FEATURE

Physician Primer

# Fitness to drive:

## *new medical reporting requirements to take effect July 1, 2018*

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After 20 years of advocacy by the OMA, the law regarding "fitness to drive" is finally changing. Starting July 1, 2018, physicians will be subject to the new mandatory/discretionary reporting requirements summarized on pages 26-27.

### Background

Since the late 1990s, the OMA has been engaged in ongoing advocacy and dialogue with the Ministry of Transportation (MTO) regarding the reporting scheme for issues related to fitness to drive.

In 1968, legislative reporting requirements were put in place requiring physicians to determine a patient's medical fitness to drive, and report unfit drivers to the MTO accordingly. This reporting requirement was originally enacted in response to physicians' concerns about their inability to persuade patients considered unfit to drive to cease driving. However, over 30 years after the legislation was put in place, problems were identified where physicians were not consistently reporting patients and did not have clarity as to which patients to report given the vagueness of the legislation. Further importance for this clarification was recognized as physicians were found liable for failing to report unfit drivers.

The original provision under section 203 of the Highway Traffic Act (HTA) required mandatory reporting by a physician of patients, 16 years of age or over, who may be suffering from medical or visual conditions that may make it unsafe for them to drive. This requirement did not specify which medical conditions physicians must report and also did not provide physicians with any discretion as to which conditions to report. This meant that in order for physicians to fully comply with this duty, they would have to report patients with low risk or temporary conditions such as limb fracture or joint arthroplasty. Reporting in this instance could not only lead to unnecessary license suspension, but also frustration on part of both the physician and patient, while not necessarily advancing driving safety.

### OMA Advocacy

As such, at the OMA Annual Meeting in 1995, this issue was considered by Council, which in turn decided that the OMA should pursue amending the HTA from an unlimited mandatory reporting framework to a mandatory/discretionary reporting scheme – mandatory reporting for certain medical conditions, functional and visual impairments, and discretionary reporting for all others. However, although several commitments were made over the years by the MTO to amend the legislative requirement, the Ministry did not move forward on passing the legislative amendments and corresponding regulations.

The OMA continued its advocacy efforts for 20 years, and finally, in 2015 – almost 50 years after the original legislation was enacted – sections 203 and 204 of the HTA were amended to reflect a mandatory/discretionary reporting framework, which would come into effect once regulations had been drafted.

Over the past couple of years, the OMA has been actively engaging with the MTO on the reporting regulations and reporting form. In order to provide expert feedback, the OMA struck a physician working group with expertise in the relevant medical conditions affecting driving ability.

## Fitness to Drive: Mandatory Reporting Requirements

Under section 203(1) of the Highway Traffic Act (HTA) and its accompanying Ontario Regulation 340/94, physicians will be required to report to the Ministry of Transportation (MTO) every person who is at least 16 years old who, in the physician's opinion, has or appears to have a prescribed medical condition, functional impairment or visual impairment.

**The prescribed medical conditions, functional impairments and visual impairments physicians will be required to report are:**

1. **Cognitive impairment**: a disorder resulting in cognitive impairment that,
   i. affects attention, judgment and problem solving, planning and sequencing, memory, insight, reaction time or visuo-spatial perception, and
   ii. results in substantial limitation of the person's ability to perform activities of daily living.

2. **Sudden incapacitation**: a disorder that has a moderate or high risk of sudden incapacitation, or that has resulted in sudden incapacitation and that has a moderate or high risk of recurrence.

3. **Motor or sensory impairment**: a condition or disorder resulting in severe motor impairment that affects co-ordination, muscle strength and control, flexibility, motor planning, touch or positional sense.

4. **Visual impairment**:
   i. A best corrected visual acuity that is below 20/50 with both eyes open and examined together.
   ii. A visual field that is less than 120 continuous degrees along the horizontal meridian, or less than 15 continuous degrees above and below fixation, or less than 60 degrees to either side of the vertical midline, including hemianopia.
   iii. Diplopia that is within 40 degrees of fixation point (in all directions) of primary position, that cannot be corrected using prism lenses or patching.

5. **Substance use disorder**: a diagnosis of an uncontrolled substance use disorder, excluding caffeine and nicotine, and the person is non-compliant with treatment recommendations.

6. **Psychiatric illness**: a condition or disorder that currently involves acute psychosis or severe abnormalities of perception such as those present in schizophrenia or in other psychotic disorders, bipolar disorders, trauma or stressor-related disorders, dissociative disorders or neurocognitive disorders, or the person has a suicidal plan involving a vehicle or an intent to use a vehicle to harm others.

**A physician is NOT required to report a person whose impairment is, in the physician's opinion**:

- of a distinctly transient or non-recurrent nature, or
- modest or incremental changes in ability that are attributable to a process of natural aging, unless the cumulative effect of the changes constitutes a condition or impairment listed above.

However, as discussed below, this does not necessarily eliminate the physician's obligation to warn patients of the risks of driving while experiencing a temporary condition or disability.

**When considering whether a patient has or appears to have a medical condition, functional impairment or visual impairment listed above, the physician may take into consideration**:

- the CCMTA Medical Standards for Drivers described in subsection 14(4) of the HTA; and
- the document entitled Determining Medical Fitness to Operate Motor Vehicles (9th edition), as amended from time to time, available on the Canadian Medical Association website.

This prescribed list will provide greater clarity to physicians about which high-risk conditions that impact driving must be reported to the MTO, while also eliminating unnecessary reporting of low-risk or temporary conditions that do not impact driving.

Physicians who comply with the regulations and report a patient unfit to drive will not be subject to liability. Conversely, failing to report a patient whose condition falls under the mandatory reporting category may leave the physician open to liability. In two cases, the Ontario Court of Appeal held that the physician's duty to report was owed to the public, when patients had been warned not to drive, but no report was made to the MTO.

## Fitness to Drive: Discretionary Reporting

Physicians will also now have discretion to report other medical conditions, functional and visual impairments, which are not covered in the prescribed list for mandatory reporting. It is important to note that discretionary reporting is not a duty – i.e., physicians are not required to make a discretionary report, but rather, will have the authority to do so.

Under section 203(2) of the HTA, physicians may report to the MTO a person who is at least 16 years old who, in the physician's opinion, has or appears to have a medical condition, functional impairment or visual impairment that may make it dangerous for the person to operate a motor vehicle.

With respect to potential liability for failing to make a discretionary report to the MTO, it is likely that with the extensive mandatory list articulated in the summary on page 26, there will be fewer circumstances in which physicians are unsure of whether or not to report. However, if a physician is unsure, but reasonably believes that a patient may present a danger behind the wheel, the physician should err on the side of caution and report the patient to the MTO. Similar to above, physicians who use their discretion to report a patient will not be subject to liability. Whether or not a physician would be liable for failing to report a discretionary case is less clear, though in light of the case law, there is the possibility of such a finding.

It is also important for physicians to understand that authority to make a discretionary report supersedes the duty of patient confidentiality. That being said, physicians should consider informing the patient of the report in advance if appropriate to do so.

In October 2017, the OMA participated in the MTO's consultation on the mandatory reporting regulations and submitted extensive feedback. The working group drafted and recommended a list of conditions/impairments for mandatory reporting and provided feedback on the content of the reporting form. Although the MTO had initially targeted a January 1, 2018 implementation date for the regulations, upon receipt of the working group's feedback, the implementation date was postponed in order to allow the government to reconsider its draft regulations.

In February 2018, the MTO released its final regulations, which upon review, reflect most (although not all) of the recommendations made by the working group. This success represents a positive culmination to the 20 years of advocacy by the OMA as well as the expertise and engagement of the physician working group.

### Reporting Requirements

Starting July 1, 2018, physicians will be subject to the reporting requirements outlined on page 26 and above.

A physician's reporting obligation does not necessarily eliminate the physician's duty to warn and discuss with patients the risks of driving while disabled or impaired, regardless of whether it is a temporary or long-term condition. In circumstances where a patient chooses to drive after being properly advised of the risks (e.g., after being sedated for a surgery), physicians can minimize their risk of exposure to liability by warning the patient of the risks, advising him or her to not drive, and suggesting or offering to make alternative transportation arrangements.

While physicians and optometrists have historically been required to report, the new amendments have expanded the pool of health care practitioners who may report. Nurse practitioners will be subject to the same mandatory/discretionary reporting requirements as physician and optometrists, whereas occupational therapists will have the authority to make discretionary reports.

Physicians will be required to report using the requisite reporting form as provided by section 204 of the HTA. This reporting form is a new version of the form physicians have currently been using and reflects the new mandatory/discretionary reporting scheme.

For mandatory reporting, a list of the most common medical conditions, functional and visual impairments are provided, for convenience, under each category. The conditions listed are those that will result in a licence suspension. Once completed, physicians can either mail or fax the form to the MTO, as per current practice. The reporting form will be made available on the Central Forms Repository (with a link from the MTO web page) as of July 1, 2018, and may be accompanied by a guide explaining how to complete the form.

### More Information

- Sections 203 and 204 of the Highway Traffic Act which mandate mandatory/discretionary reporting are available at https://www.ontario.ca/laws/statute/90h08.
- Ontario Regulation 340/94 is available at https://www.ontario.ca/laws/regulation/940340.
- Questions regarding this article can be directed to Jainita Gajjar, OMA Health Policy & Promotion, at Jainita.Gajjar@oma.org. ■