

ONTARIO NURSES' ASSOCIATION

SUBMISSION

on

Bill 218

to the

STANDING COMMITTEE ON JUSTICE POLICY

November 4, 2020



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I. Overview of ONA's Position

ONA opposes the introduction of Schedule 1 to Bill 218, the *Supporting Ontario's Recovery Act, 2020* ("Bill 218" or the "Bill"). Bill 218 would impose significant impediments against residents and families who are currently trying to hold government, long-term care homes, and other health-care facilities liable in the Courts for harm resulting from exposure to and infection with COVID-19.

ONA calls on the Standing Committee on Justice Policy to reject the Bill in its entirety on the basis that it displaces normal standards of conduct applicable when caring for patients in health-care facilities and for nursing homes is inconsistent with the *Long-Term Care Homes Act* and section 7 of the *Canadian Charter of Rights and Freedoms*.

The Ontario Nurses' Association ("ONA") is the exclusive bargaining agent representing 68,000 Registered Nurses and Health-Care Professionals. For nearly 50 years, ONA has represented members who are front-line nurses and health-care professionals in hospitals, long-term care homes, home care and in community and primary care clinics, as well as in a variety of other settings providing health care to the people of Ontario. ONA is party to approximately 550 collective agreements. ONA's members, which include over 4,000 long-term care home health-care professionals, have served on the front lines of Ontario's COVID-19 response, prioritizing patient and resident care in challenging and often unsafe practice environments and making critical contributions to the public good.

ONA welcomes the opportunity to contribute to and provide input into the Standing Committee on Justice Policy's (the "Committee") consideration of Bill 218, which would affect the law of negligence as it applies in the context of the COVID-19 pandemic.

We advise the Committee that ONA was, at no time prior to its introduction, consulted in respect of this Bill nor did ONA advocate to the province for the introduction of the measures it contains. ONA did not believe any changes in the current laws for those harmed as a result of exposure to and infection with COVID-19 was justified. The normal legal framework and accountability should continue to apply during COVID-19.

Given that COVID-19 pandemic management in Ontario has disproportionately affected elderly long-term care home residents and their loved ones, ONA will largely focus its submissions on Bill 218 to its impact in the long-term care sector.

ONA opposes the introduction of Bill 218, which, in our submission, inappropriately and retroactively shields government actors, health-care facilities, and long-term care home operators from liability in negligence in most circumstances. We note that, to date, there have been over 500 COVID-19 outbreaks in long-term care homes in Ontario and that long-term care home residents account for more than 60 percent of the COVID-19-related deaths in Ontario.¹

The Bill, if passed, will likely negatively affect the more than two dozen civil suits that have already been filed against the Government of Ontario and/or for-profit long-term care homes. In ONA's view, the proposed legislation effectively condones a standard of negligent management of the pandemic by the government and health facilities, including in the long-term care context.

ONA's concerns are summarized as follows:

- (a) Bill 218 introduces a subjective "good faith" and "honest effort" component to the negligence analysis in the context of the COVID-19 pandemic. This component will shield negligent government actors and health-care facilities from liability for objectively unreasonable conduct in the absence of gross negligence. The standard of gross negligence itself displaces the normal standard of ordinary negligence that applies to health care facilities generally and carves out an special and exceedingly high threshold to establish civil liability. The Bill will therefore make it considerably more difficult for residents and their families to hold government actors and health-care facilities to account for the harms, including death, caused by their negligent pandemic management and infection control measures.
- (b) These modifications to the common law of negligence will disincentivize government actors, health-care facilities, and long-term care home operators from fulfilling their duty of care to residents generally and from taking all reasonable precautions against the spread of COVID-19.

¹ Please see: <https://www.publichealthontario.ca/en/data-and-analysis/infectious-disease/covid-19-data-surveillance/covid-19-data-tool>; and <https://www.ontario.ca/page/how-ontario-is-responding-covid-19#section-2>

It will also shield them from liability for past negligent conduct. Bill 218 is thus at odds with the purpose, principles, and requirements of the *Long-Term Care Homes Act, 2007*,² which ensure and protect the rights of residents to live in dignity and security. Instead, the Bill minimizes the suffering endured by residents and their loved ones by introducing additional hurdles for any recourse, thereby sending the message that their suffering is unworthy of the ordinary protections of the law of negligence. Bill 218 does not represent the public interest but instead amounts to a self-serving attempt on the part of the provincial government to immunize itself and nursing homes from liability in respect of its COVID-19 response. This is a travesty of justice.

For these reasons, ONA calls on the Committee to reject Bill 218 in its entirety.

II. Good Faith Efforts and Gross Negligence

Bill 218 (the “Bill”) waters down the requirement in ordinary negligence that a person act reasonably to prevent foreseeable harm as viewed from the objective perspective of a reasonable person. Instead, the Bill shields objectively unreasonable conduct causing harm from liability where these are made in “good faith” (section 2(1)).

This provision introduces a subjective component to the ordinary negligence analysis by requiring the trier of fact to assess whether a person – which under the Bill includes health-care facilities, long-term care home operators, and government – made “honest” and/or good faith efforts irrespective of whether those efforts were objectively unreasonable (section 1(1)). This determination will turn on the state of mind of the defendant and allow government actors, for example, to easily defend themselves against claims for unreasonable conduct causing harm in the absence of “gross” negligence.

The introduction of “good faith efforts” thus effectively displaces the normal standard of ordinary negligence that applies to health care facilities and government actors to that of gross negligence.

We note here that ordinary negligence, this being the expectation that a normal, objectively reasonable degree of prudence and caution be exercised towards others, is a long-established and widely accepted, legally enforceable norm in the common law that reflects the value we, as a society, place on socially responsible conduct and the conduct we expect of government actors.

² S.O. 2007, c 8.

In contrast, gross negligence requires a proof of “very great negligence” and/or a “very marked departure from the standard of care” “by which responsible and competent people” conduct themselves before liability is found.³ Gross negligence is a very difficult standard to meet. Indeed, gross negligence has been recently characterized as “stem[ming] from abnormally deficient, even inexcusable, behaviour that shows complete disregard for others.”⁴ Imposing this higher standard sends the message that patients and elderly residents are unworthy of the normative protections of the law of negligence. It is discriminatory on the grounds of age by diminishing the value and dignity of our vulnerable senior’s population that needs the protection of society, not systemic barriers to enforce universal standards of care that should continue to apply to them like any other member of society.

In our submission, the Bill thus creates arguably insurmountable barriers to claims in negligence, inappropriately undermining the rights of those most vulnerable to pandemic mismanagement under the common law. Introduced by the provincial government in the midst of the pandemic’s more troublesome second wave, the Bill represents a self-serving attempt by the government to retroactively immunize itself from liability arising from its own crucial decision making and mismanagement during this Pandemic.

III. Contrary to the Purposes and Protections of the *Long-Term Care Homes Act*

In our submission, the limitations placed by the proposed legislation on causes of action in civil liability are at odds with the ordinary duty of care owed to residents and principles of the *Long-Term Care Homes Act, 2007* (the “Act”).

The Act closely regulates the operation of all licensed long-term care homes in Ontario for the purpose of ensuring the rights of residents to live in dignity and safety. This purpose is reflected in the Act’s “fundamental principle”, which requires that its provisions be interpreted and applied in accordance with the principle that the “home is primarily the home of its residents and is to be

³ *Gordon et al. v. Nutbean Moehl et al. v. Nutbean*, 1969 CanLII 254 (ON SC); *McCullough v Murray*, [1942] SCR 141 at 145; *Studer v Cowper*, [1951] SCR 450 (SCC); *Kingston (City) v Drennan*, [1879] 27 SCR 46 (SCC) at 60; *Dagenais v Timmins (City of)*, 1995 CanLII 591 (ON CA).

⁴ *Peracomo Inc. v. TELUS Communications Co.*, 2014 SCC 29 at para 95 (Cromwell, J., dissenting) (CanLII), quoting *Audet v. Transamerica Life Canada*, 2012 QCCA 1746 at para 90 (CanLII.)

operated so that it is a place where they may live with dignity and in security, safety and comfort and have their physical [and] psychological... needs adequately met.”⁵

The rights of residents to live in dignity and security, including psychological security, is reflected in the Act’s “Residents’ Bill of Rights”, which recognizes the right of every resident:

- “to live in a safe and clean environment”;
- “to be properly sheltered, fed, clothed, groomed and cared for in a manner consistent with his or her needs”, and;
- “to be treated... in a way that fully recognizes... and respects the resident’s dignity”.⁶

These rights are protected under section 5 of the Act, which requires every operator of a long-term care home to “ensure that the home is a safe and secure environment for its residents” as well as in provisions that require operators to maintain 24-hour nursing care.⁷

Contrary to the objectives of the Act, Bill 218 detracts from the accountability, deterrence and behavior modification function of civil liability, disincentivizing the government introducing the legislation and health facility operators from taking all objectively reasonable steps to protect patients and residents from risks to life and health. It opens the door to further harm being caused to residents without civil liability.

Further, and given the disproportionate impact of the Bill in the long-term care context, the Bill is inconsistent with the section 7 right, pursuant to the *Canadian Charter of Rights and Freedoms*,⁸ to life, liberty, security of the person. In our view, the Bill undermines the values of human dignity, physical safety, and psychological integrity underpinned by section 7 by condoning otherwise negligent conduct and legitimizing the apparent, objective, and disproportionate vulnerability experienced by long-term care residents. By making it substantially more difficult for residents and their loved ones to hold the province and long-term care home operators accountable for negligence, the Bill minimizes and perpetuates the suffering and harm endured by residents and their loved ones. It does so by creating barriers to justice and effective recourse.

⁵ *Long-Term Care Homes Act, 2007*, SO 2007, c 8, s. 1.

⁶ *Ibid*, s. 3(1), among many others.

⁷ See *ibid*, s. 8, among many others.

⁸ *The Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

IV. Conclusion

For all of the above reasons, ONA opposes the introduction of Schedule 1 of Bill 218, *Supporting Ontario's Recovery Act, 2020*, and calls on the Committee to reject the proposed Schedule in its entirety.

Residents, seniors and their families deserve more.