Toronto Lawyers ASSOCIATION TLA

April 29, 2024

The Honourable Madam Justice D.A. Wilson
Superior Court of Justice
361 University Avenue
Toronto, ON M5G 1T3

VIA EMAIL: Laura.Craig@ontario.ca

Dear Madam Justice Wilson,

RE: Proposed Amendments to Rule 34.12 and Rule 30.03 of the Rules of Civil Procedure

I am writing to you on behalf of the Toronto Lawyers' Association ("TLA"). The TLA represents the interests of more than 3,700 members who practice law in all disciplines across the Greater Toronto Area. Our membership, and our Board of Directors, represents the full diversity of our profession in Ontario. Included among our members are many lawyers who practice regularly before the Superior Court of Justice.

I write in response to Your Honour's letter dated March 14, 2024, regarding proposed amendments to Rules 34.12 and 30.03 of the Rules of Civil Procedure (the "Rules") as put forward by the Civil Rules Committee's Refusals Motions Subcommittee. The TLA agrees that given the significant demands on judicial resources it is critical for the civil justice system to operate as efficiently as possible to the benefit of the parties who require and are entitled to timely justice.

The TLA's Advocacy Committee has carefully considered the questions posed in Your Honour's letter. We are pleased to provide you with our responses below.

Question 1: Do you agree that the ability to bring a refusals motion should be limited to parties that have met the mandatory document production requirements under the Rules?

Yes, however the Court should retain discretion to permit parties to bring refusals motions even if they have not met the mandatory document production requirements. The Court should exercise this discretion only in appropriate circumstances. The Court should also permit refusals motions to be heard on the agreement of the parties, even when the moving party (or parties) have not met the mandatory document production requirements.

Question 2: Is it appropriate to discourage inappropriate refusals motions with cost consequences, such as those in subrule (5)?

Yes, we agree that cost consequences should be used to discourage parties from bringing inappropriate refusals motions.

Question 3: Do you agree with imposing mandatory documentary disclosures in personal injury cases?

Yes. In our view, it is customary in personal injury cases for a standard set of documents to be produced. Imposing mandatory documentary disclosure in these cases will help narrow potential disagreements among the parties, thereby potentially reducing the need for motions to determine documentary production issues.

Question 4: Do you have any concerns with the proposed mandatory documentary disclosures under new subrules (2.1) and (2.2)?

In our view, it is reasonable to require plaintiffs to produce their Affidavits of Documents and Schedule "A" documents within six months of issuing their Statement of Claim. We note that proposed subrule (2.1) would require plaintiffs to produce certain medical/treatment and income loss records dating back three years prior to the incident in question. It is our position that the Court should retain discretion to order plaintiffs to produce records dating further back than three years, if appropriate based on the circumstances of the case.

We have provided below our specific comments regarding proposed subrules (2.1) and (2.2):

> (2.1)(a) and (b) – As stated above, the Court should retain discretion to order production of records dating further back than three years prior to the incident giving rise to the claim;
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> (2.1)(c) – This subrule should be expanded to require production of all clinical notes and records of all *health care providers* who provided treatment in connection with the injuries being alleged;
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> (2.1)(d) and (e) – These proposed subrules should be combined into one subrule that requires production of the complete police file (including police report, officers' notes, witness statements, property damage documentation and photographs, video of the incident and audio from 911 calls) pertaining to the incident giving rise to the claim. In the case of motor vehicle accidents, the parties should also be required to produce any available event data recorder (EDR) or "black box" data, including data that may be retrieved from the vehicles' "infotainment" systems;
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> (2.1)(f) – This subrule should require production of the *complete* file from the Statutory Accident Benefits provider;

(2.1)(g) – This subrule should be divided into two such that one subrule would require production of the *complete* disability claims file arising from the incident in question and a second subrule would require production of the collateral benefits provider's file dating back three years prior to the incident in question (see our comments above regarding discretion to order production of records further back than three years);

(2.1)(h) and (i) – We agree with these proposed subrules;

(2.1)(j) – We agree that updated productions will be required in any personal injury action, however the proposed timeframe (i.e. at least three months before pre-trial and three months before trial) do not provide the parties with enough time to assess damages and obtain expert reports. We suggest that this subrule be replaced with a subrule requiring plaintiffs to update their affidavits of documents upon the *reasonable* request of the defendants. This would result in periodic updates to both medical records and income loss documentation. If the parties cannot agree on the frequency of updates to their productions, this issue should be decided by the Court in writing based on the facts of each case;

(2.1)(k) – We suggest that plaintiffs should be required to produce any video evidence in their *power, possession or control* that depicts the circumstances of the incident giving rise to the claim;

(2.2)(a) – We agree with this proposed subrule and we suggest that proposed subrule (2.1) include a corresponding obligation on the plaintiffs' part to produce a copy of the insurance policy and declaration page of any policy that affords after-the-event or adverse costs insurance coverage to the plaintiffs in relation to the action;

(2.2)(b) – We do not agree that defendants should be required to produce with their sworn Affidavits of Documents "a statement of any party and/or a will-say statement of any witnesses to the incident or any witness having relevant evidence to the issues in the pleadings". First, a production requirement of this nature (particularly compelling production of a party's statement) may be subject to litigation privilege. Second, it may be premature to require production of will-say statements prior to examinations for discovery. While we recognize the value of will-say statements in narrowing the issues and facilitating settlement discussions, their production should not be required prior to discoveries or substantial completion of undertakings. Third, if defendants are to be required to produce will-say statements under proposed subrule (2.2), then there should be a corresponding obligation for plaintiffs to provide will-say statements under subrule (2.1);

(2.2)(c) and (d) – See our comments regarding subrules (2.1) (d) and (e) above;

(2.2)(e) and (f) – We agree with these proposed subrules; and

(2.2)(g) – We disagree that defendants should be required to produce "cell phone records for the day of the accident, with telephone numbers redacted." While there may be cases in which cell phone records are relevant to the issues in dispute, demands for this data are often speculative and lack probative value. The Court should retain discretion to order production of cell phone records of both plaintiffs and defendants, however we disagree with introducing a general rule that parties should be required to produce this information in all actions.

Question 5: Do you have any concerns with the timing of disclosures?

No. We note that many personal injury actions are commenced close to the two-year limitation period. On this basis, we have no concerns with requiring parties to fulfill their mandatory documentary production obligations within six months of the claim being commenced.

Question 6: Are there additional disclosures that you would recommend? For example, should disclosure of social media be required or an obligation to maintain social media (i.e. not deleting it)?

We recommend mandatory production of OHIP subrogated claim summaries in non-motor vehicle accident personal injury actions.

We recommend mandatory disclosure of the plaintiffs' social media accounts. We further recommend an obligation to maintain social media accounts (i.e. an obligation that the plaintiffs not delete their social media accounts or any contents therein) for the duration of the litigation. The Court should retain discretion to order production of the plaintiffs' social media accounts' content in appropriate cases.

We recommend mandatory disclosure of the plaintiffs' previous and ongoing personal injury actions, if any. Failure to disclose relevant previous and ongoing litigation prior to examinations for discovery often results in inefficiencies in the discovery process (i.e. separate discoveries instead of global discoveries and continued examinations for discovery after undertakings have been answered). Early disclosure of the existence of prior and concurrent litigation and production of relevant documents, including medico-legal reports obtained in the context of prior litigation, would improve efficiency.

Question 7: The list of required disclosures is not meant to be an exhaustive list. Rather, at the very least, the listed items must be disclosed in any case involving personal injury. Do you agree with this approach?

Yes, we agree with this approach.

Question 8: Additional amendments would also indicate that if there have been redactions to a document, the fact of a redaction must be made clear. As well, a procedure for reviewing redactions would be introduced. Namely, if the opposing party questions the legitimacy of a redaction, the unredacted version of the document would be provided to the Court for determination regarding whether the redacted information is relevant to the case and should be disclosed.

We agree that if a party redacts a document, the fact of a redaction must be made clear and there should be a procedure for reviewing redactions to determine whether the redacted information must be disclosed. In our view, this determination can likely be made by the Court through written submissions provided by the parties. In order to discourage inappropriate redactions, we suggest that cost consequences be imposed on any party that redacts information that clearly should have been produced to opposing parties.

Question 9: The amendments would also provide that only relevant excerpts of the transcript of evidence should be included in the party's compendium (i.e. the full transcript should not be provided). Do you have concerns with this approach?

We agree that only relevant excerpts of transcripts of evidence should be provided in the parties' compendiums, however the full transcript should be filed with the Court as part of the parties' motion records. The Court should not be expected to review the full transcript, however making the full transcript available to the Court is advisable in the event that the parties refer to evidence not included in the compendium.

Question 10: Should the rules specify that, where the plaintiff intends to argue threshold, when setting the matter down for trial the plaintiff must confirm that they have served a threshold report on the defendant?

Yes. In our view, this approach would facilitate settlement negotiations at an earlier stage in the action.

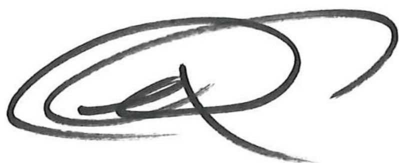
Question 11: In conjunction with question 10, if the defendant is served with the plaintiffs' threshold report and intends to respond, should the rules specify a timeline for the defendant's response (i.e. within six months of receiving the plaintiff's threshold report)?

Yes, subject to sufficient documentary production having been made by the plaintiffs. If the defendants require additional information from the plaintiffs in order to adequately respond to the plaintiffs' threshold report, then the Court should retain discretion to extend the deadline for delivery of the defendants' responding report.

In addition to considering proposed amendments to the Rules to improve the efficiency of our Courts, the TLA encourages the Court to remind all stakeholders of the importance of civility and professionalism in improving the overall efficient operation of our civil justice system. To that end, we invite the Civil Rules Committee and all stakeholders in our civil justice system to review the TLA's *Report on Civility and Professionalism in the Legal Profession*.

Again, the TLA appreciates the opportunity to participate in this consultation. Our Executive Committee would be pleased to discuss this response with the Refusals Motions Subcommittee, should it find additional consultation beneficial.

Yours very truly,



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