

Navigating the Benevolent Gesture Liability Act

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Imagine that you are driving to the hospital to visit your mother, who is recovering from a routine appendectomy, when you receive a call that she has passed away. You arrive at the hospital, then wind through the unfamiliar corridors until you reach her room. Several nurses and doctors are standing at the nearby nurses' station. You make eye contact, they look away, and you walk alone into the room. Added to your grief is an anger toward those people who knew what brought you to their hospital but failed to offer any sympathy to you.

Now, imagine that you are a nurse or doctor, and your patient unexpectedly passed away after a routine appendectomy. You called your patient's family and are standing at the nearby nurses' station when you see them arrive. You assume that an investigation will take place, but you have no idea who will be chosen to speak with the family, or what explanation could even be given. Not knowing what else to do, you look away to avoid eye contact as the family member walks into your patient's room.

Unfortunately, this scenario plays itself out regularly in Pennsylvania hospitals and nursing homes. Health care providers are caught between their desire to empathize with a patient after a bad outcome and their concern about saying something that may expose them to a malpractice claim. Enter the Benevolent Gesture Medical Professional Liability Act, which went into effect Dec. 24, 2013, making Pennsylvania the 37th jurisdiction to enact legislation precluding benevolent gestures from admissibility in medical malpractice actions. The

act, also known as the apology rule, applies to communications made in any medical negligence action commenced after Dec. 24, 2013.

Umbrella of Protection

The act is meant to provide an umbrella of protection to health care providers, encouraging them to offer condolences to a patient or bereaved family after a bad medical outcome with the confidence that their words will not be used against them in court.

The theory behind the act is that if a health care provider feels protected, he or she will freely extend the benevolent gesture, which the provider wants to give and the patient wants to receive. The person receiving the benevolent gesture may still be in shock over the bad medical outcome, but that person will not be fueled by the added sting that may come from feeling ignored or mistreated. The legislature expressed its hope that apologies would diffuse anger, resulting in fewer lawsuits or reduced settlement values.

Originally proposed to protect all communications after a bad outcome, the act resulted in a compromised bill that failed to offer protections to statements of fault or wrongdoing. As a result, while "I'm sorry" statements will not be admitted in a medical malpractice proceeding, "I was wrong" statements are still fair game. Like the many snowstorms of recent months, the act has gouged potholes in the road of patient communications, forcing health care providers

to proceed with caution as they learn which specific types of communications fall under its protection.

Vague Language and Broad Definitions

To begin with, the language of the act is not precise about who may extend and who may receive the benevolent gesture. The act purports to offer protection to benevolent gestures made by a nursing home, a health care provider or their agents. While it is clear that an apology from a surgeon is protected, it is not clear whether apologies would be protected if they are made by a surgical resident, a surgical technician or even an office manager of the surgical practice.

The act is similarly vague in defining who may receive the benevolent gesture. It is easy to grasp that the benevolent gesture may be extended to a patient or the patient's family member. However, the act also holds that benevolent gestures may be extended to anyone who has a "family-type relationship" with the patient. It is impossible for a health care provider to know with certainty if a person has such a relationship with a patient. Providers may think that they are offering condolences to a person with a family-type relationship, but may discover after a lawsuit is initiated that the patient was not particularly close to that person, exposing that provider to having the privilege challenged at trial.

The act creates another pothole in the broad definition of a benevolent gesture. The benevolent gesture extends beyond verbal communications, and seems to include actions like sending flowers, attending a funeral service or writing a note of sympathy.

In addition to protecting apologies, the act purportedly protects "explanations" made in the context of a benevolent gesture. However, there is a very thin line between an explanation and an admission of wrongdoing. If a health care provider wants to participate in a communication that would receive the

protections of the act, then the best route would be to avoid explanations altogether, opting instead for simple expressions of sympathy.

Admissibility

Providers must realize that when disclosure meetings take place with patients or their families after a bad outcome, expressions of condolences offered during that communication are protected, but statements that identify a medical error are not. Moreover, the act does not protect excited utterances. Health care providers must be aware that outbursts made in the presence of a patient or his or her family members would likely be admissible.

Benevolent gestures will be admissible if they are made after an action is commenced, leaving providers with another pothole to navigate. Courts may determine that an action commenced when a family reached out to settle a claim before initiating suit. In that event, a subsequent benevolent gesture would not be protected under the act.

Additionally, the act does not specify where the benevolent gesture may be extended, so if a health care provider has a chance meeting with a patient in a local grocery store, then it appears that its protections would apply to that conversation.

In order to enjoy the act's protections, providers should be encouraged to try to prepare what they will say in advance, before entering into a communication with a patient or a member of the patient's family. Importantly, providers should not go it alone when extending a benevolent gesture. Having a colleague there for support will help to keep a provider focused during the communication, and will also help down the road, in the event that the content of the communication is called into question. Above all things, the gesture must be sincere. Providers should be encouraged to extend a simple but heartfelt

benevolent gesture, then simply listen to the concerns raised by the patient or the patient's family member.

Inconclusive Data

Data is inconclusive as to whether jurisdictions with apology rules have experienced a decline in medical malpractice actions and settlement values. These acts are relatively new, starting in Massachusetts in 1996 and slowly gaining momentum throughout the United States. Many jurisdictions, such as Massachusetts and Michigan, protect statements of fault, which may encourage providers to communicate more freely with patients in the context of an apology. However, while Michigan has reported a decrease in medical malpractice claims since enacting its version of the apology rule in 2001, Michigan's mandatory mediation program also impacts the rate at which medical negligence claims are pursued after a bad outcome.

Given the many shortcomings of the Benevolent Gesture Act, along with the uncertain data regarding the positive impact apologies may have in avoiding malpractice claims, health care providers may find it tempting to avoid benevolent gestures altogether. However, the safe haven created by the act gives health care providers the important opportunity to empathize with patients after a bad outcome. When they see a patient or family member in distress, instead of looking away for fear of not knowing what to do, providers should feel confident in their ability to approach that patient and simply say, "I'm sorry."

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