

# ON APOLOGY

FOREWORD BY DEAN ROBERT WARD\*

On February 16, 2006, Dr. Aaron Lazare, Dean and Chancellor of the University of Massachusetts Medical Center, addressed an assembly at the Southern New England School of Law on his critically acclaimed book entitled: “On Apology!”<sup>1</sup> According to Dr. Lazare, to be an effective apology, there must be acknowledgement, remorse, explanation and reparation.<sup>2</sup> Dr. Lazare advances the hypothesis that the current proliferation of cases in our legal system is predicated on the concept that often the aggrieved party was not the beneficiary of an effective apology.<sup>3</sup> In the context of the patient-physician relationship, an effective apology means telling the patient about the injury, along with the physician’s regret for the adverse outcome. Explaining what went wrong and why and offering to make the patient whole, whether that includes additional treatment or monetary relief to cope with the injury. Unfortunately, the law may inadvertently perpetuate the system of ineffective apologies because of a doctor’s fear that saying “I’m sorry” will be treated as a damaging admission of liability by a party opponent at trial.

In short, the legal system serves as a safety net or default for ineffective apologies. If true, then one wonders about the very nature of the physician and patient relationship: is there a correlation between an effective apology and whether a physician is likely to be sued for

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\* Mr. Ward was appointed Dean of Southern New England School of Law in 1999. Before coming to SNE SL, he served as Professor of Law at New England School of Law where he taught Evidence, Criminal Law, Criminal Procedure, Prisoner’s Rights and seminars on Race and the Law and Anatomy of a Homicide. Presently, Dean Ward co-chairs the Massachusetts’ Trial Courts Access and Fairness Advisory Board.

<sup>1</sup> AARON LAZARE, ON APOLOGY 75 (Oxford University Press 2004).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

medical malpractice? Is it possible that an effective apology could impact the amount of damages awarded a plaintiff?

During the 2004 Presidential election, Republicans in particular, trumpeted the need for medical malpractice reform because soaring malpractice insurance premiums were driving good doctors out of the market.<sup>4</sup> If Dr. Lazare's thesis is accurate, that effective apology can reduce the incidence of litigation and/or reduce damages, then those campaigning for malpractice reform may be misdirecting their efforts. Instead of blaming the lawyers, perhaps doctors and insurance companies ought to re-examine their own practices. If an effective apology is more likely to produce lower verdicts or better yet, result in no lawsuit at all, then instructing doctors on how to apologize after causing an unforeseen harm might be a more productive way to slow the avalanche of medical malpractice suits.<sup>5</sup>

In 1999, the Institute of Medicine reported that between 44,000 and 98,000 deaths occurred because of medical errors.<sup>6</sup> During this same period, a debate was raging in the Congress and state legislatures about the need to cap malpractice awards because practitioners were being priced out of the medical profession. The high cost of malpractice insurance often was cited as the reason for the exodus. For many personal injury lawyers working for plaintiffs, the reactions of physicians and insurance companies appeared to be disproportionate to the problem.<sup>7</sup> They argued that if the medical profession did a better job of policing itself by disciplining bad doctors, the balance would

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<sup>4</sup> Jeffrey H. Birnbaum & John F. Harris, *President's Proposed Remedy to Curb Medical Malpractice Lawsuits Stalls*, <http://www.washingtonpost.com/wp-dyn/articles/A21931-2005Apr2.html> (last visited December 12, 2006).

<sup>5</sup> Gwen Mayes, *Apologies for Medical Errors Come With Mixed Messages*, <http://www.medscape.com/viewarticle/504276> (last visited December 12, 2006).

<sup>6</sup> *Id.*

<sup>7</sup> Open Secrets.org, *Health: Medical Malpractice Reform*, <http://www.opensecrets.org/payback/issue.asp?issueid=MM3&congno=109> (last visited December 12, 2006).

be restored.<sup>8</sup> Doctors who relied heavily on the counsel of their attorneys and insurance companies inadvertently tended to make the situation worse.<sup>9</sup> When confronted by an “adverse outcome,” the medical term for an error or unexpected injury, they feared saying anything to their patient. These statements of remorse and the promise of help were feared to be treated as admissions at trial.

Indeed, Professors Steven Goode and Olin Guy Wellborn III point out “a statement of liability made in conjunction with such an offer is not rendered inadmissible” under the rules of evidence.<sup>10</sup> Thus, it is understandable why doctors, insurance companies and personal injury/malpractice defense attorneys counsel clients to say nothing. It is no surprise that the approach taken by doctors to adverse outcomes is to deny and defend. The problem with this approach, however, is that it ratchets up the anger in the patient and their loved ones and likely results in irreparable harm to the doctor-patient relationship itself. Accordingly, Dr. Lazare may be correct in arguing that the legal system serves as the default, or final resort, where an effective apology might otherwise reduce the potential for litigation. Perhaps more importantly, an effective apology might result in a reduction in the amount of monetary damages awards.

The following article, written by Mathew Pillsbury, Esq., examines the cost and benefits of making apologies by doctors and the laws precluding the use of apologetic statements, otherwise used as damaging evidentiary admissions. Even though Rule 409 of the Federal Rules of Evidence<sup>11</sup> encourages humanitarian gestures by excluding

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> STEVEN GOODE & OLIN GUY WELLBORN III, COURTROOM EVIDENCE HANDBOOK (West 2005-2006 ed.).

<sup>11</sup> In 1975, Federal Rule of Evidence 409 took effect. It reads: “Evidence of furnishing or offering or promising to pay medical, hospital or similar expenses occasioned by an injury is not admissible to prove liability for the injury.” On its face, the language would seem to allow doctors to confirm with patients about an adverse outcome without fear. However, the commentary to the rule states in part the “reason often given

evidence of offers to assist the injured to establish liability, good lawyers find ways to circumvent what on its face ought to give apologetic doctors some protection. A number of states have gone so far as to consider or enact additional legislation to encourage doctors to apologize without worrying about future litigation.<sup>12</sup>

The Institute of Medicine, in its report, “To Err is Human,”<sup>13</sup> claimed that where “I’m sorry” legislation exists or the practice is followed, fewer lawsuits were filed and that the damages awarded were more reasonable.<sup>14</sup> “The Sorry Works Coalition” which consists of doctors, lawyers, insurers, patients and concerned citizens indicated that effective apologies do help to strengthen the relationship between physicians and patients and reduces the number of suits.<sup>15</sup> The Veterans Affairs Medical Center in Lexington, Kentucky, once known for having one of the highest number malpractice claims in the entire VA system, after implementing a policy of full disclosure, including apology protocols, now ranks among the lowest in malpractice suits.<sup>16</sup> Personal testimonials of injured patients in malpractice cases indicate that in those instances where they received an apology, plaintiffs were more willing to forgive and declined to sue.<sup>17</sup>

More than seventeen states are currently experimenting with apology laws predicated on the rationale that this may provide a means to cope with the malpractice

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being that such payment or offer is usually made from humane impulses and from an admission of liability and to hold otherwise would tend to discourage assistance to the injured person.”

<sup>12</sup> National Conference of State Legislatures, *Medical Malpractice Tort Reform*, <http://www.ncsl.org/standcomm/sclaw/medmaloverview.htm> (last visited December 13, 2006).

<sup>13</sup> LAZARE, *supra* note 1, at 75.

<sup>14</sup> INSTITUTE OF MEDICINE, *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM* (Linda T Kohn, et al. eds., National Academy Press 2000).

<sup>15</sup> *See generally*, The Sorry Works Coalition, [www.sorryworks.net](http://www.sorryworks.net) (last visited December 13, 2006).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

suit epidemic. Perhaps most importantly, many of these states which had previously adopted Rule 409, are acknowledging that the original purpose for enacting the rule, namely to encourage people to act in a more humane fashion, has failed. It appears that Dr. Lazare may be right. If an effective apology approach is nationalized, society may significantly reduce the number of malpractice law suits and achieve the goal of damages reform.