An Apology Is a Powerful Statement

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An apology is a powerful statement. It can either be used in an effort to reduce damages or to establish liability, thus inviting litigation and increasing costs. What place does an apology have in today's world of settlements, negotiations, mediations and litigation? This issue becomes far more complex when the injured party has suffered as a result of a medical error at the hands of a health care provider. As medical technology and knowledge advance exponentially, the law needs to likewise evolve and continuously redefine the legal system's use and/or admissibility of an apology as it relates to the health care arena.

According to social psychology literature an apology is defined as "admissions of blameworthiness and regret for doing harm."[1] Moral apology theorists have argued that for an apology to be true and effective it must meet the following four elements: (1) identification of the wrongful act (2) express remorse by the transgressor for their wrongful act (3) include a promise of forbearance to reform their incorrect behavior (4) if the apologizer was negligent or guilty of wrongdoing he/she must offer to compensate or in some way repair his/her wrongs.[2]

David Hilfiker, an American physician and writer, "highlighted the tension between a mistake and a confession" in his essay *Mistake*.[3] From Hilfiker's perspective, errors are a common unpreventable human occurrence. An apology contains a "pedagogical and redemptive value in acknowledging [one's] error… [it] invites a connection between human beings… creating…a way [to] connect with one another."[4] The moral process occurs when an apologizer admits his/her mistake to his/her "deepest self" and the injured party, thereby creating interdependency between the two parties.[5] It becomes a symbiotic relationship, where the wrongdoer's admission invites the offended party to offer his/her forgiveness.

Equity theorists have argued that apologizing is a means of rectifying what the injured party perceives to be a fractured relationship. To apologize is to engage in a social "ritual whereby the wrongdoer can symbolically bring himself lower (or raise us [the injured party] up)".[6] While an apology may have the effect of reducing damages, expediting settlements, and even on occasion prompting an injured party to decide not to pursue a claim, lawyers have valid reasons to hesitate before recommending that their client apologize. Apologies can be construed as admissions of fault and used to establish liability in a civil proceeding. In today's litigious society if a defendant includes the four requirements of a moral apology when apologizing litigation would almost surely ensue.

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[1] Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience,* 77, Wash. L. Rev.1122, 1132 (2002).
[2] *Id.* at 1133, 1134
[3] Lee Taft, *Apology and Medical Mistake: Opportunity or Foil?,* 14 Annals Health L. 55, 56 (2005).
[4] *Id.* at 57.
[5] *Id.*
[6] Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination,* 102 Mich. L. Rev. 460, 477 (2003).

There are other avenues available for a wrongdoer who wishes to apologize while shielding him/herself from threats of future civil liability. In a Michigan Law Review article entitled, *Apologies and Legal Settlement: An Empirical Examination,* Jennifer Robbennolt, proposes that partial apologies have the power to forestall lawsuits and facilitate settlements. [7] Partial apologies convey sympathy and remorse, often enabling the injured party to feel righted. Although this type of apology differs from a "true" apology in that the wrongdoer does not admit liability, a partial apology may open the channels for communication between the aggrieved and the physician.

Partial apologies can play a crucial role in medical malpractice cases. Recent studies report that many patients have said that an apology would have facilitated and aided their healing process, while other patients admitted that they would not have pursued a lawsuit had an apology been offered in the first place.[8] Such findings have prompted legislatures to enact statutes that encourage doctors and hospitals to implement apology policies. Most states treat apologies as exceptions to the hearsay rule, allowing them to be admitted in court as evidence against the accused.[9]

Twenty-nine states have begun to forge new ground by enacting Apology Exception legislation that protects expressions of sympathy or benevolence. These laws prevent statements of regret or condolence from being admissible in court as proof of liability. The Apology Statutes only protect the wrongdoer who offers statements of benevolence and remorse. Recently, two states have gone even further when protecting health care practitioners. In 2003, Colorado adopted a rule protecting statements of fault. However, the rule is *only* applicable to apologies made by healthcare providers; it does not include healthcare systems.

The recent trend to broaden the coverage of apology statutes while at the same time limiting their application to health care professionals is fueled by numerous studies and real-life examples that substantiate the benefits of an apology. These studies indicate that the use of full disclosure and apologies in negotiations can actually lower the frequency and costs of malpractice litigation. In addition, legal scholars and judges have recognized "the human need to convey and receive expressions of regret and contrition" even in the face of negative legal ramifications.[10] The natural inclination to apologize, along with the positive outcomes garnered from the act, have further justified the enactment of apology laws.

Many courts are eager to apply the newly enacted statutes in current malpractice suits when a mistake has been made. Their rational is consistent application of these laws within the legal system will lead to a uniform standard of judicial practice, in turn incentivizing local hospitals and practitioners to approve full disclosure mandates. In

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[7] *Id.*at 469.
[8] Jessica Fargen, *Sorry Solution: Malpractice Bill Frees Docs to Apologize*, Boston Herald Health and Medical Reporter, Sunday, March 18th, 2007.
[9] Robbennolt, *supra* at 467.
[10] Keeva, *supra n.1 at 65*

fact, years before such legislation was even proposed and/or passed, many jurisdictions were applying the same principles the statutes now highlight. For example, in 1992, the Vermont Supreme Court held that a physician's apology for an inadequate operation was not to be viewed as an admission of liability.[11].

The paradox is that while courts and legislatures may be eager to draft and implement apology statutes, in-house counsel, risk management, hospital administration and doctors themselves often have had mixed reactions. The statutes are intended to enhance patient care and safety while reducing litigation and overhead costs for hospitals. Unfortunately, many hospitals still fear that offering an apology exposes them to malpractice claims and eases the burden of proof for the plaintiff in establishing negligence and liability.

The opposing interests between patient welfare, patient safety, and patient rights versus the needs of hospitals and practitioners to protects themselves legally has been a topic of frequent debate within the medical community for the last two decades. In 1999, the Institute of Medicine (IOM) issued a report that shocked the medical community. The report's study found that a staggering 44,000 to 98,000 people died yearly due to medical error while hospitalized.[12] The IOM report proved to be a catalyst for change within the healthcare system. In 2001, the Joint Commission for the Accreditation of Hospitals established new guidelines for patient safety. One of the new regulations mandated that hospitals disclose unanticipated outcomes.

To provide additional support to the hospitals' newly enacted policies, on September 28, 2005, Senator Hillary Rodham Clinton (D-NY) and Senator Barack Obama (D-Ill) introduced SB 1784, "The National Medical Error Disclosure and Compensation Act of 2005," also known as the MEDiC Act.[13] The bill created an Office of Patient Safety and Health Care Quality with the purpose of establishing the National Patient Safety Database, which is a voluntary reporting system, which allows for analyses and improvements to current and future patient safety policies. The MEDiC Program was designed to propel the medical community to universally adopt a policy for disclosure of medical errors, apologies for these errors and early compensation for patient injury.

Founded in February 2005, the Sorry Works Coalition is a national grassroots effort to educate doctors, lawyers, insurance executives, consumers, patient advocates, and elected officials about the benefits of full-disclosure programs and their ability to reduce medical malpractice litigation while simultaneously increasing patient safety. The Coalition's goals are to "(1) educate stakeholders on medical liabilities, (2) serve as an organizing force for the full disclosure movement, and (3) advocate for legislative incentives including pilot programs."[14] The MEDiC ACT was written to work in

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[11] *Phinney v. Vinson,* 605 A. 2d 849 (Vt. 1992).
[12] *http: philidalphialawyer.info/Institutue-of Medicine-Report. htm* (last viewed on June19th, 2007).
[13] E. Catherine Becker, *The MEDiC Act of 2005: A New Approach to Safety,* (Dec. 2005) *available at* http://findarticles.com/p/articles/mi_m0FSL/is_6_82/ai_n15969697 (last viewed on June 23,2007).
[14] Doug Wojcieszak, John Banja M.D., & Carole Houk, J.D. *Sorry Works! Coalition: Making the Case For Full Disclosure,* 32 The Journal on Quality and Patient Safety, 344 at 344, 2006, *available at* http://www.sorryworks.net/pdf/Sorry_Works_White_Paper.pdf (last viewed on June 23, 2007).

partnership with the Sorry Works Coalition, providing grant money and technical assistance to help doctors, hospitals, and health systems that have adopted the Sorry Works Program. [15]

The Sorry Works Program utilizes the full-disclosure approach developed by the Veterans Administration Hospital in Lexington, Kentucky. In 1987, Steve Kraman, the former chief of staff for the VA in Lexington, began conducting monthly meetings with his newly developed risk management committee. Their goal was to perform damage control on the rapidly increasing number of malpractice suits. The team began by reviewing the hospital's litigation statistics and current guidelines on how to handle potential litigation. Typically, the hospital would respond to financial threats by comparing the assessment of fault versus financial risk and determine what would be the most cost efficient plan of action: to fight the claim or to surrender and pay a settlement fee. Patients or next of kin were treated warily or even with disregard when they contacted the hospital. Hospital staff feared that being honest with patients about medical errors may implicate the hospital. In truth, the evidence told another story. When hospitals ignored patients or next of kin the frequency of lawsuits actually increased. Patients were more likely to seek legal avenues for retribution because they felt slighted or suspicious that the hospital was involved in a cover-up.[16]

After discovering the inconsistency between assumptions and actual results, the risk management team soon faced its first challenge: a wrongful death case involving a medical error where the family was not aware of the hospital's negligence. The committee was forced to choose whether to continue with the hospital's current practice of little to no contact with the families or revise their practice. The committee chose to take the moral high road, implementing a new disclosure/apology policy, whereby they inform the family of the circumstances and offer a fair compensation. By taking this approach the case was resolved in a timely manner and for much less cost than formal litigation. Over the course of the following ten years, the hospital compiled data consistently showed similar positive results.[17]

While the VA at Lexington, Kentucky has had only positive experiences since implementing a full disclosure program, many hospitals and healthcare providers are slow to change their ways. A recent study by the University of Iowa found that 97% of the faculty and resident physicians among the sample of 530 doctors from academic medical centers in the Midwest, Mid-Atlantic, and Northeast "*would* disclose the hypothetical medical error that resulted in *minor* medical harm (resulting in prolonged treatment or discomfort) to a patient."[18] In the same study, 93% responded that if a patient suffered harm to the extent of a *severe disability or even death*, they would feel

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[15] *The National Medical Error Disclosure and Compensation (MEDiC) Act of 2005,* 1-3 (Setember 28 2005), *available at* http://www.clinton.senate.gov/documents/092805sectionbysection.pdf (last viewed on June 24, 2007).
[16] Doug Kauman, *Apologizing and Offering Fair Compensation Can Circumvent Malpractice Suits,* April 30, 2004, *available, at* http://www.sorryworks.net/media4.phtml (last viewed on June 23rd, 2007).
[17] *Id.*
[18] University of Iowa, *Study finds Gap Between Practice, Attitudes Toward Medical Errors,* http://www.sorryworks.ner/articel48.phtml (posted May 10, 2007) last viewed June 23rd, 2007.

compelled to admit their mistake. The findings suggest most practitioners would be willing to admit mistakes. In stark contrast to what one would expect based on these findings, the same study revealed that in the case of a small medical error that resulted in little to no harm, only 41% of physicians were willing to admit their mistakes. Many reasoned it would be illogical to leave themselves open to the possibility of malpractice litigation. In the study's most contradictory finding, although an overwhelming majority of respondents indicated they would accept responsibility for causing a grave medical error, a mere 5% of the participants admitted fault when that exact situation actually occurred.[19]

One possible explanation for the bewildering discrepancies uncovered by this study could be the "physician's reluctance to reveal information that may be embarrassing or unflattering."[20] Many doctors hold themselves to very high standards, subconsciously denying their own ability to falter, even in the face of medical mistakes that result in devastating consequences. New full-disclosure policies, similar to the program developed at the VA in Kentucky, have enabled practitioners to apologize without facing blame or punishment. Practitioners are able to relieve the guilt and shame they were experiencing and most importantly, they learn from their mistakes and thus improve and refine their professional techniques.[21]

In 2001, the University of Michigan Health System (U of M) created a new policy for medical malpractice claims using the basic structure and design of the Kentucky VA's program. While the policy was originally created as a means of cutting costs, in the end it "turned into a major patient safety and patient communication effort."[22] The three fundamental tenants of the program are: (1) when University of Michigan Hospital negligently caused a medical error its primary goal will be to compensate quickly and fairly. (2) if the hospital's doctors and/or staff are not responsible, the Hospital will defend their position vigorously, (3) hospital mistakes will be a means to learn and improve on behalf of patients' care and safety.[23]

Since adopting its full disclosure policy, U of M has reduced its reserves from $72 million to $20 million. The number of claims lodged against the hospital dropped from 262 to less than 100 per year. Most impressively, transaction expenses decreased over 50%, from $48,000 to $21,000 per case.[24] The U of M program helped to improve patient safety and care. In the fall of 2002, the program partnered with U of M's quality improvement and peer review process. This united front created a "SWAT team in risk

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[19] *Id.*
[20] *Id.*
[21] Steve Kraman, *Victim Compensation Without Litigation- The Lexington Experience*, *available at* http://www.sorryworks.net/media4.phtml, (last viewed June 23rd,2007).
[22] Richard C. Boothman, *Apologies and a Strong Defense at the University of Michigan Health System,* Physician Executive. Mar/Apr. 2006, at 7-10, *available at* http://www. Sorryworks.net ,(last viewed on June 18th 2007).
[23] Boothman, *Supra n.29*
[24] Doug Wojcieszak, *The Sorry Works! Coalition*, *available at* http://www.sorryworks.net/media4.phtml, (last viewed on June 23rd, 2007).

management to assist doctors who find themselves in difficult positions, helping them to sort out the issues and decide on an honest approach with patients."[25]

First, the team conducts a "root cause analysis" to determine if the standard of care was met.[26] This analysis can take weeks or months and it is imperative that the hospital maintain close contact with the family throughout the process. Second, if it is determined the standard of care was not met meaning there was error or negligence, a meeting is immediately arranged with the patient and/or family and their attorney. During the meeting, the hospital representative apologizes and admits fault. He/she then explains what occurred and the hospital's plans to prevent the error from happening in the future. The final step is for the hospital to offer a fair and just amount of compensation to the victim.[27] On the other hand, if the root analysis determines that no medical error or mistake occurred, the hospital meets with the family to offer condolences, answer questions and open the records to prove the standard of care was met. The hospital will not offer a settlement and will defend against any future civil suit arising from the claim.[28]

The "SWAT" team provides guidance to the practitioner throughout the apology process. This helps ensure the practitioner that liability and revocation of his/her license is unlikely. The full disclosure policy relieves practitioners from their overwhelming feelings of shame, and has led to an impressive 98% of U of M medical staff supporting the program. Additionally, 55% of medical staff revealed the disclosure program was a significant factor in their decision to stay at U of M. The full disclosure policy has created an open environment where health care providers feel comfortable with sharing their mistakes. This leads to constant improvements in the quality of patient care and improves the relationship of trust and respect between patients and staff and amongst the staff themselves.[29]

Bringing the use of apologies into favor has not only saved money and time, it resulted in a milestone change in the legal system. In modern society, it is commonplace to refer to malpractice lawyers as ambulance chasers, so much so that Wayne State Law School spoofs the label in its yearly "Ambulance Chase" Charity Run! People often complain about the adversarial nature of the legal system and how people and lawyers have become overly eager to sue for minor incidents. The increased use of mediation and holistic law is directly reflected in the rise of apology programs. Studies have shown that communicating, listening, understanding, and empathizing between the two parties bring beneficial results not only to the parties themselves, but also to future patients, and to the legal system as a whole.

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[25] Boothman, *Sura n.31.*
[26] Wojcieszak *Supra n. 33*
[27] *Id*
[28] *Id.*
[29] Boothman, *Sura n.31.*