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Medical Malpractice: A How To Guide

Discovery: Obtaining Full and Effective Disclosure

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Preparation for Examination for Discovery – A Plaintiff's Perspective, by Paul Mann

The first thing that one must note that is of tremendous import, at least for a plaintiff, is that facts win cases and lawyers lose them.

As a result, the facts must be well-known and understood. This is not simply the facts as contained in the hospital records, health reports, nurses notes, clinical notes, consultation notes, lab studies and any other information provided by defence counsel prior to Examinations for Discovery. Rather, this involves an understanding of who your client is, who your client was prior to the incident and anecdotes from the family to support this difference. Specifically, what was their lifestyle like? What is that lifestyle like now? What does the future hold? Such questions can be divided into three categories of past, present and future.

The family unit (only lawyers would talk like that) is basically a question of how the family (as considered by the drafters of the *Family Law Act*) interacted before the incident and after. While counsel may be retained to investigate the circumstances surrounding the untimely demise of the child, it is hasty to confine one's investigation of damages to those payable under the *Family Law Act.*

Those that drafted the *Family Law Act* decided that the three heads of damages would be loss of care, loss of guidance and loss of companionship. I do not personally know anybody who, when they have lost a child, thinks "oh my, what guidance, what care and what a relationship I have lost". It is obviously much more than that. In the context of Examinations for Discovery, it is important to remember that *Family Law Act* claims should be delved into factually with, for example, pictures and birthday cards. As a lawyer, one must attempt to understand what the

family has lost by conducting an extensive set of interviews to obtain specific recollections and information respecting the loss.

At Examinations for Discovery, preparation is key. A good general rule is that the plaintiff should be honest, straight-forward, tell the truth, not guild the lilly and answer the only the questions being put to them. The plaintiff should be advised not to volunteer any information and not to finish the defence lawyers' question for them. I tell my plaintiffs that when they do not know or cannot recall at the time (as discoveries are very stressful for all parties), to maintain that they "cannot recall at this time". The words "at this time" are key because later on while they are not under stress, perhaps their recall and their ability to provide information will improve.

Preparation for Examinations for Discovery should begin at the very outset of the case. A discovery is nothing more and nothing less than a discovery of the facts; a discovery of the condition; a discovery of the damages; a discovery of the case. If well prepared and well executed, it will provide a significant "leg up" to your trial.

Adequate preparation results in fewer undertakings. Having clearly relevant documentation in the hands of opposing counsel in advance of discoveries i.e. income tax returns in a loss of income claim, is a good example of this. This will also apply to education records; hospital notes and records; doctors records; as well as documents related to pre-existing conditions.

Patients in medical malpractice cases tend to have selective memory as a result of the stress of being in a hospital and as a result of being treated for something they do not know anything about. Perception is altered by having pain inflicted or being traumatized to the extent that a patient becomes unconscious, in a coma or under amnesia. This reality is recognized by the Supreme Court of Canada in *Snell v. Farrell.*

In preparation for the Examination for Discovery, one must not only prepare their own witnesses, but must also extensively prepare for questioning of the defendant physicians and/or Hospital. It is important to develop an understanding of what the defendants are likely to say, keeping in mind the likelihood that the defence will not have produced a single thing to you save and except for clinical notes and records. While these notes may not always be provided in

the most orderly fashion, it is imperative to study these notes and to understand them both for what they say and, just as important, what they do not say.

Going into an Examination for Discovery, it is a wise plaintiffs' counsel indeed who has some kind of an idea medically as to exactly what's going on and why. It is a wise plaintiffs' counsel who has met with several experts in various fields dealing with each individual case and taken detailed notes. It is vital that counsel have an opportunity to obtain preliminary expert opinion as to whether or not the there was substandard care and causation. If you are in receipt of 4 or 5 of those opinions, keep notes and thereafter send your expert copies of the transcripts of the discovery when received and ask them for an expert report. The earlier these experts are retained, the better.

It is important not to be naïve. If the defence says it has no reports, they're telling you the truth. What they are not telling you is that they have several opinions given verbally. Naivete today has no place in the field of medical malpractice. You must know your medicine. You must know your law. You must know how to marry the medicine with the law and you must be prepared to go the extra mile and work the case up so that it means something to an expert, instead of just 800 pages accompanied by a request to "please give me your opinion".

As plaintiff's counsel, it is important to understand the case such that you are able to work through the constant refrain from defence counsel that "you have no case". It is equally important so that one is able to recognize when defence counsel is correct, and make efforts to cut one's losses.

I hope these comments are of interest to you.

Preparation for Examination for Discovery – A Defence Perspective, by Peter Kryworuk

Every good counsel will tell you that preparation is the key to success. This is especially important in medical negligence litigation. The best plaintiff and defence counsel are always prepared. Preparation in medical negligence cases begins when the time the file is opened and continues until the case is finally completed. This paper will focus on preparation related to production and discovery. *The Rules of Civil Procedure* set out comprehensive rules for both oral and documentary discovery. A good summary of these rules is contained in an ancillary

paper. Know the rules and use them. Good counsel will give early attention to identifying all relevant documents and will take steps to locate them and ensure they are retained and ultimately produced. In a typical medical negligence case, there are four primary sources of relevant documentation, namely:

1. the plaintiff

2. the defendant physicians

3. defendant hospital and nurses

4. non parties

In medical negligence cases it is important to approach production and discovery from a strategic point of view. This involves answering the following questions:

- What information/documentation is out there?
- Where will I find it?
- Will the information/documentation likely advance my case?
- Will the information/documentation hurt my case and if so, how will I minimize its impact?

From the perspective of a lawyer representing physicians, I will always start by looking at my own client's documents. The primary document, in almost every case, is the patient's medical chart. In today's world that usually includes both paper and electronic records. Some physicians who practice extensively in a hospital environment no longer maintain a personal office chart and their records will be found primarily, if not exclusively, in the hospital's records. Depending on the matters in issue, the physicians may have other relevant documents including calendars, appointment books or call logs in paper or electronic form. In informed consent cases, any pamphlets or literature normally distributed to patients about a particular treatment or procedure can be very important as well.

In cases involving hospitals and nurses, the hospital chart is usually critical. The medical records within a hospital may not be in one centrally-filed location, and alternative locations need to be

considered. For example a radiology department may have independent records regarding a patient such as the requisition form, which may not form part of the patient's chart. In some cases, hospital policies and procedure manuals may be relevant. Additionally, some parts of a physician's hospital privileges file or a nurse's employment file, which relate to their qualifications, training and experience, may be relevant in some cases.

With respect to the plaintiff's productions, I never wait for a Discovery Plan or delivery of Affidavit of Documents to seek out relevant documents. The plaintiffs will almost always have a significant amount of relevant documents in their power of possession related to the issue of damages. The scope of documentary production related to damages will depend on the nature and size of the claim. Where it is evident that there will be a substantial pecuniary claim, I will ask for early production of documents related to all pecuniary damages.

The plaintiff may also have important documents relevant to liability and causation issues. I will almost always request an OHIP list of decoded services very early on, going back at least 5 years prior to the date of the event. This allows me to get a good handle on the plaintiff's health prior to the incident in question, and it will allow me to make an early request for medical and hospital records respecting prior medical visits or hospitalizations which are often relevant to both liability and damages issues.

Patients and their families will also often record events or conversations as they occur or may send letters or emails to family and friends outlining events that have transpired. These can be particularly relevant in cases involving issues such as the expiry of a limitation periods, informed consent and even standard of care.

My practice has been to try to secure as much of the plaintiff's documentation in advance of the discovery. I do so for two reasons. First of all, it allows me to conduct a more focused and effective discovery. Second, in a world of time-limited discoveries and proportionality, full production in advance of discovery is a much more effective way to defend a claim.

Securing complete production from the opposing party starts with a good pleading. Pleadings still define the scope of productions and discovery, and one must continue to plead with sufficient scope and particularity to allow for the production one needs to advance the case.

Do not forget about potential sources of documents from non parties to the litigation. Often this is an area which is forgotten until after discoveries. By the time some of these requests are made, it may be possible that potentially important records have been lost or destroyed.

Securing all of the relevant documents is but the first step in preparation for discovery. It is important to do a careful review of the medical records in order to ensure that you have a strong grasp of the case. Chronologies are very helpful ways of integrating information from multiple different sources.

It is impossible to truly understand the circumstances of any case without having a good understanding of the relevant medicine. There are a number excellent on-line medical reference sites that will provide good background information. Be aware, however, that much of the medical information on the internet is incomplete, out of date and at times absolutely wrong. Plaintiffs should not build their case based solely on internet-sourced medicine and, similarly, the defendants should not defend on this basis either.

The best way to truly understand the medicine and the facts of the case is to sit down with a quality expert who has had a chance to review the records and who can provide you with a firm understanding of the relevant medicine. It is critical that an expert is able to identify for you the hot issues in the case. Further, experts can provide valuable assistance to both plaintiff and defence counsel on the conduct of the discovery. From the defence perspective, not only can an expert help identify the hot issues that likely will be raised by a good plaintiffs lawyer, but also will identify areas of examination of the plaintiff that could be relevant to both liability and causation.

In many respects, preparing a party in a medical negligence action is no different from any other case. Good preparation involves informing the client about the process and what to expect. Defendant health practitioners are just as anxious about a discovery as a plaintiff. Their professional integrity is being challenged, often unfairly, and it is important to provide them with advice and reassurance. As with all parties, they need to be instructed to always tell the truth, not to guess or speculate and to be responsive to the questions asked in a fair and truthful manner. I always remind my client that the transcript will be carefully reviewed by one of their own colleagues. I remind them that a discovery is nothing but a fact-finding question and

answer session. It is not a closed-book exam and they should feel free to refer to their chart and the medical records as reasonably required in order to properly answer a question.

In medical negligence cases, discoveries are often critical to the outcome of the case. Expert opinions are often based on the evidence obtained on discovery. A poor discovery may result in the inability to get a supportive expert opinion and raises the potential for a summary judgment motion. A carefully prepared discovery is the most effective step a good counsel can take to advance their client's case.