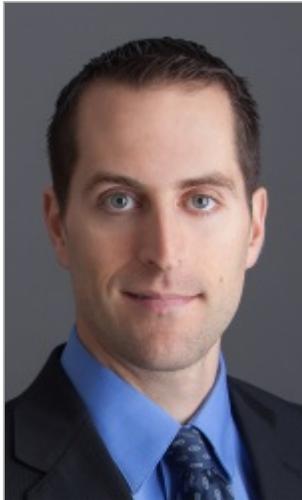


Disproportionate Stakes

Access to Justice: View from the trenches | Michael Lesage

By **Michael Lesage**



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(April 8, 2019, 2:06 PM EDT) -- As Ontario's lawyers set to elect a new slate of benchers to Convocation, the oft-discussed, seldom addressed issue of access to justice has again entered into the conversation. Most agree that access to justice is a worthy (if aspirational and ill-defined) goal, that must be advanced and encouraged. However, the facts on the ground tell a different story, that of people being unable (or unwilling) to hire lawyers or to effectively assert their rights on their own. Conversely, lawyers continue their exodus from private practice, especially within the small firm setting (this despite the fact that more and more lawyers are being called to the bar). Clearly, something is amiss.

In that regard, I believe that contested family law proceedings provide a microcosm of our justice system writ large, namely, that the procedures in place are disproportionate to the interests at stake, and/or the financial resources of the parties involved. For example, ignoring emergency or other motions, family court procedures include an application and answer, attendance at a mandatory information program, a first court date, case conference, settlement conference, trial management conference and finally trial. Of course, additional time and expense must be allocated to

deal with the vagaries of the Ministry of the Attorney General, the proverbial troll blocking and obstructing the courthouse doors.

According to the 2016 *Canadian Lawyer* legal fees survey, the minimum cost for a contested divorce was \$10,150 (excluding trial), which works out to just over 40 hours of billed lawyer time, at the minimum rate (\$234 per hour). If we assume that family lawyers bill at the average efficiency of a small-firm lawyer (20 per cent of each workday spent on collected billable work), it becomes apparent that one family lawyer can handle one contested divorce for every five weeks of full-time work, or 10 contested divorces per year.

From that revenue, the family lawyer must eke out a living, pay for their office and expenses and perhaps some level of administrative assistance, along with around \$5,000 in fees to the LSO and LawPro. Looked at another way, it takes 10 weeks of lawyer time (per couple) to work out the division of property, spousal support, child support and custody for a separating couple. Despite this, our government wonders why 58 per cent of family litigants are self-represented and decides that the solution is to increase the supply of legal service providers, rather than streamlining or simplifying an overly time-intensive process.

While family law provides perhaps the most egregious example, access to justice is becoming an issue within the personal injury field as well. The most clear-cut example would be a case of medical malpractice. Unless the injury is catastrophic (i.e. a botched knee replacement just won't cut it), an injured patient will struggle to find a lawyer willing to advance their claim. The reason for that is not hard to discern.

In almost every personal injury case, lawyers are required to advance both their time, along with all expenses necessary to prosecute the case. In medical malpractice cases, time is measured in the hundreds of hours, while expenses are typically in the high tens of thousands of dollars, and the outcome at the end of the day is at best doubtful (i.e. a better than 50 per cent chance of outright

loss).

Given the modest value of most injury claims in Canada, this means the most medical malpractice cases are simply not worth the risk. For similar reasons, this is playing out in motor vehicle cases involving soft tissue injuries, where the procedures effectively demand multiple experts and two-week trials. What rational lawyer would be willing to gamble several hundred hours of billable time and perhaps \$50,000 to perhaps win back their money invested, and earn a modest fee, four to six years after taking on the case?

Of course, this issue is present in many other fields of law as well (though the presence of contingency fee representation is much rarer). This tends to result either in onerous legal costs, or a party simply forgoing the attempted enforcement of its rights, with the realization that it lacks the resources to effectually do so.

As a profession, we now face a choice. We can continue to insist upon doing things the way we have in the past and hope for a different outcome. Alternately, we can increase the number of legal service providers and effectuate a decrease in lawyer incomes (currently averaging \$88,000). However, lower incomes alone won't reduce the amount of time required to be dedicated to matters, or the number of matters lawyers can effectively handle in a given time worked and may in fact serve to drive more from the profession.

A better option, in my view, is to recognize that many of our current practices and procedures are out of line with the value of the interests at stake (i.e. when do experts really add value to a case, versus when same are currently necessary, or why do individuals in Ontario need two wills, and not four, seven or only one?), and take steps to address and streamline them. At the end of the day, it is important that lawyers spend more than 20 per cent of their workday on paid work, and likewise, that more lawyer time is spent engaging in work that is of value to their clients.

Michael Lesage is a trial lawyer and the founder of Michael's Law Firm, a litigation boutique that specializes in complex cases involving professional negligence, business litigation, insurance coverage disputes and cases of serious injury. When not representing clients, he can often be found playing competitive sports. You can e-mail him at michael@michaelsfirm.ca

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