Handle With Care

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A Risk Management Newsletter for the Health Care Protection Program's Members

In this Issue:

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Health Team Leader's Message

As you read this, we will have already said goodbye to Phil Grewar as Executive Director of the Risk Management Branch and Government Security Office following his retirement in June.

With Phil's departure, Linda Irvine is acting temporarily as Executive Director of the branch. I was pleased to accept a position as Acting Director of Client Services for Health Programs during Linda's temporary assignment. She's left me some pretty big shoes but, with the help of my colleagues, I'm confident they will be filled. I am excited to be leading a team of hard working individuals and appreciate the unique skills, experience and support of each in meeting the challenges that always accompany transition and change.

This edition of Handle With Care brings together contributions from both our own staff and external experts. I hope you will enjoy reading them and, as always, we welcome any suggestions for future articles, risk tips you would like to share or initiatives you may like to showcase. Please do not hesitate to send your comments/suggestions to us at HCPP@gov.bc.ca.➤

Sharon White, A/Director—Client Services
Health Care Protection Program

Retirement of our Accomplished Leader

Phil Grewar, founder and Executive Director of the Risk Management Branch and Government Security Office and creator of the Health Care Protection Program (HCPP), has retired after nearly thirty years as a BC public servant. Phil's innovating approach, expertise and experience in the field of risk management set the bar for public sector risk management in Canada.

Under his watch, the Risk Management Branch and Government Security Office developed and implemented a series of comprehensive risk management programs for the provincial public sector (including ministries, Crown corporations, government agencies and contracted service providers). In addition to HCPP, there are currently 25 different programs and risk pools running out of the branch.

Over his lengthy career, Phil received numerous honours. To name a few:

- In 1998 Phil was named "Risk Manager of the Year" by Chicago-based *Business Insurance* magazine. He was the first public sector recipient and second Canadian to receive this award during the magazine's first 21 years.
- In 2002 he received the Queen's Golden Jubilee award in recognition of his contributions to the province.
- In 2010, Phil was recognized with a Ministry of Finance "Apex Award" for Leadership for promoting risk management in government and realizing a conservative net saving to government of over $1 billion through the innovative self-insured programs.
- In June 2012 Phil was once again recognized for his achievements and outstanding contribution to the province at the Premier's Awards by taking home the Legacy prize.

To quote his usual sign off as he departed at the end of the day: "Someone's in charge!" Phil leaves very big shoes to fill and he will truly be missed.➤

Making Complaints to Regulatory Bodies within the Protection of Absolute Privilege

When someone makes a complaint about a professional to a professional regulatory body, he or she can do so within the protection of absolute privilege, provided that certain safeguards are taken. The protection of absolute privilege provides a complete defence to any civil claim arising from the complaint, including a defamation claim.

The defence of absolute privilege exists to protect the functioning of the judicial and quasi-judicial process and to encourage individuals to participate in the judicial or quasi-judicial process without fear of exposing themselves to civil action.

An occasion of absolute privilege exists if the purpose of the communication is sufficiently related to or necessary for the judicial or quasi-judicial proceedings. Hence, a letter initiating a complaint to a regulatory body, correspondence to and from, or testimony given in relation to the proceeding, would be protected. However, the protection of absolute privilege does not extend outside of the proceedings, and as such, discussing or republishing the complaint, submissions or evidence outside of the regulatory proceeding will not be protected by this defence.

The privileged occasion of absolute privilege exists even if the complaint is found to be without merit and is dismissed at an early stage long before there being any need for an inquiry hearing; this is because the purpose of the immunity would be undermined if absolute privilege only applied where the complaint leads to an inquiry proceeding: *Hung v Gardiner*, 2003 BCCA 257.

An occasion of absolute privilege only exists where the body or society to whom the complaint is made is quasi-judicial in nature as opposed to merely administrative. Hence, in *Sussman v Eales*, (1985) 33 CCLT 156; (1986) 25 CPC (2d) 7, the Court found that the manager of a nursing home was protected by an occasion of absolute privilege when making a complaint about a dentist to the Royal College of Dental Surgeons, but was not protected by an occasion of absolute privilege when forwarding a copy of the complaint to the Waterloo-Wellington Dental Society.

Publications that are not necessary to further the judicial or quasi-judicial process may in some cases be protected by an alternative defence of qualified privilege. Qualified privilege provides a complete defence (even with respect to a defamatory statement that turns out to be untrue) provided the Defendant can establish that he or she had a duty or interest to communicate information to the recipient and the recipient has a corresponding "legitimate" interest to receive the information. However, the defence of qualified privilege will fail where the defamatory comment was not reasonable and germane to the occasion, or where a plaintiff can establish malice. Qualified privilege is often a more costly defence to pursue given that it allows a plaintiff to open up evidentiary issues that often cannot be resolved by way of Affidavit evidence, resulting in the need for a full trial.

It is therefore important when making a complaint about a professional to a regulatory body, or providing evidence to further a complaint, that one ensures that the communication is made only to the appropriate quasi-judicial body, and is not copied to disinterested parties. When in doubt, before proceeding, seeking advice from a lawyer practising defamation can help you ensure that you can report the professional to the appropriate regulatory body, within the protection provided by absolute privilege.➤

This article is not intended to provide legal advice and readers should not act on the information contained herein without seeking specific independent advice on the particular matters with which they are concerned.

Written by Karen Zimmer, Partner, Alexander Holburn Beaudin + Lang LLP

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http://defamationlawblog.ahbl.ca/2014/03/25/making-complaints-to-regulatory-bodies-within-the-protection-of-absolute-privilege/

Mental Stress claim arising at work is a WCB matter

Successful BCCA decision finding that a mental stress claim arising at work is a non-compensable WCB matter

By Leslie Slater
Downs Construction Ltd. v. Workers Compensation Appeal Tribunal, 2012 BCCA 392

Leslie Slater of Carfra Lawton LLP, acting for the Defendant employer, along with co-Defence Counsel Harold Turnham, acting for the Defendant employee, successfully appealed a WCB decision to the BC Court of Appeal.

In summary, the Plaintiff brought a tort claim for mental stress which allegedly rendered her permanently disabled as a result of being bullied at work by a co-worker. She sued both her employer and the co-worker. The employer brought an application to the Workers' Compensation Board, seeking certification that the matter arose out of and in the course of employment, and that the tort claim should be stayed.

The Workers' Compensation Appeal Tribunal ("WCAT") upheld the Board's decision and found that the Plaintiff, co-worker, and employer were workers and an employer under the *Workers Compensation Act*, that the incident occurred at work, and that the psychological injury was caused by the employment incident, but found that the Plaintiff had not met the criteria set out in the Act to establish a mental stress claim – while it was an acute reaction to a sudden traumatic event, it was not "unexpected". The WCAT issued a s. 257 certificate stating that the injury "did not arise out of and in the course of employment".

On judicial review, the judge determined that if the Plaintiff was not entitled to receive WCB benefits, she could continue her tort claim against the employer and co-worker.

In a unanimous decision, the BC Court of Appeal ("BCCA") disagreed with the judge below and determined that while the Plaintiff was precluded from receiving benefits through WCB, the injury clearly arose out of and in the course of employment. The BCCA cited the "historic trade-off" – workers gave up their right to sue employers and co-workers, in exchange for a no-fault compensation system, and, conversely, employers pay into the system for the certainty that employees cannot sue them. The court found that in this case, the Plaintiff was entitled to claim WCB benefits, but that she was unsuccessful in receiving them because she did not fit the criteria for compensation. Because of the "historic trade-off", she was not entitled to bring a tort claim against her employer or the co-worker.

It is noteworthy that this decision brings the BC law in line with the laws in Alberta and Saskatchewan.➤

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The Apology Act: It's OK to Say "I'm Sorry"

Canadians are renowned for our willingness to apologize in any situation. Yet, when faced with a possible lawsuit, even Canucks shy away from saying 'sorry'. In a legal context, common wisdom tells us that an apology should be avoided, lest it be used by an opposing party as evidence of liability or by an insurance provider to deny or alter coverage. One high profile example is the decision of the Canadian Red Cross not to apologize in light of the tainted blood scandal in the 1980's, when blood was being inadequately screened and patients were being exposed to HIV and Hepatitis C. Then Red Cross CEO, Douglas Lindores, who testified before the Commission investigating the scandal, agreed that one reason why the Red Cross declined to apologize initially to persons infected by tainted blood was that an apology might be construed as an admission of liability.[i]

This fear, while not necessarily well founded,[ii] is understandable; the Canadian justice system is adversarial and the tort system in particular, works by assigning blame based on available evidence, including evidence of any pre-trial admissions of wrongdoing. Unfortunately, this fear of apologizing also has many negative consequences, least of which is to discourage individuals from doing what they believe is right. It

(continued on page 4)

The Apology Act: Its OK to Say "I'm Sorry" *(continued from page 3)*

has also been suggested that the threat of legal liability may hinder early attempts at conflict resolution and contribute to the deterioration of the relationship between medical professionals, their patients and the public.[iii]

The Apology Act

To remedy this problem the provincial government of BC passed the *Apology Act* in 2006. The Act provides an exemption to the general rule of evidence that relevant information is admissible, and provides that an apology cannot be used in court as evidence of fault or liability. Specifically, the Act provides that an apology:

a) Does not constitute an express or implied admission of fault or liability;

b) Cannot be used as an acknowledgement of liability so as to alter a limitation period;

c) Does not void or impair any insurance coverage available to the person who apologized; and

d) Despite any other legislation, an apology made by or on behalf of a person in connection with any matter is not admissible in any court as evidence of the fault or liability of the person in connection with that matter.[iv]

Notably, the Act defines "apology" as "an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contribution 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". By specifying that an apology under the Act may include admissions of liability, the Act provides the broadest possible legal protection for apologetic statements. In other words, the Act not only protects the "I'm sorry this happened to you" apologetic statement, but the "I'm sorry I did this to you" apologetic statement as well.

The Apology Act has yet to be applied in a medical malpractice case or by a regulatory college under the *Health Professions Act*. However, due to the encompassing language of the legislation, and the application of the Act in motor vehicle cases[v] and in an administrative setting at the BC Human Rights Tribunal,[vi] it is safe to assume the Act will protect the apologies of medical professionals in a medical malpractice context or in front of a regulatory college.

There is also a concern about the scope of the Act, and whether the courts of British Columbia will provide a broad or narrow interpretation of the protections it offers. For example, a letter to a client or patient may contain an apology while also containing facts or assertions about what happened. There is a risk that a court may decide to protect only the narrow apology language (such as "I'm sorry") while allowing the facts or assertions to be admitted as evidence.[vii]

How and When to Apologize

Even though the Apology Act protects apologetic statements from being used as evidence of liability, it is still important to approach apologies thoughtfully. A poorly worded apology can do as much damage as a considerate apology can provide solace and closure to those involved in an adverse event.

The following are a few things to consider when deciding whether to apologize and how:

- Do you want to apologize? An apology should be sincere and result from a genuine desire to express regret and sympathy. It may be obvious to the recipient of an apology if you have ulterior motives or are apologizing halfheartedly.
- What are the facts? It is important that any facts referred to in a statement of apology are accurate. There is a risk that facts contained in an apology will be admissible in court and may indicate to the recipient how to direct their investigation.
- Was it your fault? If you are not responsible for the harm you are apologizing for, you may wish to phrase your apology differently or to forgo an apology altogether.
- Is someone else at fault? Even if someone else is at fault for harm done to your patient,

(continued on page 5)

The Apology Act: It's OK to Say "I'm Sorry"

(continued from page 4)

you should avoid laying blame in an apology or explanation.

- What are you going to do about it? A good apology should include a statement about how you plan to make sure that the same mistake will not be made again, including changes you might have made to policy or procedure in response to an adverse event.

When you have any concern that an act or omission has occurred for which an apology might be issued, you should contract your Risk Management Branch, who will in turn contact HCPP for assistance. They can help you put together a thoughtful apology that is appropriate for your situation.➤

Jessica Abells
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i. Ottawa, Minister of Public Works and Government Services Canada, "Commission of Inquiry on the Blood system in Canada – Final Report" vol. 3, 1997, at page 1038.

ii. Case law suggests that even before the *Apology Act* came into force, judges would rarely if ever base a finding of liability on information contained in an apology and that on the contrary, judges tend to sympathize with defendants who express regret. See John C. Kleefeld, "Thinking Like a Human: British Columbia's *Apology Act*", 40 UBCL Rev. 2007 at page 795. See also Catherine Morris, "Legal Consequences of Apologies in Canada" (Paper presented to the University of Victoria workshop, Apologies, Non-Apologies, and Conflict Resolution, 3 October 2003), available online at http://www.peacemakers.ca/publications/.

iii. See for example the British Columbia, Ministry of Attorney General, "Discussion Paper on Apology Legislation", January 30, 2006.

iv. *Apology Act*, [SBC 2006] Chapter 19.

v. See for example *Dupre v Patterson,* 2013 BCSC 1561 (CanLII).

vi. See *Sleightholm v Metrin and another (No. 3)*, 2013 BCHRT 75.

vii. See *Robinson v. Cragg*, 2010 ABQB 743.

Hospital Corners— Quick Risk Tips

The importance of measuring & expressing patient weights in metric units only

Medication errors can easily occur when a patient's weight is documented in non-metric units of measure (e.g. pounds). Given that the dosage of many medications is based on weight, miscommunication about a patient's weight can have potential for serious harm. Mistakes can be made by health care professionals when converting pounds to kilograms or documentation of a patients' weight in pounds can accidentally be interpreted as kilograms. One kilogram equals 2.2 pounds which means such an error will result in the patient receiving more than twice the intended dose.

The Institute for Safe Medication Practice (ISMP) best practice standard for measuring patient weight is to record the weight in kilograms to decrease the risk of medication errors. They recommend:

- Patient weight must always be measured, communicated and clearly documented in kilograms (kg).
- Using measured weight rather than a stated, historical, or estimated weight.
- Ensuring all bed scales and upright scales used for weighing patients are set to report in kilograms (kg).
- Ensuring computer information systems and medication device screens, printouts, and preprinted order forms list or prompt for weight only in metric designation (grams or kilograms).

See the ISMP 2014-15 Targeted Medication Safety Best Practices for Hospitals article for further details.➤

Risk Wise Answers - Final Premium Adjustments under the Provincial Construction Program

Q - Why are final premium adjustments required under the Provincial Construction Insurance Program?

Final premium adjustments are requirements in both the Wrap-up and Course of Construction (COC) insurance policies under the Provincial Construction Program (the Program). Because the initial premiums for construction insurance are based on estimations of future costs, they cannot be finalized until the project has concluded.

Before Health Care Agencies (HCAs) commence construction projects where values are one million ($1,000,000.00) or over, project managers are required to send in a Construction Insurance Underwriting Questionnaire or application to HCPP. From the information provided in the application, coverage is then placed under the Program. Premiums for the Owner controlled construction insurance are then calculated and charged to the HCAs based on the Estimated Construction Project Costs (both hard and soft costs), time on risk and various other factors outlined in the application.

Requests from HCA project managers for coverage extensions are also common during construction because of, for example, changes in the scope of work or other unexpected outcomes such as building code changes. When this happens, additional premiums are calculated and the HCAs are invoiced for the extra time on risk.

Once the project reaches completion, the true Costs of the construction start to become known to the project manager. It is at this time the Risk Management Branch's independent insurance broker under contract, currently Marsh Canada, requests the completed construction value to conclude the final premium adjustment. This value should be the total projected Costs, or as close to it as reasonably possible, as it is understood there may be minor works that need to be completed or invoiced on the project. Because of the 30 day requirement within the policy, and the fact that final invoices are still likely coming in, the final Costs should be as close to what the project manager can best determine at the time. This figure is not expected to be the official total as it is understood the true final Costs may not be known for months after construction is completed.

For future budgeting purposes, project managers need to be aware at the beginning of a project that a final premium adjustment is a requirement on all projects under the Program. This may lead to additional costs (e.g. for additional time on risk and/or construction costs), no cost (e.g. on time and on budget), or potentially a refund (e.g. less time and/or less construction costs than estimated). In short, it is important that a contingency be put in place at the beginning of any project to ensure all such costs are accounted for at the end of the project, if any, and to work with the Risk Management Branch's broker to conclude the premium requirements under the Program.

As noted above, final premium adjustments are a requirement in the Wrap-up and COC insurance policies under the Program. Whilst both policies address this, the Wrap-up policy specifically states under Section VI – Conditions, #9 - Premium and Premium Adjustment, (b):

> "*The First Named Insured [the HCA] agrees to report to us [the insurer on risk] the completed project cost within thirty (30) days after completion of the Project Insured, and further agrees that the premium is to be adjusted on the basis of the Adjustment Rate stated in the Declarations, subject to the retention by us of the minimum retained premium stated in the Declarations [the broker will calculate this]. "Project Cost" is defined as the total cost of all work, including labour, materials and equipment, in connection with the Insured Project, but excludes the cost of the land, financial borrowing costs and fees paid to consulting architects and consulting engineers."*

We hope this brings clarification to any questions around this requirement. If there are any additional questions please contact your HCA risk lead or HCPP.

Jeff Milne CIP, CRM, ABCP
Risk Management Consultant

About Our Organization...

We are the Client Services Team for the Health Care Protection Program (HCPP). HCPP is a self-insurance program which is funded by the Health Authorities of BC. The program is housed within the offices of the Risk Management Branch of the Ministry of Finance which also has responsibility for similar programs such as the Schools Protection Program, and the University, College & Institute Protection Program. As part of the services of our program, we provide risk management services including risk mitigation, risk financing and claims and litigation management to HCPP member entities including all the Health Authorities and various other stand-alone health care agencies in the Province of BC.➤

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Are there any topics you would like us to cover? Email us at HCPP@gov.bc.ca

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