

Commentary:

Waiting for Remedies and Remedies for Waiting –

Recourses for Cancer Care Delays

Upon being diagnosed with cancer, the main thing a Canadian patient will face – apart from emotional upheaval – is delay. She will wait for referrals to and appointments with specialists. She will also likely face a wait for treatment, be it radiotherapy, chemotherapy or surgery, and the period of delay encountered will often surpassed clinically-indicated benchmarks.¹ Such delays stand apart from the waiting this patient may have already faced in scheduling diagnostic procedures like x-rays, ultrasounds, mammograms and biopsies, and obtaining their results.² Prolonged waiting subjects patients to psychological and physical suffering³ and risks decreasing survival rates.⁴ Some patients might be inclined to turn to law or the courts as a means of accessing more effective, timely care, or for remedying harms occasioned by delayed treatment. They will not, however, have much luck in so doing.

There are a limited number of ways in which the law can be invoked to prevent or redress harm associated with waiting for care. Even where such harm can be traced directly and causally to a delayed diagnosis or treatment, the cards are stacked against the patient, and her claim is likely to be ineffective. In the result, if reduced wait times across this country are to be achieved, this end is more likely to emanate from political, rather than legal, mobilization.

A patient's dim prospects for success in seeking legal redress for prolonged waits for cancer care are evident in the context of three potential courses of action. First, this patient might argue that the State, by establishing a medical system that provides inadequate health care resources, has interfered with her right to personal security. The Supreme Court of Canada has held that the failure to provide necessary care in a timely manner constitutes an interference with this right, which is guaranteed by both the *Canadian Charter of Rights and Freedoms* and the *Québec Charter of Human Rights and Freedoms*. The Court specified, however, that State action only constitutes an unjustified interference with personal security when it arbitrarily delays care delivery *and* imposes a legal impediment to obtaining that care. Thus, the combination of a wait for subsidized care and a prohibition on accessing care through alternate, private means amounts to an unconstitutional breach of personal security.⁵ In contrast, delays in treatment delivery *on their own* are unlikely to amount to unconstitutional state action. In this respect, a discernable line exists between negative and positive rights in relation to health care provision. Canadians have a distinct right to be free from state interference with their own efforts to access care. But this does not translate into a positive entitlement to funded care in all circumstances.⁶

A second type of legal claim might be premised on administrative law rather than the Constitution. In the *Stein* case,⁷ a patient sought reimbursement from the *Régie d'assurance maladie du Québec* (RAMQ) for colon cancer treatment obtained in New

York. The petitioner's turn to treatment abroad followed a referral by his treating oncologists in Montreal, as two viable procedures were unavailable in Canada and the third could be obtained only pursuant to extensive delay. The RAMQ refused Stein's claim twice and an administrative tribunal then declined to overturn the RAMQ's refusal. Stein subsequently sought a review of the tribunal's decision before the Quebec Superior Court, which upheld his argument that the RAMQ's refusal to reimburse was irrational and should be overturned. The Court thus ordered the RAMQ to reimburse the petitioner for the costs of foreign cancer care.

While the court found for the patient in this case, the particular facts of *Stein* must be borne in mind, namely: Stein required procedures that could not be obtained in Canada, he faced extensive delays for those that could be accessed domestically, and he had the support of his local oncologists. Reflective of these circumstances, the RAMQ now requires proof of three criteria before it will reimburse the costs of treatment obtained abroad due to domestic wait times: (1) the health services obtained must be insurable services unavailable within Quebec, (2) these services must be medically indicated and not experimental, and (3) two Quebec physicians with relevant expertise must endorse the patient's request. Ultimately, these criteria narrow the number of successful applications for RAMQ reimbursement for extra-territorial care.

A third potential route of litigation for an aggrieved cancer patient is a private law claim, that is, an action levied against individual health care actors. This path is

remedial rather than preemptive in that it requires evidence of harm having already occurred and aims to restore, to the extent possible, the loss occasioned by injury. This route affords patients limited prospects for redress. In 2004, the Quebec Superior Court certified a class comprised of breast cancer patients who faced delays that surpassed an eight-week benchmark for obtaining radiotherapy after surgery.⁸ Within this class action, the Court refused to include the Government of Quebec as a defendant, reasoning that the State's radio-oncology funding decisions were policy matters, *prima facie* immune to tort or constitutional claims. The Quebec Court of Appeal affirmed this decision and the Supreme Court subsequently denied leave to appeal.⁹ In its decision, the Court of Appeal exhibited deference to the government's discretion over health care funding. This litigation eventually settled out of court in 2009. In accepting the terms of the settlement agreement, the Court noted that the plaintiffs would have faced considerable evidentiary and causality burdens in advancing their claim had they proceeded to trial, particularly in view of inconsistent scientific evidence on wait times.

This overview of jurisprudence highlighting remedies that may be sought for losses associated with cancer care wait times indicates that improved access to such care is unlikely to result from legislative reform prompted by judicial decisionmaking. Reduced wait times are more likely to be realized through policy initiatives spurred by stakeholder advocacy. Key among these stakeholders are members of the medical community. Physicians and other health care professionals who treat cancer patients are uniquely positioned to testify to the impact – on both

physiological and psychological wellness, in both anecdotal and aggregate terms – of delays in cancer treatment. Thus wait times for cancer care, although clearly a matter of public policy, constitutes an issue that falls squarely within the medical profession’s ken. There is no doubt, then, that political action in this domain – be it through individual communication with members of Parliament or provincial legislatures, or involvement in more formalized advocacy, outreach or public education networks such as those structured under the Canadian Medical Association’s auspices – would not constitute professional overreach. Rather, such initiatives are an essential complement to cancer patients’ own political efforts, critical to the crafting of reasoned and effective policy for addressing a key health care challenge of our day.

Key Points:

- Cancer care wait times represent a preeminent political and health care challenge in Canada.
- Law affords few opportunities for individual cancer patients seeking to preempt or redress harm occasioned by delayed cancer diagnosis or care.
- Recent judicial decisions illuminate that patients are unlikely to encounter success, in seeking to access more timely cancer care, in bringing a claim rooted in constitutional, administrative or private law/tort law.
- Improved delivery of effective cancer care is unlikely to occur as a result of judicially-prompted law reform. Rather, this will require policy redesign fueled by stakeholder activism, which must include political advocacy, outreach and education efforts from within the medical community.

REFERENCES

¹ Prolonged wait times for cancer care throughout the country are well-documented: Donnelly, B. Dealing with Wait Times in Prostate Cancer *Can Urol Assoc J* 2010; 4:4 249; Cooke, AL et al. Radiation Treatment Waiting Times for Breast Cancer Patients in Manitoba, 2001 and 2005 *Curr Oncol* 2009; 16:5 58-64; Wai, ES et al. Wait Times in Diagnostic Evaluation and Treatment for Patients with Stage III Non-Small Cell Lung Cancer in British Columbia *Am J Clin Oncol* 2012; 35:4 373-7; Liberman, M et al. Delays to Surgery in Non-Small-Cell Lung Cancer *Can J Surg* 2006; 49:1 31-36. Wait times in some areas for some forms of cancer show overall increases: Singh H et al. Wait times from presentation to

treatment for colorectal cancer: a population-based study *Can J Gastroenterol* 2010; 24(1) 33-9; Leddin D. Survey of access to gastroenterology in Canada: the SAGE wait times program *Can J Gastroenterol* 2010; 24(1) 20-5.

² Simunovic, M et al. A Snapshot of Waiting Times for Cancer Surgery Provided by Surgeons Affiliated with Regional Cancer Centres in Ontario *CMAJ* 2001; 165:4 421-5.

³ Fortin A et al. Effect of treatment delay on outcome of patients with early-stage head-and-neck carcinoma receiving radical radiotherapy *Int J Radiat Oncol Biol Phys* 2002; 52(4) 929-36; Mulcahy CM, Parry DC, Glover TD. The "patient patient": the trauma of waiting and the power of resistance for people living with cancer *Qual Health Res* 2010; 20(8) 1062-75.

⁴ See, for example, Kulkarni, GS et al. Longer wait times increase overall mortality in patients with bladder cancer *J Urol* 2009; 182(4) 1318-24.

⁵ *Chaoulli v. Quebec (Attorney General)* 2005 SCC 35. See also *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

⁶ The Ontario Court of Appeal's adopted this approach in *Flora v. Ontario (Health Insurance Plan, General Manager)*, 2008 ONCA 538, refusing a liver cancer patient's claim for reimbursement for fees associated with a partial liver transplant obtained in the United Kingdom.

⁷ *Stein c. Tribunal administratif du Québec et Régie de l'assurance-maladie du Québec*, [1999] R.J.Q. 2416

⁸ *Cilinger v. Procureur général du Québec*, [2004] RJQ 3083.

⁹ *Cilinger c. Procureur général du Québec*, [2004] RJQ 2943 (CA); [2004] CSCR no 582.