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Medical Malpractice: A How To Guide

Use of Medical Literature in Medical Negligence Actions

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Ontario Bar Association
Continuing Legal Education

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Introduction

It is hard to imagine a medical negligence trial without there being reference made to medical literature including textbooks, studies, journal papers, professional guidelines and consensus statements.

As lawyers, we need to know how to use these resources to our advantage. Similarly, we need to know how to defend against the use of medical literature by opposing counsel that may otherwise be very damaging to our case.

The purpose of this paper is to provide a concise review of the general legal principles associated with use of medical literature at trial including the proper use of this literature in both examination in chief and during the cross examination of an opposing party's expert.

Using Medical Literature at Trial: General Principles

***R. v. Valley*, [1986] O.J. No. 77 (C.A.)**

An expert forming an opinion may draw on works of a general nature which form part of the corpus of knowledge with which an expert in a given field would be expected to be acquainted.

***R. v. S.A.B.*, [2003] 2 S.C.R. 678 (S.C.C.)**

An expert is entitled to refer to the sources within his/her field of expertise to explain and support her conclusions.

***R. v. Paul*, [2002] O.J. No. 4733 (C.A.)**

It is well settled that expert witnesses are entitled to rely on hearsay evidence in the formulation of their opinions and it then becomes a question of what weight is attached to such evidence by the trier of fact.

***R. v. D.D.*, [2000] 2 S.C.R. 275 (S.C.C.)**

One of the dangers of expert opinions is that they are derived from academic literature which is unsworn and not available for cross-examination. Though not properly admissible as evidence for the truth of its contents, this material finds its way into the proceedings – if an expert is permitted to give his/her opinion, he/she ought to be permitted to give the circumstances upon which that opinion is based.

***R. v. Lavallee*, [1990] 1 S.C.R. 852 (S.C.C.)**

An expert opinion is admissible if relevant, even if it is based on hearsay evidence. This second hand evidence (hearsay) is admissible to show the information on which the expert's opinion is based, not for the truth of that information. Any deficiencies with the evidence will go to weight rather than admissibility of the opinion.

The Use of Medical Literature in Direct Examination

a) Generally

***R. v. Anderson* (1914), 22 C.C.C. 455 (Alta. C.A.)**

An expert medical witness may state in direct examination that he/she bases his/her opinion partly on the opinions of text-writers who are recognized by the medical profession at large as of authority.

The expert who adopts the text-writer's opinion as his/her own, may read the text as expressing his/her own opinion.

The expert may refer to such text-books if to do so will aid in enabling him/her to express an opinion.

b) Obligation to Disclose Medical Literature Evidence

Rule 53.03 of the *Rules of Civil Procedure*, R.R.O. 1990, REG. 194

Rule 53.03 (2.1): A report provided for the purposes of subrule (1) or (2) shall contain the following information:

6. The expert's reasons for his or her opinion, including,

(iii) a list of every document, if any, relied on by the expert in forming the opinion.

***Philion v. Smith*, [2008] O.J. No. 3412 (S.C.J.)**

Failure to disclose the basis of an opinion creates unnecessary mischief. Judicial resources are wasted and the parties incur unnecessary costs to argue the scope of cross-examination and the proper use of documents that form the basis of an expert's opinion.

Failure to disclose the literature relied on for an expert's opinion results in prejudice to the opposing party, as his/her expert is unable to research/respond to it.

The Use of Medical Literature in Cross-examination

***R. v. Marquard*, [1993] 4 S.C.R. 223 (S.C.C.)**

If the expert witness acknowledges a work's authority, parts of it may be read to the witness, and to the extent they are confirmed by the witness, they become evidence.

If the expert witness is unaware of the publication or does not recognize its authority, counsel cannot cross-examine the witness on the work.

***Philion v. Smith*, [2008] O.J. No. 3412 (S.C.J.)**

The proper procedure to cross-examine an expert on texts, case studies, or reports is:

i. to ask the witness whether he/she knows the relevant work and accepts it as authoritative; and

ii. to put the relevant passage of the work to the witness and seek the witness' confirmation of it.

Practical Tips for Use of Literature in Cross Examinations of Experts

- Prepare thoroughly; ensure sufficient copies are provided and references properly marked
- Know the medicine/science being referred to in the literature
- Know all of the literature you intend to rely upon including the source, date, the authors and the details of study
- Ensure the literature is authoritative and comes from recognized, peer-reviewed publications
- Ask your own expert to confirm the authoritativeness of the literature you propose to use during cross-examination of the opposing party's expert
- Identify passages that could be harmful to your case and identify a strategy to deal with them
- Consider whether the literature should be marked as an exhibit at trial and, if so, for what purpose
- Use precise language in cross-examination to ensure that it reflects the language used in the relevant literature
- If the expert witness does not accept the literature as authoritative, try the following:
    - If you are able, prove that it is authoritative through other experts (your own and opposing experts). Use the failure of the expert to accept a work as authoritative to discredit the expert where you can demonstrate that the work is authoritative and well recognized by the profession
    - Put the propositions to the witness without reference to the actual paper. Both the witness and the trier of fact will know you are referring to the literature and often the expert will agree with the proposition in whole as in part.

Sample of Authoritative Medical Texts and Journals by Subject Area

** While this list does not purport to be exhaustive, it offers a list of some of the authoritative text and journal sources in some of the primary medical disciplines

General / multi-disciplinary journals

- The Lancet
- The New England Journal of Medicine
- Science
- Journal of Clinical Investigation
- Canadian Medical Association Journal
- Nature
- American Journal of Medicine
- British Medical Journal (BMJ)
- Medicine

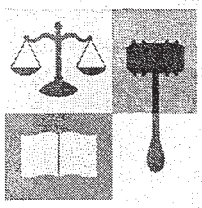
RESOURCE BY MEDICAL DISCIPLINE		
Medical Discipline	**Texts**	**Journals**
Cardiology	- Valentin et al., Hurst's The Heart, 13th ed. - Bonow: Braunwald's Heart Disease - A Textbook of Cardiovascular Medicine, 9th ed. - Crawford et al, Cardiology, 3rd ed. - Bender et al., Oxford American Handbook of Cardiology - Topol, Textbook of Cardiovascular Medicine, 3rd ed. - Topol et al.,Textbook of Interventional Cardiology, 6th ed.	- The American Journal of Cardiology - Canadian Journal of Cardiology - American Heart Journal - Journal of the American College of Cardiology - Paediatric cardiology - Circulation
Emergency Medicine	- Tintinalli's Emergency Medicine, 7th ed. - Marx, Rosen's Emergency Medicine, 7th ed. - Adams, Emergency Medicine, 1st ed. - Parrillo & Dellinger, Critical Care Medicine, 3rd ed.	- Emergency Medicine Journal - Academic Emergency Medicine - The Journal of Emergency Medicine

Family Medicine	- Rakel, Textbook of Family Medicine, 8th ed, - Mosby's Guide to Physical Examination, 11th ed. - Oxford Textbook of Primary Medical Care	- The Annals of Family Medicine - Family Practice - The Journal of Family Practice - Canadian Family Physician
Hematology	- Hoffman, Hematology: Basic Principles and Practice, 4th ed. - Wintrobe's Clinical Hematology, - Rodak, Hematology: Clinical Principles and Applications, 3rd ed. - Carr, Clinical Hematology Atlas, 4th ed. - Williams Hematology, 8th ed.	- Blood - American Journal of Hematology - British Journal of Hematology - Journal of Hematology and Oncology
Infectious Disease	- Cook, Manson's Tropical Diseases, 22nd ed. - Plotkin, Vaccines, 5th ed. - Mandell, Douglas and Bennett's Principles and Practice of Infectious Diseases, 7th ed.	- International Journal of Infectious Disease - Canadian Journal of Infectious Diseases & Medical Microbiology - The Lancet Infectious Diseases - Journal of Infectious Diseases - Clinical Infectious Diseases (CID)
Internal Medicine	- Longo et al., Harrison's Principles of Internal Medicine, 18th ed. - Porter et al., The Merck Manual of Diagnosis and Therapy, 19th ed. - Ferri, Practical Guide to the Care of the Medical Patient, 8th ed.	- Journal of General Internal Medicine - Journal of Internal Medicine (JIM) - Annals of Internal Medicine - The Canadian Journal of General Internal Medicine - Archives of Internal Medicine

Neurology	- Ropper et al., Adams and Victor's Principles of Neurology, 9th ed. - DeJong's the Neurological Examination, 6th ed. - Current Therapy in Neurologic Disease, 7th ed.	- Canadian Journal of Neurological Sciences - Journal of Neurology - Neurology Journal - Stroke - The Lancet Neurology - Brain: A Journal of Neurology
Obstetrics/ Gynaecology	- Williams Obstetrics, 20th ed. - Scott et al., Danforth's Obstetrics and Gynaecology, 9th ed. - Rock et al., Te Linde's Operative Gynaecology, 9th ed. - Berek & Novak's Gynaecology, 15th ed. - DeCherney et al., Current Diagnosis and Treatment: Obstetrics and Gynacology, 10th ed.	- Journal of Obstetrics and Gynaecology Canada - International Journal of Obstetrics and Gynaecology - American Journal of Obstetrics and Gynaecology
Oncology	- Greene, Infections in Cancer Patients (Basic and Clinical Oncology) - Abeloff, Clinical Oncology, 3rd ed. - DeVita, Hellman, and Rosenberg's Cancer: Principles and Practice of Oncology (Cancer: Principles & Practice, 9th ed. - Gunderson, Clinical Radiation Oncology, 3rd ed.	- Journal of Clinical Oncology - Hot Topics in Oncology - Journal of Oncology Practice - British Journal of Cancer - Annals of Oncology
Ophthalmology	- Vaughan & Asbury's General Ophthalmology, 18th ed. - The Wills Eye Manual: Office and Emergency Room Diagnosis and Treatment of Eye Disease, 5th ed. -Kertes et al, Evidence-based Eye Care: Clinical Trials and Beyond, 4th ed.	- Canadian Journal of Ophthalmology - Ophthalmology - Clinical & Experimental Ophthalmology - American Journal of Ophthalmology

Orthopaedics	- Canale et al., Campbell's Operative Orthopaedics, 11th ed. - Miller et al., Essential Orthopaedics - Bulstrode et al, Oxford Textbook of Trauma and Orthopaedics, 2nd ed.	- Journal of Orthopaedics - Journal of Orthopaedic Surgery - Journal of the American Academy of Orthopaedic Surgeons - The Journal of Orthopaedic & Sports Physical Therapy
Pediatrics	- Kliegman et al., Nelson Textbook of Pediatrics, 19th ed. - Zitelli & Davis, Atlas of Pediatric Physical Diagnosis, 5th ed. - Burns et al., Pediatric Primary Care, 4th ed. - Coran et al., Pediatric Surgery, 7th ed.	- Pediatrics - Archives of Pediatrics & Adolescent Medicine - Journal of Adolescent Health - Pediatrics & Child Health
Psychiatry	- Kaufman, Clinical Neurology for Psychiatrists, 6th ed. - Kaplan and Sadock's Comprehensive Textbook of Psychiatry, 7th ed.	- Canadian Journal of Psychiatry - American Journal of Psychiatry - Archives of General Psychiatry - Biological Psychiatry
Surgery	- Gray's Anatomy, 40th ed. - Sellke et al., Sabiston and Spencer's Surgery of the Chest, 8th ed. - Cameron, Current Surgical Therapy, 10th ed.	- American Journal of Surgery - Annals of Surgery - Canadian Journal of Surgery - Journal of the American College of Surgeons
Urology / Nephrology	- Taneja, Complications of Urologic Surgery, 4th ed. - Wein, Campbell-Walsh Urology, 10th ed. - Graham & Keane, Glenn's Urologic Surgery, 7th ed.	- The Journal of Urology - Urology - Journal of the American Society of Nephrology - Nephrology - Pediatric Nephrology

Medical Research: Tips and Techniques



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Resources Available to Research a Medical Condition/Disease

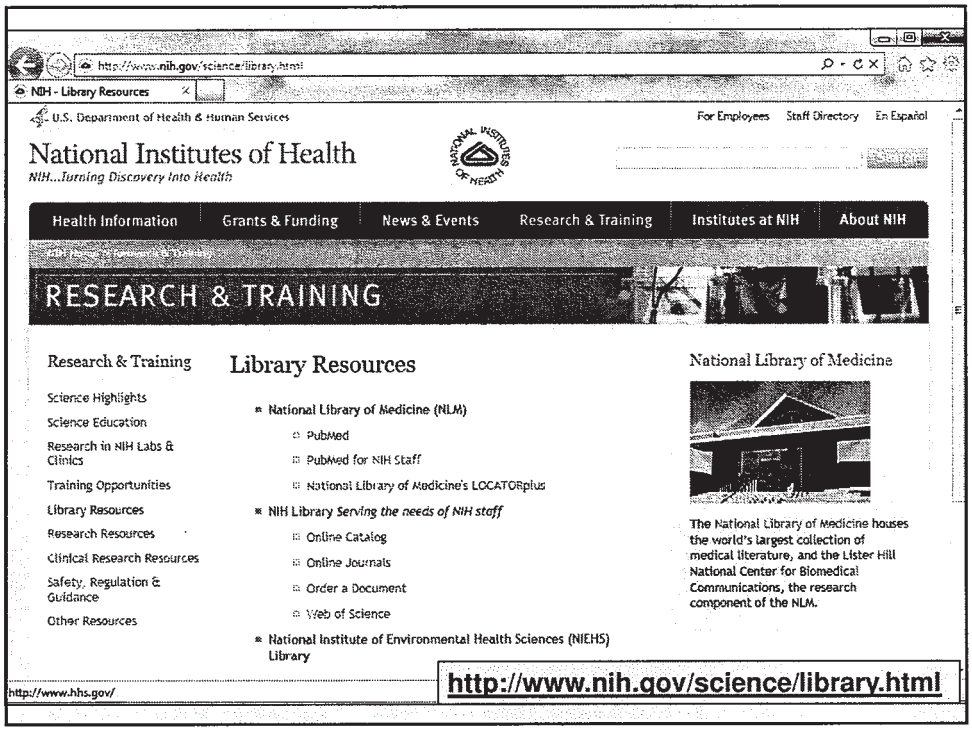
In order to get some general background information about a particular condition or disease consider:

National Institute of Health

http://www.nih.gov/

- part of the U.S. Department of Health and Human Services, it is a leading US-based medical research agency
- made up of 27 Institutes and Centers, each with a specific research agenda
- i.e. National Cancer Institute, National Institute of the General Medical Sciences

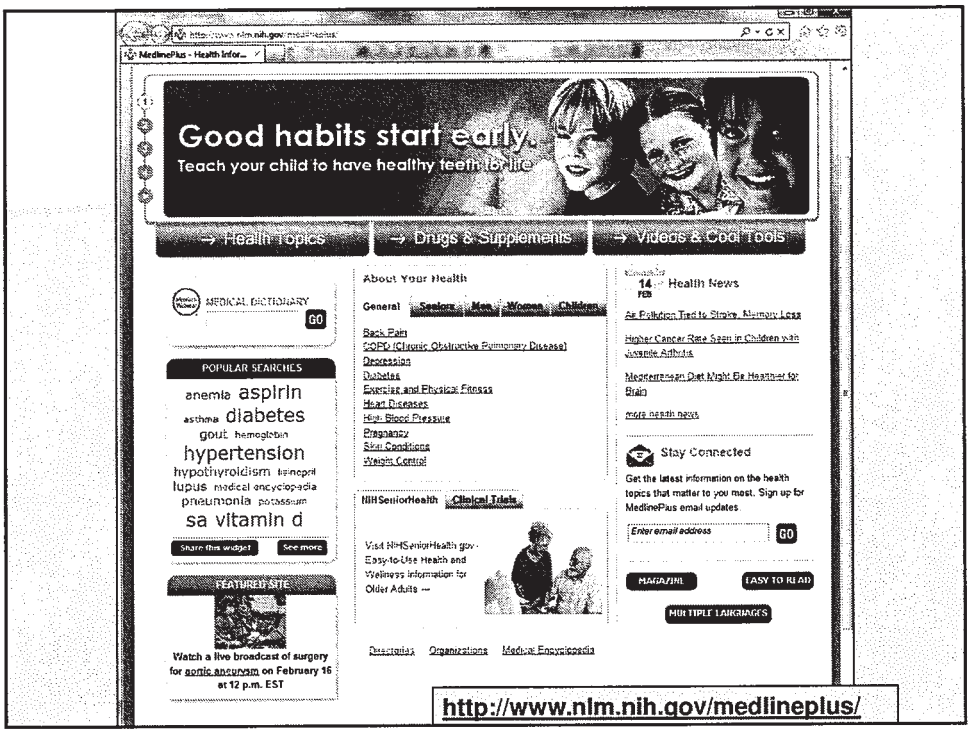
- extensive catalogue of on-line Books and Journals – MANY AVAILABLE FREE OF CHARGE
- Some books and Journals are available only with a subscription to the source journal
- Listing of on-line databases to conduct further searching
- Subject guide to narrow search parameters i.e. Drug Information Resource Guide



Medline Plus

www.medlineplus.gov or
www.nlm.nih.gov/medlineplus/medlineplus.html

- Medline Plus has good health information from the National Library of Medicine
- Generally up-to-date authoritative information
- Extensive information from NIH on over 800 diseases and conditions
- Free of Charge

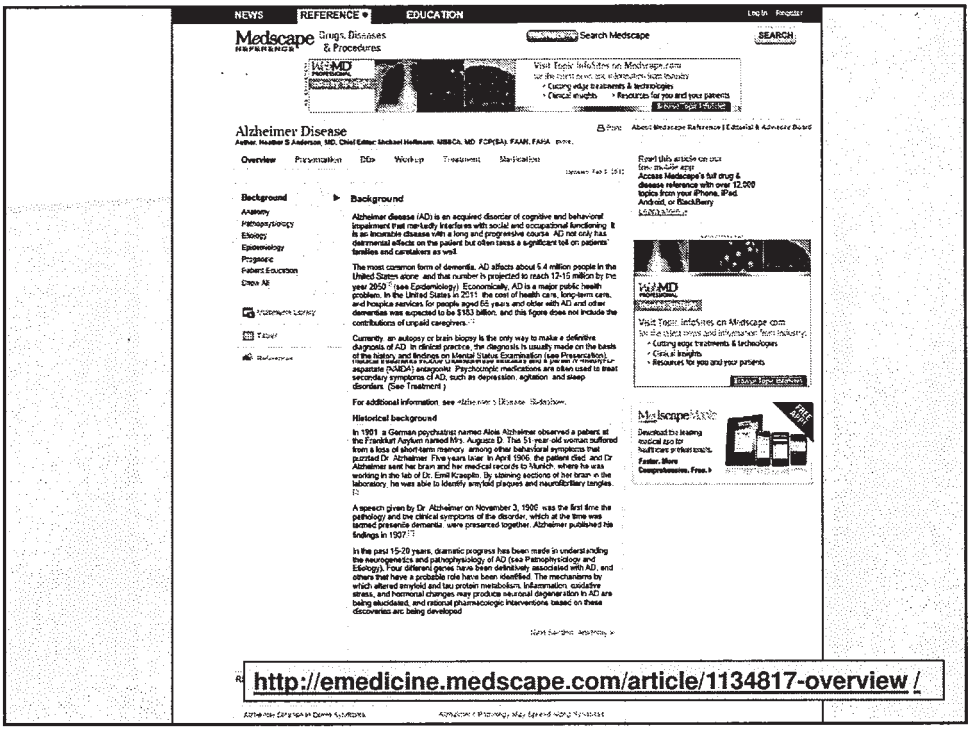


http://www.nlm.nih.gov/medlineplus/

Medscape

http://emedicine.medscape.com/

- Online clinical knowledge database affiliated with WebMD
- One-time free registration
- Database of various diseases, drugs, procedures
- Searchable database of 6,800 articles, commentaries, professional medical content
- Listing of current medical news/media coverage

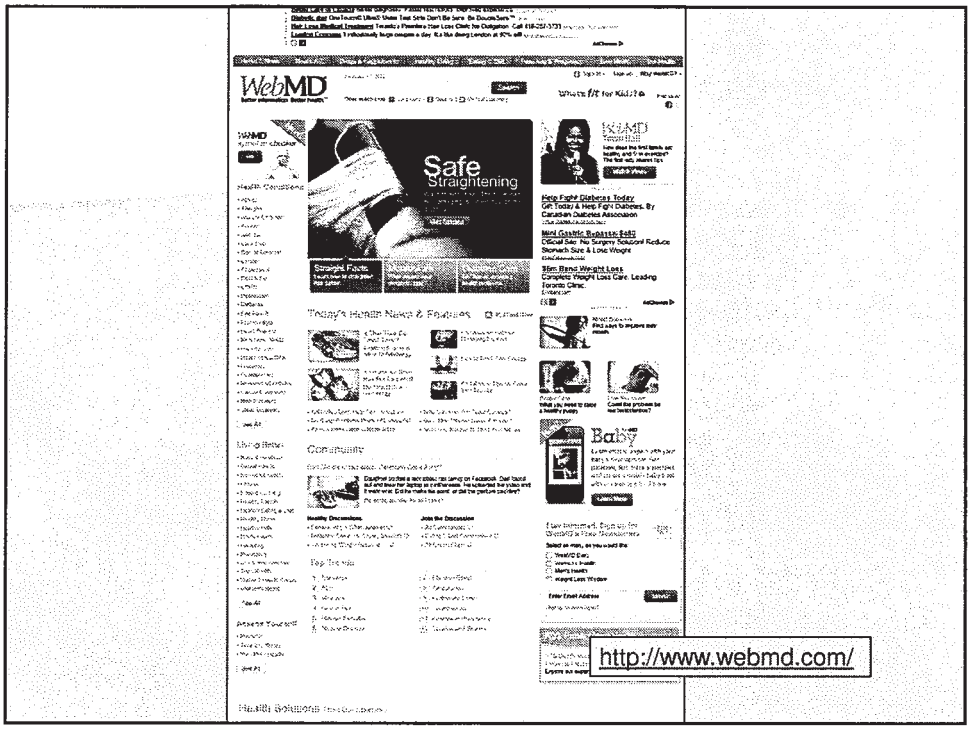


http://emedicine.medscape.com/article/1134817-overview /

WebMD

www.webmd.com/

- General health information
- Free of charge
- Content generally timely and accurate
- Health news for the public
- Maintains up-to-date medical reference content databases



Medicine Net

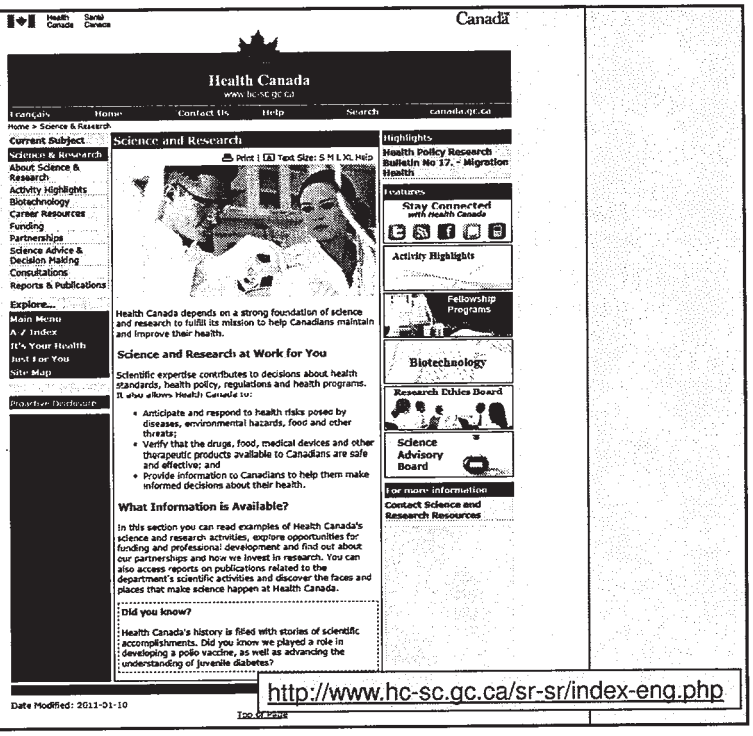
http://www.medicinenet.com/script/main/hp.asp

- Online health information providing easy to read, in depth, authoritative medical information for consumers
- Free of charge
- Medical dictionary, slideshows, database of medical conditions

Medical Research Council of Canada

www.hc-sc.gc.ca

- Science and Research page and research Diseases and Health Conditions
- Provides information on research and science being conducted by Health Canada including research in the following areas:
  - food inspection
  - pharmaceuticals regulation
  - disease tracking
  - compliance testing of consumer products
- Free access to general public

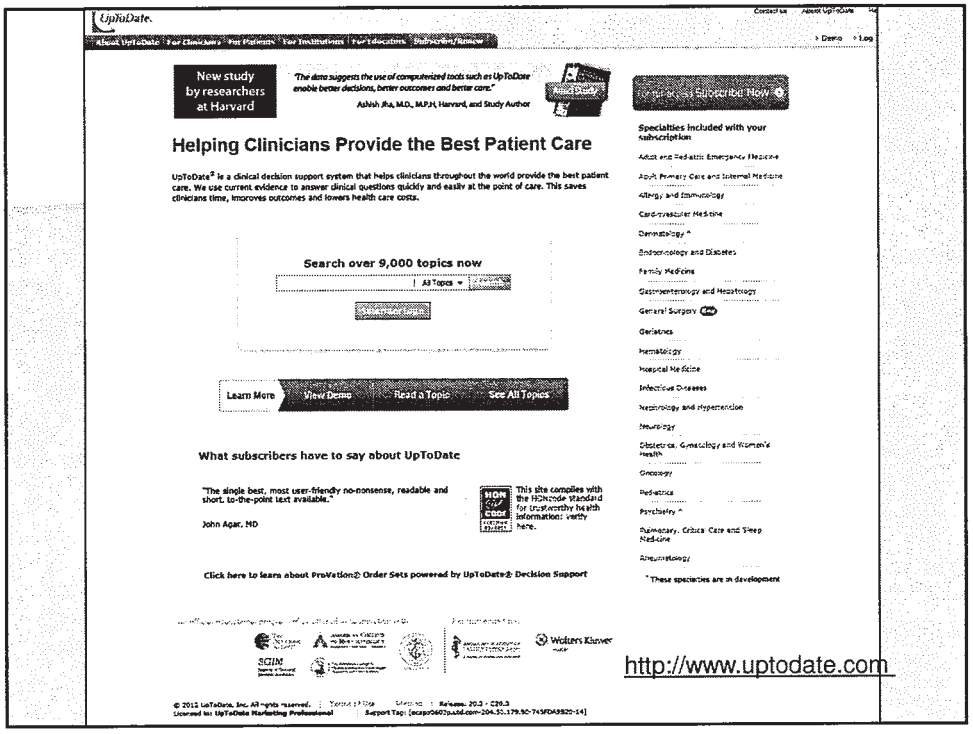


http://www.hc-sc.gc.ca/sr-sr/index-eng.php

UptoDate

www.uptodate.com

- Evidence-based knowledge system authored by physicians
- Editorial board reviews content
- Some free access for the general public
- Subscription access for hospitals and physicians – **approx. $500 annual subscription**
- May obtain information through an expert if they have access



http://www.uptodate.com

Searching for Authoritative Literature

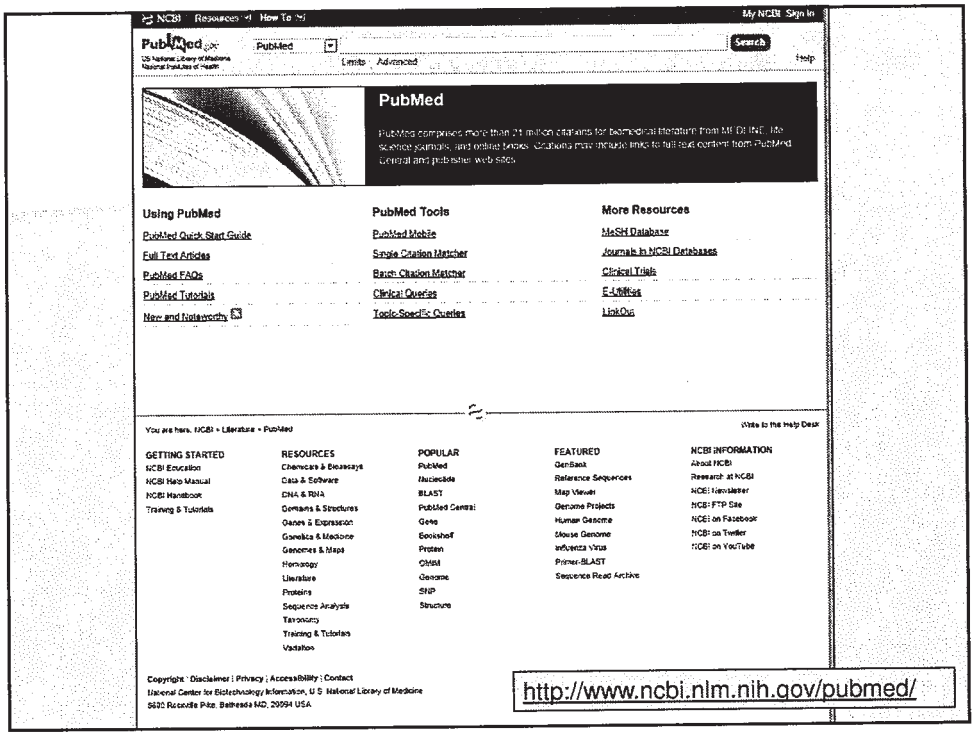
University Medical School Library Catalogues

- Library catalogues UWO, U of T, McMaster, Ottawa, Queen's
  - http://www.lib.uwo.ca/
  - http://onesearch.library.utoronto.ca/
  - http://library.mcmaster.ca/
  - http://www.biblio.uottawa.ca/html/index.jsp?lang=en
  - http://library.queensu.ca/
- Free online access to databases and journals to alumni with privileges
- Remote online access available

PubMed

www.ncbi.nlm.nih.gov/pubmed/

- Premier database in Health and Life Sciences
- US National Library of Medicine - over 18 million references from 5,500 worldwide journals
- Updated daily
- Medline is a primary component of PubMed
- Searching is free, but there is a charge for some full text copies
- Search by author, journal, subject
- Single Citation Finder is a unique tool to narrow search parameters when you have incomplete search information



Cochrane Database of Systemic Reviews

http://www.cochrane.org/cochrane-reviews

- Database offers free access to abstracts and where available, plain language summaries of all Cochrane systematic reviews
- Over 20 years ago Cochrane started identifying every clinical trial and undertook a systemic review of each trial
- Follow a rigorous protocol to evaluate trials
- There is a cost for this service

Cinahl

http://www.ebscohost.com/academic/cinahl-plus-with-full-text/

- Nursing generated database
- Covers over 6,500 journals including Cochrane systemic reviews
- Fee for subscription

NHS Athens

www.evidence.nhs.uk

- UK database, National Institute for Health and Clinical Excellence
- Access to many online journals
- Advanced searches of many healthcare databases including: CINAHL, MEDLINE,COCHRANE and other leading medical databases
- Restricted access and paid subscription required

Further Sources of Medical Information

Other Databases

- NHS Centre for Reviews and Dissemination (CRD) Databases
  - http://isiknowledge.com/WOSEvidenceUpdates
- health-evidence.ca (Public Health)
- TRIP Database (Turning Research Into Practice)

Evidence-Based Clinical Practice Guidelines

- Best Practice Guidelines (Registered Nurses Association of Ontario)
- CMA Infobase: clinical practice guidelines -- Canadian Medical Association
- National Guideline Clearinghouse (United States)
- National Institute for Health and Clinical Evidence (NICE - UK)
- Practice Guidelines (Program in Evidence-Based Care) (Cancer Care Ontario)