HEALTH CARE ERRORS AND APOLOGIES

[Area of Coverage - Clinical Advising, Defence of Malpractice Claims]

It is an inescapable reality in health care that patients sometimes experience adverse outcomes, some of which may be the result of human error. The natural human impulse is to want to apologize for a mistake and patients often want, or need, to hear an acknowledgment that they have suffered harm. At the same time, however, there is a competing consideration for the health care provider; namely, the possibility that an apology might be taken as an admission of fault, which could be used in subsequent malpractice litigation.

In November, 2008, the Alberta Legislature passed an amendment to the Alberta Evidence Act designed to alleviate this tension. The new provision – section 26.1 – removes the legal implications of apologizing, so that health care providers can now feel free to offer an apology without fear that it might return to haunt them in legal proceedings. The policy reasons underlying this legislation go far beyond simply protecting health care workers from possible litigation. The objective is to keep communications open between health care providers, patients and their families when medical mistakes are made. A sincere, open apology, together with an adequate explanation, helps to restore a positive relationship, and, in some cases, might alleviate the desire to commence litigation. The ultimate aim is to facilitate early and effective resolution of disputes.

The legislation defines "apology" as "an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate" (Alberta Evidence Act, R.S.A. 2000, c. A-18, s. 26.1(1)). Importantly, this definition encompasses admissions of wrongdoing. This means that a health care professional no longer has to limit his or her apology to mere regret that the patient has experienced an adverse effect, but can actually admit to making a mistake.

Section 26.1(2) goes on to provide that an apology made by or on behalf of a person is deemed not to constitute an admission of fault or liability. Furthermore, s. 26.1(3) makes the apology inadmissible in a court as proof of liability. Thus, health care providers, employers and institutions can apologize freely without fear that it can later be used in evidence against them in a civil lawsuit.
One note of caution: pursuant to s. 26.1(4), this provision does not apply to the prosecution of an offence. Accordingly, apologies are not protected from being admitted into evidence in such circumstances. This exception applies not only to criminal matters, but also to any offence that could be the subject of a prosecution, such as an unlawful disclosure of health information under the Health Information Act.

Any member of our health law group would be happy to provide further advice or direction on this recent legislative development.

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