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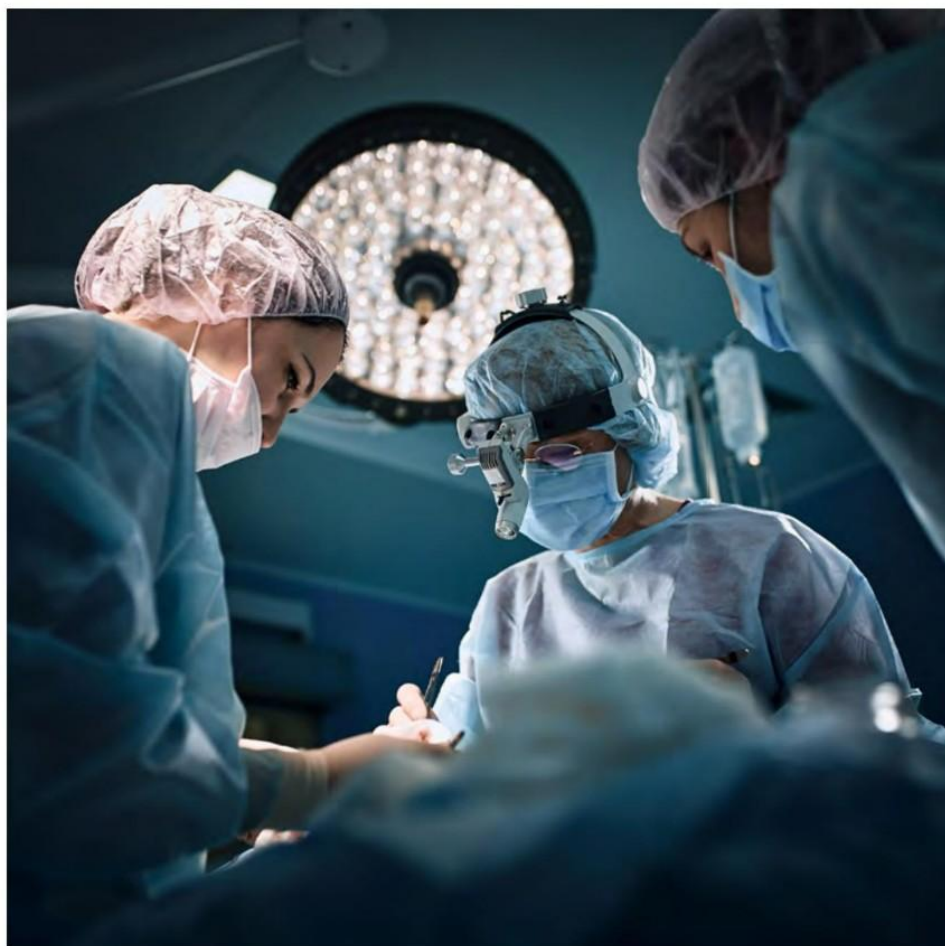
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Ontario reforms spark medical malpractice backlash

Plaintiff lawyers warn that Ontario's civil justice overhaul would upend medical malpractice litigation, writes **Tim Wilbur**



ONTARIO'S SWEEPING civil justice reforms, championed by Chief Justice Geoffrey Morawetz and Attorney General Doug Downey, are drawing sharp criticism from plaintiff-side medical malpractice lawyers. The overhaul, co-chaired by Ontario Superior Court of Justice Cary Boswell and Allison Spiegel of Spiegel Nichols Fox LLP, promises faster, simpler litigation. For those litigating medical negligence, though, they say the changes threaten to undermine the very core of their practice.

Plaintiff lawyers challenge new rules

Aleks Mladenovic, partner at Thomson Rogers LLP, says the lack of medical malpractice expertise among those drafting the reforms highlights a fundamental flaw in the process: "None of the subcommittee members are practising members of the bar who do medical malpractice work in any capacity." He argues the new rules were "driven not by just the issue of delays but the issue of costs, which, of course, is frankly not an issue in medical malpractice cases," since plaintiffs never bear the costs because they pay lawyers on a contingency basis and the Canadian Medical Protective

MEDICAL MALPRACTICE

PHASE 2 REFORMS IMPACTING MEDICAL MALPRACTICE



No oral discovery:

Oral examinations for discovery are eliminated, replaced by binding, lawyer-prepared witness statements.



Upfront evidence:

Parties must disclose primary evidence and witness statements at the outset of litigation.



Limited document disclosure: Only documents a party intends to rely on, plus “known adverse documents,” must be produced.



Pre-litigation protocols:

Early communication and document exchange are mandatory before filing a claim.

Association (CMPA) “is publicly funded and very well financed.”

The most contentious change for medical malpractice litigators is the elimination of oral examinations for discovery, which would be replaced by lawyer-prepared witness statements and a narrower approach to document disclosure. Mladenovic predicts that these statements would be drafted by lawyers for their clients, making meaningful impeachment at trial impossible. He stresses that every medical malpractice case he had won hinged on impeachment – where a physician says one thing at discovery and another at trial. “That will now be impossible to achieve,” he says.

He describes the new approach to document disclosure as equally problematic. The “known adverse document” rule, which requires parties to produce only the documents they intend to rely on and those they know to be adverse, is, in his view, unworkable.



“If they don’t know what a known adverse document is, how in the hell am I supposed to know that?”

Aleks Mladenovic, Thomson Rogers LLP

“The committee even admits that they don’t even know what that means. At one point, they say, ‘Admittedly we haven’t been able to agree on what constitutes a known adverse document’... If they don’t know what a known adverse document is, how in the hell am I supposed to know that?” he says.

Mladenovic says that while the reforms may be worthwhile in other areas, medical malpractice litigation is fundamentally different from other types of civil cases. “Medical malpractice cases should definitely be exempted from these rule changes. There’s no question in my mind,” he says. Since healthcare is publicly funded, including much of the money funding the

CMPA, “when it goes wrong, we should have the highest access to justice because we paid for it. Doctors have their premiums paid by the public.”

He also rejects the idea that the current discovery process is responsible for delays. “Examinations for discovery do not delay cases.” If the goal is to speed up litigation, he says, the answer is simple: “Impose time-lines. You could say [that] the parties must conduct examinations for discovery within 12 months of the close of pleadings. And guess what will happen? We’ll all just do it.”

British Columbia’s approach offers contrast

Paul McGivern, a medical malpractice lawyer at Pacific Medical Law in Vancouver, echoes these concerns, even though such reforms are not yet proposed in British Columbia. “The ability to do examinations for discovery [is] absolutely critical

to any prospect of succeeding on a medical malpractice claim,” he says, dismissing litigation through affidavits as “nonsense.” He argues that relying on written statements would let defendants avoid key admissions.

McGivern points to BC’s approach, where parties can secure trial dates soon after pleadings close, keeping cases focused and reducing delay. “Then everybody is working towards a date that we’re going to get in front of a trial judge,” he says – a “huge time-saving mechanism” that prevents procedural drift and wasted resources.

He notes BC’s seven-hour limit on discoveries, with the option to request more time if needed, as a reasonable compromise.

“Seven hours, plus the option of going to chambers or going to a pretrial judge and just saying, ‘Look, I need more time, and these are the reasons I need more time,’ is a reasonable compromise,” he says. For McGivern, “We need an opportunity to do our jobs, to get focused on what are the issues, how can we resolve these issues, and we can’t do our jobs without the option of doing discovery.”

He adds that in BC, medical malpractice cases are already carved out from certain

handcuff plaintiffs and defence counsel in medical malpractice matters, where the interactions between doctors and patients are routinely complex and controversial, and doctors often claim that the written records do not reflect what was actually done or said,” he says.

Defence counsel urges caution

Domenic Crolla, a partner at Gowling WLG who represents the CMPA, takes a more measured tone. In an email, he wrote, “The

record to allow the parties to examine the merits of the case.” However, he noted, “The CMPA (as did many other organizations) recommends retaining limited oral discovery in appropriate medical liability cases to preserve its important role in testing evidence and as a fact-gathering tool for all parties.”

Crolla also pointed to alternatives: “There are other litigation discovery mechanisms that, if properly implemented, can also promote the important goals of factual discovery and issue narrowing.” He supports a phased implementation and scheduled review, warning that “as with any substantive change, there is a level of uncertainty with the transition process.”

While open to reform, he wrote that the CMPA insists changes must be carefully designed. “While extensive front-loading can simply shift costs, the CMPA supports ... the implementation of a medical liability Pre-Litigation Protocol to increase early communication and document exchange, narrow issues and parties, and critically assess merits before filing,” he wrote.

The future of reforms

For all parties, medical malpractice has unique dynamics that must be considered when implementing change. Whether Ontario’s civil justice reforms take that into account, and whether other provinces follow Ontario’s lead, is still an open question. **CL**



“The ability to do examinations for discovery [is] absolutely critical to any prospect of succeeding on a medical malpractice claim”

Paul McGivern, Pacific Medical Law

reforms that apply to other personal injury cases. “They’re not like motor vehicle cases. They are very different. They’re much more complex. They’re much more involved. You need an opportunity to get all the expert reports that you want. And we recognize you’re going to spend a lot more money than is spent on motor vehicle cases,” he says.

Both lawyers dismiss the “upfront evidence model,” which relies on lawyer-prepared witness statements, as ineffective. McGivern calls it “probably mostly a waste of time and a waste of money,” noting it increases costs for plaintiffs with limited resources and does not shorten timelines. “It is going to increase costs because these people are going to have to sit in front of their lawyers and produce all of this documentation,” he says.

Mladenovic is even more scathing: “Self-serving statements written by professional advocates that can never be truly tested until trial? The [working group] clearly has no idea how badly this would

CMPA has expressed in its submission to the Civil Rules Review that it understands and supports efforts to streamline litigation. The proposal in the Phase 2 Consultation paper made a number of proposals, including the elimination of oral examinations for discovery. If this proposal is accepted in its entirety, then binding witness statements, documentary disclosure, and written interrogatories will need to provide a thorough

