Registered Nurses' Association of Ontario
L'Association des infirmières et infirmiers autorisés de l'Ontario

Apologies in the Healing Process: The Apology Act, 2008

Submission on Bill 108 to the Standing Committee on Justice Policy

February 17, 2009

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Table of Contents

RNAO Submission on Bill 108

Summary of Recommendations

1. RNAO recommends that the Committee members support Bill 108, the *Apology Act*, without amendment.

2. RNAO recommends that education programs for health-care professionals be implemented that include how to best to effect an apology when a medical error or adverse incident has occurred and the legal, ethical and professional obligations that may apply.

3. RNAO recommends that the Government implement the recommendation of the Health Professions Regulatory Advisory Council (HPRAC) that all regulated health professionals be required to have and maintain professional liability insurance so as to ensure health care providers can speak freely and openly without the uncertainty that open communication in the patients' interest might impact negatively on coverage.

4. RNAO recommends that the Government give priority to measures that increase access to the civil justice system, with full consideration given to the factors leading to inequitable access.

5. RNAO recommends that the protection of apologies in civil proceedings not be allowed to trivialize or otherwise lessen the value of formal apologies to Aboriginal people for past injustice.

Introduction

The Registered Nurses' Association of Ontario (RNAO) is the professional organization for registered nurses who practise in all roles and sectors across this province. Our mandate is to advocate for healthy public policy and for the role of registered nurses in enhancing the health of Ontarians. We welcome this opportunity to present this submission on Bill 108, the *Apology Act, 108*, to the Standing Committee on Justice Policy.

Registered nurses join many in the health professions in applauding apology legislation that allows people to freely apologize for a mistake or wrongdoing without the uncertainty or fear that the apology could be used in a lawsuit against them or that an insurer will use the apology to withhold coverage.

The RNAO appreciates the initiative of David Orazietti, MPP for Sault Ste. Marie, who introduced the *Apology Act* as a private member's bill, and the support of the Attorney General, the Hon. Chris Bentley, who brought forward the legislation in its present form.

Background

i. The *Apology Act, 2008*

Bill 108 is deceptively short – only five sections. It is broadly written to protect individuals and organizations from having an apology used against them as an express or implied admission of fault in any future civil or administrative proceeding or arbitration. "Apology", in turn, is defined to cover both expressions of sympathy or regret, and more specific words that expressly or impliedly admit fault or liability.[1] Further, Bill 108 guarantees the apology cannot be used to void any insurance coverage the individual or organization may have.[2]

However, that is not to say the apology has no legal effect. It can still be used in criminal prosecutions and *Provincial Offences Act* prosecutions[3] and, since it only applies to liability, an apology can still be used by a civil court in assessment of damages.[4]

ii. Other jurisdictions

Bill 108 is the latest in a series of virtually identical enactments that started in Canada with British Columbia's passage of comprehensive apology legislation on May 18, 2006[5], Saskatchewan[6] , Manitoba[7] and most recently Alberta[8] followed suit. Saskatchewan and Alberta framed the legislation as amendments to their Evidence statutes while British Columbia and Manitoba have stand-alone apology legislation very similar to Ontario's Bill 108. All of these jurisdictions afford similar protection to apologies.[9]

In contrast, in the United States, where about 30 states have apology legislation, there is more variety. Since Massachusetts became the first state to protect apologies in 1986, most states have limited their legislation to the health care context. Their statutes often refer to expressions of sympathy for "unanticipated outcomes" in health care, a euphemism for medical malpractice. Indeed, many of the American apology laws were packaged with other changes specifically targeted at health care and medical malpractice.[10]

While it is still too early to determine what lessons there are to learn from the Canadian experience with apology legislation, it appears to have lived up to its expectations in the United States as well as Australia where all the states and territories have recently passed apology legislation.[11] In the area of medical malpractice, for example, empirical evidence suggests that apologies can reduce litigation and promote the early resolution of disputes.[12]Where hospitals at the University of Michigan Health System have been encouraging physicians to apologize for mistakes since 2002, malpractice lawsuits and notices of intent to sue have dropped from 262 filed in 2001 to about 130 a year.[13]

iii. For and Against

Alfred Allan reviews the five general arguments that have motivated the passage of apology legislation in the Australian states and territories:

1. The moral argument. This assumes that harm is often caused by human lapses in judgment or concentration and that wrong-doers, even if mainly for selfish reasons, want to demonstrate their behaviour was not due to malice. A failure by wrongdoers to apologize often causes an escalation of victims' feelings of anger and indignation which in turn increases the conflict between the parties;

2. The intangible loss argument. Some intangible losses such as emotional distress, grief, loss of consortium and pain and suffering cannot be compensated for adequately by pecuniary damages, or money. An apology can often take away the negative psychological symptoms experienced by victims such as anger and self-blame and thus repair some of the harm;

3. The economic argument. While not necessarily accurate, there arguably has been a general increase in litigiousness that is costly to the system and can be reduced by disclosure of errors and apologizing to victims;

4. The efficacy argument. This assumes that wrong-doers hesitate to engage in an open and direct dialogue with a victim because they fear that by doing so it will be construed as admitting liability; and,

5. The therapeutic argument. This focuses on the physical and mental health advantages of apologies and how they enhance the wellbeing of both victims and wrongdoers.[14]

Closer to home, a discussion paper on apology legislation released by the British Columbia Ministry of the Attorney General summarized the factors often cited in favour and against apology legislation in the academic literature:

Pro:
1. Avoidance of litigation and promotion of early cost-effective dispute resolution;
2. Encouragement of natural, open and direct dialogue after injuries; and
3. Encouragement of the moral and humane act of taking responsibility for one's actions and apologizing after harming another.

Con:
1. Loss of confidence in the courts if a person who admits liability in an apology is later found not to be liable in court;
2. Encouragement of insincere apologies, and
3. Acceptance of inappropriately low settlements by emotionally vulnerable plaintiffs who may be easily swayed by an apology.[15]

Russell Getz cautions against overstating the role of an apology in proving liability. He writes that requiring plaintiffs to prove their case on the facts is not an undue hardship and an apology, or its absence, is rarely determinative. Furthermore, it is not a radical departure from the current situation where apologies given in settlement negotiations, mediation and certain other statutory provisions are already inadmissible as evidence.[16]

Similarly, the sincerity of an apology or lack thereof is unlikely to preclude a lawsuit that would otherwise be pursued. Noted defence counsel Edward

Greenspan is critical of Bill 108 for encouraging insincere or forced apologies merely to avoid a lawsuit[17] but there is nothing in Bill 108 that would bar a meritorious case from proceeding.

As for emotionally vulnerable plaintiffs being swayed to accept inappropriately low settlements, this argument was made by Dugald Christie, a former B.C. lawyer and activist. Christie criticized the B.C. *Apology Act* as "simply wrong" because it would induce people not to sue. Moreover, the people most likely not to sue would be the most deserving and vulnerable such as retirees with chronic conditions, Aboriginal people, the poor, and people with disabilities. For Christie an apology, to be meaningful, must be accompanied by a willingness to make reparations.[18]

In a review of published studies, Allan found very few that tested whether apologies reduced the propensity of victims to litigate and those looked at whether victims were more likely to settle. One study found that an apology was useful in reducing barriers to settlement, but not significantly so, and another concluded that apologies may inhibit litigious behaviour depending on the form of the apology.[19]

The RNAO suggests that the real story is that there are much greater, and indeed insurmountable barriers to litigation than whether there has been an apology, particularly for the most vulnerable.

More fundamental barriers to equitable access to justice from the legal system are the factors of cost and time which work against those with less-deep pockets, generally plaintiffs. In 2007, the Canadian Medical Protection Association (CMPA) reported 928 legal actions commenced and 575 legal actions were dismissed, discontinued or abandoned. Many of those actions that were not dismissed or abandoned were settled – a total of 312 in 2007. Few actually survived to trial, and of those trial actions that were determined in 2007, the plaintiff was successful in only 25, and the defendant was successful in 70.[20] In short, the chance of success of the average plaintiff who persists in seeing an action through to trial is very low. Some estimate that only about two per cent of patients injured by negligence in Canada receive compensation.[21]There are probably many reasons for this, but there is no denying that medical negligence cases are complex, expensive and time-consuming. The lack of an apology is certainly no guarantee that a plaintiff will get their 'day in court'.

Adding to the complexity of the issue is the different meaning an apology has depending on a person's cultural background. While the concept of an apology is basic to all human cultures, it is affected by cultural norms and power differentials. One is more likely to get an apology in Japan, for example, where it is considered to be a virtue than in North America where it is sometimes part of a negotiated process toward reconciliation.[22]Some people are more prone to apologize for reasons of gender or religion than are other people.[23]

Apology legislation may help reduce litigation and increase the likelihood of settlement. Indeed mediators report that for many plaintiffs a sincere apology is the most valuable part of a settlement.[24]However, an apology does not remove

the plaintiff's right to seek fair compensation in court and the same barriers to litigation discussed above will still exist to some degree. Clearly the issue of inequitable access to the civil courts needs to be confronted regardless of whether the *Apology Act, 2008* is enacted.

> **RNAO Recommendation**: *That the Government give priority to measures that increase access to the civil justice system, with full consideration given to the factors leading to inequitable access*.

Finally, a caution was raised by the Aboriginal Law Section of the Ontario Bar Association in relation to the emerging societal importance in Canada and elsewhere of apologies to Aboriginal people arising from past and other injustices. They urge that attempts be taken to ensure apology legislation does not unwittingly compound any injustice involving Aboriginal peoples.[25] Certainly the protection of apologies in civil proceedings must not be allowed to trivialize or otherwise lessen the value of apologies to Aboriginal people. The RNAO agrees with the sentiment expressed by the OBA Aboriginal Law Section.

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Apologies in Health Care

As Harold Kushner, Acting Ombudsman of BC wrote in 2006, "a sincere apology can heal wounds, restore dignity, and encourage forgiveness. Often providing an apology is simply the right thing to do."[26]Much of the literature focuses on the healing powers of an apology and how it is integral to patient safety and maintaining open communications between health-care professional and patient.

Registered nurses, like all health-care professionals, are familiar with the silence mode into which health professionals fall when there is an error. They have been advised not to apologize because it can come back to haunt them, even when open communication with the patient is what is most needed to build the relationship between patient and provider and improve the patient's health. By protecting health-care professionals who express a sincere apology, Bill 108 will be of great benefit to patients and health-care providers. It is a good in itself for the individuals involved and it is collectively beneficial for fostering a culture of candour in the health-care system which will facilitate systemic improvements. It is for this reason that the RNAO strongly endorses Bill 108, the *Apology Act, 2008*, as written.

There are many interrelated aspects to the role of an apology in health-care practice. An apology can facilitate forgiveness, reconciliation and closure. It can help diminish feeling of guilt and shame on the part of the provider. Full disclosure to the patient, including an apology, is the ethically responsible course of action. Nondisclosure, on the other hand, can put the patient at risk of future harm and deprive them of vital information needed to make future health-care choices.[27] Openness about errors is crucial for professional learning, patient

safety improvements and rebuilding trust in the health-care system. In fact, apologies are recognized as having profound healing effects for all parties.[28] [29]

Bill 108 is consistent with the Canadian Disclosure Guidelines released on March 18, 2008 by the Canadian Patient Safety Institute (CPSI). These guidelines aim to increase open and honest communication among health-care professionals and patients that respects and addresses the needs of patients and strengthens relationships.[30] Central to the Guidelines is the apology, defined as "an expression of sympathy or regret, a statement that one is sorry". According to the guidelines the apology should be expressed early, as a signal of genuine concern and sympathy. It may be followed by subsequent expressions of regret. In this context, it is understood that the apology is not deemed an expression of liability or fault, as liability is a decision for the court.[31] Of course, in the absence of apology legislation, uncertainty as to the legal consequences of an apology can lead to an apology that is delayed or not given.

It is therefore essential that health professionals not feel the need to look over their shoulders or second guess themselves about possible legal implications when faced with a situation that calls for an apology. The RNAO strongly suggests that, hand in hand with apology legislation, the Government also implement the recommendation of the Health Professions Regulatory Advisory Council (HPRAC) in Critical Links – Transforming and Supporting Patient Care[32] that would require all regulated health professionals to have and maintain professional liability insurance or be otherwise protected against professional liability. This will ensure health care providers can speak freely and openly, without the uncertainty that open communication in the patients' interest might impact negatively on coverage

Finally, effective disclosure and apology is neither simple nor pain free, and health care professionals need education in how best to express an apology when a medical error or adverse incident has occurred. There is also a need for greater awareness of providers' legal, ethical and professional obligations in this regard.[33] Passage of apology legislation such as Bill 108 does not remove the need for effective and thorough education for health professionals about how to tell patients about adverse events.[34]

> **RNAO Recommendation**: *That the Committee members support Bill 108, the Apology Act, without amendment*.
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> **RNAO Recommendation***: That the Government implement the recommendation of the Health Professions Regulatory Advisory Council (HPRAC) that all regulated health professionals be required to have and maintain professional liability insurance so as to ensure health care providers can speak freely and openly, without the uncertainty that open*

communication in the patients' interest might impact negatively on coverage.

Conclusion

In Bill 108, the *Apology Act, 2008*, the Attorney General has opted to protect all apologies irrespective of whether they include or infer an admission of guilt in addition to an expression of regret. Registered nurses strongly support this model of apology legislation, particularly for its role in facilitating open communication, disclosure and healing in the health-care context. It is a welcome step forward for both patients and health-care professionals. For this reason the RNAO recommends the Committee approve Bill 108 as written.

Recommendations

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