

ADVOCACY CENTRE FOR THE ELDERLY
SUBMISSIONS TO THE STANDING COMMITTEE ON JUSTICE POLICY
RE: BILL 218 – *SUPPORTING ONTARIO'S RECOVERY ACT, 2020*

November 4, 2020

THE ADVOCACY CENTRE FOR THE ELDERLY

The Advocacy Centre for the Elderly [ACE] is a community legal clinic under the *Legal Aid Services Act* that has been serving low-income seniors continuously since 1984. ACE is committed to upholding the rights of low-income seniors. Its purpose is to improve the quality of life of seniors by providing legal services that include direct client assistance, public legal education, law reform, community development, and community organizing.

ACE employs six lawyers -- consisting of an executive director, two institutional advocates and three staff litigation lawyers -- three licensed paralegals, an administrative coordinator and contract intake staff.

ACE provides legal advice and representation on elder law matters, and has appeared before all levels of court and tribunals including the Superior Court of Justice, the Ontario Court of Appeal, the Federal Court, and the Supreme Court of Canada. Legal advice and representation of long-term care and retirement home residents, and civil litigation on elder law issues are both core areas of practice within ACE's experience and expertise.

COMPLAINTS OF NEGLIGENCE AGAINST LONG-TERM CARE AND RETIREMENT HOMES

ACE regularly receives complaints from residents and their families about substandard quality of care in Ontario long-term care and retirement homes. In almost all cases, ACE will offer advice that does not touch on civil claims against an allegedly negligent long-term care or retirement home. Other avenues, such as direct communication with the

home over ongoing caregiving issues, complaints to the Retirement Homes Regulatory Authority or the Ministry of Long-Term Care, complaints to the governing college of a regulated health practitioner (such as the College of Physicians and Surgeons of Ontario, or the College of Nurses of Ontario) and other non-litigious remedies are discussed and may be recommended. These avenues have lower barriers for access to justice for a complainant, and they may in the end effectively resolve a complaint.

As a community legal aid clinic, ACE focuses its limited resources on areas where the unmet need for access to justice for low-income seniors is the greatest. Where civil action for personal injuries caused by the negligence of a long-term care or retirement home is in issue, ACE will now routinely refer the caller to the personal injury bar.

While at one time it was difficult if not impossible to obtain legal advice and representation on these matters, the personal injury bar has over the past 25 years developed an expertise and willingness to accept personal injury cases against long-term care and retirement homes. This development has greatly increased access to justice for long-term care and retirement home residents and their families seeking civil redress.

BARRIERS TO ACCESS TO JUSTICE

While ACE has successfully brought legal action against lawyers, financial advisors, banks, mortgage lenders, the police and other similarly situated defendants, it has not obtained instructions in cases where it has offered representation and recommended legal action for negligence against a long-term care or retirement home. We feel this is reflective of the high barriers to access to justice for this type of legal action.

Perhaps the most significant barriers to access to justice for older adults seeking civil redress for negligence against long-term care and retirement homes are the historically low damage awards for personal injuries inflicted on older adults; uncertainty over the legal standard of care for a reasonably competent long-term care or retirement home operator; the inherent uncertainty of a successful verdict against a defendant; and the overwhelming costs consequences to the plaintiff of an unsuccessful verdict. In short, the

risk of loss and adverse costs consequences have historically far outweighed the prospect of modest if not negligible damage awards.

It is not easy to prove negligence against a retirement home or a long-term care home according to the ordinary legal standard of negligence. There are very few, if any, Canadian legal decisions giving direction on what forms negligence by a long-term care or retirement home operator. While a successful plaintiff may expect to receive some measure of damages (although the quantum of damages may be highly uncertain), under the “loser pay” principle of costs an unsuccessful plaintiff may expect to pay tens of thousands of dollars in costs following trial. This is simply beyond the means of the low-income seniors that we serve.

Furthermore, the possibility of an adverse cost consequence can be seriously complicated if the plaintiff long-term care or retirement home resident is mentally incapable of instructing a lawyer. In that case, another person (usually an immediate family member) would need to act as a litigation guardian, and in doing so would have to swear an affidavit under the *Rules of Civil Procedure* acknowledging that they have been informed of their liability to pay personally any costs awarded against them or the person under disability.¹ This is a powerful deterrent to the commencement of legal proceedings.

In one case, long before representation from the personal injury bar was widely available, ACE offered legal advice and representation to a family whose elderly father had been severely injured in a long-term care home. An elderly Italian-speaking widower lived with his son, daughter-in-law and grandchildren in their family home. He was admitted to a long-term care home for “respite care” for a matter of weeks. During that time, his Italian-speaking daughter-in-law visited him daily and found that he was complaining of pain in his leg. She immediately brought this to the attention of the nursing staff, and did so again the next day, and the day after that, but the staff seemed unaware of her father-in-law’s condition. She then called 911 from the long-term care home. Emergency responders

¹ *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 7.02 (2).

arrived and cut the trousers off her father father-in-law, which exposed his broken femur that protruded through his skin.

Despite these horrific events, this family declined to swear an affidavit in support of a litigation guardianship that had been prepared as a necessary step before commencing legal action. They were then supporting themselves and a young family, with a mortgage, car payments and other financial obligations, and they simply could not afford to assume the adverse cost consequences of an uncertain verdict. They chose not to bring legal action.

While this particular anecdote is both memorable and extreme, it is also representative of the same considerations brought to bear on many other potential tort claimants against long-term care and retirement homes that ACE has advised over the past 25 years.

BILL 218

Bill 218, *Supporting Ontario's Recovery Act, 2020*, would provide protection from liability for any person, including licensed long-term care and retirement homes, for acts or omissions that give rise to an individual being or potentially being infected with or exposed to COVID-19 on or after March 17, 2020, if at the relevant time the person acted or made a good faith effort to act in accordance with public health guidance related to COVID-19 that apply to the person, and any federal, provincial or municipal law relating to COVID-19 that apply to the person; and the act or omission of the person does not constitute gross negligence.²

The Bill defines a “good faith effort” to include an honest effort, whether or not that effort is reasonable.³

²² Bill 218, Schedule I, s. 2(1).

³ *Ibid.*, s. 2(2).

Furthermore, the Bill bars any legal proceedings based on COVID-19 related claims and provides that any legal claims already brought are deemed to have been dismissed without costs.⁴

BILL 218 SHOULD NOT APPLY TO LONG-TERM CARE AND RETIREMENT HOMES

Bill 218 should not apply to long-term care and retirement homes for these reasons:

1. The ordinary standard of negligence is sufficient to protect non-negligent long-term care and retirement home operators from civil liability for COVID-19 related claims.
2. Bill 218 would protect long-term care and retirement home operators whose negligent acts or omissions led to otherwise actionable COVID-19 related claims. Bill 218 protects negligent long-term care and retirement home operators whose degree of negligence does not rise to the level of gross negligence.
3. The legal interpretation of “gross negligence” in the long-term care and retirement home context is vague and uncertain. There are no case precedents to rely on, and it is not yet known how courts will interpret the standard of “gross negligence”, giving rise to additional litigation risks and uncertainty for plaintiffs seeking civil redress against negligent and/or grossly negligent long-term care and retirement home operators.
4. There are already significant power imbalances between long-term care and retirement homes and their residents. These power imbalances create barriers to access to justice for vulnerable long-term care and retirement home residents that would only be exacerbated by invoking a good faith defence and a standard of gross negligence for civil liability.

⁴ *Ibid.*, s. 2(3)

5. Long-term care and retirement home operators are in the business of providing high-quality care to their residents. Good public policy demands that they should be held accountable in damages when they cause harm or injury to their residents through their acts or omissions that amount to negligence and/or gross negligence.

THE ORDINARY STANDARD OF NEGLIGENCE IS SUFFICIENT

Anyone bringing an action for negligence against a long-term care or retirement home must discharge a burden of proof to a balance of probabilities that meets several distinct legal tests: there must be proof of damage; the defendant's conduct must cause the plaintiff's loss; the defendant must have failed to meet the standard of care of a reasonably competent long-term care or retirement home operator; the long-term care home must have owed a duty of care to the plaintiff; the acts or omissions of the long-term care or retirement home must have been the proximate cause of the plaintiff's injuries and loss; and the plaintiff's damages must have been foreseeable and not too remote from the defendant's acts and omissions.

These tests are seldom self-evident, and each of them can be problematic for a long-term care or retirement home resident or their family to prove with evidence as required by law. Among the evidentiary issues facing a plaintiff are proving causation of the plaintiff's loss; proving the standard of care of a reasonably competent long-term care or retirement home; and proving that the actions were the proximate cause of the plaintiff's loss, and that the plaintiff's losses were not remote.

There is little established case law on the standard of care of a reasonably competent long-term care or retirement home, which is a finding of fact to be established with evidence.

Where the plaintiff's loss consists of personal injuries, the plaintiff must show that the losses would not have occurred but for the acts or omissions of the defendant. This may be a difficult evidentiary burden where the plaintiff is a person late in life with pre-existing medical conditions and care needs that could not be met in the community. It may be

difficult to show to the requisite standard of proof that personal injuries suffered by the plaintiff were not too remote would not have occurred but for the acts or omissions of the long-term care or retirement home.

Furthermore, establishing the proper measure of damages for any injuries suffered by the plaintiff is difficult in the absence of a body of decided case law of similar cases.

The ordinary standard of negligence is already difficult for a long-term care or retirement home resident and their family to prove, and it provides many defences that are available to a defendant. No additional “good faith” defence and no higher standard of care such as “gross negligence” is needed to protect the rights of non-negligent long-term care and retirement home operators.

BILL 218 PROTECTS NEGLIGENT LONG-TERM CARE HOME OPERATORS

A long-term care or retirement home operator who is not negligent does not need the immunity protection of Bill 218.

In the long-term care and retirement home context, Bill 218 would only protect negligent long-term care home operators whose degree of negligence does not rise to the level of “gross negligence”.

Negligent long-term care and retirement home operators should be held accountable for injury and damages caused by their negligence, even within the ordinary legal meaning of negligence.

THE INTERPRETATION OF “GROSS NEGLIGENCE” IS VAGUE AND UNCERTAIN

“Gross negligence” is a finding of fact that has no decided case precedents in the context of long-term care and retirement home negligence.

Gross negligence has been defined in law as “a very great negligence”, the details of which will vary from one factual context to another.⁵

Gross negligence is the required legal standard under several Ontario statutes. For example, under municipal legislation, a municipality is not liable for injury caused by snow or ice on a sidewalk except in the case of gross negligence.⁶ There is ample litigation over what forms gross negligence in the context of ice and snow on the sidewalks. However, despite the long history of this legislation, the differences between negligence and gross negligence can be slight, nuanced, and unpredictable.

At one time, the “guest passenger” provisions of *Ontario Highway Traffic Act* provided that motorists were not responsible for damages caused to gratuitous passengers of a motor vehicle, except in the case of gross negligence. In the context of gratuitous passenger cases, the Ontario Court of Appeal noted that “[t]here appears to be little judicial support for a clear line of demarcation between negligent conduct which is termed ordinary negligence and that which is characterized as gross negligence.”⁷

Eventually, the guest passenger provisions were repealed, leaving only one standard of negligence for all motor vehicle injury claims, and this is consistent with the Court’s further dictum that:

Perhaps our rising social consciousness tends to disregard an arbitrary standard which is not subject to precise delineation, or it may be that circumstances which gave birth to the restrictive, gratuitous-passenger legislation are no longer applicable in our present society where the legislative trend is to hold responsible everyone who injures another as a result of his negligent conduct.⁸

⁵ *Canadian Encyclopedic Digest*, Negligence, II Elements of Cause of Action, 4 Standard of Care, (f) Gross Negligence at para. 141.

⁶ See, e.g.: *Municipal Act, 2001*, s. 44(9) and *City of Toronto Act, 2006*, s. 42(5).

⁷ *DeSousa v. Matos*, 1976 CarswellOnt 392 (H.C.) (Lerner, J) at para. 13, citing *Engler v. Rossignol* (1975), 10 O.R. (2d) 721 at 726 (C.A.), per Evans, J.A.

⁸ *Ibid.*

One wonders why a “rising social consciousness” that was evident in 1975 should not warn against invoking “an arbitrary standard which is not subject to precise delineation” with respect to the concept of “gross negligence” pertaining to tort claims against long-term care and retirement home operators in the present day.

It is difficult enough for plaintiffs and defendants to know the distinctions between negligence and gross negligence in a claim for damages arising from ice and snow on sidewalks. It would likely be much more difficult for plaintiffs and defendants in long-term care and retirement home negligence actions to know the same distinctions where no established body of case law exists.

The absence of predictability concerning the test of “gross negligence” creates even more litigation risk and increases the barriers for access to justice for long-term care and retirement home residents and their families.

BILL 218 SHOULD NOT INCREASE BARRIERS TO ACCESS TO JUSTICE FOR LONG-TERM CARE AND RETIREMENT HOME RESIDENTS

There are already significant barriers to access to justice for long-term care and retirement home residents and their families when a resident is injured by the negligent act or omission of a long-term care or retirement home operator. Increased barriers are not necessary.

Long-term care and retirement home residents are individuals who do not usually have the wealth and financial resources available to a long-term care or retirement home operator, who operates a business that is covered by a policy of liability insurance. Residents and their families do not normally have access to the financial resources that are needed to bring or defend litigation over negligence claims. While this power imbalance is mitigated by the willingness of the personal injury bar to bring claims on a contingency basis, the very real risk of an adverse costs award still exists and civil litigation is not a level playing field between similarly situated plaintiffs and defendants.

Furthermore, there are significant non-financial barriers to bringing litigation by a long-term care or retirement home resident or their family. The injured resident and their family may be suffering from pain, grief and distress from the nature of their injuries and loss. They may not wish to relive the experiences that cause their harm and injury. It can be difficult and traumatic for them to bring civil claims for damages.

Bill 218 would create additional barriers to access to justice that should not be imposed on long-term care and retirement home residents and their families.

PUBLIC POLICY DEMANDS THAT LONG-TERM CARE AND RETIREMENT HOMES SHOULD PROVIDE HIGH-QUALITY CARE

Long-term care and retirement home operators are in the business of providing high quality care to their residents. Caregiving is their core function, and the very basis of their relationship with their residents.

Long-term care and retirement homes are paid to provide care, and as a matter of public policy they should be expected to provide high quality care that does not cause harm or injury to their residents through their negligent acts or omissions.

In certain cases, Ontario law provides immunity from damages for gratuitous, goodwill actions taken in emergency situations. For example, under *Sabrina's Law*,⁹ no action may be brought for damages arising from the administration by a school board employee of anaphylactic medication except in the case of gross negligence. Under the *Chase McEachern Act (Heart Defibrillator Civil Liability)*,¹⁰ a person who, in good faith, voluntarily and without reasonable expectation of compensation or reward uses a defibrillator on a person experiencing an emergency is not liable for damages except in the case of gross negligence. Similarly, under the *Good Samaritan Act*,¹¹ a person who voluntarily and without reasonable expectation of compensation or reward provides emergency

⁹ S.O. 2005, c. 7.

¹⁰ S.O. 2007, c. 10, Sched. N.

¹¹ S.O. 2001, c. 2.

healthcare services or first-aid assistance to a person who is injured or unconscious as a result of an accident or other emergency is not liable in damages except in the case of gross negligence.

In all of these cases, civil immunity except in the case of gross negligence is provided to persons who are not compensated or rewarded for providing emergency life-saving measures. The delivery of long-term care is entirely different from a rescuer who freely and voluntarily provides emergency medical treatment without compensation or reward. The long-term care or retirement home operator is paid and expected to provide high quality care that is not negligent and that does not cause injury or damage to their residents.

Good public policy demands that negligent long-term care and retirement home operators should continue to be responsible in damages for the injuries caused by their negligent acts or omissions, without the availability of a “good faith” defence, and without any higher level of gross negligence and any bar to action.

CONCLUSION

ACE therefore submits that Bill 218 should exempt and exclude long-term care and retirement home operators from all of the immunity provisions provided by this act. It should not extend a good faith defence, and it should not impose an enhanced legal standard of gross negligence nor a bar to actions for ordinary negligence brought by long-term care and retirement home residents and their families.

Dated at Toronto, Ontario this 4th day of November, 2020.

ADVOCACY CENTRE FOR THE ELDERLY

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