Subcommittee on Expert Evidence

Summary of Responses to Initial Consultation

June 25, 2021

Consultation letters were sent to the following eight organizations, asking for information to assist in formulating recommendations to the Civil Rules Committee to address the late service of expert reports:

- The Federation of Ontario Law Associations ["FOLA"]
- The Insurance Bureau of Canada ["IBC"]
- Canadian Defence Lawyers ["CDL"]
- The Holland Group
- The Canadian Medical Protective Association ["CMPA"]
- The Ontario Bar Association ["OBA"]
- The Ontario Trial Lawyers Association ["OTLA"]
- The Advocates' Society

All eight organizations responded. Additional responses were received from the Toronto Lawyers Association ["TLA"], who received the consultation letter from their umbrella organization, FOLA, and the Healthcare Insurance Reciprocal of Canada ["HIROC"], who requested, and were granted, an opportunity to provide submissions.

The Consultation Letter

The letter sent to each organization described the problems on which the Expert Evidence Subcommittee has focussed. While scarce judicial resources require efficiency in the civil justice system, counsel are increasingly delivering expert reports late, leading to wasted pre-trials and last-minute adjournments of civil trials. This squanders judicial resources where another trial or pre-trial cannot be scheduled immediately.

A sequence of questions was posed:

(1) Is late service of expert reports a problematic practice in the experience of your members?
(2) If so, what problems have they experienced?
(3) Is the conscious delay in the delivery of expert reports until after the pre-trial conference something your members have seen or done?
(4) Why would parties serve expert reports on the eve of trial and then seek an adjournment?
(5) What suggestions would your organization have to remedy the problem of last-minute pre-trial conference and trial adjournment requests arising from the late service of expert reports?

(6) Should late service of expert reports be permitted on consent of the parties if that results in a wasted pre-trial conference or the adjournment of a fixed trial date?
(7) What factors should judges consider in deciding whether to allow late service of expert reports for pre-trial conferences and trials, and should the factors be different for each?
(8) Should pre-trial judges be empowered to impose immediately payable costs sanctions for a wasted pre-trial conference, and should a judge hearing a leave motion to late file expert evidence be able to do the same?
(9) Should the wording in r. 53.08(1) of the *Rules of Civil Procedure*, which sets the trial judge's authority to admit late expert reports, be changed from "leave shall be granted" to "leave may be granted"? Would this assist in addressing the problem?

The responses to each question are summarized below, followed by a summary of other solutions to the problems proposed by the parties, some of which go beyond the mandate of the expert evidence subcommittee.

1. Is late service of expert reports a problematic practice in the experience of your members?

The organizations disagree on the extent of the problem:

- The IBC states that late service is common and problematic in motor vehicle litigation.
- The TLA states that it is a particular problem in personal injury litigation, but also in corporate and commercial litigation.
- The Holland Group states that while there is little data to fully appreciate the extent of the problem, and the information available is mostly empiric or anecdotal, it does not appear to be significant problem in medical malpractice cases.
- The OBA assert that most counsel serve expert reports on time and in accordance with the *Rules*. When they do so late, it is often with sufficient notice for the responding party to address the report, with no need for an adjournment. However, the OBA acknowledges that some members receive late expert reports very close to the start of trial, without prior notice, and cannot adequately respond. They must then choose between proceeding without the ability to respond or seeking an adjournment. Neither outcome is acceptable, and a solution addressing this situation would be welcomed.
- The CDL believe there is widespread, general compliance with timelines. They note that the nature of the expert report determines the prejudice occasioned by late service, and that many late reports will not impede assessment of the case by counsel or the pre-trial judge.
- Similarly, the CMPA expressed the view that, as things stand, r. 53.03 functions reasonably well.
- HIROC states that they occasionally see late service of expert reports but that, in most cases, counsel can respond and preserve pre-trial and trial dates. However, late service of liability reports introducing new theories of the case can be disruptive, and result in delay, additional costs, and wasted court resources.

- The OTLA acknowledges that late service is a problem but does not believe that it materially impacts delays in the civil system and does not believe that related changes to the *Rules* are necessary or warranted. To the extent it is a problem, the OTLA asserts that it should be addressed through case-management.
- The Advocates' Society takes a similar stance: they do not believe late service is a widespread or common practice. While they acknowledge that delay is an extremely significant problem, they do not believe late service is contributing to delay in a material way. They note the need to distinguish between late service of an entirely new, and updated or supplemental, expert reports; between late service caused by counsel and that caused by the experts themselves; and between late service affecting pre-trial conferences and late service affecting trials.
- The FOLA does not believe there is a deliberate "practice" of late delivery.

2. If so, what problems have they experienced?

Responses to this question identified both problems leading to the late service of expert reports, and problems resulting from late service. Here, I describe only the problems resulting from late service. I have summarized the responses on the problems that lead to late service under question four.

Knock-on effect on responding reports: The IBC notes that late plaintiff reports lead responding defence reports to also be late. The CDL also states that, since the plaintiff has the burden of proof and the defence only responds to their case, the later the plaintiff serves their reports, the later the defendant's will be served. However, the OTLA disagrees with this perspective, arguing that by the time a case is ready for pre-trial, the issues between the parties, and the need for defence medicals, are well known:

> "[O]ur members often experience defence counsel asserting that they cannot obtain and serve expert reports before the plaintiff's reports are served. Where the defendant takes the position that it has a defensible case, they should proceed accordingly and obtain/serve their reports in compliance with the *Rules*."

Effect on pre-trial conference: The TLA submits that late service renders pre-trial conferences unproductive. The IBC notes that late or unavailable reports undercut the intended effect of pre-trial conferences - aiding resolution. The pre-trial judge either cannot provide candid thoughts on the matter or may risk being unbalanced by doing so because one party has not had a chance to respond to a late-served report. The OBA also pointed to the inefficient use of pre-trial time that can result from late service. However, the Advocates' Society argues that pre-trial conferences do not need to be wasted just because not all expert reports are available. In some cases, meaningful settlement discussions can still occur and, even where they are not possible, trial management is still a productive and valuable use of pre-trial time. Many of the items listed in r. 50.06 will not be impacted by late service of expert reports.

Preventing settlement: The CDL states that where expert reports are not in hand prior to settlement discussions, it is difficult for insurance claim handlers and counsel to

confidently assess the case and provide or obtain appropriate settlement authority. That authority is a prerequisite to fruitful negotiations. The IBC points to the same problem. Because defendants cannot accurately and proactively assess the merits of personal injury claims without expert evidence, late service impairs attempts at early and fair resolution of claims.

Impact on conduct of future trial: The IBC points to the fact that, without expert reports, the pre-trial judge cannot assess the time needed for trial, leading to trial estimates that may be grossly inaccurate.

Adjournment of Trial: The TLA submits that the adjournment of trial dates is the most problematic result of late service. The IBC states that while late service is more common prior to pre-trial, late delivery on the eve of trial leaves the defendant with no opportunity to respond and forces them to seek an adjournment instead, which can lead to significant delays and increased pre-judgment interest costs.

Prejudice caused by adjournment: The OBA states that counsel, given a new report on the eve of trial, must decide whether to obtain a rush responding report or seek an adjournment. Often, such adjournments are prejudicial to the plaintiff. In personal injury cases, the plaintiff usually gets 100% of future income loss, but only 70% of past gross income loss. A one-year adjournment creates a significant difference in recoverable income. The statutory deductible also increases each year with inflation. Late service can therefore be used as a tactical tool to pressure plaintiffs to settle, though this is rare.

3. Is the conscious delay in the delivery of expert reports until after the pre-trial conference something your members have seen or done?

The IBC states that there is no reason for defendants to intentionally delay delivery of expert reports, but that they may be required to do so where the plaintiff is late in serving their own reports. The CMPA states that, in their experience, neither plaintiff nor defence counsel consciously seek to delay delivering expert reports, and delays that do occur are usually remedied shortly after the pre-trial. The CDL does not believe that counsel mischievously delay service of expert reports to create delay but notes that there can be legitimate reasons for delay. HIROC states that they have not observed or participated in the conscious delay in delivery of expert reports, and that they ask their counsel to obtain early, informed expert opinions.

The FOLA, CDL, Holland Group, CMPA, the OTLA and the Advocates' Society all point to the delay between the pre-trial conference and the trial as a significant reason for consciously delaying the delivery of expert reports until after the pre-trial. The FOLA states that this is not a common occurrence but that there may be a conscious delay where it is genuinely felt that resolution at the pre-trial will not be dependent on a particular report. Similarly, the Holland Group acknowledges that conscious decisions are sometimes made not to complete and serve all expert reports before pre-trial due to the considerable changes that can occur between the pre-trial and the trial, a problem

discussed in more detail below. A detailed account of the comments on pre-trial conferences is provided at the end of this summary.

The TLA states that while it is difficult to determine when late service is the result of a conscious effort, they suspect that many of the members who practice civil litigation have encountered circumstances where they suspect that opposing counsel have deliberately served reports late to gain a tactical advantage.

4. Why would parties serve expert reports on the eve of trial and then seek an adjournment?

Both the OBA and the OTLA clarify that it is usually not the party serving the late expert that seeks the adjournment. Instead, it is the receiving party that is forced to seek an adjournment to adequately respond to the late served report they have received. A number of possible reasons for late service of expert reports were identified by the parties. Some of these explain late service after the pre-trial but well in advance of trial, while others are specific to reports served on the eve of trial. Many of these reasons relate to lengthy delays between pre-trials and trials.

Difficulty obtaining expert reports: It is difficult to find appropriate experts, and get them to commit to a firm turnaround time, especially when they are professionals in occupations for whom providing expert reports is outside their comfort zone (FOLA). Expert witnesses may not be available (HIROC), at times due to multi-party litigation and the limited availability of non-conflicted witnesses (IBC). It can be challenging to identify the appropriate expert, and in medical negligence cases multiple experts are often required (CMPA). There can also be delays in getting third party production required by the expert to prepare their report (CMPA). Sometimes late delivery of reports by the experts themselves causes delayed service (OBA).

Competence: Delays may be due to file management, files being run by junior staff prior to the pre-trial conference, and a lack of preparation and proactivity (IBC). Some plaintiffs' counsel carry a large pending caseload and may just have failed to turn their mind to experts (IBC). The FOLA note that late service can be caused by issues with file and time management and also point to the unprecedented stress and pressure faced by members of the legal profession. The CDL state that counsel, usually plaintiff's counsel, serve reports late largely due to poor litigation file management: poor oversight of clerks/support staff, poor diary systems, and poor training and professional rigour. The Advocates' Society points to inadvertence and poor planning on the part of counsel, particularly those with high-volume practices who may not realize that a particular report is necessary until they commence trial preparation.

The passage of time: Considerable changes can occur when there is a long delay between the pre-trial and the trial, requiring further reports. Where reports are prepared before pre-trial and there is then a long wait for a trial, further assessments and updated reports are inevitably required shortly before the trial date (Holland Group, IBC, Advocates' Society, OTLA). Further issues may be identified between the pre-trial and

trial on which expert evidence is needed (CMPA). The OBA also identifies this possibility but states that, where it occurs, counsel should take all reasonable steps to keep opposing counsel and the court apprised of the situation.

Costs: The cost of expert reports is high and, in many personal injury cases, disproportionate relative to the amounts in issue (IBC). Parties may therefore be reluctant to incur the costs associated with experts. This is exacerbated by delays between pre-trials and trials. Both the Advocates' Society and the Holland Group note that the delay between pre-trial and trial, and the resulting need to potentially update reports later at extra cost, creates an incentive to delay obtaining expert reports until closer to the trial.

Hope of settlement: The CMPA, the OBA, the Advocates' Society, and the FOLA all describe counsel refraining from serving expert reports prior to the pre-trial in the hope that the action will settle at the pre-trial, without incurring the cost of expert reports. The FOLA states that parties and counsel are understandably hesitant to incur the high cost of expert reports when it can be avoided, and that high disbursements on experts can serve as a barrier to settlement. The Advocates' Society submits that pre-trials are not wasted as a result of this practice, nor are trials delayed. This practice may be more prevalent where there is no mandatory mediation.

Waiting for plaintiff reports: The defence relies on plaintiffs to provide their records and deliver their reports in a timely fashion before the defence can obtain and deliver a reply report (CMPA). Where a plaintiff serves their report just 90 days before the pre-trial, it can be very difficult for the defendant to obtain and serve their responding report within the 30 days available to them, given the time it takes to book an expert and receive their report (IBC).

"Retooling" the case: Counsel may obtain expert reports after the pre-trial in order to "retool" their case to address weaknesses identified at the pre-trial (Holland Group). The lag between the pre-trial and trial facilitates this practice.

Tactical delay: The IBC says that their members have experienced what appear to be tactical delays: plaintiff's counsel push a matter to brink of trial in the hope of extracting a high settlement offer. If a high offer is not forthcoming, then they seek an adjournment based on a late served expert report or the need to procure one. The Advocates' Society acknowledges that some delays may be due to a party trying to gain an advantage but suggest that this kind of sharp practice is very rare.

Avoiding trial: Many lawyers procrastinate in litigation because they are afraid or reluctant to conduct a trial if settlement does not occur (CDL). Adjournments can result where counsel expected a matter would settle but it did not, a problem that effective case-management would substantially alleviate (Holland Group).

Financial Advantages: In auto cases, there is a clear financial advantage to delay for the defendant because the statutory deductible increases each year, and past income

damages are restricted to 70% of gross losses. This is compounded by low pre-judgment interest rates in s. 128 of the *Courts of Justice Act* (OTLA).

Other circumstances: A change of counsel can also lead to late reports, as can external factors including complications arising from COVID restrictions (CDL).

5. What suggestions would your organization have to remedy the problem of last-minute pre-trial conference and trial adjournment requests arising from the late service of expert reports?

Many of the responses identified increased case-management and improved pre-trial conference procedures as key to resolving this problem. These suggestions are described in greater detail at the end of this summary.

Pre-trial Procedures: A repeated theme is that addressing issues with pre-trials is essential. The FOLA states that the deadlines in r. 53.03 should be revoked unless pre-trial conferences are held no more than 90 days before trial. The CDL submits that the core problem is not the timing of the reports, but the timing of pre-trials.

Case-Management: The Advocates' Society, HIROC, the IBC, the Holland Group and the CMPA all point to greater case-management as part of the solution.

Enforce the existing rules: The CDL and the IBC urge greater enforcement of the rules that are already in place. The IBC suggests greater enforcement of requirement that the parties establish a reasonable timetable for the delivery of expert reports. The CDL suggests making an example in few cases by disallowing the report and the requested adjournment in the face of an imminent trial.

Change the Rules: The IBC, the OBA, and the OTLA recommend changing the rules in the direction of presumptive inadmissibility:

- Make expert reports delivered at the last minute before trial presumptively inadmissible, absent a cogent explanation for late service. This presumption would need balanced against ensuring trial fairness (OBA).
- A party who breaches r. 53.03 timelines should have to demonstrate, by way of motion, exceptional circumstances and the exercise of due diligence before their reports are allowed into evidence (OTLA).
- Allow the pre-trial judge to order that a late-filed report not be used as evidence unless the offending party can prove a reasonable explanation for why it could not have been obtained in compliance with the *Rules* (IBC).
- Provide greater encouragement for striking the trial record when a matter is not ready for trial (IBC).
- Change timelines from 90/60/30 days to 120/60/30 days, so there is sufficient time to obtain responding reports (IBC).
- Amend the rules to limit expert reports to primary (initial), responding, and reply, in order to end the continuous back and forth (OTLA)

Cost consequences: The IBC, the OBA, the OTLA, the Advocates' Society and the TLA each discussed costs consequences as a possible response to the problem. To avoid repetition, their comments are included under question eight.

6. Should late service of expert reports be permitted on consent of the parties if that results in a wasted pre-trial conference or the adjournment of a fixed trial date?

There was disagreement on this question. The FOLA submit that consent should be permitted in either case. Similarly, the CMPA say counsel are qualified to understand the implications of consenting and choose whether to do so. The Advocates' Society states that while the waste of judicial resources should be discouraged, the just determination of the dispute must remain the primary consideration. If the parties agree that a late expert report is relevant and probative, it should not be discarded solely because the trial will be adjourned. The Holland Group and the OTLA agree but suggest some limits. The Holland Group states that trial adjournments based on consent should be entertained where the request is made months in advance. The OTLA states that adjournments should be sought as soon as possible for the sake of court resources. HIROC states that the parties should work together to avoid wasting judicial resources.

The TLA recommends that the court exercise great caution before permitting parties to consent to late service where doing so will result in an adjournment of the pre-trial or trial. Where parties have a legitimate reason to consent to late service, and the resulting adjournment is justified, the court could consider permitting adjournment on a case-by-case basis with future dates peremptory on both parties.

The IBC, the OBA, and the CDL all state that any consent should not be allowed to result in an adjournment of the trial. The IBC and CDL both state that the same may not apply to pre-trials. The CDL argues that the effect on a pre-trial is of less concern where the pre-trial can be rescheduled without adjourning the trial. The IBC say counsel should be required to seek an adjournment of the pre-trial at least 60 days in advance so that judicial resources can be reallocated.

7. What factors should judges consider in deciding whether to allow late service of expert reports for pre-trial conferences and trials, and should the factors be different for each?

The following factors were proposed for consideration, some of which overlap:

- Trial fairness (IBC, CMPA, OBA);
- Prejudice to the receiving party if the report is admitted (IBC, OBA, OTLA, Advocates' Society, TLA);
- Prejudice to the serving party if the report is not admitted (IBC, Advocates' Society);
- Consent (IBC, CMPA, OBA) or objection (Advocates' Society) of the parties;
- When the expert was retained or the report requested (Holland Group, Advocates' Society);

- When the late report was delivered, and proximity to the pre-trial or trial (Holland Group, CMPA, Advocates' Society);
- Reason and reasonable explanation for late delivery, including justifiable, extenuating, exceptional, or unforeseen circumstances beyond the serving party's control (IBC, Holland Group, CMPA, OBA, OTLA, Advocates' Society, TLA);
- Whether reasonable efforts were made to obtain the reports on time (FOLA, OBA, OTLA) or whether it could have been adduced earlier (TLA);
- Conduct of the serving party in contributing to the delay and in the proceeding to date (IBC, Holland Group);
- Whether late service was intended to aid the cost-effective resolution of the action (FOLA, OTLA);
- Whether new facts or issues have arisen requiring the report (OTLA, Advocates' Society);
- The nature of the report, including whether the report is supplemental/rebuttal, or raises a new issue (Holland Group, Advocates' Society, HIROC);
- Whether the report responds to a late-served report (IBC);
- Whether there is evidence that the late service was intended to create delay (FOLA);
- The significance of the evidence to the case, necessity of the evidence to the trier of fact (CMPA, OBA, Advocates' Society);
- Ability of the other party to respond (CMPA, OBA);
- Whether prejudice caused could be addressed by adjournment (Advocates' Society, TLA) or by costs (OBA, Advocates' Society);
- Impact on public's view of and confidence in the justice system (OBA); and
- The history of the action and the age of the claim (Advocates' Society).

The CMPA suggest that there should be continued flexibility for late delivery shortly after pre-trial. While there should be less flexibility for reports delivered on the eve of trial, caution must be exercised not to exclude relevant evidence without compelling reasons for doing so.

Several responses stated that the analysis should differ between the pre-trial and trial (IBC, Holland Group, CDL, Advocates' Society). The IBC say there should be more latitude at pre-trials, whereas the standard should be extremely high at trial – with new reports only admitted where there is new and undiscoverable evidence or a change in circumstances (i.e. death or incapacity of a key retained expert). The CDL states consent should be a factor at the pre-trial but not at the trial, and that – at trial – a new and dramatic change in circumstances should be required. The Advocates' Society states that the factors will be similar, but the analysis undertaken will not be the same.

The OTLA argues that <u>if pre-trials take place no more than 90 days before trial</u>, the same factors should apply at pre-trial as at trial, with strict compliance expected.

8. Should pre-trial judges be empowered to impose immediately payable costs sanctions for a wasted pre-trial conference, and should a judge hearing a leave motion to late file expert evidence be able to do the same?

Several responses support imposing costs sanctions:

- The IBC submits that imposing meaningful financial consequences could create real improvements in compliance but, to be effective and fair, consumers and plaintiffs would need to be protected from these consequences, including by making the costs personally payable by plaintiff counsel. Automatic and punitive cost consequences could dissuade counsel from "gambling" and obtaining late expert reports when the pre-trial assessment does not support their theory of the case.
- The OBA also supports providing this discretionary power, and imposing adverse costs awards immediately where an adjournment cannot be avoided due to late service of expert report.
- The TLA suggests that costs orders are the only realistic remedy for non-compliance as the court is unlikely to exclude otherwise admissible expert evidence solely for lateness.

Some responses provided more cautious support for costs sanctions:

- The IBC argues that both pre-trial judges and judges hearing motions for leave to late-file expert evidence should be empowered to impose immediately payable cost consequences, but that caution is warranted when using this authority in pre-trials.
- The CMPA states that costs orders may be appropriate, and will send a message to litigants that the Rules are not meant to be ignored, but should be used sparingly and only in the most egregious cases of unexplained delay.
- The Advocates' Society states that costs thrown away are an effective deterrent if awarded in a consistent and predictable manner but should be reserved for particularly egregious circumstances that could and should have been avoided.
- HIROC states that costs sanctions should be considered in rare cases, depending on the reasons for the late delivery of an expert report, including the nature and type of report, and the impact of the late service.
- The OTLA recommends amending r. 49.1 to prohibit a party from relying on cost consequence of failure to accept an offer to settle if they failed to comply with r. 53.03 timelines, but states that the implementation of costs consequences should depend on the circumstances of the case and whether there are extenuating circumstances for the delay.
- The FOLA asks who costs sanctions would be against – client or counsel? They suggest that costs sanctions should only be imposed where it is found that late service was intended to frustrate the pre-trial or trial process, which will be rare.

Other responses opposed expanding the authority to order costs:

- The CDL objects to pre-trial judges being given further authority to order costs beyond that already granted in the *Rules*, as whether time was wasted and who

wasted it is subjective. They also reject the suggestion that a pre-trial is wasted simply because settlement discussions are perfunctory or non-existent.

- The Holland Group says pre-trial judges already have sufficient authority to award costs at a pre-trial, and that this authority should be used sparingly.
- The Advocates' Society states that the *Rules* already provide sufficient authority to impose costs sanctions, and that this authority should only be used with caution and in the most egregious cases.

9. Should the wording in r. 53.08(1) of the *Rules of Civil Procedure*, which sets the trial judge's authority to admit late expert reports, be changed from "leave shall be granted" to "leave may be granted"? Would this assist in addressing the problem?

There was disagreement on this question also. This change is supported by the IBC, the CDL, the OBA, and the TLA:

- **IBC:** Judges may currently feel compelled to permit late delivery and will not feel compelled if this change is made. The change would still provide flexibility in appropriate cases. The rule could also stipulate that the court consider a list of factors when exercising this discretion, such as those currently listed under r. 57.01.
- **CDL:** "Shall" almost appears like permission to ignore the timelines. The message to counsel must be that late reports will not be tolerated. The rule could alternatively say that leave shall not be granted unless the serving party can show an unexpected change of circumstances, the exercise of due diligence, and no prejudice.
- **OBA:** Trial judges should have discretion to rule late-served reports inadmissible where admission would result in trial unfairness, but this change may have little practical effect.
- **TLA:** This change would permit the court to refuse leave where there is no legitimate explanation for late service, and could prevent waste of judicial resources.

The change is opposed by the FOLA, the Holland Group, the CMPA, the OTLA, the Advocates' Society, and HIROC:

- **FOLA:** The rule already gives the judge sufficient latitude to impose terms on admission.
- **The Holland Group:** This change will not address the identified problems and may cause new ones. Leave can already be denied where granting leave will cause prejudice or undue delay.
- **CMPA:** This change will not result in a material improvement as the current language already enables exclusion where there is prejudice or undue delay, and there is no other justification for disallowing late-served reports.
- **OTLA:** Rule 53.08(1) is not limited to expert reports and applies to other evidence. Relevant evidence should be admitted where it does not cause prejudice or undue delay. However, the words "with an adjournment if necessary" should be removed because adjournments should not be the solution to late service.

- **The Advocates' Society:** The priority must remain the just determination of every civil proceeding on its merits. The current rule ensures probative and relevant evidence is before the court unless there is non-compensable prejudice.
- **HIROC:** Amendments to the *Rules* will not be required if more robust case management is implemented, the tools currently available in the *Rules* are utilized.

10. Other Suggestions for Solutions

Solutions were suggested that went beyond the questions asked and the immediate problem. Some of these lie outside the subcommittee's mandate. Those most frequently discussed were changes to pre-trial conferences, and case-management, both of which are discussed in more detail below. Other suggestions included:

- Resolving the delay between the commencement of a lawsuit and the trial by mandating that the trial occur within a certain period (perhaps two or three years) from the commencement of the action. This could create more efficiency, less foot-dragging, and the urgency needed for settlement to occur (CDL).
- For complex medical malpractice cases, set the trial date early in the process (Holland Group).
- Make rebuttal expert reports unnecessary by giving experts more leeway to expand on their report in testimony where their testimony is responsive to another expert. Experts should not have to engage in a back and forth of reports right up to the eve of trial (CDL).
- Make the cross-examination of experts available in advance of trial. This could lead to earlier and more informed choices on settlement (CDL).
- Permanently or temporarily suspend jury trials in all but a few types of cases (FOLA).
- Assign specialty judges to pre-trial and trials where possible (FOLA).
- Consider a triage system for self-represented litigants (FOLA).
- Balance the pre-judgment interest rate so that neither party is advantaged by trying to delay the ultimate resolution of the action (FOLA).
- Provide directions for the service of expert reports when there are trial sittings with rolling start dates making the date of the commencement of the trial unclear (OBA).
- Require parties to prove compliance with r. 53.03(2.2) and agree upon timetable for delivery of any remaining expert reports before the pre-trial and trial date are scheduled (CMPA).
- Consider alternatives to damages reports, and in particular future care reports, as recommended by Justice Goudge in his Medical Liability Review (HIROC).

11. Case Management

The FOLA, Holland Group, CMPA, Advocates' Society, the IBC, HIROC, and the TLA all suggest that increased use of case management would help resolve the problems that the subcommittee is considering. The FOLA urges mandatory case management across the province. HIROC states that regular brief case management meetings by phone or video would ensure that the parties are on course and avoid unnecessary delays and costs. The Holland Group states that the broader implementation of even "light touch"

case management would resolve the vast majority of problems with late service of expert reports. The CMPA states that robust and effective case-management can balance the effects of late service on the civil justice system with the need for flexibility. While this will require additional judicial resources at the outset, it will reduce the waste of judicial resources overall. The Advocates' Society commented that their members in regions with significant case management have found that clear timetables and the ready availability of case conferences have ensured that trials proceed as scheduled.

Specific suggestions for case management included:

- A planning call or virtual attendance one month before the pre-trial to discuss and confirm the status of expert reports and set a strict schedule if necessary (IBC).
- Applying case-management first to complex cases and unrepresented litigants (CMPA).
- Court-ordered timetables to reduce unnecessary delays (HIROC), and costs ordered against those that contravene them (TLA).
- Holding a case conference within a certain time after a matter is set down for trial to assist in implementing or adhering to a reasonable timetable for service (CMPA).
- Holding a trial management conference 90 days before trial to ensure that any last-minute problems are dealt with sufficiently ahead of trial (Advocates' Society).

12. Pre-Trial Conferences

Both the Holland Group and the CDL urged that the late service of expert evidence not be addressed in isolation, as it is part of a larger problem. Almost every response discussed problems with pre-trial conferences that underlie and exacerbate the issue of late service of expert reports. Many of these comments related to a lack of standardization across the province in how pre-trials are scheduled, prepared for, and utilized.

The OTLA agrees that parties should adhere to the timelines for the service of expert reports, but states that strict adherence only serves the objectives described in r. 1.04 if:

1) Pre-trial and trial dates are scheduled contemporaneously (i.e. at a uniform and consistent trial scheduling court); and
2) Pre-trials take place within 90 days of the trial date.

Without this, the OTLA states the problem of late service of expert reports cannot be realistically and fairly rectified. These sentiments are reflected in other responses.

Scheduling the Pre-Trial

In some jurisdictions, pre-trials are a pre-requisite to obtaining trial dates (Holland Group, OBA, OTLA, HIROC). Pre-trials that occur prior to obtaining trial dates are inefficient (OBA). This is a particular problem for reports on damages (HIROC). Expert reports quantifying plaintiff's damages are quantified to the date of trial. If the date of trial is unknown, then these reports either cannot be obtained for the pre-trial or, if obtained, must be updated before trial, leading to additional costs (OTLA, HIROC). A standardized province-wide practice for scheduling trial and pre-trial dates is needed (FOLA, Holland Group, OBA).

The pre-trial and trial date should be set at the same time, at a scheduling appearance (CDL, OTLA). The delivery of expert reports or a commitment to an enforced schedule could be a pre-requisite to obtaining a pre-trial date (IBC). Counsel could alternatively be required to submit a notice of readiness prior to obtaining a pre-trial date (Holland Croup).

Time Between Pre-Trial and Trial

The FOLA, OTLA, CMPA, Holland Group, Advocates' Society, OBA, HIROC, and the CDL suggest that pre-trials must be held close in time to trials to be effective. In British Columbia, trial management conferences occurs at least 28 days, and not more than 120 days, before trial (CDL). In some Ontario jurisdictions, pre-trials occur 18-36 months before trials (FOLA, OTLA). Medical negligence cases typically take 38-40 months to conclude, depending on complexity and location, with pre-trials often well before trial (CMPA).

Pre-trials held a year in advance of trial are not effective (Holland Group, CMPA, OTLA). They reduce any incentive to deliver expert reports on time and make doing so less cost-effective as updated reports are inevitably needed (OBA, CDL, Holland Group, OTLA). These delays also contribute to a lack of urgency and pressure on insurers and counsel to ready their case for, or engage in meaningful settlement discussions at, pre-trial conferences (OTLA). Pre-trials should occur no more than 90 days before trials (FOLA, CDL, Holland Group). FOLA suggests amending the *Rules* to this effect. More cases would then be resolved at pre-trial as counsel would be more likely to arrive fully prepared (Holland Group)

Relationship between Pre-Trial, Mediation and Settlement

The OBA and the Advocates' Society note that where there is no mandatory mediation, the pre-trial is often used as mediation because it is the first opportunity to discuss settlement. Where there is a perceived possibility of settlement, expert reports are not seen as an effective use of resources. However, if the case then does not settle at pre-trial, either further pre-trial conferences are required, or there is a lack of predictability and control over the delivery of expert reports. The OBA suggests expanding mandatory mediations to more jurisdictions to reduce the use of pre-trials as *de facto* mediations. The OTLA suggests, in appropriate cases, giving litigants the option of an additional, earlier pre-trial to explore the possibility of settlement without requiring compliance with r. 53.03.

The Pre-Trial Memorandum

The FOLA and the OTLA both suggest the development of standardized practices for the pre-trial memorandum.

- *Length:* This is currently 10 pages in Hamilton, but 20 pages in Waterloo (FOLA). The standard length should be 20 pages (OTLA).

- *Inclusion of Expert Reports:* Some regions prohibit filing of expert reports with pre-trial memoranda (FOLA). Parties should be allowed and encouraged to attach expert reports or excerpts of expert reports on key issues (OTLA).
- *Key Issues:* Could also require counsel to agree on 1-3 issues to be addressed at the pre-trial, because it should be clear by this point which issues are a barrier to settlement (FOLA, OTLA). The pre-trial judge could then actively try to resolve these issues.

The Holland Group noted that the length and thoroughness of the pre-trial also varies by region and suggest that the pre-trial should provide sufficient opportunity for a fulsome discussion of the case (at least a half day).