

The Risk Manager

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Apologies, Expressions of Sympathy, Benevolent Gestures

The changes in Missouri's law relating to professional liability that took effect at the end of August of 2005 were intended to address a number of issues concerning claims. The limit on non-economic damages, new rules on where claims may be filed, and the other revisions adopted in 2005 were primarily designed to fix provisions in the old law that were seen as problematic or that had been rendered ineffective. One provision however -- Section 538.229 -- was entirely new. This is what it says:

Certain statements, writings, and benevolent gestures inadmissible, when – definitions.

538.229.1 The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. However, nothing in the section shall prohibit admission of a statement of fault.

2. For the purposes of this section, the following terms mean:

- (1) "Benevolent gestures", actions which convey a sense of compassion or commiseration emanating from human impulses;*
- (2) "Family", the spouse, parent, grandparent, stepmother, stepfather, child, grandchild, brother, sister, half brother, half sister, adopted children of a parent, or spouse's parents of an injured party.*

It is our view that this section is very important, and the purpose of this edition of The Risk Manager is to make certain Galen's insureds are aware that fear of weakening a law case no longer entirely blocks your ability to respond naturally when a patient encounters a bad result.

The so-called "tort reform" provisions adopted in 2005 have not yet been tested in court, so it is possible that part or all of the new law may be struck down by the courts for one reason or

another. Furthermore, the meaning of phrases such as "benevolent gestures" and "sense of compassion" has not been spelled out in actual cases. For these reasons it is too early to make definitive statements about what is or is not protected.

That said, in our opinion it would be unwise (and unnatural) to stifle expressions of sympathy until the courts have issued their final word on this law. It is a documented fact that a significant number of claims made against doctors have their roots in a plaintiff's feeling that a doctor was not sympathetic. Such feelings are of course compounded when there is a death or serious injury after medical care has been rendered, or when treatments fail. Add to this sensitive emotional situation the high expectations we have of medicine today, and you can see that doctors and other health care providers are frequently going to come face to face with a sad situation, disappointed relatives, and the risk of a claim.

If the new law means anything, it must mean that a doctor whose patient has died is allowed to say "I am very sorry that your relative did not pull through. If there is anything I can do to help please let me know." Saying something like this is normal and kind. It puts the doctor and the survivors on the same side. Probably most doctors already speak up. Not expressing sympathy is apt to strike a relative as cold and defensive. The idea that there is something to hide might arise. What our new law adds to the mix is that you do not need to be so very careful in expressing yourself. An authentic expression of sympathy will not be admissible in a civil action, even if it is not worded perfectly.

We have seen that whenever things go wrong the chances of a lawsuit can be reduced by a candid admission accompanied by an explanation of the issue, an expression of sympathy, and a sensible plan for fixing the problem. In the ideal world the bad result is one that the patient has been

informed about before the treatment started, so when death is not an issue the physician is able to say “I am sorry to report that such and such, which we talked about before we started this treatment, has occurred. Now we have a choice of doing this or that. What do you think? Do you have any questions?”

The idea is to remind and assure the patient that you are on his or her side as you fight the health problem together. Expressions of sympathy may be appropriate. Avoiding bad outcomes is the goal, but physicians are human and bad outcomes occur. As is often said in other contexts, attempts to cover something up usually make things worse. Concealment can trigger hostility and suspicion in patients and, if there is a trial, devious behavior - when revealed - will damage the defendant’s standing with a jury.

The new law does not, however, go so far as to protect against the admissibility of a statement of fault. That is to say, if you admit there was an error the admission could be used in a lawsuit.

So there are still good reasons not to rush to the extreme and confess fault if someone has been injured during a medical procedure, or has failed to respond to treatment. Most people who suffer a disappointing medical outcome are not victims of negligence or of a failure to be treated in accordance with the standard of care for their ailment. Linking a bad outcome with bad medicine is a habit of the plaintiff’s bar. If you have done your best for a patient, and the result is not good, you do not need to apologize and you should not. An apology is different from an expression of sympathy. An apology may be construed as an admission of fault, and such an admission can still go into evidence.

The protection extended by Missouri’s new law to expressions of sympathy and benevolence is limited to the natural recipients of such expressions – the patient and members of the patient’s family, as defined in the statute. This, in an era when HIPAA has made us all aware of the need to respect confidentiality, should not be a hard limit to observe, but it is worth noting that an expression of sympathy made to a third party like a reporter would be admissible in a civil action and could be twisted into sounding like an admission of liability..

Summary

The basic lesson here is that in most circumstances you need not and should not allow the possibility of a lawsuit to affect your natural behavior. The new law has removed or reduced the risk that saying you are sorry about an unfortunate outcome will be turned into an admission and used against you.

The best part of this new provision in Missouri’s law is that it encourages something that is normal and important - the human bond between doctor and patient - and goes in the direction of removing this connection from the world of calculation and litigation.

Go ahead and shed a tear if you feel sad, or let someone cry on your shoulder. Say you are sorry things did not work out, or go as well as hoped. Don’t let the fear of litigation turn you into a cold fish, if only because cold fish are more likely to be resented by patients and find themselves in a legal dispute that is really grounded in human emotions.

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