Think Twice Before Saying “I’m Sorry”

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On April 19, 2011, Governor Rick Snyder signed Senate Bill No. 53, amending 1961 PA 236. The Bill was designed to provide protection to physicians who say “I’m Sorry” when an untoward outcome occurs.

Although Senate Bill 53 is a step in the right direction, healthcare providers must approach any such “apology moment” with extreme care.

The Bill provides, in part:

A statement, writing, or action that expresses sympathy, compassion, commiseration, or a general sense of benevolence relating to the pain, suffering, or death of an individual and that is made to that individual or to the individual’s family is inadmissible as evidence of an admission of liability in an action for medical malpractice.

The Bill does not apply to a statement of “fault, negligence, or culpable conduct that is part of or made in addition to a statement, writing, or action described [above].”

In other words, although the Bill precludes evidence of a physician’s general expression of compassion from being introduced as an admission of liability, it specifically provides that statements of “fault, negligence or culpable conduct” are not part of the Bill’s protection.

There is a movement advocating full-disclosure and proactive apology that purports same results in statistically reduced liability exposure. Many disagree with that conclusion. While proactive apology may reduce an institution or health system’s overall liability exposure, that approach may not apply at all to an individual practitioner, in an individual case.

For years, plaintiff’s attorneys have argued that statements of sympathy should be deemed admissions of liability. If the trial court judge was persuaded by such arguments, plaintiff did not have to present any further evidence that the provider breached the standard of care. Although the Bill appears to preclude this argument, providers should think twice before acting in reliance upon the Bill’s scanty protection.

The practical outcome of the law is best demonstrated by way of example. Assume a surgeon nicks the bile duct during laparoscopic gallbladder surgery. The surgeon wishes to express sympathy. Much to his lawyer’s surprise, the surgeon makes the following statement to the patient: “I am very sorry this happened. This complication should never have occurred.”

If the patient files a lawsuit against the surgeon, Senate Bill 53 will apply to the statement. The plaintiff’s attorney will argue the entire statement is an admission of “fault, negligence, or culpable conduct”, and therefore beyond the Bill’s protection. The physician, on the other hand, will argue that the entire statement was an expression of sympathy, and not an admission of liability. It will be up to the trial judge to decide whether to allow the entire statement, strike it in whole, or redact portions. In this example, if the judge redacts the part of the statement that is clearly an expression of sympathy, the only text the jury will see is the statement of culpable conduct. In other words, the provider loses the ability to show the jury that he cared enough about the patient to show compassion, yet his statement that the complication should never have occurred is accepted as an admission of fault.

Healthcare providers should be especially careful when making a verbal statement of apology, as opposed to one in writing. As the old expression says, people hear what they want to hear, and see what they want to see. The word “sorry” has several different meanings. Although it is common to
say “sorry” when someone experiences a loss (“I’m sorry to hear your grandmother passed away”), it is also common to say “sorry” after acting inappropriately (“I’m sorry I stepped on your foot”).

Although your verbal statement may be intended to convey a general expression of sympathy, the patient may interpret your statement to mean you are admitting fault for an inappropriate action. Further, as time passes, all the patient may “recall” is that the physician admitted fault, not the actual words used. The patient may testify the doctor specifically admitted he made a mistake. For this reason, a written expression of sympathy may be the best approach, if one chooses to express sympathy.

Senate Bill 53 is certainly a step in the right direction. Nonetheless, providers should not issue statements of apology without a thorough consideration of the risks such a statement carries. Making a verbal or written statement of apology should only occur following a detailed discussion with counsel or risk management.

Mobile technology seems to be giving today’s physicians more diagnostic tools and freedom to practice medicine outside traditional health care environments. Has your practice or hospital adopted mobile technology?

- Fully adopted. I use mobile technology routinely in my clinical life.
- Partially adopted. I use mobile technology for a handful of things but don’t find it practical for many clinical applications.
- Not adopted. I do not see the advantage to adopting mobile technology for a clinical applications.

Previous Poll:
A recent NPR-Reuters poll found 60% of Americans support compensating people who donate bone marrow, kidneys and liver portions with future health care, and 41–46% approved of exchanging cash, tuition payment or tax breaks for these types of donations. Where do you stand?

- 48% Compensation of all types should be legal for organ donation.
- 29% Limited compensation should be legal for organ donation.
- 24% Compensation should never be legalized for organ donation.