Alberta Doctors' Digest

Sparking reactions and potential litigation from those impacted by the pandemic

One of the last pieces of legislation passed by the UCP government in the recent spring session was *Bill 70*, the *COVID-19 Related Measures Act*. This legislation was, to say the least, controversial and will no doubt spark reactions and potentially litigation from those impacted by the pandemic through medical treatment or care (or lack of treatment or care).

The *COVID-19 Related Measures Act* essentially provides a protection from civil actions for health professionals and health care facilities providing treatment relating to COVID-19 patients over the last year and a half. Specifically, the key section reads as follows:

“4(1) Subject to sections 6 and 7 and the regulations, no action for damages lies or shall be commenced or maintained against a health service facility, regional health authority or person referred to in section 2 as a direct or indirect result of an individual being or potentially being infected with or exposed to COVID-19 on or after March 1, 2020 as a direct or indirect result of an act or omission of a health service facility, regional health authority or person, as the case may be…”

The qualification on this otherwise broad exemption from liability is that the actions of the health service facility, regional health authority or person must have been made “in good faith … in accordance with public health guidance relating to COVID-19” and that the act or omission complained of does not constitute “gross negligence.” Although “good faith efforts” are defined as “an honest effort, whether or not that effort is reasonable,” the concept of “gross negligence” is not defined.

“Gross negligence” is a difficult concept in common law circles. There is not one hard and fast definition, but rather it is something that is ascertained on a fact-based, case-by-case analysis. It’s a bit like the old definition of good art – “I don’t know much about it, but I recognize it when I see it.” Traditionally, the courts have referenced it as “very great negligence,” a “marked departure for the applicable standard of care,” “positive or affirmative negligence rather than passive negligence,” or “conduct so arbitrary it reflects complete disregard for the consequences.”

Regardless of how you define it, gross negligence is much further along the continuum of negligent conduct, tending more towards criminal negligence or wanton or reckless misconduct, but conduct that falls short of intentional.

The legislation came into force on March 1, 2020 (which most of us will recall was the start of the lockdowns and increasing numbers of cases in Alberta); therefore, it essentially impacts on existing litigation or pending actions arising from care or treatment in either health care facilities or RHAs or by persons. And to be clear, “health care facilities” is also a broadly defined term that includes public hospitals or chartered surgical facilities, auxiliary hospitals, nursing homes, pharmacies, protective safe houses, supportive living accommodations, or places where addiction treatment services are provided.

The protections under this legislation extend to owners, operators, contractors, agents of those entities but, for the purposes of this article and perhaps most importantly, regulated members as defined in the *Health Professions Act*, which include nurses, pharmacists, health care technicians and, of course, physicians.

On one hand, this is perceived as a very harmful and negative piece of legislation by the individuals and groups – and lawyers representing those individuals and families – who view themselves as being disadvantaged by the government's response to the COVID-19 crisis. There is no question that hundreds of individuals died or suffered extreme consequences as a result of circumstances forced on such facilities by this pandemic and, in retrospect, there is also no doubt that things might have been done better. In that context, the protection afforded by the "gross negligence" threshold probably makes sense for health care professionals.

For regulated members under the *Health Professions Act* (including physicians), this legislation provides welcome relief for those who used their best efforts to provide services during this extraordinary and unprecedented time. The establishment of the "gross negligence" bar, while a high one, is probably appropriate given the best efforts of most, if not all of those professionals, to say nothing of the ability to fall back in reliance on public health standards established by the Minister of Health through the Chief Medical Officer's office.

This pandemic created, and continues to create, public health challenges in Alberta, Canada and the entire world. If nothing else, our health system has had a crash course in responding to this crisis, and if there is another one (which seems inevitable), hopefully the experience of the last 18 months or so will serve us well.

Editor's note: The views, perspectives and opinions in this article are solely the author's and do not necessarily represent those of the AMA.

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