

Submission to the Standing Committee on Justice Policy on Bill 218

November 4, 2020



Mission and Mandate

Our primary goal is to protect and improve our public health care system. We work to honour and strengthen the principles of the Canada Health Act. We are led by our shared commitment to core values of equality, democracy, social inclusion and social justice; and by the five principles of the Act: universality; comprehensiveness; portability; accessibility and public administration. We are a non-partisan public interest activist coalition and network.

To this end, we empower the members of our constituent organizations to become actively engaged in the making of public policy on matters related to our public health care system and healthy communities. We seek to provide to member organizations and the broader public ongoing information about our health care system and its programs and services, and to protect our public health system from threats such as cuts, delisting and privatization. Through public education and support for public debate, we contribute to the maintenance and extension of a system of checks and balances that is essential to good decision-making. We are an extremely collaborative organization, actively working with others to share resources and information.

Who We Are

The Ontario Health Coalition is comprised of a Board of Directors, committees of the Board as approved in the Coalition's annual Action Plan, Local Coalitions, member organizations and individual members. Currently the Ontario Health Coalition represents more than half-a-million Ontarians, 400 member organizations and a network of Local Health Coalitions and individual members. Our members include: seniors' groups; patients' organizations; unions; nurses and health professionals' organizations; physicians and physician organizations that support the public health system; non-profit community agencies; ethnic and cultural organizations; residents' and family councils; retirees; poverty and equality-seeking groups; women's organizations, Students for Medicare and other organizations committed to public health care for all under the principles of equity and compassion that underlie the Canada Health Act.

Submission

Margaret (a pseudonym) loved music. She was a foster child herself, and when she grew up she became a foster mother to dozens of children. She was amazingly generous, welcoming single moms with children – sometimes for years at a time – into her home. Her life was valuable. She was loved by her family, her community and all the children she cared for. She was extraordinary and unique. As a society we should have seen her life as precious, as worth protecting. Instead, Margaret died in August in hospital after months of decline, suffering and inadequate care in her long-term care home.

In her last months Margaret was isolated in her long-term care home. She did not receive the foot care for which her family paid extra and she developed painful sores and infected blisters on her feet. She did not receive her pain medication and spent hours crying in pain on the phone with her daughter. The nurses' station was too busy to speak on the phone and to help. Margaret's decline was precipitous and she suffered it alone and without adequate care. Her daughter was shut out, unable to help.

Like all residents in long-term care, Margaret paid for her care and we all helped to pay as taxpayers. But Margaret did not get it.

There were 30 residents in Margaret's wing and only one or two PSWs assigned at any time for all of them.

Margaret did not see a doctor from January to June.

Margaret died in hospital of kidney failure and a serious UTI in August.

Her daughter says:

"I know my mom is out of pain. My family would like me to let all this go, but I don't feel like I can. My natural reactions of grief are frozen because it's not over or resolved. Caring for people was a thing that my mom believed in, and she would have wanted me to speak up. She wouldn't want me to stay silent."

"It's just all wrong," her daughter said. "My mind and soul will never be the same."¹

.....

"My mind and soul will never be the same."

I can no longer count the times that family members of the dead have described the ways in which their lives have changed forever from the experiences they have had trying to get care for their mothers, fathers, grandmothers and grandfathers over the last six months. Their pain, like Margaret's daughter's, is etched on their minds and souls.

Justice is fundamentally about fairness. It is about accountability. It is about treating people with respect and in accordance with the fundamental values and morals of our society.

Ontario's long-term care residents and their families have already suffered unspeakably. Many are haunted by the conditions in which their loved ones died. There has been no accountability for what has happened. They deserve some kind of closure. They need justice.

Bill 218 covers any company or person and the government and its agencies. It does three things in relation to access to justice for the family members of loved ones who have suffered harm and who have died in long-term care and retirement homes during the pandemic and are seeking justice.

1. It raises the bar from simple negligence to gross negligence for the plaintiffs (Section 2 (1)(b)).
2. It lowers the bar for the defense from the normal definition of good faith effort, which requires a reasonable and competent effort to be simply “an honest effort” whether reasonable or not. (Interpretation Section 1 (1).)
3. It makes these measures retroactive to March 17, 2020, the very week that COVID-19 began to spread in long-term care homes and retirement homes and extinguishes rights, claims, costs and compensation for anyone who started legal proceedings during the period covered retroactively. (Section 2(1) and Section 5, 6 and 7.)

Bottom line, this Bill would make it harder for those who are seeking justice for those who have been harmed as a result of COVID-19 in long-term care and retirement homes, and, at the same time would make it easier for those operators to defend themselves.

What this means is that the bar for those who are seeking justice for negligence under the laws that currently exist would be required to meet the new standard of gross negligence even though the laws would have required simple negligence at the time they started their legal actions.

It means that going forward, long-term care and retirement homes don't have to worry about being held to account for negligence, only gross negligence, and they do not have to meet the normal test of good faith (ie. that their efforts were competent and reasonable).

The primary entities that benefit from this policy decision are the long-term care and retirement home companies. This Bill does not serve the public interest. It is not just.

What we are calling for is simple.

Long-term care and retirement homes should be carved out of this Bill.

We also support the recommendations for amendments proposed by the Ontario Federation of Labour with respect to WSIB.

In other jurisdictions governments have resisted the lobby efforts of for-profit long-term care home companies that have tried to achieve what they call “tort reform” like this bill to limit their liability in the face of litigation for their negligence. In 2012, in response to litigation and the refusal of the state to stifle lawsuits, Extencicare left Kentucky.ⁱⁱ Extencicare was facing five wrongful death lawsuits and one negligence lawsuit.ⁱⁱⁱ In 2001 Extencicare left Florida and Texas after lawsuits and similar failure to achieve their desired “tort reform”. In fact, Extencicare left the United States entirely and chose instead to expand in Canada after a case by the U.S. Department of Justice that resulted in the company agreeing to pay \$38 million to the United States and eight states. Let me read you verbatim what the U.S. Department of Justice said in their press release about the company in 2014:

“Extencicare Health Services Inc. (Extencicare) and its subsidiary Progressive Step Corporation (ProStep) have agreed to pay \$38 million to the United States and eight states to resolve allegations that Extencicare billed Medicare and Medicaid for materially substandard nursing services that were so deficient that they were effectively worthless and billed Medicare for medically unreasonable and unnecessary rehabilitation therapy services, the Justice Department and the U.S. Department of Health and Human Services Office of Inspector General (HHS-OIG) jointly announced today. This resolution is the largest failure of care settlement with a chain-wide skilled nursing facility in the department’s history.”^{iv}

Subsequently, Extencicare sold its U.S. homes and expanded into other markets, particularly in Canada.^v

Not only is the United States not kowtowing to industry lobby to make it harder to sue them for their negligent care, but at almost the same time as Ontario’s government introduced this Bill, the Attorney General in Massachusetts filed the first criminal charges against the leaders of a nursing

home where 76 residents died of COVID-19 for permitting serious bodily injury or neglect of an elder.^{vi} On March 3, 2020, the U.S. Attorney General announced the U.S. Justice Department's National Nursing Home Initiative. This is a comprehensive effort by the department, led by the Elder Justice Initiative and in strong partnership with the U.S. Department of Health and Human Services that uses every available tool to pursue nursing homes that provide substandard care to their residents.^{vii}

The contrast with what the Ontario government is proposing to do in Bill 218 could not be more stark.

The history of this time will be written and as Members of Provincial Parliament your conduct today and in the coming days will be written in the annals of our province's history.

The care of the elderly through this pandemic – people who were precious, who in the main could not speak for themselves, who needed us to care for them at their time of vulnerability – this is the measure of our humanity.

It is too late for more than 2,000 human beings who died, many of them in conditions that are unspeakable, that have left those who loved them damaged forever with grief and guilt.

As legislators, you have the power to do the right thing.

We are asking you to search your own conscience.

The very least you can do, is not make their journey to justice – and hopefully a little bit of closure – harder than it already is.

ⁱ<https://journeymagazineptbo.com/2020/10/15/18741/?fbclid=IwAR02GAhksPwVtfU9PUdo4HYluASU2tI7Zs2adhNMuRKky4EFXNBFuiUu2Hg>

ⁱⁱ Newman, Elizabeth “Extendicare leaves Kentucky, blames need for tort reform” McKnight's Long-Term Care News, July 5 2012 <https://www.mcknights.com/news/extendicare-leaves-kentucky-blames-need-for-tort-reform/> ;
Extendicare REIT “Extendicare REIT exiting Kentucky market” press release May 14, 2012
<file:///C:/Users/brown/Downloads/extendicare-reit-exiting-kentucky-market-may-14-2012.pdf>

ⁱⁱⁱ Bello, Mark M. “Extendicare Leaves Another State as Lawsuits Continue to Mount” Lawsuit Funding News, July 8, 2012 <https://lawsuitfinancial.legalexaminer.com/home-family/nursing-home-elder-abuse/extendicare-leaves-another-state-as-lawsuits-continue-to-mount/>

^{iv} United States Department of Justice, “Extendicare Health Services Inc. Agrees to Pay \$38 Million to Settle False Claims Act Allegations Relating to the Provision of Substandard Nursing Care and Medically Unnecessary Rehabilitation Therapy” press release Friday, October 10, 2014 <https://www.justice.gov/opa/pr/extendicare-health-services-inc-agrees-pay-38-million-settle-false-claims-act-allegations>

^v Mongan, Emily “Extendicare closes \$870 million sale of its U.S. facilities” McKnight's Long-Term Care News, July 7, 2015 <https://www.mcknights.com/news/extendicare-closes-870-million-sale-of-its-u-s-facilities/> and <https://www.extendicare.com/about-extendicare/our-history/>

^{vi} Brown, Danielle “COVID-19 charges against nursing home leaders first of many, legal expert says” McKnight's Long-Term Care News, September 28, 2020 <https://www.mcknights.com/news/covid-19-criminal-charges-against-nursing-home-leaders-first-of-many-legal-expert-says/>

^{vii} United States Department of Justice “Department of Justice Requesting Data From Governors of States that Issued COVID-19 Orders that May Have Resulted in Deaths of Elderly Nursing Home Residents” press release August 26, 2020 <https://www.justice.gov/opa/pr/department-justice-requesting-data-governors-states-issued-covid-19-orders-may-have-resulted>