...

The result of the exchange of these defences is often that the plaintiff and defence counsel will have no idea of the position of each party on the standard of care, or on the causal relationship between the injury and the event which is alleged as the cause of the injury.

The Alberta Rules of Court do have some provisions governing a demand for particulars, not, of course, specifically directed at the medical malpractice action. Rules 115 and 117 provide only that:

115. In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, particulars (with dates and items, if necessary) shall be stated in the pleading.

117.(1) A further and better statement of the nature of the claim of defence or further and better particulars of any matter stated in any pleadings, notice or written proceedings requiring particulars, may in all cases be ordered to be delivered within a time to be fixed and failing the time having been fixed, the time for the delivery of the particulars shall be within 8 days.

(2) The statement, or particulars shall be filed and attached to the pleading, notice or writing to which it refers.

Rule 115 is not applicable in most medical malpractice claims. Rule 117 is rarely used to force disclosure in a medical malpractice claim, as particulars are not ordered unless the party seeking them does not know them and needs them to plead.

B. *British Columbia*

As in Alberta, the medical malpractice claim in British Columbia is not subject to any special Rules of Court. Pleadings are of the same generalized nature. The statement of claim will list brief particulars of the ways in which the defendants are alleged to be negligent. A typical statement of defence will state:

In answer to the whole of the Statement of Claim, the Defendant denies that he was negligent as alleged in paragraph ... of the Statement of Claim or at all nor did he cause or contribute to any loss or damage allegedly suffered by the Plaintiff.

In further answer to the whole of the Statement of Claim, the Defendant states that any and all medical care rendered by him to the Plaintiff was in accordance with standard approved medical practice and was without fault or neglect.

Rule 19 of the Rules of Court in theory offers the opportunity for a demand for particulars:

19(11) Where the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or where particulars may be necessary, full particulars, with dates and items, if applicable, shall be stated in the pleading. If the particulars of debt, expenses or damages are lengthy, the party may refer to this fact and instead of pleading the particulars shall deliver the particulars in a separate document either before or with the pleading.

(16) The Court may order a party to deliver further and better particulars of a matter stated in a pleading.

(17) Before applying to the court for particulars, a party shall demand them in writing from the other party.

(18) A demand for particulars does not operate as a stay of proceedings or give an extension of time, but a party may apply for an extension of time for delivering a pleading on the ground that the party cannot answer that pleading until particulars are provided.

Thus, the closing of pleadings does not prevent a demand for particulars in order to further clarify and define the issues.⁸ However, the provision is rarely used in a medical malpractice context and does not lend itself to such litigation. A demand by the plaintiff for particulars of the applicable standard of care alleged in the statement of defence would likely be met by a successful argument that this is a question of evidence rather than pleading.

C. *United States Federal Rules*

In the United States Federal Courts, practice is similar to that in Alberta and British Columbia. The Federal Civil Judicial Procedure and Rules, which govern proceedings in United States District Courts, provide for an action to be commenced by filing a complaint (Rule 3), with the Defendant to serve an answer within twenty days of service of the Summons (Rule 12). A provision for a Bill of Particulars was abolished in 1946 and the present Rule 12(e) provides only for a "motion for more definite statement". This is limited to situations where a pleading is so vague or ambiguous that the opposite party "cannot reasonably be required to frame a responsive pleading".

The abolition of the Bill of Particulars, and its replacement by the more restrictive motion for a more definite statement, reflected a clear policy preference for clarifying and defining issues through the discovery process rather than through pleadings. Before its abolition, the federal Bill of Particulars was strongly criticized by courts who considered it to be obsolete in view of the adequate discovery procedures provided elsewhere in the Rules.⁹

⁸ *Proconic Electronics Ltd. v. Wong* (1985), 67 B.C.L.R. 237 (B.C.S.C.).

⁹ *Sun Valley Manufacturing Company v. Mylish, Pa.* (1944), 8 Fed. Rules Serv. 12(e) 36, Case 6.

D. *New York*

In contrast to the rather generalized procedures governing the filing, form and content of a statement of claim and statement of defence in Alberta, British Columbia or under the United States Federal Rules, the Rules of Court in a medical malpractice action in the State of New York are specific as to the contents of documentation that may be served. Following service of a complaint by the plaintiff, which requires a Certificate of Merit in all medical, dental and podiatric malpractice claims, the defence may demand a Bill of Particulars. The function of the Bill of Particulars is "to amplify the pleading, limit the proof and prevent surprise at trial".¹⁰

A demand for a Bill of Particulars is routine in most malpractice cases. Rule 3042 provides for the general procedure, as well as for applications that may be made on a failure to comply with that demand. Rule 3043 sets forth general matters which may be requested by the defence in a demand for a Bill of Particulars, and this, of course, has been amplified upon substantially by the body of malpractice case law in the State of New York. Interestingly, section 3044 requires that where the complaint is verified, which is again routine in malpractice cases, the Bill of Particulars must also be verified—that is, sworn to by the client or by the attorney if the client does not reside in the same county in which the attorney maintains his or her office.¹¹

Unlike disclosure through Affidavit of Documents, which proceeds without regard to who has the burden of proof, a party is required to serve a Bill of Particulars only on issues on which he has the burden of proof. However, if it appears that the party who is requested to file a Bill of Particulars is ignorant of the facts and that all or a substantial portion of the information sought is within the knowledge of the party seeking the bill, the court may permit disclosure by discovery at the option of the party required to file the bill, prior to actual filing of the same.¹²

If the party upon whom the demand has been duly served fails to serve the Bill of Particulars within the required time, that party will be precluded on motion by the defence from putting into evidence anything

¹⁰ *State of New York v. Horsemen's Benevolent and Protective Association*, 34 A.D. 2d 769, 311 N.Y.S. 2d 511 (1st Dept., 1970).

¹¹ See CPLR, s. 3020, McKinney, *supra*, footnote 5, Book 7B.

¹² *Coonradt v. Walco*, 55 Misc. 2d 557, 285 N.Y.S. 2d 421 (N.Y.S.C., 1967). Of course, a Bill of Particulars is distinguished from disclosure required at discovery and inspection in that the former is sought to amplify pleadings, the latter to provide evidence in order to prove one's cause of action: *Rakov v. Gingold*, 23 Misc. 2d 725, 194 N.Y.S. 2d 17 (N.Y.S.C., 1989).

as to which he failed to furnish particulars, unless the party swears under oath that he has no knowledge of a particular item demanded.¹³

E. Summary

If the current rules, such as those in Alberta, British Columbia and the United States Federal Courts, were broadened in their scope and a statement of particulars (in the format used in the State of New York) was required of both plaintiff and defence, the desired result of limiting the issues for trial and forcing greater pretrial disclosure of the facts might well be achieved. Indeed, the rule for exchange of bill of particulars might be broadened even beyond the scope of the New York Rules. Where a general denial is filed by the defendant doctor or the defendant hospital, particulars of the defence might well be required in every instance, together with full disclosure of the defendant's version of the facts, filed in much the same manner as to plaintiff provides particulars of negligence. Under such a rule, following the filing of a statement of claim and a statement of defence in a medical malpractice action, either party would have the automatic right to demand particulars of the statement of claim or the statement of defence. Both parties would be required to set out particulars of their respective positions on the applicable standard of care and of their version of the facts. The bill of particulars would be filed prior to discovery, or, with leave of the court, after discovery where only one party is in possession of all the facts.

Under such a rule, if the defendant filed a general denial simply stating that the treatment rendered was within the accepted standard of care, the plaintiff would be entitled to serve a demand for particulars, in the form currently in use in New York State, requiring the defence to set out its version of the appropriate standard of care and its version of the facts bringing the care within that standard. The plaintiff may well be required, on service of a similar demand, to set out his position as to the deviations from the standard of care with equal particularity. In this manner, at least, the court would have before it the plaintiff's and defendant's position with respect to the standard of care and the plaintiff would have greater disclosure well in advance of discovery.

II. Pretrial Disclosure

A. General

1. Alberta

In Alberta, the most commonly used disclosure tool used by both parties prior to trial is the oral examination for discovery. This pre-trial

¹³ Article 30, Rule 3045, McKinney, *supra*, footnote 5, Book 7B. It appears that the specific intent of article 30, Rule 3045 is to establish a procedure whereby a defendant may concede liability upon the condition that the plaintiff consent to arbitration of damages. It appears that this particular rule has not been used to any great extent since it was passed approximately four years prior to the date of this article. It may be that the arbitration procedure is as expensive as actual trial and for this reason parties are electing to bypass it in favour of trial.

procedure, alone or even in conjunction with a notice to produce documents, often does not yield sufficient information to the plaintiff to permit adequate proof at trial of the negligent acts complained of.

In *Ontario Bean Producers Marketing Board v. W.G. Thompson & Sons Ltd.*,¹⁴ Trainor J. stated that the purposes of discovery are:

- (a) to enable the examining party to know the case he has to meet;
- (b) to procure admissions to enable one to dispense with formal proof;
- (c) to procure admissions which may destroy an opponent's case;
- (d) to facilitate settlement, pre-trial procedures and trials;
- (e) to eliminate or narrow issues;
- (f) to avoid surprise at trial.

In fact, few if any of these objectives are consistently achieved in a medical malpractice action discovery in Alberta. The failure of oral discovery to achieve these stated objectives is probably the result of a number of factors:

- (1) The failure of plaintiff's counsel to prepare questions in consultation with medical experts in advance;
- (2) The relative sophistication and intelligence of the professional defendant;
- (3) The restrictive nature of oral examination which often elicits vociferous objections from the defence to questions on the very facts in issue such as the applicable standard of care;
- (4) The restrictive scope of Rule 200 of the Alberta Rules of Court, which does not contemplate written interrogatories as a pre-trial discovery tool nor pre-trial examinations of the opposing party's expert witnesses, except in limited circumstances where the witness refuses or is unable to come to the jurisdiction:

200(1) Any party to an action, any officer of a corporate party and any person who is or has been employed by any party to an action, and who appears to have some knowledge touching the question at issue, acquired by virtue of that employment whether the party or person is within or without the jurisdiction, may be orally examined on oath or affirmation before the trial of the action touching the matters in question by any person adverse in interest, without order.

The Alberta Rules of Court have a limited provision for pre-trial disclosure of documents. Rule 186(2) simply provides:

186(2). At any time after the close of pleadings any party to a cause or matter may by notice in writing require any other party to the cause or matter adverse in interest, to discover by affidavit the documents which are or which have been in his possession or power relating to all matters or questions in the cause or matter, and the party so required shall within 10 days after receipt of the demand discover by affidavit the documents requested.

This rule, although broadly interpreted, would not appear to envisage the production of evidence *per se*. Nor does it contemplate production of expert work product or other material created in preparation for litigation.

¹⁴ (1981), 120 D.L.R. (3d) 531, at p. 533 (Ont. H.C.).

2. British Columbia

In British Columbia, the requirements on disclosure are broader than in Alberta. Each party is allowed discovery by one or more of (1) discovery and inspection of documents (Rule 26), (2) oral examination for discovery (Rule 27), (3) an order for pre-trial examination of non-party witnesses (Rule 28), (4) written interrogatories (Rule 29) and (5) physical examination or inspection (Rule 30).

3. New York

Although in the State of New York under civil practice law and rules, a Bill of Particulars can be required only of the party who has the burden of proof of the thing sought to be particularized, the disclosure rules are much broader than those contained in the Alberta Rules of Court, or even those in British Columbia. Civil Practice Law and Rules (CPLR), section 3101(a) requires disclosure:

... of all *evidence* material and necessary in the prosecution or defence of an action, regardless of the burden of proof, by :

1. A party, or the officer, director, member, agent or employee of a party.
2. A person who possessed a cause of action or defence asserted in the action.
3. A person about to depart from the state, or without the state or residing at a greater distance from the place of trial than one hundred miles or so sick or infirm as to afford reasonable grounds or belief that he will not be able to attend the trial or a person authorized to practice medicine who has provided medical care or diagnosis to the party demanding disclosure or who has been retained by him as an expert witness; and
4. Any other person upon notice stating the circumstances or reasons such disclosure is sought or required.

McKinney's Consolidated Laws of New York¹⁵ makes it clear that this particular rule was clearly drafted with the intention of forcing all disclosure necessary to prevent surprise at trial:

At early common law the pleadings, which numbered many more than the basic three allowed today (complaint, answer and perhaps reply, see CPLR 3011), sharpened and defined the issues. Disclosure as we know it today played no role. With the CPLR, a trend which started earlier culminates. The role of the pleadings has been vastly reduced under the CPLR, whose article 30 relieves pleadings of all technical pressures. See *Foley v. D'Agostino*, 21 A.D. 2d 60, 248 N.Y.S. 2d 121 (1st Dep't 1964), and Commentaries on CPLR 3013. It may be said that the role of pretrial disclosure has expanded in inverse proportion to the diminished role of pleadings. This is perhaps the CPLR's healthiest contribution. When pleadings held full sway, each party was compelled to depend on his adversary's very careful counsel-drawn contentions. He had no chance before trial to examine his adversary. He knew only what his adversary wanted him to know or what outside investigation revealed. The CPLR, with its stress on disclosure and its diminution of pleadings, permits much more meaningful trial preparation by requiring each party to "tip his hand" well in advance of trial. This avoids surprise and tends more to base the final result on the facts rather than on tactics. A party can no longer hide behind the exquisite phraseology of his pleadings; he must step out in advance of trial and

¹⁵ *Supra*, footnote 5, Book 7B, CPLR 3101 to 3200, p. 10.

respond to his adversary's probing questions. The adversary system may still permit a card or two to remain close to the party's vest, but if that happens the fault is not the CPLR's. With the limited exceptions of subdivisions (b), (c) and (d), CPLR 3101 seeks to expose virtually the entire deck.

In the State of New York, the pleadings have thus assumed a secondary role in terms of defining the scope of the action and the rule for pre-trial disclosure would appear to encourage a broader disclosure of the evidence on each side.

CPLR 3101(a) is very broad in its scope. It may encompass not only those materials which will constitute evidence but also any information which might lead to the discovery of admissible material. Relevance and materiality are not prerequisites to discovery. The opinion of an expert prepared for litigation and any writing created by or for a party or his agent in preparation for litigation, may be produced if the court finds that the material can no longer be duplicated because of a change in conditions and that withholding it will result in injustice or undue hardship. There are however some protected documents, such as privileged material and the work product of an attorney.

4. *United States Federal Rules*

In broad terms, the discovery available in the Federal Courts is similar to that provided for in British Columbia. United States Federal Rule 26(a) states:

Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admissions.

While the general scope of this Rule and the British Columbia Rules are similar in that they are intended to provide for discovery of all relevant non-privileged information, the United States Rules have specific provisions which provide for broader discovery in certain circumstances. Two in particular may be noted.

First, Rule 26(2) states:

A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at the trial. For purposes of this paragraph an application for insurance shall not be treated as part of an insurance agreement.

The question of whether a defendant is insured, and the limits of that coverage, are often matters of critical importance to plaintiff's counsel in considering whether to proceed with an action or in evaluating settlement possibilities. This is rarely a concern in medical malpractice cases in Canada because of the role of the Canadian Medical Protective Association (CMPA). It is likely that a rule such as Rule 26(2) would not apply to the CMPA

in any event as that body is arguably an association rather than "a person carrying on an insurance business". However, there may be cases where the defendant is a member of a paramedical or alternative medical profession not belonging to the CMPA where such a provision would be useful to plaintiff's counsel in advising his or her client. In such a situation, under present British Columbia practice, plaintiff's counsel has no way of knowing whether or not the defendant is insured unless voluntary disclosure is made. Counsel must make his or her best guess based in knowledge of the defence counsel who appears and whether that defence counsel frequently acts for insurers.

Second, a much more significant United States provision broadening discovery beyond the British Columbia practice is contained in Rule 26(3). It allows for discovery of documents "prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)". This material can only be obtained if the party seeking it is "unable without undue hardship to obtain the substantial equivalent of the materials by other means". The Rule specifically exempts disclosure of "mental impressions, conclusions, opinions, or legal theories of any attorney or other representative".

In British Columbia, all of the material contemplated by that Rule would be considered privileged as having been prepared for the dominant purpose of litigation.

In most medical malpractice cases, the crucial documents are hospital and clinical records producible under the British Columbia Rule relating to discovery of documents. A rule similar to United States Rule 26(b)(3) would not likely assist the plaintiff in most cases. Commentaries on the American Rule make it clear that the purpose of the Rule is not to give one party the benefit of the other party's preparation. It does not, for example, allow for the production of witness statements when a witness is available to be interviewed by both sides. However, it is certainly possible to imagine circumstances where the defence has, in its investigation of a case, unearthed clinical data about the plaintiff or about the type of condition suffered by the plaintiff, which does not form part of the plaintiff's treatment record. A plaintiff, lacking the resources for such an investigation, may have no other means of obtaining such material. In such cases, a rule similar to Rule 26(b)(3) would be an important step in assuring full pre-trial disclosure.

5. Reform

A detailed comparison of the law and practice in each of these jurisdictions could yield valuable suggestions for reform, of which only the following may be discussed within the confines of this article:

- (1) the right to written interrogatory in addition to oral discovery;

- (2) the right to examine expert witnesses;
- (3) an expansion of the scope of cross-examination in discovery to include specific questions of standard of care;
- (4) greater control of objections during oral discovery; and
- (5) greater supervision generally of the discovery process.

B. *The Written Interrogatory*

A comparison of the experience in British Columbia and the United States appears to give conflicting responses on the value of written interrogatories.

1. *British Columbia*

Rule 29 of the British Columbia Rules of Court provides:

- (1) A party to an action may serve on any other party, or on a director, officer, partner, agent, employee or external auditor of a party, interrogatories in Form 22 relating to a matter in question in the action, and the person to whom the interrogatories are directed shall, within 21 days, deliver an answer on affidavit to the interrogatories. The party serving the interrogatories shall notify all other parties of record.

This Rule is rarely used in medical malpractice or any other form of personal injury litigation, except occasionally by the defence to obtain details on matters related to quantum of damages. It is rarely used by a plaintiff on issues related to liability. A major problem with written interrogatories, as opposed to oral examination, is that the response is carefully drafted by counsel after detailed consideration of the question. A response reveals the minimum of information and the experience of most counsel is that a properly prepared oral examination for discovery is generally more useful (although nothing in the British Columbia Rules prevents the use of both interrogatories and oral examination).

A further restriction of medical malpractice use of interrogatories is the established case law which makes it clear that they are limited to questions of fact arising from the recipient's personal knowledge or reasonable inquiry.¹⁶ In most cases, this would preclude a plaintiff from obtaining any effective discovery on the troublesome issues of the applicable standard of care or causation.

2. *United States*

Although the written interrogatory has been criticized in the American literature, there is considerable support for the view that, when properly used, it can be a time saving, sophisticated tool, achieving broad pre-trial disclosure of facts and evidence. It cannot be used as a tool to replace the oral discovery; however it can perform the invaluable function of gathering facts in advance of oral discovery, permitting a more sophisticated cross-examination in discovery of the defendant doctor and hospital officer.

¹⁶ *Martin and Corbett v. The Queen* (1987), 3 B.C.L.R. (2d) 60 (B.C.S.C.).

In some American jurisdictions, in a medical malpractice action, the written interrogatory is commonly used to establish the following:

- (1) Who knows the facts supporting, or the documents pertinent to, the defence.
- (2) Identities of (a) lay witnesses; (b) persons from whom the other side got statements and views and the facts obtained; (c) expert witnesses the other side will call at trial and the grounds of their opinion.
- (3) Existence, description, condition and location of documents and tangible property relating to the care of medical equipment and all health care records.
- (4) Similar incidents or common problems the party has encountered in the past.
- (5) The full names, addresses or last known addresses, and current places of employment, of physicians, nurses, other health care personnel and other persons present at the time of the event, or who had anything to do with the plaintiff during the shift on which the event occurred.
- (6) When and where each defendant saw, treated, or consulted with the plaintiff, what each defendant did each time and with what other health care personnel each defendant consulted, at what time and the substance of the consultation.¹⁷

While some of this information may be obtained in oral discovery it is often only by undertaking and not until the discovery process is already well under way. It would certainly enhance preparation for oral discovery of the medical witness if all of the foregoing information was first produced in the form of written interrogatory. The plaintiff, once armed with this information, could then direct attention to a more satisfactory oral discovery of the "whys" of the procedures undertaken or not undertaken by the defence.

In fact, prior to oral discovery the plaintiff would be well advised to use the written interrogatory to require the defendant to provide even further information than that outlined above:¹⁸

- (1) To specifically explain how the alleged incident occurred.
- (2) To provide a detailed description of all events in chronological order with the time and place of each specific event.
- (3) To confirm whether the physician has previously been involved in any medical malpractice action.
- (4) To confirm whether the defendant doctor is of the opinion that the plaintiff is in any way contributorily negligent or if he is

¹⁷ L.S. Charfoos and D.W. Christensen, *Interrogatories: How to Use Them Effectively in Personal Injury Cases* (1986), 22 (June) *Trial* 56.

¹⁸ Charles Kramer, *Medical Malpractice* (1989), Vol. 3, pp. 22A.18-22A.22, where (1) to (7) are set out and more fully discussed.

of the opinion that there was any deviation from accepted standards of medical practice on the part of any other defendant or third party, whether that party is or is not named in the action.

- (5) The nature and substance of all conversations with the plaintiff before and after the alleged malpractice.
- (6) The course of the plaintiff's illness from the time the defendant first undertook the plaintiff's care until the time of the occurrence and thereafter, together with full details of length of time with the plaintiff and the substance of all physical examinations performed.
- (7) The defendant should be asked to set forth all education, including specifics of licenses, specialties, board certifications, a list of all books, articles, lectures given or published; in short, a complete history of the defendant's experience.
- (8) The defendant should be asked to outline all publications, texts or writings consulted at the time of treatment and in preparing answers to interrogatories.

In many United States jurisdictions, the right to direct written interrogatory is granted in addition to the right of oral deposition of the opposing party of and the opposing party's experts, subject to certain limitations on combined usage. Rule 3130 of Civil Practice Law and Rules in the State of New York provides:¹⁹

3130. Use of interrogatories.

1. Except as otherwise provided herein, after commencement of an action, any party may serve upon any other party written interrogatories. Except in a matrimonial action, a party may not serve written interrogatories on another party and also demand a bill of particulars of the same party pursuant to section 3041. In the case of an action to recover damages for personal injury, injury to property or wrongful death predicated solely on a cause or causes of action for negligence, a party shall not be permitted to serve interrogatories on and conduct a deposition of the same party pursuant to rule 3107 without leave of court.

In terms of timing, oral depositions usually follow answers to written interrogatories, although in some jurisdictions interrogatories may follow depositions at the option of counsel.²⁰

The majority of states have adopted most aspects of the Federal Rules of Civil Procedure. The Rules permit the noting of an adverse party's deposition at any time thirty days or more following the service of the summons and complaint.

¹⁹ Article 31, Rule 3130, McKinney, *supra*, footnote 5, Supplementary Pamphlet. While this section does permit examination by deposition together with interrogatories, this may not be done without leave of the court. It is rare for a defendant to utilize both devices in the State of New York, except where one firm represents more than one defendant and then proceeds with service of interrogatories on behalf of one of its clients and takes a deposition of the plaintiff on behalf of the other.

Section 3130.2 deals with matrimonial proceedings and is not therefore set out in the text.

²⁰ Kramer, *op. cit.*, footnote 18, p. 22A.30.

Of the specific rules dealing with interrogatories one of the most useful is in Rule 33 of the Federal Rules. It would overcome the difficulty noted earlier in the British Columbia Rules which precludes discovery of standard of care or causation. Rule 33 provides, in part:

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to the fact or the application of law to fact, but the Court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

The rule would appear to allow a plaintiff, in some cases, to obtain early discovery of the defendant's position on what is often the most troublesome issue in medical malpractice litigation, that of causation.

Frequently, plaintiff's counsel who believes that he or she has, through admissions on discovery and through the obtaining of favourable expert reports, built a strong case to show a departure from the applicable standard of care will, at a late date, have to meet a defence based upon medical theory that the defendant's error did not cause the plaintiff's damages. For example, in a case involving obstetrical negligence, there may be clear evidence of negligent conduct during the birth of a child which *prima facie* appears to be clearly related to subsequent disabilities. The defence, however, may present theories of some genetic or other cause likely to cause such disabilities, even if the birth had taken place without incident. Under present British Columbia practice, the defendant need not provide any notice of that theory until the required delivery of expert reports thirty days before trial.

A rule similar to the American Rule would permit the plaintiff to ask, at an early date, for the defendant's opinion as to the cause of the plaintiff's injury. In many cases, the defendant could legitimately respond that he or she lacked the expertise to give an opinion on causation. Even in the example given above, a defendant obstetrician may well state that he or she lacks the expertise because the opinion on causation is properly within the field of expertise of a neonatologist or pediatrician. However, there will be many cases where the question of causation is clearly within the defendant's area of specialty and early disclosure, through a rule that allows solicitation of opinion evidence, would be useful.

The last part of the American Rule quoted above allows the court to delay answers to interrogatories seeking opinion evidence until after other discoveries have taken place. The clear intent is that a defendant should not be bound to an answer given at an early stage of the litigation which may be based on incomplete knowledge of all the evidence. Indeed, the general American Rule is that interrogatories, even if given, do not limit contrary proof by the party unless there are exceptional circumstances in which relying on the answer can be said to have caused prejudice.

A rule permitting interrogatories on questions of opinion may not, in and of itself, result in complete disclosure of the defendant's position

on a crucial issue such as causation. But it may at least provide the plaintiff with some indication of the defendant's approach and may give the plaintiff an opportunity for his or her own investigation of at least one possible defence theory that may have to be met at trial.

3. *Summary*

It might be possible to use the written interrogatory as an aid to oral discovery in the following ways:

- (1) prior to discovery to collect data that might not otherwise be disclosed in an Affidavit on Production, such as the physician's position with respect to the chronology of events, copies of his or her curriculum vitae, and relevant articles or texts used by the plaintiff as a reference in treating the plaintiff;
- (2) to ascertain the physician's position with respect to the appropriate standard of care.

C. *Expert Witnesses*

1. *Alberta*

Rule 200 of the Alberta Rules of Court, which appears quite broad in scope, has not been used by litigants for the purpose of a pre-trial deposition of experts. Indeed, it would be ill advised to attempt to rely on this particular rule as a basis for any application to examine experts as the rule appears to be restricted to parties and former and present employees of the parties. There are however two rules which deal specifically with experts.

Rule 218.1(1) requires advance disclosure of the opinions of the experts of the parties:

218.1(1) A party intending to call an expert witness at a trial shall, not fewer than 90 days prior to the commencement of trial, serve on every other party to the action a copy of a statement signed by the expert setting out his name and qualifications and the substance of his opinion.

(1.1) A party on whom a statement has been served under subrule (1) who intends to call an expert witness in rebuttal to the matters mentioned in the statement shall, not more than 45 days from service of the statement, serve on every other party to the action a copy of a statement signed by that expert setting out his name and qualifications and the substance of his opinion.

(2) Unless subrule (1) and (1.1), as the case may be, has been complied with, a party may not call an expert witness to testify without leave of the court.

(3) Where a party proposes to call an expert witness at the trial and to offer in evidence a report by the expert witness, that party shall, without prejudice to the right of any party to object to its admission in evidence, serve on every other party to the action a copy of the report not fewer than 10 days prior to the commencement of the trial.

Rule 218.1 is deficient for a number of reasons:

- (1) The time frame for exchange is usually well after the certificate of readiness has been filed, only 90 days prior to trial, thus discouraging early disclosure of the expert opinions;
- (2) There is no provision for cross-examination of the experts on their opinion prior to trial;
- (3) The disclosure of the expert opinion is not tied in any meaningful manner to the date for the pre-trial conference, which may have been held well before the exchange of expert reports, thus preventing useful discussion with the trial judge of the merits of the lawsuit.²¹

Rule 218(1) provides for the appointment of an independent expert by the court on its own motion or on application where independent technical evidence would appear to be required. In such a case the parties are entitled to a copy of the report, and they may apply for leave to examine the expert, either prior to or at the trial.

2. *British Columbia*

In British Columbia, Rule 28 of the Rules of Court provides for an order for pre-trial examination of a witness, but specifically excludes expert witnesses in all but the most exceptional circumstances. Rule 28(2):

An expert retained or specially employed by another party in anticipation of litigation or preparation for trial may not be examined under this rule unless the party seeking the examination is unable to obtain facts and opinions on the same subject by other means.

Rare will be the case when a plaintiff could successfully assert an inability to obtain his or her own expert in the field at issue. Nor would a plaintiff wish to rely on the defendant's expert as the sole source of information or opinion. The need to discover the opinion of the opposite party's expert is rarely related to the uncovering of basic facts or information to which Rule 28(2) is directed. The need for pre-trial discovery of an expert is related to a party's knowing the case to be met and being in a position to challenge that position at trial. In British Columbia, the only provisions serving that purpose are contained in sections 10 and 11 of the Evidence Act.²² Section 11 requires that a statement in writing of

²¹ The case of the unavailability of the expert for trial is covered in Rule 270(1):

270(1) The court may, in any cause or matter where it appears necessary for the purposes of justice, order a person to be examined upon oath before an officer of the court, or any other person, and at any place whether within or without the jurisdiction.

(2) Where the testimony of a person who is resident outside of Alberta is required, the court may order the issue of a commission for the examination of the person.

(3) The examination shall, unless otherwise ordered, be conducted in accordance with the practice upon examination of witnesses at the trial, so far as it is applicable.

²² R.S.B.C. 1979, c. 116.

the expert opinion and the facts on which it is based must be furnished at least 30 days before the expert testifies. Section 10 sets out an alternate procedure under which the written statement of the expert, if delivered 30 days in advance, may be filed as evidence subject to the opposite party's right to require the expert's attendance for cross-examinations.

It is important to note that the required notice period is not 30 days before trial, although in practice parties frequently treat it as such, but thirty days before the expert testifies or before the written report is to be tendered. While this usually means the plaintiff's counsel must file reports thirty days before trial, the defendant may, in a long trial, be under no obligation to file a report until the eve of trial or even after the trial has begun. Moreover, it has been held that the notice provision does not apply to statements directly rebutting the opponent's expert.²³ Thus, a defence expert may, without notice, give opinions at trial aimed at directly contradicting matters contained in the evidence of the plaintiff's expert. It has also been held that an expert giving evidence in British Columbia may not give evidence in examination in chief not contained in his or her report other than explanation of technical terms and other matters of clarification.²⁴ This is, however, an authority that is often honoured more in the breach than in the observance. Depending upon the inclination of a trial judge, an expert retained by either the plaintiff or the defendant may give evidence well beyond what is contained in the report or written statement.

3. *United States*

In contrast to Alberta and British Columbia, the cross-examination of deposition of the defendant's expert is a part of pre-trial procedure in many United States jurisdictions. The pre-trial deposition may include questions on the following topics:

- (1) Cross-examination concerning the witness' educational and professional background.
- (2) The substantive testimony that the witness will be delivering at trial.
- (3) The witness' opinion about the quality of medical care the plaintiff received and if the case centres on an alleged defective procedure or treatment, the defendant's expert should be fully questioned about what the appropriate treatment or procedure should have been.

Frequently, and not surprisingly, much of the questioning of the expert concerns the expert's opinion about the particulars of the deviation from the standard of care. It is not uncommon for both plaintiff and defence experts to be examined orally well in advance of trial with detailed and

²³ *Peterson v. Degelder* (1985), 62 B.C.L.R. 253 (B.C.S.C.).

²⁴ *Ibid.*

technical disclosure about the expert's opinions and exact testimony as to the standard of care propounded on each side by the experts.

This is precisely the type of evidence that is often not elicited prior to trial in most Alberta medical malpractice actions, given that there is no specific rule permitting pre-trial discovery of the opponent's expert. In fact, specific questions directed at discovery of the appropriate standard of care may be objected to by opposing counsel, and the objection may be sustained, as it was in *Pavic v. Mallen*,²⁵ on application on the ground that any opinion evidence as to (1) what the standard of care should have been, or (2) what specific deviations from the standard of care occurred, constitutes questions of law to be determined by the trial judge.

The procedures for pre-trial deposition of the opposing parties' experts are complex, yet their complexity is not outweighed by their usefulness. For example, the rules in the State of New York at 3101(d) make specific provision for examination of experts:²⁶

(d) Trial preparation. 1. Experts. (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on the grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.

(ii) In an action for medical, dental or podiatric malpractice, any party may, by written offer made to and served upon all other parties and filed with the court, offer to disclose the name of, and to make available for examination upon oral

²⁵ (Unreported).

²⁶ McKinney, *supra*, footnote 5, Supplementary Pamphlet, CPLR 3101 to 2100. Rule 3101 was substantially changed in 1985, effective July 1986. Prior to that date, according to Mr. Golomb (see acknowledgement, *supra*, p. 558), no routine disclosure in connection with parties' expert witnesses was allowed. The changes noted which required disclosure were made as part of a wide reaching insurance and medical industry legislative package designed to reduce the numbers of malpractice cases. The defence bar, in forcing compromise leading to the final drafting of Rule 3101(d)(1), was attempting to impose an expert witness disclosure scheme which is similar to that used in the federal courts where complete expert witness disclosure is the rule rather than the exception. The end result is a compromise which results in a system in which a party may return the demand disclosure of specified information regarding the expected testimony of an expert. There are difficulties with the current section which are similar to those in Alberta (that is, the failure to specify any penalty for non-compliance with the demand) although this is perhaps one instance in which Alberta has a better rule for sanctions which precludes the calling of the expert at trial where 218.1 has not been complied with. (The foregoing commentary is provided specifically by Mr. Golomb).

deposition, any person the party making the offer expects to call as an expert witness at trial. Notwithstanding the provisions of section one hundred forty-eight-a of the judiciary law and the rules of the appellate divisions adopted pursuant to subdivision one of such section which authorize or otherwise require the matter to be heard before a medical malpractice panel, the offer may be conditioned upon all the parties agreeing to waive the hearing of the matter before the panel. No other condition may be attached to the offer by any party. Within twenty days of service of the offer, a party shall accept or reject the offer by serving a written reply upon all parties and filing a copy thereof with the court. Failure to serve a reply within twenty days of service of the offer shall be deemed a rejection of the offer. If all parties accept the offer, each party shall be required to produce his or her expert witness for examination upon oral deposition upon receipt of a notice to take oral deposition in accordance with rule thirty-one hundred seven of this chapter and if the offer was condition upon waiver of the hearing of the matter before the panel, the panel shall not be utilized. If any party, having made or accepted the offer, fails to make that party's expert available for oral deposition, that party shall be precluded from offering expert testimony at the trial of the action.

(iii) Further disclosure concerning the expert testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate. However, a party, without court order, may take the testimony of a person authorized to practice medicine, dentistry or podiatry who is the party's treating or retained expert, as described in paragraph three of subdivision (a) of this section, in which event any other party shall be entitled to the full disclosure authorized by this article with respect to that expert without court order.

2. Materials. Subject to the provisions of paragraph one of this subdivision, materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representatives of a party concerning the litigation.

It appears that the overall intention of this particular amendment to the rules of court, which was only passed in 1985, is to expand pre-trial disclosure even beyond that of original Rule 3101. Concurrent with the passage of this particular amendment, the same New York Statute mandated the conducting of an early precalendar conference in malpractice cases. The Rule (CPLR 3406(b)) requires that "[t]o the extent feasible, the justice convening the pre-calendar conference shall hear and decide all subsequent pre-trial motions in the case and shall be assigned to the trial".²⁷

The net effect of the foregoing amendment would appear at the very least to offer an effective alternative to the standard progress of the Alberta medical malpractice action. The rule contemplates much earlier disclosure of the expert opinion, that is, "upon request", and the rule contemplates

²⁷ McKinney, *ibid.*, Supplementary Pamphlet, CPLR 3401 to 5100.

pre-trial deposition of the experts in certain circumstances. Finally, the disclosure of material prepared in anticipation of litigation or for trial by or for another party may be disclosed upon the condition that the party seeking discovery has substantial need of it and is unable without undue hardship to obtain the substantially equivalent of the materials by other means.

The United States Federal Rules allow discovery of two categories of experts. Rule 26(A) allows a party, through interrogatories, to require identification of every person whom the other party expects to call as an expert witness and a summary of the opinion. Further discovery by other means, such as oral examination, may be obtained by order. Rule 26(B) allows discovery of an expert retained for assistance in trial preparation who is not expected to be called as a witness where that witness has conducted a physical examination of the plaintiff, or where there are "exceptional circumstances under which it is impractical for the parties seeking discovery to obtain facts or opinions on the same subject by other means".

The latter provision is similar to the little used British Columbia Rule 28(2) referred to above, except that where the plaintiff is physically examined by a physician obtained by the defendant, discovery of that evidence is mandatory. Under current British Columbia practice, it is possible for a defendant to obtain an examination of the plaintiff and never disclose the results of that examination or the opinion of the examiner if they do not in fact assist the defendant's case.

It is the former provision for discovery of experts who are intended to testify at trial that is the most urgently needed reform of Canadian procedure in this area. Such a provision would allow early disclosure of expert opinions on which each party would rely and would allow each counsel the opportunity for a full pre-trial cross-examination of the opposing experts. While this would undoubtedly lengthen pre-trial procedures, it would shorten trials and limit them to matters truly in issue, eliminate surprises at trial and, in many cases, perhaps lead to settlement.

Given the complexities and vital importance of expert evidence in medical malpractice cases, it is submitted that much broader pre-trial discovery of experts, similar to the American practice, is required. The need is highlighted by the advisory committee on the Federal Rules whose commentaries are contained in the published edition of the Rules.²⁸

A prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand.

²⁸ Federal Rules, *op. cit.*, footnote 7, p. 83 (commentary on Rule 26).

4. *Summary*

The medical malpractice case is almost always dependent upon the opinion of experts. As the opposing expert opinion is so crucial to counsel's overall assessment of the merits, it is recommended that limited pre-trial discovery of the experts testifying in each case be permitted, as a further pre-trial discovery tool.

D. *Conduct of Oral Examination for Discovery*

1. *Alberta*

In the province of Alberta, the flow of discovery questioning is frequently interrupted by a zealous series of objections to the questions being posed. This problem has arisen as a result of the requirement in Alberta that objections be made as the question is being posed, in order to preserve the right of the objector to claim that the question was improper at the time of trial or on a later interlocutory motion.

The case law is clear that objections may only be made if the question is irrelevant, hypothetical, calls for opinion evidence, or calls for a legal opinion. In fact, objections are often made on grounds other than these. The end result is often that valuable evidence is suppressed or, at the very least, the flow and continuity of discovery is hampered. Further, numerous interlocutory motions are often required to settle the issue of propriety of objections with a resulting waste of time and money both for plaintiff and defence.

2. *British Columbia*

The British Columbia Rules and practice relating to objections on examination for discovery are similar to those in Alberta. Rule 27(24) states:

Where a person under examination objects to answer a question put to him or her, the question and the objection shall be taken down by the official reporter and the validity of the objection may be decided by the court, which may order the person to submit to further examination.

As in Alberta, the practice requires the validity of an objection to be tested on a separate chambers application with a further examination if necessary. While the clear preference of the courts is for full and complete discovery, many objections are never tested. Moreover, although it has not been verified, it may be that the flow of objections is not as great a problem as it seems to be in Alberta.

3. *United States*

By contrast, CPLR 3115 of New York specifically provides:²⁹

(a) *Objection when deposition offered in evidence.* Subject to the other provisions of this Rule, objection may be made *at the trial* or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

²⁹ McKinney, *supra*, footnote 5, Book 7B. (Emphasis added).

This particular rule allows the attorney whose client is being cross examined at deposition a measure of relaxation as the propriety of questions need not be objected to until the trial itself. This, of course, affords an advantage to the examining party who may question more freely without the fear of constant interruption as to the propriety of the question.

The only type of question that must be objected to at deposition, under penalty of losing the right to subsequently object, is the question which may forthwith be cured. CPLR 3115(b) provides:³⁰

(b) *Errors which might be obviated if made known promptly.* Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of question or answers, in the oath or affirmation, or in the conduct of persons, and errors of any kind which might be obviated or removed if objection were promptly presented are waived unless reasonable objection thereto is made at the taking of the deposition.

The United States Federal Rule 30(c), dealing with oral depositions of parties, includes a provision that "evidence objected to shall be taken subject to the objections".

4. Reform

The Alberta and British Columbia rules concerning discovery and, more particularly, the practice and procedure that has developed with respect to the raising of objections at discovery, has discouraged to some extent the free flow of question and answer that is so crucial to effective cross-examination. Often, discovery transcripts in the medical malpractice action disclose numerous objections or matters under advisement which may be subsequently overruled if the plaintiff's counsel has the money and the time to bring the necessary interlocutory application that is usually required. All too often however, the objections made at discovery are left unchallenged,

³⁰ *Ibid.* Mr. Golomb (see acknowledgement, *supra*, p. 558), advises that in connection with depositions of defendants in malpractice cases in the important decision of *McDermott v. Manhattan Eye Ear and Throat Hospital*, 15 N.Y. (2d) 20, 255 N.Y.S. (2d) 65 (1964), the court held that: (a) a plaintiff in a malpractice action is entitled to call the defendant doctor to the stand and question him both as to his factual knowledge of the case, that is as to his examination, diagnosis, treatment and the like, and if he be so qualified to call him as an expert for the purpose of establishing the generally accepted medical practice in the community; and (b) by allowing the plaintiff to examine the defendant doctor with respect to the standard of skill and care ordinarily exercised by physicians in the community under like circumstances and with regard to whether his conduct conforms thereto, even though such questions call for the expression of an expert opinion, the courts do no more than conform to the obvious purpose of the adverse party witness rule. That purpose, of course, is to permit the production in each case of all pertinent and relevant evidence that is available for the parties to the action (citations omitted). The issue whether the defendant doctor deviated from the proper and approved practice . . . is assuredly "pertinent and relevant" to a malpractice action. Indeed absent such proof the plaintiff's case would have to be dismissed. Mr. Golomb advises that this particular rule as explained in the *McDermott* case has long been extended to pre-trial deposition questioning where the bounds of permissible inquiry are even broader than at trial of the action.

with follow-up interlocutory. The adoption of a practice akin to that in the United States would solve many of these problems.

E. Supervision of Disclosure During the Discovery Process

1. Alberta

In Alberta, it is uncommon for any court official such as a judge, or a referee or master in chambers, to supervise all or any parts of pretrial proceedings. In most instances, the manner in which examination for discovery is conducted is left to the discretion of the parties. In the context of a medical malpractice action, this may operate to the detriment of plaintiff's counsel, particularly the less vigilant and aggressive.

In Alberta, counsel appointed for the defendant doctor and defendant hospital usually "specialize" in the defence of the medical malpractice case. Most, if not all, are exceptionally proficient, completely attuned to all phases of the defence and cognizant of every aspect of the operation of the defendant hospital and the doctor's medical practice. To some extent, this can affect the nature of pretrial disclosure made, particularly if plaintiff's counsel is less than vigilant and less than fully informed as to the types of medical records available for disclosure. Finally, there is always the difficulty of the expense of the action for the plaintiff, who is usually faced with the deep pocket of the Canadian Medical Protectorate Society, the insurer of the defendant doctors.

The Alberta Rules of Court, while making provision for the appointment of a referee, do not link that appointment to the direct supervision of pretrial discovery process. Rule 403 of the Alberta Rules of Court simply provides:

403. All masters in chambers, clerks or deputy clerks of the Court of Queen's Bench and such other persons as are appointed by the Lieutenant Governor in Council are official referees for the purposes of references by the Court.

Rule 424 provides that any question in an action may be referred to a referee:

424. Where any question in an action is referred to a referee he may, subject to the order of the court, hold an inquiry at, or adjourn it to any convenient place, and have any inspection or view.

However in Alberta, the use of the referee is not at all associated with the supervision of pretrial disclosure and discovery. The only remedy commonly used for controlling the scope of disclosure is the interlocutory application which is an expensive remedy for the plaintiff if utilized on a frequent basis, especially since rulings at the Masters level are frequently appealed by the defence to a judge in chambers during the course of a medical malpractice case. Further, many pre-trial applications in medical malpractice suits involve the necessity of a special chambers hearing which requires a brief of law in addition to the usual affidavit evidence. In fact, it would not be a rash conclusion to say that the "typical" medical malpractice

case may involve at least three to four interlocutory motions on the following issues:

- (1) The propriety of questions put at examination for discovery.
- (2) The extent of disclosure in affidavits on production.
- (3) The responses to undertakings arising at discovery.
- (4) The initial application for trial before a judge and jury (which often must be made before the certificate of readiness is filed).
- (5) The final application to remove the matter from a judge and jury (which is often made by the defence after exchange of expert reports under Rule 218.1).

Valuable court time and money might well be saved if the Alberta Rules were modified to permit one sitting judge to hear all pre-trial motions or to allow for retired judges or senior counsel to sit as referees from inception of the suit to the commencement of trial. In conjunction with the appointment of referees, the rules might be further amended to dispense with the necessity for affidavits and briefs of law during the course of hearings before referees, unless both parties agree or the referee so orders.

2. *British Columbia*

Pre-trial conferences have long been part of the British Columbia Rules. Rule 35(3) provides:

A pre-trial conference shall be attended by the solicitor for the parties, or the parties themselves, and shall consider:

- (a) the simplification of the issues;
- (b) the necessity or desirability of amendments to pleadings;
- (c) the possibility of obtaining admissions which might facilitate the trial;
- (d) the quantum of damages;
- (e) fixing a date for the trial; and
- (f) any other matters that may aid in the disposition of the action or the attainment of justice.

In the past, pre-trial conferences have, as often as not, been rather empty formalistic exercises, wherein counsel have confirmed to the presiding judge their estimate of the necessary length of trial, whether or not discoveries have been completed, their estimates (not binding and not necessarily accurate) as to the number of witnesses to be called, and their estimation (often expressed in arbitrary and meaningless percentages) of the chances of settlement.

However, recent changes to Rule 35 have greatly increased the scope of what can be done at a pre-trial conference, reflecting a clear policy preference for a greater judicial role in pre-trial procedures. It is important to note that, in contrast to Alberta, a trial date may be and usually is obtained as soon as pleadings are closed. This may be a year in advance of the trial date, at a time when discovery procedures have not begun, much less been concluded. The court thus has an ever more urgent interest in the progress of matters that have been allotted valuable time on the

trial list. The recent changes greatly expand the power of the court at a pre-trial conference.³¹ The court may now order the filing of a statement of agreed facts by a specified date, may set a discovery schedule and place limits on discovery procedures.

Most intriguingly, the new rules governing pre-trial conferences in British Columbia also allow the court to order that "experts who have been retained by the parties confer, on a without prejudice basis, to determine those matters on which they agree and to identify those matters on which they do not agree".³² The obvious intent of this rule is to limit the issues and encourage settlement. However in the absence of meaningful procedures for pre-trial discovery of experts, it may be possible for plaintiff's counsel to use this provision to obtain at least some greater understanding of the issues arising from expert evidence. The question is whether the court will be prepared to combine this power under the pre-trial rule to order exchange of expert reports earlier than what is provided for in the Evidence Act,³³ or whether it will be prepared to order an experts' conference prior to the formal exchange of expert reports.

The new rule opens the possibility for a much more aggressive use of pre-trial procedures by counsel seeking earlier definition of issues and seeking to advance discovery procedures. This is particularly so in light of the long standing practice, at least in the Vancouver Registry of the British Columbia Supreme Court, to assign one judge to hear all pre-trial conferences where a case is set for a trial of three weeks or longer. Thus, there can be a number of pre-trials in a case, all before one judge who acquires some familiarity with the issues and is able to deal expeditiously not only with standard pre-trial conference matters, but also matters which might otherwise be heard on the normal chambers list, such as motions to compel answers to questions on discovery or applications for further and better production of documents.

The pre-trial rule must also be read in conjunction with the new Rule 39(15) which requires that where a trial is estimated to be ten days or longer, the parties must file an agreed case management program setting out a number of matters relating to the timing of amendments to pleadings, discovery, notices to admit and the advisability of a settlement conference. The rule also requires a case management program to state when expert reports will be exchanged and whether a conference of experts is contemplated. A pre-trial conference may deal with any aspects of the case management program that cannot be agreed.

In British Columbia, a procedure for formal Notice to Admit has long been a part of the Rules of Court. Rule 31(1) provides that by delivery of a Notice to Admit a party may request any other party to admit for

³¹ Rule 35(4).

³² Rule 35(4)(k).

³³ *Supra*, footnote 22.

the purposes of the proceeding the truth of fact or the authenticity of a document specified in the Notice. The fact or document is deemed to be admitted unless the other party delivers, within 14 days of service of the Notice, a written statement that either denies the fact, sets forth detailed reasons why it cannot be admitted, or states an objection on grounds of privilege or relevance.

This is a procedure that has not had any effective use except to eliminate proof at trial of the most routine and non-contentious matters. Counsel who do not wish to admit a matter have always been able to avoid doing so with an appropriately worded response. However, in September 1990, the new Rule 31(7) went into effect, making the use of Notice to Admit mandatory. Each party is required, forty-five days before trial, to deliver a Notice setting out those facts which the party delivering the Notice considers are not in dispute. There is a clear desire on the part of the court for parties to resolve by agreement all issues not seriously in dispute. Rule 31(8) provides that where a Notice is not delivered or where there is an unreasonable refusal to admit the truth, the court may penalize the party for costs.

It is too early to know what effect the new Rule will have on the conduct of litigation in general or medical malpractice litigation in particular. Once again, comparison with the United States Federal Rule 36 is instructive. This Rule does not provide for compulsory Notice to Admit as does the new British Columbia Rule, and provides only that a party may serve a written request for admission. Depending upon how counsel use, and the courts apply, these provisions, the British Columbia practice may move much closer to what is set out in the American Federal Rules regarding pre-trial proceedings.³⁴

3. New York

In New York, the uneven matching of money and ability as between plaintiff and defence counsel has been balanced to some extent by a special rule allowing for supervision of all phases of the disclosure and discovery process by a judicial hearing officer, who is defined as any person who has served as a judge of a court of record of a New York Court, but who no longer holds that office (whether because of retirement or otherwise).

Rule 3104 of New York CPLR provides that:³⁵

- (a) *Motion for and extent of supervision of disclosure.* Upon motion of any party or witness on notice to all parties or on its own initiative without notice, the court in which an action is pending may by one of its judges, or a referee supervise all or part of any disclosure procedure.

³⁴ See the discussion, *infra*, p. 585-586.

³⁵ McKinney, *supra*, footnote 1, Book B7, Supplementary Pamphlet, CPLR 3101 to 3200.

(b) *Selection of referee.* A judicial hearing officer may be designated as a referee under this section or the court may permit all of the parties in an action to stipulate that a named attorney may act as a referee. In such latter event, the stipulation shall provide for payment of his fees which shall, unless otherwise agreed be taxed as disbursements.

Subparagraph (b) was amended in 1983 to create the office of "Judicial Hearing Officer".³⁶ Judicial Hearing Officer, defined in CPLR 105, essentially means a retired judge as long as the chief administrator of the courts certifies that the person's mental and physical capacities are intact and that his or her services are needed "to expedite the business of the courts".

This particular rule seems to be of considerable use when there is evidence that opposing counsel are unable to cooperate, where infants are involved as parties, and where technical issues involving extensive pre-trial disclosure of documents are likely to occur.

Rule 3406 makes special provision for pre-trial conferences in the case of medical, dental or podiatric malpractice.³⁷

Rule 3406. Mandatory filing and pre-calendar conference in dental, podiatric and medical malpractice actions.

(a) *Mandatory filing.* Not more than sixty days after is joined, the plaintiff in an action to recover damages for dental, medical or podiatric malpractice shall file with the clerk of the court in which the action is commenced a notice of dental, medical or podiatric malpractice action, on a form to be specified by the chief administrator of the courts. Together with such notice, the plaintiff shall file: (i) proof of service of such notice upon all other parties to the action; (ii) proof that, if demanded, authorizations to obtain medical, dental, podiatric and hospital records have been served upon the defendants in the action; and (iii) such other papers as may be required to be filed by rule of the chief administrator of the courts. The time for filing a notice of dental, medical or podiatric malpractice action may be extended by the court only upon a motion made pursuant to section two thousand four of this chapter.

(b) *Pre-calendar conference.* The chief administrator of the courts, in accordance with such standards and administrative policies as may be promulgated pursuant to section twenty-eight of article six of the constitution, shall adopt special calendar control rules for actions to recover damages for dental, podiatric or medical malpractice. Such rules shall require a pre-calendar conference in such an action, the purpose of which shall include, but not be limited to, encouraging settlement, simplifying

³⁶ *Ibid.*, Supplementary Pamphlet, CPLR 3101 to 3200, p. 233.

³⁷ *Ibid.*, Supplementary Pamphlet, CPLR 3401 to 5100. This particular rule should be read in conjunction with Rule 202.56 of the Uniform Rules for Trial Courts which sets forth the type of form upon which pre-trial conferences are requested and the matters about which pre-trial conferences will be concerned. It is generally the opinion of Mr. Golomb that these particular rules have provided assistance in the discovery process by setting forth an agenda of agreed upon or judicially imposed discovery.

or limiting issues and establishing a timetable for disclosure, establishing a timetable for offers and dispositions pursuant to subparagraph (ii) of paragraph one of subdivision (d) of section thirty-one hundred one of this chapter, future conferences, and trial. The timetable for disclosure shall provide for the completion of disclosure not later than twelve months after the notice of dental, podiatric or medical malpractice is filed and shall require that all parties be ready for the trial of the case not later than eighteen months after such notice is filed. The initial pre-calendar conference shall be held after issue is joined in a case but before a note of issue is filed and before a medical malpractice panel hearing, if any, is scheduled. To the extent feasible, the justice convening the pre-calendar conference shall hear and decide all subsequent pre-trial motions in the case and shall be assigned the trial of the case. The chief administrator of the courts also shall provide for the imposition of costs or other sanctions, including imposition of reasonable attorney's fees, dismissal of an action, claim, cross-claim, counterclaim or defense, or rendering a judgment by default for failure of a party or a party's attorney to comply with these special calendar rules or any order of a court made thereunder. The chief administrator of the courts, in the exercise of discretion, may provide for exemption from the requirement of a pre-calendar conference in any judicial district or a country where there exists no demonstrated need for such conferences.

The key advantages to this particular rule appear to be fourfold:

- (1) A specific timetable must be established for disclosure, which includes depositions.
- (2) All disclosure of evidence permitted under the rules including depositions, must be completed not later than twelve months after notice of the action is filed.
- (3) To the extent feasible, one judge is designated to hear all pretrial motions and the trial itself.
- (4) All parties must be ready to proceed to trial in 18 months.

The 60 day period set forth in the Rule is extendable but only on motion to the court and not by agreement between the parties unless the agreement is also confirmed by the court. The *raison d'être* for the passage of the rule appears to be the concern that there be continuity and timeliness in the progression of the medical malpractice suit as it proceeds through the system.

4. United States Federal Rules

The United States Federal Rules allow for two procedures by which the court may intervene prior to trial, a "discovery conference" and a pre-trial conference.

Rule 26(f) provides for a discovery conference which may be ordered upon motion of either side. At the discovery conference, the court may make an order "identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses as are necessary for the proper management of discovery in the action". Prior to the conference, the parties are under a duty to attempt to reach agreement on these matters.

The discovery conference may be combined with or may pre-date a pre-trial conference. Issues to be dealt with at the pre-trial conference include:³⁸

- (1) the formulation and simplification of the issues, including the elimination of frivolous claims or defences;
- (2) the necessity or desirability of amendments to the pleadings;
- (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;
- (4) the avoidance of unnecessary proof and of cumulative evidence;
- (5) the identification of witnesses and documents, the need and schedules for filing and exchanging pre-trial briefs, and the date or dates for further conferences and for trial;
- (6) the advisability of referring matters to a magistrate or master;
- (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;
- (8) the form and substance of the pre-trial order;
- (9) the disposition of pending motions;
- (10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and
- (11) such other matters as may aid in the disposition of the action.

The pre-trial conference may also deal with scheduling and limiting the time for joinder of other parties, motions and discovery. The Rule further provides: "at least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed."

5. Summary

In general it is recommended that closer pre-trial supervision of the medical malpractice case would likely improve pre-trial disclosure, and perhaps result in expeditious resolution of the many interlocutory issues which seem to arise in the course of these lawsuits.

It is further recommended that one pre-trial judge be assigned to each case where damages claimed exceed a certain monetary limit and that regular pre-trial conferences be held in front of the same pre-trial judge throughout the course of the lawsuit.

³⁸ U.S. Federal Rules, *op. cit.*, footnote 7, Rule 16(c).

Conclusion

It is certainly the authors' opinion that many of the comments contained in the Pritchard Commission Report concerning the difficulties of medical malpractice lawsuits for the plaintiff centre around the difficulties that are inherent in the general rules of practice and procedure in Alberta and British Columbia. There do not appear to be clear rules which allow for a complete disclosure of the expert's position and there appear to be less judicial control of the overall cause of action than might be warranted in the circumstances of these complex cases. The writers hope that the comments contained in this article will incite others to consider potential rule amendments.