“Sorry” Is Never Enough: How State Apology Laws Fail to Reduce Medical Malpractice Liability Risk [71 Stan. L. Rev. 341 (2019)]

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Apologies have become a standard way for health-care providers to restore a plaintiff’s dignity and heal humiliations caused by error or negligence. Apologies have also been thought to encourage resolution of matters without the need for litigation. To encourage and facilitate that process, jurisdictions such as Ontario have enacted legislation that protects individuals who apologize from having their apology used as evidence of wrongdoing. New research raises questions over the effectiveness of apology laws — at least insofar as they may reduce lawsuits.

Two early studies on apology laws published in the *Journal of Empirical Legal Studies* found mixed results. Some evidence suggested that apology laws work as intended, while other evidence suggested they might actually increase the risk of medical malpractice lawsuits. The evidence gathered in these early studies were derived from publicly available datasets that excluded certain claims, like those with no payment. Building on this study, the authors of a *Stanford Law Review* article, published in February 2019, have collected evidence from a dataset of malpractice claims obtained directly from a large national American malpractice insurer, which includes information that publicly available datasets do not have.

What the authors of this new study found was surprising: apology laws have been unsuccessful in reducing medical malpractice liability. Apology laws were found to have increased the probability of a lawsuit and the average payment made to resolve the claim, though the number of demand letters not leading to a lawsuit did decrease.

The likelihood of a surgeon facing a lawsuit was slightly different — the study found that the probability of a lawsuit was unchanged for surgeons and that apologies did not have a substantial effect on the average payment made to resolve a claim.

These results are consistent with prior theories that apology laws increase a patient’s awareness of malpractice. What the findings demonstrate, however, is that the apology itself does not counteract the increased awareness, and so the number of lawsuits increase as awareness increases.

The authors of the article theorized that awareness might also explain why the numbers for surgeons did not change. Surgical errors are generally more obvious or disclosed more regularly, so the promotion of apologies did not change overall patient awareness of practitioner error.

Overall, the evidence suggests that apology laws do not work to decrease the malpractice liability risk for physicians. The study did not look at the effect of apologies from hospitals or other practitioners. Prior studies have shown that hospital apologies and disclosure programs *do* reduce both the frequency and size of medical malpractice claims. For example, the University of Michigan Health System previously found that apologies led to a 33 per cent decrease in demands for compensation and a 60 per cent decrease in compensation paid overall.

Ultimately, lawsuits are one of many concerns associated with apologies in the medical context. While this new study may cast doubt on the extent to which an apology can reduce law suits, apologies will still likely remain necessary, as they do still seem to achieve their most important function: doing right by the patient.

As it turns out, the difference is in the training. Physicians in the apology and disclosure programs go through extensive training on when to apologize and what to say when apologizing. For example, the apology program in place in several Massachusetts hospitals took six to nine months to implement and involved training hospital staff members through presentations, posters, intranet pages, badge cards and a 24/7 pager number for clinicians to ask questions. Furthermore, physicians have access to coaches that can advise them on effective apology methods.

The issue with apology laws is that no guidance is offered to physicians on when to apologize and what to say. Physicians are left guessing at what is protected by the law and left to reconcile on their own with whether what they say falls within the ambit of the law.

The authors of the *Stanford Law Review* study blame the poor statutory design, stating that apology laws were “probably the result of legislative compromise, and do not protect the type of information that may be necessary for apologies to effectively dissuade patients from pursuing legal action.” If only statements of sympathy are protected by law, physicians may not be able to express remorse or explain their medical error. Plaintiffs may perceive the apology as insincere and in turn it may provoke rather than assuage anger.

The authors conclude that the defects in statutory design, coupled with physicians who are confused about when and how to apologize, are what led to the increase of malpractice liability risk instead of decrease as the laws intended. Moving forward, the authors offer a few recommendations: repeal the apology laws or at least rehabilitate them while at the same time implementing the more effective hospital-specific apology and disclosure programs, which includes extensive training on the effective utilization of physician apologies in a hospital setting.

For more information, please refer to the full article: “Sorry” Is Never Enough: How State Apology Laws Fail to Reduce Medical Malpractice Liability Risk [71 Stan. L. Rev. 341 (2019)].

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