When sorry seems to be the hardest word

By Donald Dinnie

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When things go wrong, appropriate communication by medical practitioners with a patient and their relatives is a skill perfected over time. When, how and in what manner to communicate sympathy, commiseration, condolence, compassion or an apology are not considerations which should be lightly dismissed.

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While a general message of condolence or sympathy is unlikely to be problematic such a message which includes an apology for example may hold negative consequences for the practitioner involved.

Apology statutes

Many jurisdictions in the United States of America appreciate the dilemma practitioners face in wanting to communicate compassionately with patients and their families when there is an unanticipated outcome of medical care and in doing so not exposing themselves to a claim. Or putting them in breach of their professional indemnity policies which forbid in general terms the making of any admissions without the consent of the insurer.

Those jurisdictions have apology statutes which provide the practitioner with protection.

For example, in Ohio the statute says that: ‘’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, sympathy, commiseration, condolence, compassion, or a general sense of benevolence that are made by a health care provider …the alleged victim, a relative, or a representative of the alleged victim, and that relates to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care are inadmissible as evidence as an admission of liability or as evidence of an admission against interest".

There are basically two types of apology statutes – those, in a minority of jurisdictions, which expressly provide protection for admissions of fault, and those that are silent on the issue such as the Ohio statute.

In a recent judgment of the Supreme Court of Ohio that court had to determine whether expressions of regret and admissions of fault made by the attending practitioner to the victim's family were properly excluded from evidence in medical malpractice action brought against the practitioner for wrongful death.

At the time there were differing views amongst two lower courts in other matters, the one holding that admissions of fault were not protected from discovery by the apology statute.

The Webster's definition of apology includes ''an admission to another of a wrong or discourtesy done him accompanied by an expression of regret". While the Oxford English Dictionary defines apology to include ''regretful acknowledgement of fault or failure'').

Because the definition included an ''admission …of a wrong'' the court held that admissions of fault are part and parcel of an apology. And so, the admission was protected from disclosure at trial.

South Africa has no apology statute or the equivalent in its rules of evidence.

Which is why practitioners do need to be careful about what and how they convey expressions of compassion and commiseration following an unexpected medical outcome.

That doesn't mean one should not act compassionately or communicate as needed with a patient or relatives.

An apology as an admission

Bear in mind, however, that a well-meant expression of regret in respect of the medical outcome may be interpreted as a regret for negligent care or an admission thereof. And that an apology in particular may be problematical because it involves not only regret but an admission.

Those expressions may be explainable in evidence but not after much anxiety and cost.

An admission may not only expose the practitioner to liability in a claim but also give cause to the professional indemnity insurer to deny coverage because of breach of the no admissions obligations placed on the professional in terms of the medical malpractice policy.

It is desirable to communicate as much as possible to a patient and their family when there is an unexpected outcome of medical care. Practitioners, however, do need to be circumspect about what, how and when anything is communicated. The danger lies in thinking that the outcome is without fault on the part of the medical team, so anything may be said with impunity. The patient or family may hold a different view, even if they are wrong about that.

Or they may come to hold a different view because of what is communicated to them in what may be seen as an admission of fault. It is preferable to notify the circumstances to the medical negligence insurer and obtain their consent and guidance, and of legal counsel appointed by those insurers before communicating substantively.

Mediation

When mediating a medical malpractice dispute a full and frank exchange of views is very useful in obtaining a resolution.

The rules of mediation usually provide that what is said in the course of mediation cannot be used in subsequent litigation or arbitration if the mediation is unsuccessful. Although of course what is said cannot be unheard it cannot be used in evidence in those proceedings.

So, it is useful to include in a medical negligence mediation a wording along the lines of the United States' apology statutes preventing apologies, which may be all the patient seeks or which goes a considerable way to achieving a swift and cost-effective resolution, from being used in evidence.

That also allows for practitioners to be able to express sympathy and commiseration, contextualised in the mediation process, without concern that it may be misinterpreted as an admission. Or even if misinterpreted used against the practitioner in subsequent proceedings.

When protected under those rules from disclosure sorry need not be the hardest word.

ABOUT THE AUTHOR

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