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Should a Physician Apologize for a Medical Mistake? – The Controversy Over the Effectiveness of Apology Law Statutes

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SHOULD A PHYSICIAN APOLOGIZE FOR A MEDICAL MISTAKE? – THE CONTROVERSY OVER THE EFFECTIVENESS OF APOLOGY LAW STATUTES

SAMUEL D. HODGE, JR.*

ABSTRACT

There are two approaches that health care providers can pursue in handling a medical error. Is it better for a physician not to admit a mistake and aggressively defend the claim or apologize and try to amicably resolve the matter? There has been a growing movement for physicians to offer words of sympathy or to apologize for a medical mistake as a way of minimizing the impact of a medical error and reducing the chances of a malpractice claim. There are a number of benefits to this approach but critics maintain that an apology is a useless gesture with an unproven track record and merely a way of obtaining tort reform in disguise. This Article will explore this controversy, the enactment and criticisms of apology laws designed to encourage physicians to talk to patients about medical mistakes, and it will examine how the courts have responded to whether expressions of sympathy and fault are admissible in court without constituting an admission of liability.

"Would 'sorry' have made any difference? Does it ever? It's just a word. One word against a thousand actions."
— Sarah Ockler

A nursing professor underwent a routine hysterectomy at a teaching hospital, but things did not go as planned, and she slipped into a coma for several weeks.[1] Five surgeries later, she was left with permanent injuries.[2] Despite her efforts to learn what had happened, she was greeted with a wall of silence.[3] The most that the patient could

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[1] Sandra G. Boodman, *Should Hospitals — and Doctors — Apologize for Medical Mistakes?*, WASH. POST (Mar. 12, 2017), https://www.washingtonpost.com/national/health-science/should-hospitals--and-doctors--apologize-for-medical-mistakes/2017/03/10/1cad035a-fd20-11e6-8f41-ea6ed597e4ca_story.html.

[2] *Id.*

[3] *Id.*

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learn from the physicians is that "things didn't go well."[4] The woman, who is also a lawyer, then spent years trying to discover what went wrong during her initial operation.[5]

Compare this experience with that of a retired police officer who sustained a catastrophic spinal cord injury that left him paralyzed during back surgery.[6] The man was immediately informed by the surgeon as to what went wrong, and he was issued an apology for the mistake.[7] The hospital then paid an undisclosed amount in settlement, without the necessity of the patient filing suit.[8]

These cases demonstrate the two approaches that a health care provider can pursue in handling a medical error. Is it better for a physician not to admit a mistake and aggressively defend the claim or apologize and try to amicably resolve the matter? This Article will explore this controversy, the enactment and criticisms of apology laws designed to encourage physicians to talk to patients about medical mistakes, and it will examine how the courts have responded to whether expressions of sympathy and fault are admissible in court without constituting an admission of liability. Words of sympathy and admitting responsibility for a mistake have proven benefits in a medical context and help reduce malpractice claims or their value, which will be a focus of this Article. This Article is broken down into multiple parts. Following an introduction to the topic of an apologies, Part II examines the requirements for a disclosure in the case of an adverse medical event. Part III discusses the malpractice crises in the United States, and Part IV looks at the viability of tort reform as a solution to the problem. Part V details the benefits of an apology, and Part VI outlines the various efforts across the country to promote apologies in a medical context. Part VII explores the various reasons why some doctors will not apologize or offer words of sympathy, and Part VIII offers the counterview as to why physician apologies are important. This is followed by Part IX which sets forth the various legislative responses concerning apology laws in both the United States and other countries. Part X presents the criticisms by those who do not favor apology laws, and Part XI is devoted to an examination of some of the court decisions that have explored the admissibility of an apology.

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I. INTRODUCTION

Children are taught during their tender years to say "I'm sorry" whether they hurt someone's feelings either accidentally or intentionally. This acceptance of responsibility is engrained into the consciousness of American society.[9] The refrain has now become a routine utterance because of its value to diminish an embarrassing or problematic situation.[10] As individuals grow older, however, it becomes harder to admit a mistake because of the consequences that may follow.[11]

Physicians experience bad medical outcomes exposing them to malpractice claims regardless of their carefulness. Even the most skilled, competent, and focused physician will experience adverse outcomes.[12] This creates a dilemma because a doctor's natural inclination is to offer words of comfort and apologize, but they hesitate to do either, since indication of fault may lead to a lawsuit[13] or be used against them in court.[14] These feelings concerning not offering words of comfort are reinforced when defense counsel admonishes doctors not to say anything that can be

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9 Nancy L. Zisk, *A Physician's Apology: An Argument Against Statutory Protection*, 18 RICH. J.L. & PUB. INT. 369, 370 (2015).

10 Nicole Marie Saitta & Samuel D. Hodge, Jr., *Is it Unrealistic to Expect a Doctor to Apologize for an Unforeseen Medical Complication? — A Primer on Apologies Laws*, 82 PA. BAR ASS'N Q. 93, 94 (2011).

11 Zaina Afrassiab, *Why Mediation & "Sorry" Make Sense: Apology Statutes as a Catalyst for Change in Medical Malpractice*, 2019 J. DISP. RESOL. 197, 197 (2019).

12 *Id.* at 205.

13 Zisk, *supra* note 9, at 371.

14 Erika R. Davis, Note, *I'm Sorry I'm Scared of Litigation: Evaluating the Effectiveness of Apology Laws*, 3 Tenn. L. Rev. F. 70, 71 (2016).

construed as an admission of liability.[15] Unfortunately, this strategy has the unintended consequence of angering the patient and encouraging litigation that the healthcare provider wished to prevent. This failure to express sympathy and remorse can also diminish the doctor-patient relationship and obstruct patient safety.[16]

Physicians have traditionally declined to admit mistakes, and this philosophy can be traced back to Hippocrates who taught his students to hide "most things from the patient while . . . attending to him . . . revealing nothing of the patient's future or present condition."[17] The American Medical Association (AMA) reinforced this approach when in the mid-19th century it adopted a Code of Ethics that reminded physicians that they had a "sacred duty" to "avoid all things which have a tendency to discourage the patient and depress his spirits."[18] The current ethical philosophy in medicine, however, is much different and centers on patient autonomy with the right of individuals to control their health information. Patients also enjoy the ability to be fully informed about medical procedures and to determine their course of treatment.

II. Requirements for Disclosure

This metamorphosis over the years has led federal and state governments to create reporting requirements to track medical mistakes.[19] These mandates are important because they are designed to hold health care providers responsible for performance or to offer information that may foster improved safety.[20] Minnesota was the first jurisdiction to enact mandatory disclosures of "never events" in 2003,[21] which includes such things as surgery on the wrong body part, an operation done on the wrong patient, surgery that is not covered by the informed consent document, retention of a foreign object in a person's body after surgery, and death during an operation on

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15 *Id.* at 71–72. Certain malpractice policies include clauses prohibiting admission or cooperation. These provisions will void coverage if the insured admits or assumes liability. While courts "generally have been reluctant to void coverage on the basis of a policyholder's truthful statements to an injured person, either for public policy reasons or because 'no admission' clauses have been construed narrowly." Nevertheless, the carrier can still advance the assertion that the apology harmed their ability to investigate or settle the claim. *To Apologize or Not to Apologize, That Is the Question*, CLAIMS & LITIG. MGMT. 9 (2018), https://www.theclm.org/File/DownLoad?type=18&fileName=0358e388_97fd_45d4_9c59_d2a1d4cb9fd2.pdf&userFileName=SESSION%203%20-%20CLAIMS%20MANAGEMENT%20-%20To%20Apologize%20or%20Not%20to%20Apologize%20-%20.pdf.

16 Davis, *supra* note 14, at 72.

17 Zisk, *supra* note 9, at 370.

18 Sandeep Jauhar, Opinion, *When Doctors Need to Lie*, N.Y. TIMES (Feb. 22, 2014), https://www.nytimes.com/2014/02/23/opinion/sunday/ when-doctors-need-to-lie.html.

19 Zisk, *supra* note 9, at 387.

20 *See* COMM. ON QUALITY OF HEALTH CARE IN AM., INST. OF MED., TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 86 (Linda T. Kohn et al. eds., 2000).

21 Lucinda Jesson & Peter Knapp, *My Lawyer Told Me to Say I'm Sorry: Lawyers, Doctors and Medical Apologies*, 35 WM. MITCHELL L. REV. 1410, 1419 (2009).

a normally healthy person.[22] Within four years, twenty-six states mandated the reporting of an adverse event or incident. Pennsylvania became the first state to require hospitals to inform both the state and patients of a serious medical event that compromises patient safety and results in an unanticipated injury.[23] This law is one of the harshest in the country and requires hospitals to inform patients within one week following a "serious event."[24] The legislation, however, bars the use of those communications as proof of responsibility for the incident.[25]

The federal government enacted the Patient Safety and Quality Improvement Act in 2005, which implemented a voluntary system for reporting patient safety information through the Patient Safety Organization.[26] Medicare and Medicaid followed suit in 2008 indicating that they would not issue payment for "never events," including wrong-site surgery, pressure ulcers, or foreign bodies left in a person during surgery.[27] Critics are skeptical of these disclosure laws because their appropriateness for regulatory oversight and enforceability remains a significant challenge. It does not appear, however, that those states with reporting requirements have taken serious steps to enforce these mandates.[28]

To reduce medical malpractice claims, related expenses, and emotional toll, states have enacted laws to prohibit words of empathy, condolence or apology from being used against physicians in court.[29] These statutes are premised upon the belief that permitting medical professionals to espouse words of apology can reduce malpractice claims.[30] Whether these statutes have achieved their stated goal of reducing malpractice claims and assuaging patient anger is debatable and commentators have recently pointed out flaws with these laws as explained in Part X.

III. THE MALPRACTICE CRISIS

At the beginning of the twenty-first century, many states were experiencing significant numbers of physicians engaged in high-risk specialties leaving or

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22 *Minnesota's 29 Reportable Adverse Health Events*, MINN. DEP'T OF HEALTH, https://www.health.state.mn.us/facilities/patientsafety/adverseevents/adverseevents.html (last updated Jan. 29, 2019).

23 Jesson & Knapp, *supra* note 21, at 1419.

24 Thomas H. Gallagher et al., *Disclosing Harmful Medical Errors to Patients*, 356 NEW ENG. J. MED. 2713, 2715 (2007).

25 *Id.*

26 Jesson & Knapp, *supra* note 21, at 1420.

27 *Id.*

28 Gallagher et al., *supra* note 24, at 2715.

29 Heather Morton, *Medical Professional Apologies Statutes*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 11, 2018), https://www.ncsl.org/research/financial-services-and-commerce/medical-professional-apologies-statutes.aspx.

30 *Id.*

contemplating withdrawing from their practices.[31] As a former AMA President indicated, doctors are leaving their communities on a steady basis due to rising insurance premiums, and "an out-of-control legal system."[32] The cost of insurance has become unaffordable or unavailable for many physicians, and multi-million dollar jury awards are too common.[33] These factors caused health care providers to offer restricted services, leave practices, or move their offices; all of which seriously harm patient access to proper medical care.[34]

Health care providers eagerly point out that the mere happening of an adverse event does not mean that the incident was the result of malpractice.[35] After all, known risks and undesired outcomes of medical interventions occur in the absence of a medical error.[36] Malpractice litigation, however, is a powerful influence in shaping health care attitudes.[37] The mere thought of being sued may alter clinical decisions, harm physician-patient relationships, and influence the professional experiences and attitudes of health care professionals.[38]

The flip side of the argument is demonstrated by a report issued by the Institute of Medicine addressing medical errors in the United States.[39] That paper disclosed that between 44,000 to 98,000 people die each year from a medical mistake.[40] To put this in perspective, "more people die in a given year as a result of medical errors than motor vehicle accidents, breast cancer or AIDS."[41]

IV. TORT REFORM

One solution to the dilemma is tort reform, but this is a highly contentious remedy with physicians, insurers, and other business interests pushing to protect themselves from the spiraling costs of lawsuits and multi-million dollar awards.[42] Trial attorneys

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31 Robert E. Cline & Carl J. Pepine, *Medical Malpractice Crisis: Florida's Recent Experience*, 109 CIRCULATION 2936, 2936 (2004).

32 *Id.*

33 *Id.*

34 *Id.*

35 Afrassiab, *supra* note 11, at 205.

36 *Id.*

37 Richard Boothman & Margo M. Hoyler, *The University of Michigan's Early Disclosure and Offer Program*, BULL. AM. COLL. SURGEONS, Mar. 2013, at 21, 21.

38 *Id.*

39 Debra Hardy Havens & Lizbet Boroughs, *To Err is Human: A Report from the Institute of Medicine*, 14 J. PEDIATRIC HEALTH CARE 77, 77 (2000).

40 *Id.*

41 *Id.*

42 *See* Debra Cascardo, *The Medical Malpractice Crisis: What Is the Cause? Is There A Cure?*, 22 J. MED. PRAC. MGMT. 283 (2007).

and patient advocates, however, assert that litigation is the only remedy for those harmed by the healthcare system.[43] Supporters of tort reform[44] propose non-economic damage caps as the key liability reform change.[45] However, this limitation has the main effect of reducing hospital rates instead of charges levied against physicians.[46]

To remedy these competing and polarizing views, most states have enacted apology laws to encourage physician apologies.[47] The justification for these efforts is that frivolous malpractice claims will be filed with less frequency when a doctor apologizes to a patient without fear that their words can be used against them in court.[48] Apologies are more than a way to demonstrate sympathy to the aggrieved; they promote an alternative to litigation in a healthcare setting.[49]

V. BENEFITS OF AN APOLOGY

Physician apologies have the advantage of decreasing the financial toll that would be expected from litigating a malpractice claim.[50] As one study noted, "an apology gave the wronged party a sense of satisfaction and closure, resulting in faster settlements and lower demands for damages."[51] The language of the apology is also critical, for the study determined that admitting responsibility is more successful than merely conveying words of empathy.[52] More than 90% of malpractice claimants, when asked why they filed suit, revealed that a claim was advanced for one of the

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43 *Id.*

44 Proponents of tort reform claim that state legislators and judges are influenced by plaintiffs' lawyer contributions. Well-organized entities like trial lawyer associations frustrate attempts for reform. In contrast, opponents of tort reform maintain that patients are a disparate group of consumers who need powerful representation. Insurance companies, physicians, and hospitals have powerful organizations that protect their interests. This partially explains why reform has been sluggish and challenging. Marilynn Wei, *Doctors, Apologies, and the Law: An Analysis and Critique of Apology Laws*, 39 J. HEALTH L. 106, 119–20 (2006).

45 Charles Kolodkin, *Tort Reform and Its Impact on Medical Malpractice Insurance*, INT'L RISK MGMT. INST. (Mar. 2003), https://www.irmi.com/articles/expert-commentary/tort-reform-and-its-impact-on-medical-malpractice-insurance.

46 *Id.*

47 Benjamin J. McMichael, *The Failure of "Sorry": An Empirical Evaluation of Apology Laws, Health Care, and Medical Malpractice,* 22 LEWIS & CLARK L. REV. 1199, 1201 (2017).

48 *Id.* at 1199.

49 Afrassiab, *supra* note 11, at 197.

50 *Id.*

51 Matt Palmquist, *The Benefits of Saying You're Sorry*, STRATEGY+BUSINESS (Nov. 23, 2010), https://www.strategy-business.com/article/10411a.

52 *See* Jennifer K. Robbennolt, *Apologies and Settlement*, 45 CT. REV. 90, 92 (2010). The study presented a scenario where the offending party provided either a partial apology, which contained words of sympathy but no acceptance of responsibility, a full, responsibility-accepting apology, or no apology. *Id.*

following reasons: to prevent the mistake from occurring to another patient, to obtain an explanation as to what went wrong, or for the health care provider to recognize what they had done.[53] More importantly, 40% of malpractice claimants asserted that if they had been provided with an explanation and apology, they would not have pursued litigation.[54]

An apology is also important because it provides emotional and psychological advantages to both the offender and the victim.[55] As noted in *Psychology Today*, an apology is "an important ritual, a way of showing respect and empathy for the wronged person."[56] Words of sympathy can neutralize the anger maintained by the aggrieved and minimize additional misunderstandings.[57] An apology cannot undo the harmful conduct, but if done properly, it can minimize the undesirable effects of that conduct.[58] An apology even affects the body's physiological reactions by decreasing a person's blood pressure and heart rate while stabilizing breathing.[59] Further, emotional healing takes place because the victim no longer views the wrongdoer as a threat.[60]

In a medical context, an apology can afford the patient and family with a better understanding of what happened, provide physicians with the opportunity to learn from their mistakes, produce more closure with the patient, and reduce the chances of litigation.[61]

It is important to make a distinction between an apology and an account. An account merely includes a factual explanation of the event without an admission of fault or an excuse that refers to the denial or mitigation on the part of the wrongdoer.[62] An apology, on the other hand, is "an admission of error or discourtesy accompanied by an expression of regret."[63] The bottom line is that an apology is about removing

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53 Michelle R. Dujardin, *Physician Disclosure and/or Apology: Does it Help or Hinder the Physician-Patient Relationship?*, MGMA 1, 2 (2016), https://www.mgma.com/MGMA/media/files/fellowship%20papers/Physician-Disclosure-andor-Apology-Does-it-Help-or-Hinder-the-Physician-Patient-Relationship.pdf?ext=.pdf.

54 *Id.*

55 Beverly Engel, *The Power of Apology*, PSYCH. TODAY, http://www.psychologytoday.com/us/articles/200207/the-power-apology (last reviewed June 9, 2016).

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.*

61 *See* Dujardin, *supra* note 53, at 2.

62 *See* Davis, *supra* note 14, at 73.

63 *Apology*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/apology (last visited Jan. 18, 2020).

the wall of excuses and entering into a condition of vulnerability whereby the individual admits responsibility for a mistake while verbalizing regret for the act.[64] People, however, frequently resort to labeling a statement an as apology when it is merely an account of events.[65]

VI. MOVEMENT FOR DISCLOSURE OF ERRORS

Many patients are in an exposed physical or psychological condition following even routine medical procedures.[66] Thus, reactions can be dramatic and stressful when a patient is injured in an unforeseen incident, particularly when the injury is from a person they trust.[67] Patients also balance financial consequences that may follow an incident.[68] Patients frequently work through the adverse outcome feeling isolated.[69] They want to know what happened, but often cannot discover the information they need.[70] Therefore, it is little wonder that patients have stressed the need to learn the full details of a medical error. Such a revelation by the treating physician can become a central part of patient care and impact issues of patient safety.[71]

It has been shown that nearly all patients (98%) want to be informed of an error even if it is minor.[72] Only 14% wish to see a different physician after a minor mistake, compared with 65% following a significant error.[73] Most patients (88%) also wanted the physician to apologize while nearly all (99%) wanted to help prevent the error from being repeated.[74] However, mere disclosure of a mistake may not be enough. Those patients who were disappointed with their conversations with the physician had a penchant to see incompetence or malicious intent on the part of the doctor.[75] Patients are also more prone to think about suing after a moderate or severe mistake if the

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64 *See* Davis, *supra* note 14, at 73–74.

65 *Id.* at 73.

66 *See* Christine W. Duclos et al., *Patient Perspectives of Patient-Provider Communication After Adverse Events*, 17 INT'L J. FOR QUALITY HEALTH CARE 479, 481 (2005).

67 *Id.*

68 *Id.*

69 *Id.* at 482.

70 *Id.*

71 *See* Jennifer K. Robbennolt, *Apologies and Medical Error*, 467 CLINICAL ORTHOPEDIC & RELATED RSCH. 376, 376 (2009).

72 Amy B. Witman et al., *How Do Patients Want Physicians to Handle Mistakes?*, 156 ARCH. INTERNAL MED. 2565, 2565 (1996).

73 *Id.*

74 *See* Wei, *supra* note 44, at 18.

75 *See* Duclos et al., *supra* note 66, at 482.

physician did not voluntarily divulge the error.[76] With moderate mistakes, only 12% of patients would sue if their physician informed them of the error, but 20% would sue if they found out from someone other than the doctor.[77]

A study published in *Health Affairs* concluded that when patients institute suits, their primary reasons are the assessment that the physician was dishonest about the incident, the feeling that no one clarified what happened, and influence by a third party – frequently another health care professional – to sue.[78]

Ethics also plays a role in the disclosure of unanticipated outcomes.[79] For instance, the American Medical Association's Code of Ethics provides:

> It is a fundamental ethical requirement that a physician should at all times deal honestly and openly with patients. . . . Situations occasionally occur in which a patient suffers significant medical complications that may have resulted from the physician's mistake or judgment. In these situations, the physician is ethically required to inform the patient of all the facts necessary to ensure understanding of what has occurred.[80]

The American College of Physicians promotes a similar position and notes that patients should be notified of "procedural or judgment errors" if that disclosure would be "material to the patient's well-being."[81] The Joint Commission on the Accreditation of Healthcare Organizations ("JCAHO") requires that "patients and, when appropriate, their families are informed about the outcomes of care, including unanticipated outcomes."[82] Following the release of a report on the necessity to make a full disclosure, the National Quality Forum ("NQF") sanctioned a new safe-practice guideline which states:

> NQF safe practices are evidence-based practices that, according to expert opinion and consensus among major quality-of-care organizations such as the Joint Commission, the Institute for Healthcare Improvement, the Agency for Healthcare Research and Quality, and the Centers for Medicare and

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76 *See* Witman et al., *supra* note 72, at 2565.

77 *Id.*

78 *See Dealing with a Medical Mistake: Should Physicians Apologize to Patients?*, MED. ECON. (Nov. 10, 2013), https://www.medicaleconomics.com/view/dealing-medical-mistake-should-physicians-apologize-patients.

79 *See* Robbennolt, *supra* note 71, at 377.

80 Frank Federico, *Disclosure of Medical Error Forum*, 23 RISK MGMT. FOUND. HARV. MED. INST. 1, 2 (2003); *Opinion 8.12 – Patient Information*, 13 AMA J. ETHICS 626, 626 (2011).

81 Wei, *supra* note 44, at 19.

82 William M. Barron & Mark G. Kuczewski, *Unanticipated Harm to Patients: Deciding When to Disclose Outcomes*, 29 JOINT COMM'N J. ON QUALITY & PATIENT SAFETY 551, 551 (2003).

> Medicaid Services, represent essential dimensions of high-quality health care.[83]

These new safety procedures will advance disclosures by making the admission of unexpected results a priority, by training medical personnel for these problematic conversations and tracking disclosure outcomes for future performance improvement.[84]

Critics, however, maintain that these requirements lack proper specificity, are not adequately designed to cover complex errors, and are too narrow in scope.[85] For instance, the Joint Commission's pronouncement mandate confuses physicians as to what constitutes an "unanticipated" error, and the AMA Code of Ethics fails to define when a complication is "significant."[86] These pronouncements also do not indicate who should report the mistake to the patient, and they only require a disclosure of facts.[87] Equally as important, the standards say nothing about the issuance of an apology, admission of responsibility, or assurance that changes would be made to make sure that the error can be prevented in the future.[88]

VII. Why Physicians Do Not Apologize

Despite these rules, many physicians still avoid talking to a patient or their family about an adverse medical outcome.[89] They operate in an environment where mistakes are unacceptable and should not be disclosed because perfection is the goal.[90] Statistically, only about one-fourth of all physicians who make a medical error will talk to patients or their families about that error.[91] The answer to why this silence occurs is complex since there are a host of different explanations for this failure. In some cases, the doctor may simply be unaware of the mistake and resulting harm, particularly if the problem is not immediately apparent or if it is believed to be caused by a disease process instead of human error.[92]

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83 Gallagher et al., *supra* note 24, at 2714. "

84 *See* Saitta & Hodge, *supra* note 10, at 96. "

85 *See* Wei, *supra* note 44, at 19. "

86 *Id.* at 19–20. "

87 *Id.* at 20. "

88 *Id.* at 20–21. "

89 *Id.* at 21. "

90 *See* Jesson & Knapp, *supra* note 21, at 1417. "

91 *See* A.W. Wu et al., *Do House Officers Learn from Their Mistakes?*, 12 BMJ Quality & " Safety 221, 225 (2003).

92 *See* Saitta & Hodge, *supra* note 10, at 96.

Physicians also work in a culture that "frowns on admitting medical errors, usually on the pretense of fear over malpractice lawsuits."[93] They are hesitant to converse about errors in public because of concern over exposing fault, disciplinary action, reputational repercussions, and worry over losing referrals.[94] Physicians' silence is even seen in morbidity and mortality ("M & M") conferences.[95] These meetings are designed to improve patient safety by discussing and lessening adverse events, enhancing the quality of care as a function of the hospital governance configuration, and creating educational learning moments.[96] In this way, there is a better awareness of prior mistakes thereby providing the opportunity to avoid them in the future and improving patient care.[97] M & M conferences are non-punitive and the discussions are usually kept confidential by law.[98] Despite these open and legally protected forums, physicians are still not forthcoming in admitting errors or making disclosures.[99] Errors are rarely discussed, and when they are the subject of the conversation, the attendees do not speak in a way that indicates a mistake occurred.[100] This conduct is surprising when considered in light of the AMA Code of Ethics which provides: "Concern regarding legal liability which might result following truthful disclosure should not affect the physician's honesty with a patient."[101]

One must also not overlook the fact that physicians are concerned that a disclosure or apology may be misinterpreted as an admission of liability.[102] This is important because a survey of health care professionals demonstrated that almost half of the physicians questioned were either "highly" or "extremely" worried that they will be named in a lawsuit within the next five years.[103] This attitude is undergoing a gradual shift as demonstrated by a recent study that showed that "physicians generally

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93 Lawrence Schlachter, *Medical Culture Encourages Doctors to Avoid Admitting Mistakes*, STAT (Jan. 13, 2017), https://www.statnews.com/2017/01/13/medical-errors-doctors/.

94 *See* Wei, *supra* note 44, at 26.

95 *Id.* at 23.

96 *See* Jim George, *Medical Morbidity and Mortality Conferences: Past, Present and Future*, 93 POST GRAD. MED. J. 148, 148.

97 *See* Nancy E. Epstein, *Morbidity and Mortality Conferences: Their Educational Role and Why We Should Be There*, 201 SURGICAL NEUROLOGY INT'L S377, S379 (2012).

98 ATUL GAWANDE, COMPLICATIONS: A SURGEON'S NOTES ON AN IMPERFECT SCIENCE 57–58, 62 (2002).

99 Wei, *supra* note 44, at 126.

100 *Id.* at 128.

101 *Opinion 8.12 – Patient Information*, *supra* note 80, at 626.

102 Saitta & Hodge, *supra* note 10, at 96.

103 Federico, *supra* note 80, at 2.

endorsed the importance of disclosing harmful errors to patients."[104] Whether the fear of apologizing is unfounded or not, physicians engage in measures to protect themselves from lawsuits, and that includes withholding an apology if they believe it will be used against them.[105]

California was one of the first jurisdictions to enact an apology law, and its Assembly Committee on the Judiciary provided an understanding as to why physicians in that state do not successfully offer words of sympathy with patients and their families.[106] They ascertained that the California Evidence Code "manifestly discourages the human tendency to apologize or express regret over an incident caused by negligence" despite research that demonstrates "30 percent of plaintiffs claim no suit would have occurred if a medical doctor in a medical malpractice context had apologized."[107] These contradictory views are attributable to concern by health care providers that their words of empathy may be interpreted as an admission of responsibility.[108] The "monetary costs, the damage to their professional reputation, the risk to their licensure, and the emotional burdens that come with lawsuits" combined with the challenge to integrity cause physicians to be cautious when it comes to any action that could foster litigation.[109] Physicians also worry over the unpredictability of the tort system and will try to circumvent it, even if that means not making a disclosure or an apology.[110]

Medical mistakes and being threatened by litigation exacts an emotional toll on the physician.[111] Most doctors report emotional distress over being sued, but their reaction to a lawsuit is frequently preceded by a period of emotional tumult following the negative outcome.[112] The doctor may bear feelings of responsibility or guilt, a sincere sorrow for the patient, nervousness, and concern about being sued.[113] These emotions may not abate until the statute of limitations has run or suit has been instituted.[114] Most doctors react to being sued by undergoing episodes of emotional

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104 *See* Thomas Gallagher et al., *US and Canadian Physicians' Attitudes and Experiences Regarding Disclosing Errors to Patients*, 166 ARCH. INTERNAL MED. 1605, 1609 (2006).

105 Saitta & Hodge, *supra* note 10, at 96.

106 *Id.*

107 CAL. EVID. CODE § 1160 (2020). Quentin Kopp, the Bill's sponsor, offered these comments in an explanation that followed the legislation. The study cited was conducted by the University of Florida, College of Law.

108 Steven Keeva, *Does Law Mean Never Having to Say You're Sorry?*, 85 A.B.A. J. 64, 65 (1999).

109 Wei, *supra* note 44, at 139.

110 *Id.* at 140–41.

111 Sara Charles, *Coping with a Medical Malpractice Suit*, 174 W.J. MED. 55, 55 (2001).

112 *Id.*

113 *Id.*

114 *Id.*

distress during various periods of the litigation.[115] They may experience episodes of major depressive disorder (27%–39%), adjustment disorder (20%–53%), and the start or aggravation of a physical illness (2%–15%).[116] While counsel and insurance companies frequently tell them not to take the allegations personally, or that it is merely the cost of doing business, physicians commonly share these negative feelings and reactions.[117]

VIII. THE BENEFIT OF PHYSICIANS' APOLOGIES

Research demonstrates that anger is a primary factor for suing a physician and this hostility can weaken the patient's abhorrence for using the legal system to punish a physician.[118] Likewise, studies show that apologies by health care providers diminish patient anger, increase interactions between patient and doctor, and reduce the patient's need to sue.[119] A more subtle advantage is that disclosure by a physician helps in defending a malpractice claim because it demonstrates respect for the patient as well as possibly decreasing the likelihood of a lawsuit since patients and their families are favorably impressed with caring gestures.[120]

Apology programs have been gaining acceptance since 2001 as a way to minimize malpractice claims.[121] As noted by the founder of the Sorry Works Coalition, 5% to 10% of hospitals across the country have created apology policies.[122] For example, medical centers affiliated with the University of Illinois at Chicago, Kaiser Permanente's Medical Centers, Stanford University, Johns Hopkins University, Harvard University, the Catholic Healthcare West System, and the Children's Hospitals and Clinics of Minnesota have initiated "I'm sorry" programs.[123] The most recognized private-sector program is the initiative at COPIC, a liability insurance carrier run by physicians in Colorado.[124] This company covers around 6,000 doctors and is the largest insurer in the state.[125] In 2000, COPIC implemented an initiative to improve transparent and open discussions about injuries

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115 *Id.*

116 *Id.*

117 *Id.*

118 Elaine Liu & Benjamin Ho, *Does Sorry Work? The Impact of Apology Laws on Medical Malpractice*, 43 J. RISK & UNCERTAINTY 141, 148 (2011).

119 *Id.*

120 Federico, *supra* note 80, at 2.

121 Davis, *supra* note 14, at 90.

122 Kevin O'Reilly, *"I'm Sorry": Why Is That So Hard for Doctors to Say?*, AM. MED. NEWS (Feb. 1, 2010), https://amednews.com/article/20100201/profession/302019937/4/.

123 *Id.*

124 Gallagher et al., *supra* note 104, at 2716.

125 *Id.*

and quicken the payment process in certain situations.[126] Statistics demonstrate that this program resolved disputes in a less adversarial context than normal malpractice claims with a lower than average payment per event.[127]

Research shows that these initiatives have certain common elements in that they:

> (1) proactively identify adverse events; (2) distinguish between injuries caused by medical negligence and those arising from complications of disease or intrinsically high-risk medical care; (3) offer patients full disclosure and honest explanations; (4) encourage legal representation for patients and families; and (5) offer an apology with rapid and fair compensation when standards are not met.[128]

Patient responses to these programs have been very positive.[129] When executed as part of a hospital- or system-wide initiative, they can decrease the incidence and median size of malpractice claims.[130] For instance, the *Journal of Patient Safety and Risk Management* cited to a study which revealed that when a hospital's staff and its physicians are agreeable to discuss, express regret for, and resolve unfavorable medical events by a "collaborative communication resolution program," there was a considerable reduction in the number of malpractice claims, costs, and time needed to close cases.[131] Simple apologies were able to resolve medical error cases 43% of the time.[132]

The Lexington Veterans Affairs Medical Center in Kentucky conducted a six-year study after it implemented an apology program and discovered that the hospital "paid an average $15,622 per claim, compared with a $98,000 average at VA hospitals without 'I'm sorry' policies."[133] The University of Michigan Health System also adopted a disclosure, apology, and compensation policy during the same year and was able to diminish its litigation expenses by $2 million annually and new claims by more than 40%.[134]

Information supplied by the National Practitioner Databank Public Use Data File determined that the mean length of litigation in those states with apology laws was 3.4

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126 *Id.*

127 *Id.*

128 Davis, *supra* note 14, at 91.

129 *Id.* at 92.

130 McMichael, *supra* note 47, at 11.

131 Bonnie G. Ackerman, *You Had Me at "I'm Sorry": The Impact of Physicians' Apologies on Medical Malpractice Litigation*, NAT'L L. REV. (Nov. 6, 2018), https://www.natlawreview.com/article/you-had-me-i-m-sorry-impact-physicians-apologies-medical-malpractice-litigation.

132 *Id.*

133 O'Reilly, *supra* note 122.

134 *Id.*

years.[135] In those jurisdictions without such laws, the average litigation time was 5.6 years.[136] A re-examination of those states with apology laws revealed that the mean litigation time was 4.4 years before apology laws were enacted and 4.1 years post the enactment date of the legislation.[137] These laws have the benefit of speeding up the litigation and this shortened period benefits both the plaintiff and the defendant since the litigation does not have to hang over their heads.[138]

IX. LEGISLATIVE RESPONSES

At the federal level, in 2005, then-Senators Hillary Clinton and Barack Obama co-sponsored the National Medical Error Disclosure and Compensation Act.[139] This proposal linked patient safety and the problems with the medical liability systems as dual struggles.[140] One of the bill's main functions was to require hospitals to reveal medical mistakes to patients while offering reasonable compensation when appropriate.[141] It then proposed improvement of the disclosure practice as a reform.[142] While Congress did not enact the measure, its introduction demonstrated the growing importance of the topic.[143] During the same term, other Senators proposed the Fair and Reliable Medical Justice Act, "which would have allocated federal funds for exploring alternatives to current litigation systems, including the creation of specialized healthcare courts."[144] While these types of remedial measures have been proposed, nothing has been implemented to date on the national level.[145]

Attorneys and physicians may remain wary of remedial measures involving the disclosure of medical errors and offering apologies, but most states have enacted laws to encourage words of sympathy between physicians and patients without the

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135 Jody A. Charnow, *Apology Laws Found to Speed up Malpractice Litigation*, RENAL & UROLOGY NEWS (May 7, 2016), https://www.renalandurologynews.com/home/conference-highlights/american-urological-association-annual-meeting/aua-2016-annual-meeting/aua-2016-misc-urinary-problems/apology-laws-found-to-speed-up-malpractice-litigation/.

136 *Id.*

137 *Id.*

138 *Id.*

139 Liu & Ho, *supra* note 118, at 142; s*ee also* National MEDiC Act, S. 1784, 109th Cong. (2005).

140 Gallagher et al., *supra* note 104, at 2715.

141 *The National Medical Error Disclosure and Compensation (MEDiC) Act*, PATIENT SAFETY NETWORK (Oct. 12, 2005), https://psnet.ahrq.gov/issue/national-medical-error-disclosure-and-compensation-medic-act.

142 Gallagher et al., *supra* note 104, at 2715.

143 *Id.*

144 Maria Pearlmutter, *Physician Apologies and General Admissions of Fault: Amending the Federal Rules of Evidence*, 72 OHIO ST. L.J. 687, 694 (2011).

145 Saitta & Hodge, *supra* note 10, at 102.

statements of condolences being misinterpreted as an admission of responsibility.[146] These laws are an effort to spread the advantages of physician apologies throughout the complete health care system.[147] After all, the basic premise of apology laws is simple: doctors can reduce their exposure to malpractice claims by offering words of sympathy and empathy.[148]

A. United States

Massachusetts was the first jurisdiction in 1986 to enact an apology law, but it was not done as the result of a medical mistake.[149] Rather, it was the byproduct of the automobile related death of the child of former State Senator William Saltontall.[150] The legislator desperately wanted to receive an apology from the driver of the offending vehicle but never obtained one.[151] He learned that the driver wanted to apologize but was afraid that his words could be used against him in court.[152] Armed with this knowledge, the Senator persuaded his colleagues to pass a law making the apologies of tortfeasors inadmissible in civil litigation.[153]

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146 *Id.* Even the American Bar Association passed a resolution that "supports enactment of state and territorial legislation that provides that all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence which relate only to the pain, suffering, or death of a person which are made by a medical provider or the staff of a medical provider to that person, that person's family, representative or friend, as the result of the unanticipated outcome of medical care, shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest for any purpose in a civil action for medical negligence." *Recommendation on the Enactment of State Apology Legislation*, AM. BAR ASS'N (Feb. 12, 2007), https://www.americanbar.org/content/dam/aba/images/medical_liability/med_mal_resolution112.pdf.

147 McMichael, *supra* note 47, at 12.

148 *Id.*

149 Zisk, *supra* note 9, at 375–76.

150 *Id.* at 376.

151 *Id.*

152 *Id.*

153 *Id.*; *see* MASS. GEN. LAWS ch. 233, § 23D (1986). That law provides: "Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action." In 2012, Massachusetts enacted a second apology law limited to health care professionals which are defined as "a physician, podiatrist, physical therapist, occupational therapist, dentist, dental hygienist, optometrist, nurse, nurse practitioner, physician assistant, chiropractor, psychologist, independent clinical social worker, speech-language pathologist, audiologist, marriage and family therapist or mental health counselor." The new law also appears to fall within the category of a full apology law since it provides that "all statements . . . expressing benevolence, regret, apology . . . mistake, error or a general sense of concern which are made by a health care provider . . . to the patient . . . which relate to the unanticipated

Since then, thirty-nine states, the District of Columbia, and Guam have passed laws addressing physician apologies or sympathetic gestures.[154] These laws now outnumber the better-known tort reforms, including noneconomic damages caps, in U.S. jurisdictions.[155] These statutes are not uniform in language or scope but can generally be divided into two camps: full and limited apology laws.[156] Full apology laws shield conversations that contain an apology as well as an admission of fault, error, mistake, and liability.[157] The jurisdictions that have full apology laws are: Arizona,[158] Colorado,[159] Connecticut,[160] Georgia,[161] and South Carolina.[162] For example, Colorado's law provides:

> In any civil action brought by an alleged victim of an unanticipated outcome of medical care, . . . any and all statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, . . . or a general sense of benevolence which are made by a health care provider or an employee of a health care provider . . . which relate to the discomfort, pain, suffering, injury, or death of the alleged victim . . . shall be inadmissible as evidence of an admission of liability.[163]

These types of all-encompassing statutes are in the minority. These statutes, however, contain strict limitations such that the apology can only be made to the patient or an immediate family member.[164]

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outcome shall be inadmissible as evidence in any judicial or administrative proceeding . . . ." MASS. GEN. LAWS ch. 233, § 79L (2012).

154 Heather Morton, *Medical Professional Apologies Statutes*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/research/financial-services-and-commerce/medical-professional-apologies-statutes.aspx (last visited Jan. 20, 2020).

155 McMichael, *supra* note 47, at 1201.

156 Davis, *supra* note 14, at 81.

157 *Id.*

158 ARIZ. REV. STAT. ANN. § 12.2605 (2005).

159 COLO. REV. STAT. § 13-25-135 (2003).

160 CONN. GEN. STAT. § 52.184d (2005).

161 GA. CODE ANN. § 24-4-416 (2013).

162 David Doyle, *Apologizing for Medical Missteps: Whether It's a Mistake for Physicians*, PHYSICIANS PRAC. (Feb. 22, 2014), https://www.physicianspractice.com/view/apologizing-medical-missteps-whether-its-mistake-physicians. South Carolina's Apology law can be found at S.C. CODE ANN. § 19-1-190 (2006).

163 COLO. REV. STAT. § 13-25-135 (2003).

164 Davis, *supra* note 14, at 87.

A partial apology law, on the other hand, is more common and only protects words of sympathy, condolences, or compassion.[165] For example, the apology law in Oregon provides:

> For the purposes of any civil action against a person licensed by the Oregon Medical Board or a health care institution…or other entity that employs a person…any expression of regret or apology made by or on behalf of the person, the institution, the facility or other entity, inducing expressions of regret or apology . . . including an expression of regret or apology that is made in writing, orally or by conduct, does not constitute an admission of liability.[166]

One of the most obvious differences in these laws pertains to the class of individuals to whom the statement must be conveyed to be protected.[167] The majority of partial apology law jurisdictions require the statement to be confined to the victim, or that person's family or representative.[168] Others are more encompassing and protect statements made to anyone related to the patient by "marriage, blood, or adoption."[169] Four states and the District of Columbia even protect statements made to friends of the aggrieved patient.[170] For instance, Idaho shields the disclosure of apologies made to the "patient or family member or friend of a patient."[171]

Some statutes place a time limit during which an apology must be made to encourage speedier communications.[172] These states include Washington and Vermont whereby a physician must notify a patient within 30 days of a medical mistake, or within 30 days of when the provider knew or should have known of the ramifications of the error.[173] If the physician follows this requirement, a statement of sympathy remains inadmissible.[174] Illinois at one time mandated an even stricter time constraint whereby an apology had to be made "within 72 hours of when the provider

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165 *Id.* at 81.

166 OR. REV. STAT. § 677.082 (2011).

167 Davis, *supra* note 14, at 86.

168 *Id.*

169 *Id.* For example, North Dakota's law defines a relative as "an individual who has a relationship to the patient by marriage, blood, or adoption" and a representative is considered "a legal guardian, attorney, person designated to make decisions on behalf of a patient under a health care directive, or any person recognized in law or custom as a patient's agent." N.D. CENT. CODE § 31-04-12 (2007).

170 Davis, *supra* note 14, at 86.

171 IDAHO CODE § 9-207 (2006).

172 Saitta & Hodge, *supra* note 10, at 103.

173 *See* WASH. REV. CODE § 5.64.010 (2006); VT. STAT. ANN. tit. 12, § 1912 (2005); *see also* Saitta & Hodge, *supra* note 10, at 103.

174 *See* WASH. REV. CODE § 5.64.010 (2006); VT. STAT. ANN. tit. 12, § 1912 (2005); *see also* Saitta & Hodge, *supra* note 10, at 103.

knew or should have known of the potential cause of such outcome" to remain inadmissible.[175]

Some second generation apology laws, such as those enacted in Massachusetts[176] and Oregon,[177] take apology laws one step further by mandating that disclosure programs be established within healthcare facilities as a condition precedent to receive immunity for apologies.[178]

The jurisdictions that do not have any form of an apology law are: Alaska, Alabama, Arkansas, Illinois, Kansas, Kentucky, Minnesota, Mississippi, Nevada, New Mexico, New York, and Rhode Island.[179]

B. Other Countries

Apology laws are not unique to the United States. For example, the constitution of Canada provides that it is the responsibility of the provinces and territories to enact laws concerning liability.[180] As of 2009, apology legislation[181] was enacted in: British Columbia, Saskatchewan, Manitoba, Ontario, and Alberta.[182] Australia and England have enacted laws protecting apologies from civil liability.[183] For example, the UK Compensation Act of 2006 provides: "An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty."[184] While this law does not define what is meant by an apology, New South

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175 735 ILL. COMP. STAT. 5/8-1901 (2005) (repealed 2013); *see also* Saitta & Hodge, *supra* note 10, at 103. The law of Illinois was subsequently declared unconstitutional. However, it does have a law that makes any payment for medical, surgical, hospital, or rehabilitation services, or the offer to provide or pay for such services, "inadmissible for purposes of showing that the caregiver made an admission of liability." *See* 735 ILL. COMP. STAT. 5/8-1901 (2013); *see also* Jennifer Stuart, *A Flaw in Apology Laws?*, SMITH AMUNDSEN (Dec. 16, 2016), https://www.salawus.com/insights-alerts-ApologyLaws.html.

176 MASS. GEN. LAWS ch. 233, § 79L (2012).

177 OR. REV. STAT. § 677.082 (2011).

178 *What "Snarky Doctors" Missed About the Vanderbilt Apology Law Study*, SORRY WORKS (Feb. 10, 2017), https://sorryworks.net/blog/1909.

179 Darryl Weiman, *Apologies May Not Be Enough*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/apologies-may-not-be-enough_b_5a23fa89e4b05072e8b56a08.

180 Noni MacDonald & Amir Attaran, Editorial, *Medical Errors, Apologies and Apology Laws*, 180 CAN. MED. ASS'N J. 11, 11 (2009).

181 Canada has nine provinces and two territories that have apology laws. Paul Thomas, *When the Doctor Says Sorry – Do We Know if Apology Laws Work?*, CMAJ BLOGS (Apr. 5, 2018), https://cmajblogs.com/when-the-doctor-says-sorry-do-we-know-if-apology-laws-work/.

182 MacDonald & Attaran, *supra* note 180, at 11.

183 Prue E. Vines, *Apologies and Civil Liability in England, Wales and Scotland: The View from Elsewhere*, 12 EDINBURGH L. REV. 200, 200 (2008), https://ssrn.com/abstract=1366505.

184 *Id.* at 202–06.

Wales, the Australian Capital Territory in Australia, and British Columbia in Canada define the term to include an admission of fault. [185]

Scotland passed the Apologies Act 2016 ("the Act") which allows a party to apologize "for an unfavorable outcome or omission without that apology being admissible in Court."[186] The law defines an apology as:

> Any statement made by or on behalf of a person which indicates that the person is sorry about, or regrets, an act, omission or outcome and includes any part of the statement which contains an undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing a recurrence.[187]

Hong Kong in 2017 became the first jurisdiction in Asia to enact an apology law.[188] That directive provides that an apology will not create an admission of fault nor will the statement be admissible as evidence to the detriment of the marker of the apology.[189]

X. CRITICS OF APOLOGY LAWS

Apology laws in the abstract make a lot of sense, and there are numerous justifications for their enactment to reduce malpractice claims. Some critics, however, retort that there is little evidence to show that apology laws have decreased the malpractice litigation rate.[190] They even maintain that the laws could have the opposite effect, or they make little difference in the number of suits.[191] For example, researchers at Vanderbilt University evaluated the claims of a malpractice carrier from 2004 through 2014,[192] which insured more than 90% of surgeons and non-surgeon doctors involved in practice with the treatment of cardiac patients.[193] They discovered that

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185 *Id.* at 206.

186 Laura Menary, *When (And Where) Is an Apology an Admission of Liability?*, CARSON MCDOWELL (Aug. 8, 2017), https://www.carson-mcdowell.com/news-and-events/insights/when-and-where-is-an-apology-an-admission-of-liability.

187 *Id.*

188 *Apology Legislation Passed in Hong Kong – What Does it Mean for You*, HERBERT, SMITH, FREEHILLS (July 19, 2017), https://hsfnotes.com/adr/2017/07/19/apology-legislation-passed-in-hong-kong-what-does-it-mean-for-you/.

189 *Id.*

190 *The Effect of "Apology Laws" on Medical Malpractice Claims*, FRONZUTO L. GRP. (June 28, 2019), https://www.fronzutolaw.com/articles/the-effect-of-apology-laws-on-medical-malpractice-claims/.

191 *Do 'Apology Laws' Work? Sorry, The Answer May Be No*, ADVISORY BD. (June 17, 2019), https://www.advisory.com/daily-briefing/2019/06/17/apology-laws.

192 Benjamin McMichael et al., *"Sorry" Is Never Enough: How State Apology Laws Fail To Reduce Medical Malpractice Liability Risk*, 71 STAN. L. REV. 341, 363 (2019).

193 *Id.*

almost two-thirds of the claims resulted in litigation, and the state apology laws failed to significantly influence whether a claim against a surgeon proceeded to trial.[194] Likewise, apology statutes did not seem to influence the average payment for claims against surgeons.[195] As for claims against non-surgeons in jurisdictions with apology laws, they were 46% more apt to end up in litigation.[196]

The researchers ascertained that apology laws increased "the average payment made to resolve a claim" against this group.[197] The takeaway from this study was that apology laws seem to increase rather than limit medical malpractice liability risks.[198] This result makes sense when one considers that an apology may alert patients to mistakes that they would have never learned about, emboldening them to institute suit rather than comprising or dropping their claims before engaging in litigation.[199] As was mentioned:

> An apology may alert the patient to malpractice she would not otherwise have discovered or embolden the patient to conclude that malpractice has occurred when she would have otherwise been unsure. . . . Even if patients cannot use the apology itself as evidence, the apology may alert patients to potential malpractice and encourage them to seek other forms of (admissible) evidence.[200]

The investigators also discovered that apology laws enlarge the number of malpractice claims by about 15% and that these statutes increase claim payouts by roughly 25%.[201] It must be noted, however, that an examination of four states who were early adopters of apology laws learned that, over time, the net effect of apology laws on the number of claims is zero or perhaps negative, which is mostly consistent with the planned effect of the laws.[202] Surprisingly, one study even found that apology laws did not dissuade the practice of defensive medicine.[203] Rather, the evidence implies that the laws increase the practice of defensive medicine with no advantage to patients.[204]

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194 *Id.* at 367, 393.

195 *Do Apology Laws Work?*, *supra* note 191.

196 *Id.*

197 *Id.*

198 *Id.*

199 McMichael et al., *supra* note 192, at 379.

200 *Do Apology Laws Work?*, *supra* note 191.

201 McMichael, *supra* note 47, at 1230–31. *But see* Liu & Ho, *supra* note 118, at 163.

202 McMichael, *supra* note 47, at 1231.

203 *Id.* at 1205.

204 *Id.* at 1260.

Some maintain that apology laws have a structural flaw that may inhibit full disclosures and apologies thereby undermining the influence of the law on malpractice litigation.[205] Disclosure laws do not mandate, and many apology laws do not safeguard, the critical information that patients seek to learn after an unexpected result. Patients look at the apology and disclosure processes as entangled, meaning that not only do they look for statements of empathy, but they also desire information concerning the character of the incident, why it occurred, and how future incidents will be averted.[206] Nevertheless, disclosure statutes mandate only a minimal declaration that an unexpected event happened, and most apology statutes are flawed, because they protect only a statement of compassion, overlooking the need to present supplementary information to patients.[207]

It is further asserted that apology laws are nothing more than tort reform in disguise.[208] It is claimed that these laws weaken the preventative effect of tort liability.[209] While they generate strategic apologies by physicians, these words of sympathy do not articulate an actual commitment to preventing future wrongdoing. Instead, they manipulate the human propensity to alleviate emotions, which consist of a variety of psychological, social, and evolutionary reasons.[210] The individuals who are harmed end up forgiving the tortfeasor and settling for a smaller portion of the actual value of their claims.[211] Physicians armed with this knowledge can foresee that they will be exposed to limited liability if they apologize, so they will have much less of an incentive to take precautions that would avert errors in the first place.[212] Therefore, the essence of an apology in this context is that it dilutes deterrence "making it better to be sorry than safe."[213]

Clifford A. Rieders, Esquire, a prominent malpractice attorney in Pennsylvania, is dubious as to the efficacy and necessity of these statutes and suggests that it is always important to look at how the apology law is drafted in a particular jurisdiction.[214] For instance, he notes that the apology statute in Pennsylvania refers to a "…gesture that

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205 Anna Mastroianni et al., *The Flaws in State 'Apology' and 'Disclosure' Laws Dilute Their Intended Impact on Malpractice Suits*, 29 HEALTH AFFS. 1611, 1614 (2010).

206 *Id.*

207 *Id.* at 1614–15.

208 Yonathan Arbel & Yotam Kaplan, *Tort Reform Through the Back Door: A Critique of Law and Apologies*, 90 S. CAL. L. REV. 1199, 1201 (2017).

209 *Id.*

210 *Id.*

211 *Id.*

212 *Id.*

213 *Id.*

214 Letter from Clifford A. Rieders, Esq., to author (Jan. 22, 2020) (on file with author).

conveys a sense of apology…."[215] Mr. Reiders then asks: "What does that mean?"[216] He responds by opining that the phrase refers to "behavior as emanating from humane impulses."[217] Thank goodness, he notes, that "no court, to my knowledge, has had to explain the meaning of that phrase."[218] It is counsel's perception that "This Act was not intended to change anything in Pennsylvania law… It was a 'feel-good' or one might say 'benevolent gesture' to the medical healthcare community. The truth is that before the Act, the literature in publications, such as *The New England Journal of Medicine,* indicated that apologies reduce the risk of a patient or family going to a lawyer and that even apologies admitting fault were more apt to reduce the likelihood of a lawsuit."[219] In his experience, Mr. Reiders "has never heard of any doctor or health care provider be any more candid with a patient, as a result of this type of statute. Doctors and hospitals remain reluctant to inform their patients or families the truth when bad or serious events occur in the health care facility."[220] In retrospect, "the law has changed nothing. What must change is the attitude of health care professionals."[221]

The research findings of the Vanderbilt study, which are cited in several articles claiming that apology laws don't work, have come under attack as "erroneous and damaging to the disclosure movement."[222] As was noted: "The whole point of apology laws is to encourage docs to apologize. However, the Vandy researchers candidly admitted they never ascertained whether apologies increased or decreased with apology laws!"[223] The website *Sorry Works!* goes on to state that the researchers at Vanderbilt took a giant step by concluding that apology laws are to blame for the increase in malpractice litigation based upon the data they studied.[224] However, those researchers made their assertions without taking into consideration other contributing influences such as newspaper reports about medical errors and activities of the trial bar.[225]

Some experts who are aware of the findings generated by the research at Vanderbilt still emphasize that apologizing to patients leads to better outcomes all

215 *Id.*

216 *Id.*

217 *Id.*

218 *Id.*

219 *Id.*

220 *Id.*

221 *Id.*

222 *The Folly of the Vanderbilt Apology Study*, SORRY WORKS!, http://sorryworkssite.bondwaresite.com/the-folly-of-the-vanderbilt-apology-study-cms-406 (last visited Jan. 23, 2020).

223 *Id.*

224 *Id.*

225 *Id.*

around.[226] It was further noted that a study published in *Health Services Research* reported that "error disclosure increases incident reports and decreases claims and costs."[227]

XI. Court Rulings Involving Apologies

While there are many documented benefits for physician apologies, the one obvious risk of this benevolent gesture is that counsel for the plaintiff will attempt to construe the words as admitting liability that the physician has botched the treatment or acknowledged negligence.[228] Defense counsel will counter that the words are mere expressions of empathy that do not contain any admission of wrongdoing.[229]

Apology laws safeguard words of sympathy by physicians, but some courts have ruled that professional negligence must still be proven and cannot be built on the simple expression "I'm sorry."[230] Public policy supports words of sympathy as being social interactions and fostering settlements.[231] As noted in *McCormick on Evidence*:

> Admissions of a party are received as substantive evidence of the facts admitted. The word 'sorry' in conjunction with other language or circumstances may constitute an admission, denoting apology. Standing alone, it is not an admission of negligence; it may mean regret, not apology.[232]

Even in the absence of a law that bars an apology from being used in court, not all utterances of sympathy or regret are equivalent to an admission of malpractice.[233] *Phinney v. Vinson* reinforces this concept when the Supreme Court of Vermont opined that a physician's alleged admissions to another doctor that he had performed an "inadequate resection" and his apology to the patient "for his failure to do so" were insufficient to raise a jury issue on the applicable standard of care, breach of that standard, and causation as elements of medical malpractice.[234]

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226 Benjamin J. McMichael & R. Lawrence Van Horn, *How to Apologize Effectively for Medical Errors*, HEALIO (May 14, 2019), https://www.healio.com/primary-care/practice-management/news/online/%7B8ed41e3b-5695-40bd-aaf3-0831ed2bcb4d%7D/how-to-apologize-effectively-for-medical-errors.

227 *Id.*

228 Jay Zitter, Annotation, *Admissibility of Evidence of Medical Defendant's Apologetic Statement or the Like as Evidence of Negligence*, 97 A.L.R. 6th 519, § 2 (2014).

229 *Id.*

230 *Id.* § 4.

231 *Id.* § 2.

232 CHARLES TILFORD MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 629 (Edward Cleary et al. eds., 2d ed. 1972).

233 Saitta & Hodge, *supra* note 10, at 109.

234 Phinney v. Vinson, 605 A.2d 849, 849–50 (Vt. 1992).

A. Cases Before the Enactment of Apology Laws

One of the earliest cases involving an extrajudicial statement by a doctor occurred in 1945.[235] In *Lashley* v. *Koerber*, the court believed that the physician's admission of fault was sufficient to create an issue for the jury in determining liability.[236] This malpractice action involved the defendant's alleged negligence in failing to take an x-ray when he failed to diagnose and treat a fractured finger on the plaintiff's hand that was crushed by a folding bed.[237] According to the testimony of the plaintiff's husband, the physician admitted "that he should have had an X-ray taken in the beginning," and "I know, it is not your fault . . . it is all my own."[238] The court noted that an extrajudicial admission of fault, "may amount to no more than an admission of bona fide mistake or misfortune and thus be insufficient to establish negligence."[239] However, under the facts of this case, a jury "could reasonably conclude that the admissions of defendant physician imported that he had not exercised that reasonable degree of skill and learning and care ordinarily exercised by other doctors of good standing practicing in the community and that as a proximate result of such negligence plaintiff suffered damage."[240]

An opposite result was reached in *Senesac* v. *Associates*.[241] This case arose in 1982 and involved an action against a gynecologist and clinic for the negligent performance of an abortion.[242] In upholding a finding in favor of the defendants, the court ruled that a statement by the gynecologist "that she 'made a mistake, that she was sorry, and that [the perforation of the uterus] had never happened before' did not establish a departure from the standard of care."[243] The court commented that a doctor's belief that she departed from her own standards of care and skill did not establish a breach of the appropriate duty normally exercised by physicians in the absence of expert medical evidence.[244] This case was important at the time because the court determined that the medical evidence itself must establish negligence instead of a physician's mere apologetic admission.[245]

A similar result was rendered ten years later when a Georgia court opined that "evidence of activity constituting a voluntary offer of assistance made on the impulse

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235 *See* Lashley v. Koerber, 156 P.2d 441, 442 (Cal. 1945).

236 *Id.* at 445.

237 *Id.* at 442.

238 *Id.* at 444.

239 *Id.* at 445.

240 *Id.*

241 *See* Senesac v. Assocs., 449 A.2d 900, 903 (Vt. 1982).

242 *Id.* at 901.

243 *Id.*

244 *Id.*

245 *Id.* at 903.

of benevolence or sympathy should be encouraged and should not be considered as an admission of liability."[246] *Deese* v. *Carroll City County Hospital* revealed that the defendant made partial payments of the plaintiff's medical expenses and lost wages.[247] The plaintiff claimed that these payments constituted an admission of liability.[248] The trial court granted the defendant's motion in limine to preclude the admissibility of this evidence.[249] Georgia has a statute that provides: "admissions or propositions made with a view to a compromise are not proper evidence."[250] The court noted that "evidence of activity constituting a voluntary offer of assistance made on the impulse of benevolence or sympathy should be encouraged and should not be considered as an admission of liability."[251] In upholding this ruling, the appellate court noted that the admissibility of evidence rests within the sound discretion of the trial court, and it was convinced that such an abuse had not been established.[252]

Alabama does not have an apology law, but it reviewed a case involving a question of an apology in *Giles* v. *Brookwood Health Services, Inc.*[253] In this litigation, the plaintiff claimed that the physician removed the patient's wrong ovary.[254] The physician was said to have told the plaintiff's husband that he was sorry for the mix-up and that he had removed the wrong body part.[255] The physician denied this statement.[256] In response to the defendant's Motion for Summary Judgment, the plaintiff asserted that the physician had apologized by noting that he was sorry and this was sufficient to meet the burden of proof.[257] The Alabama Supreme Court upheld the granting of the defendant's motion and noted that the doctor's statement of empathy did not constitute expert testimony that he injured the plaintiff by breaching the applicable standard of care.[258] The apology was nothing more than an extrajudicial statement and that a "bona fide mistake of judgment or untoward result of treatment

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246 Deese v. Carroll City Cnty. Hosp., 416 S.E.2d 127, 129 (Ga. Ct. App. 1992).

247 *Id.*

248 *Id.*

249 *Id.*

250 *Id.*; GA. CODE ANN. § 24-3-37 (2013).

251 *Deese*, 416 S.E.2d at 129.

252 *Id.*

253 Giles v. Brookwood Health Servs., Inc., 5 So. 3d 533, 537 (Ala. 2008).

254 *Id.* at 540.

255 *Id.*

256 *Id.* at 541.

257 *Id.* at 550–51.

258 *Id.* at 551.

is not alone sufficient to permit the inference of breach of duty."[259] The apology also did not contradict the doctor's testimony or that of the plaintiff's medical expert that the defendant's actions fell within the standard of care.[260] Therefore, the patient's account of the apology did not create a genuine issue of material fact that the defendant committed an error.[261]

In the Utah case of *Woods* v. *Zeluff*, a patient sued his health care providers for unsuccessful foot surgery that disabled him.[262] During a post-surgery examination, the physician stated "I don't think we should have done this surgery," "I've missed something," and "I jumped the gun."[263] Utah's Rules of Evidence use a balancing test to determine whether the unfair prejudicial potential of the evidence outweighs its probative value.[264] The court noted that the statements were not necessarily an apology, the frank admissions do have the effect of having the doctor admitting responsibility for an action, so the statements are not unfairly prejudicial.[265] The defendants argued that the doctor's statements were "words of compassion and remorse," so the evidence should be excluded.[266] The Utah Court of Appeals held that exclusion of the testimony was prejudicial to the patient.[267] Even assuming that the defendants are correct in their assertion that the physician's statement by itself is insufficient to support a finding of malpractice, the statements are nonetheless clearly probative.[268] It must be noted that this case arose before the state enacted its apology law in 2010, so one must question whether the result would be the same if the issue again surfaced in Utah.

B. Cases After the Enactment of Apology Statutes

One of the most frequently cited cases involving the admissibility of an apology is *Stewart v. Vivian*.[269] This Ohio Supreme Court decision dealt with whether a health care provider's statement of fault admitting liability based on an apology was prohibited from being introduced into evidence as the result of the state's apology law.[270] The facts reveal that the plaintiff attempted suicide and was taken to the

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259 *Id.* at 552.

260 *Id.*

261 *Id.* at 553.

262 Wood v. Zeluff, 158 P.3d 552, 553–54 (Utah Ct. App. 2007).

263 *Id.* at 554.

264 *Id.* at 555; *see* UTAH R. EVID. 402.

265 *Wood*, 158 P.3d at 554.

266 *Id.* at 555.

267 *Id.* at 556.

268 *Id.*

269 Stewart v. Vivian, 91 N.E.3d 716, 717 (Ohio 2017).

270 *Id.*

emergency room where she was subsequently transferred to the psychiatric wing.[271] The patient was to be observed every 15 minutes.[272] The next day, the woman's husband visited and found the patient unconscious as the result of hanging.[273] She was immediately transferred to the intensive care unit and placed on life support from which she could not recover.[274] Eventually, the patient died.[275]

A lawsuit was filed against the doctor who tried to bar his statement to the family that he knew the patent was going to kill herself, and that the woman told the doctor that she would keep trying until she succeeded.[276] Another family member noted, however, that he recalled the doctor saying that he did not know how the incident happened and that it was a terrible situation.[277]

The court determined that the two versions of events were impossible to reconcile and that the physician's statements were an attempt at commiseration and inadmissible under the state's apology law.[278] The jury found in favor of the defendant and the decision was appealed.[279] At the next court level, the court opined that the state's apology law provides that any statement of sympathy, condolence or a general sense of benevolence made by a health care provider dealing with an unanticipated outcome is inadmissible as an admission of liability.[280] The General Assembly did not define the term "apology" in the statute, but it means "a statement that expresses a feeling of regret for an unanticipated outcome," and "may include an acknowledgment that the patient's medical care fell below the standard of care."[281] The plaintiff maintains that only pure expressions of an apology are protected, but the legislature did not qualify the term apology or place any limitation on its meaning.[282] Therefore, the statute is not ambiguous and the judgment of the lower court was affirmed.[283]

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271 *Id.* at 718.

272 *Id.*

273 *Id.*

274 *Id.*

275 *Id.*

276 *Id.* at 719.

277 *Id.*

278 *Id.*

279 *Id.*

280 *Id.* at 720.

281 *Id.* at 721; s*ee* OHIO REV. CODE ANN. § 2317.43(A) (West 2019).

282 *Stewart*, 91 N.E.3d at 721.

283 *Id.* at 722.

The Massachusetts court in *Rodriquez* v. *Leffers* considered the admissibility of an apology.[284] The facts show that a patient sued her physician for negligently performing a biopsy.[285] Subsequently, the defendant stated "I'm sorry. I cut the nerve."[286] The patient wished to use this utterance as evidence of negligence.[287] The defense sought to preclude the words based on Massachusetts' apology law, that "benevolent statements, writing or gestures are inadmissible as evidence of liability in all civil actions."[288] Pursuant to a Motion in Limine, the trial judge allowed the apology into evidence, but that decision was reversed on appeal because the expression had "no probative value as an admission of responsibility or liability."[289]

Ronan v. Sanford Health involved a malpractice claim in South Dakota.[290] The plaintiff was an anesthesiologist who started to feel ill and went to the emergency room.[291] He was admitted and given antibiotics. Ronan was also referred to an infectious disease specialist who told him that he might have cocci, which is a fungal disease.[292] Despite his failure to improve, the plaintiff was discharged. During the next few months, he saw several physicians, but no one ordered tests to see if he had cocci.[293] His condition worsened and a lung biopsy and blood test were eventually ordered and confirmed the suspected diagnosis.[294] The plaintiff went on to develop severe complications from his improper treatment and sued for medical negligence.[295] A jury found for the defendant, and it was alleged that the court should have allowed statements by the defendant's employees into evidence under that state's apology law.[296]

The facts show that the plaintiffs met with two employees of the hospital who said that "I am so sorry we failed you" and "we let you down."[297] The court ruled that these

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284 Motion in Limine of Def. James Leffers, M.D., to Preclude Any Evidence of a Ref. to Statements of Benevolence or Apology by Dr. Leffers [hereinafter Motion in Limine] at 1, Rodriques v. Leffers, No. B01-01034 (Mass. Supp. 2004), 2004 WL 5825606.

285 *Id.*

286 *Id.*

287 *Id.*

288 *Id.* at 2.

289 Denton v. Park Hotel Inc., 180 N.E.2d 70 (Mass. 1962).

290 Ronan v. Sanford Health, 809 N.W.2d 834 (S.D. 2012).

291 *Id.* at 835.

292 *Id.*

293 *Id.* at 836.

294 *Id.*

295 *Id.*

296 *Id.*

297 *Id.*

statements were not admissible under that state's apology law, which prohibits apologies to be admitted as evidence of negligence at trial.[298] On appeal, the plaintiff maintained that these statements were admissible as declarations against interests for purposes of impeachment.[299] The statute does state that "[n]othing . . . prohibits the admission, for the purpose of impeachment, of any statement constituting an admission against interest of the health care provider making such statement."[300]

The appellate court disagreed and noted that this rule only governs the substantive admissibility as hearsay, and the statute imposes an additional restriction that apology statements may only be used for impeachment purposes if there is a prior inconsistent statement.[301] The witnesses had not been called at the time that these statements were introduced as part of the plaintiff's case so there was nothing to impeach.[302] Rather, the statements were being used as substantive evidence in violation of the apology law.[303]

An apology law will not help a physician who admits liability in a state that only protects words of sympathy.[304] In *Strout v. Central Maine Medical Center*, the plaintiff went to the emergency room because of abdominal pain.[305] A CAT-Scan revealed a mass in his liver which the doctor thought was cancerous.[306] The patient was told that the cancer would be inoperable and that he had less than one year to live.[307] A few weeks later, a biopsy revealed that the patient did not have cancer but suffered from lymphoma which had a five-year survival rate.[308] The patient complained to the president of the hospital who authored a letter attempting to explain what had happened but noted that the treating physician should have waited until the biopsy results had been returned before saying anything.[309] The president then told the patient that the balance of his bill would be marked satisfied.[310]

A suit was filed again, and the physician and the hospital moved to exclude the letter, maintaining that it was an expression of sympathy, which is inadmissible under

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298 *Id.* at 837.

299 *Id.* at 838.

300 *Id.*

301 *Id.*

302 *Id.*

303 *Id.*

304 Strout v. Cent. Me. Med. Ctr., 94 A.3d 786 (Me. 2014).

305 *Id.* at 787.

306 *Id.*

307 *Id.* at 788.

308 *Id.*

309 *Id.*

310 *Id.*

the Maine apology law.[311] The trial judge allowed the statement to be read into evidence, and the jury returned with a $200,000 verdict which was appealed.[312] This ruling was upheld by the Supreme Court of Maine, which noted that one must make a distinction between expressions of apology as opposed to a letter of admission.[313] Nothing in the statute indicates that statements of fault are inadmissible even when accompanied by an expression of sympathy or benevolence.[314] Therefore, the ruling by the trial judge was proper. The statement was an admission of fault.[315]

XII. Conclusion

Patients can experience bad outcomes regardless of the carefulness and skill of their physicians. After all, the practice of medicine is not a guarantee of a good result and complications arise in the absence of negligence. However, more patients die each year as a result of medical errors than those caused by motor vehicle accidents, breast cancer or AIDS.

A doctor's natural inclination is to offer words of comfort to a patient and to apologize when something goes wrong, but they hesitate because it may lead to a lawsuit or their words may be used against them in court. To eliminate these concerns, states have enacted laws to prohibit words of empathy, condolence or apology from being used against physicians in court. These statutes are premised upon the belief that by permitting medical professionals to express words of apology, it can reduce malpractice claims.

Apology programs have gained momentum since 2001 as a way to minimize lawsuits.[316] Thirty-nine states, the District of Columbia, and Guam have enacted legislation dealing with physician apologies or sympathetic gestures. The laws outnumber the better-known tort reforms including noneconomic damages caps in attractiveness among jurisdictions. These statutes are not uniform in language or scope but will bar words of sympathy from being admitted into evidence at trial. Some even protect admissions of fault. Trial lawyer associations are opposed to these legislative initiatives and maintain that they are efforts at tort reform in disguise.

Apologies, however, can provide the aggrieved party with a sense of satisfaction and closure, resulting in faster settlements and lower demands for damages. Words of empathy are also important because they provide emotional and psychological advantages to both the offender and victim. When patients were asked why they filed suit against a physician more than 90% asserted that a claim was pursued to prevent the mistake from occurring to another patient, to obtain an explanation as to what went wrong, or for the health care provider to recognize what they had done.[317] More

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311 *Id.*

312 *Id.* at 789.

313 *Id.* at 789–90.

314 *Id.* at 789.

315 *Id.* at 790.

316 *See* Davis, *supra* note 14, at 90.

317 Dujardin, *supra* note 53, at 2.

importantly, 40% asserted that if they had been provided with an explanation and apology, they would not have pursued litigation.[318]

Cracks, however, have appeared in the justifications for apology laws with critics claiming there is little evidence to show that these laws are effective.[319] They even maintain that the legislation could have the opposite effect by increasing the number of claims.[320] Whether these statutes have reduced malpractice claims and assuaged patient anger is subject to debate given the recent articles that have pointed out alleged flaws with these legislative initiatives.

Proponents of apologies counter that the studies questioning the effectiveness of apologies are "erroneous and damaging to the disclosure movement."[321] They point out that apology laws are designed to encourage doctors to talk to patents and apologize when there has been an adverse outcome. It is noted that the Vanderbilt study, which has gained so much attention, never ascertained whether apologies increased or decreased following the enactment of apology laws. That research was also confined to one insurance company and limited to physicians who treated people with cardiac conditions. It did not take into account factors such as publicity in newspapers about medical errors, the efforts of pressure groups to minimize the effectiveness of the laws, changing attitudes of society, and the growing litigious nature of society.

Philosophically, apology laws make a lot of sense, and there are numerous justifications for their enactment. However, conflicting claims and statistics are being advanced by both the proponents and critics concerning the usefulness of these laws. Does it matter, however, which position is correct? Patients deserve to be fully informed as to why their medical treatment produced an unexpected result. This is also both ethically and professionally required.[322] Patients also appreciate and deserve physician words of empathy and sympathy. Hiding medical errors through a veil of secrecy is inappropriate and does not work.

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318 *Id.*

319 *See The Effect of "Apology Laws" on Medical Malpractice Claims*, *supra* note 190.

320 *See Do Apology Laws Work?*, *supra* note 191.

321 *See The Folly of the Vanderbilt Apology Study*, *supra* note 222.

322 *See* Michael Alberstein et. al., *Apologies in the Healthcare System: From Clinical Medicine to Public Health*, 74 L. & CONTEMP. PROBS. 151, 154 (2011).