

A Flaw in Apology Laws?

Amundsen Davis Health Care Alert

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“Apology laws” prevent plaintiffs from using a caregiver’s apology or statement of sympathy as evidence of the caregiver’s liability in lawsuit. While Illinois does not currently have an “apology law” on the books, it does have a statute that makes any provision of or payment for medical, surgical, hospital, or rehabilitation services for a person, or the offer to provide or pay for such services, inadmissible for purposes of showing that the caregiver made an admission of liability. (735 ILCS 5/8-1901.)

Past studies have reported that physician disclosure programs can encourage physician-patient communication, reduce malpractice suit payments, and reduce the number of malpractice suits filed by patients. A new study from Vanderbilt University adds to this discussion by challenging those conclusions, and reports instead that they found that apology laws do not effectively limit medical malpractice liability risk.

The Vanderbilt study, titled “Sorry is Never Enough: The Effect of State Apology Laws on Medical Malpractice Liability Risk,” utilized data from a single type of specialty physician. The specialty itself was not identified for “confidentiality reasons,” but the study notes that the data it used included approximately 90% of all physicians practicing within that specialty over an 8-year period. The investigators looked at all claims filed against those physicians, regardless of whether the claims resulted in a formal lawsuit being paid or in a payment to the claimant.

The Vanderbilt study concluded that for physicians who do not regularly perform surgery, apology laws actually increase the probability of facing a lawsuit, and increase the average payment made to resolve a claim. For surgeons, the study found that apology laws did not have a significant effect on the probability of facing a lawsuit or the average payment made to resolve the claim. The study acknowledged that its findings were not consistent with other studies that touted the benefits of physician disclosure programs, but nevertheless concluded that for apology laws, the fostering of increased communication does not necessarily translate into a reduction in medical malpractice liability.

The takeaway from the study is that apology laws, and the mere ability to apologize, are not enough to reduce the risk of a malpractice suit. The apology laws themselves are often insufficient, permitting expressions of sympathy but not a full explanation of the medical error. Instead, the benefit may come from physicians being adequately and properly trained on when to apologize, and

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what to say when apologizing, along with the early settlement offers that are frequently made as part of a formal physician disclosure program.

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