

## Personal Injury

# Impact of Ontario's health-care crisis on personal injury law, claimants

By **Ashu Ismail**



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(September 27, 2022, 2:02 PM EDT) -- Ontario's health-care system is in crisis, provoked in large part by the COVID pandemic. Surgical and diagnostic imaging wait times have increased dramatically. Emergency departments have been forced to close for hours or days at a time because of nursing and staff shortages. Thousands of hospital beds are occupied by non-urgent patients because long-term and alternative care facilities are overwhelmed and understaffed. In addition, more than 10 per cent of Ontarians do not have a family physician and must use overcrowded walk-in clinics or emergency departments for their health-care needs.

The Ford government recently announced a series of measures designed to combat this crisis. These include rerouting publicly funded surgical procedures to private facilities, waiving fees and registration requirements for international nursing candidates and investing up to \$57 million over three years to increase the number of nurse practitioners working in long-term care homes. As well, the government has proposed temporarily diverting patients waiting for a long-term care bed to a home not of their choosing where spaces are available to free up hospital beds.

Whatever the merits of these measures in the longer term, the impact of current crisis will persist for the foreseeable future.

## Impact on personal injury law

This health-care crisis has had a pervasive negative impact on families across Ontario. Of course, the fallout of COVID delays in the courts and at the Licence Appeal Tribunal continues to bog down proceedings. However, this is only one of the extraordinary obstacles faced by anyone suffering serious injuries in a collision.

## Civil litigation

Unless there is a genuine dispute over liability, the defendant's insurance company is motivated to settle claims against its client to avoid the additional time and expense of ongoing litigation. However, these insurers do not simply hand out money in response to allegations in a statement of claim — they expect convincing evidence that shows the nature and extent of the plaintiff's injuries and ongoing impairments, as well as the financial, functional and emotional losses they will, or reasonably could, suffer.

Ordinarily, the plaintiff's counsel begins acquiring this evidence shortly after the retainer is signed and uses it as the basis for drafting the claim. In straightforward cases, provision of these records can lead to productive settlement discussions, even before a claim is issued. Currently, many potential plaintiffs are still waiting for diagnostic imaging, specialist consultations, treatment and rehabilitation for months after the collision, rendering the initial records of limited use.

Also, over the course of the pandemic, there can be sizable gaps in the medical history, resulting in missed diagnoses, treatment and referrals plaintiffs would normally receive. Where the plaintiff does not have a family physician, this issue is compounded by a reluctance to attend overcrowded walk-in

clinics or emergency rooms, both during the height of COVID and ongoing. Documentation at clinics and ERs is never as comprehensive as that produced by family physicians, and lately has been even less adequate. As well, inexperienced or overburdened staff often miss or fail to respond promptly to requests for records.

Similar delays plague the plaintiff at every stage of the litigation. Claims are issued months later than usual. Documentary discovery is sporadic, and the resulting affidavits of documents are incomplete when finally served. Examinations for discovery are not arranged or attended until a reasonable evidentiary record can be reviewed. Undertakings tend to be more extensive and trigger another round of delays.

Treating reports cannot be delivered since the necessary appointments have not occurred or treatment has not concluded. Maximum medical recovery cannot be declared with confidence. Expert opinions take longer to complete, and expert witnesses either cannot participate or have limited availability for trial. Without medical opinions, neither side is eager to participate in good-faith mediation.

This seemingly endless ordeal has been disastrous for the mental health of already-vulnerable plaintiffs, impacting both the duration and the quality of their ongoing efforts at recovery.

### **Accident benefits**

Delays and roadblocks related to the health-care crisis also continually undermine a collision victim's accident benefits claim. These claims are adjusted based upon available evidence; a benefit must be reasonable and necessary. Treatment plans, income replacement and other benefits are denied pending receipt of records. Potentially unnecessary independent medical examinations are scheduled to fill in the evidentiary gaps. Claimants with soft-tissue injuries and mild brain injuries cannot adduce neurocognitive or diagnostic evidence to demonstrate that their conditions exceed the parameters of the Minor Injury Guideline.

Nursing, attendant care and other rehabilitative resources are scarce, leading to prolonged convalescence, often with less satisfactory outcomes. Disputes arise that ordinarily could be avoided and cannot settle until sufficient evidence is available.

These systemic delays also impact potential catastrophically impaired (CAT) claimants, particularly those applying under the Whole Person Impairment (WPI) category. Without a solid evidentiary foundation in advance of the two-year anniversary of the collision, contentious CAT disputes are almost inevitable, which might be resolved without a hearing if the claimant's treating reports are available in a timely fashion.

Prior to the current crisis, an accident benefits claim often plateaued and might settle around the two-year mark, with reasonable provision for the claimant's future needs. When available, such settlements provide necessary funds for a plaintiff's ongoing support while their lawsuit proceeds. Now, however, far more injury victims find themselves trapped in limbo from both sides, which increases their distress and further jeopardizes their recovery.

### **What can be done**

More than ever, frank and ongoing communication with personal injury clients is essential. They need to be informed of these challenges so that they and their families can prepare, emotionally and financially, for the likelihood that their claims will take longer than they might otherwise assume or have heard. Personal injury firms can provide information about litigation loans and other resources. They can request advances on settlement from defence counsel and/or can recommend treating practitioners who will defer payment. They can ensure their practices are managed efficiently (for example, by following up document requests consistently).

Both sides of the personal injury bar can respond promptly and courteously to requests for documents or dates. They can resolve procedural disputes without a motion and avoid rescheduling motions or discoveries. By working together to facilitate the claims' progress whenever possible, we can help minimize the devastating impact experienced by Ontario's collision victims.

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