Apologize...or Not?

By Clark R. Hudson

Not infrequently doctors are faced with situations where a patient has experienced an adverse outcome or event. How should the doctor approach this situation? Is saying “I’m sorry” the equivalent of saying “I’m at fault” in the State of California? The simple answer is no.

There is a growing trend across the country that recognizes an apology or statement of sympathy are important acts that can diffuse rather than fuel potential litigation. California takes a consistent position by refusing to allow evidence of an apology to be admissible.

California Evidence Code §1160 specifically addresses the admissibility of expressions of sympathy or benevolence. This code section states:

“(a) 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 involved in an accident 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. A statement of fault, however, which is part of, or in addition to, any of the above shall not be inadmissible pursuant to this section.

(b) For purposes of this section:

   (1) “Accident” means an occurrence resulting in injury or death to one or more persons which is not the result of willful action by a party.

   (2) “Benevolent gestures” means actions which convey a sense of compassion or commiseration emanating from humane impulses.

   (3) “Family” means the spouse, parent, grandparent, stepmother, stepfather, child, grandchild, brother, sister, half brother, half sister, adopted children of parent, or spouse’s parents of an injured party. (added by Stats.2000, c. 195 (A.B.2804), § 1.)”

A physician should be wary to the terms that are used when sharing the condolences with the patient, or their family. Care should be taken to avoid any expression that would imply an admission of fault.

The following is an actual example from a San Diego Superior Court case:

Question: Do you recall telling [Mr. Smith] “I’m sorry about your pain. It’s my fault.”?

Answer: I did that. I don’t remember doing it, but I know I told him several times that.

In this example the doctor had indicated to the patient that he was both sorry for the patient’s
postoperative pain, and that it was his fault. It was obviously a poor choice of words. While the California Evidence Code will exclude expressions of sympathy, statements or admissions of fault are always admissible. Of note, even though the trial court allowed the above-referenced statement to be presented to the jury, the jury nevertheless determined, through a unanimous vote, that the physician was actually apologizing for the outcome, and not indicating he was negligent in the patient’s care.

There is obviously no “sure fire” way to prevent patients from filing lawsuits following an adverse outcome. However, physicians in California should understand expressions of sympathy are not admissible evidence. As with any case, there is always a possibility the patient could misinterpret the expression of sympathy as one of guilt. However, there is a greater probability the apology will be well received, and litigation avoided.

1 Harvard Developing Uniform Apology Policy for Boston Hospitals, July 26, 2005, Insurance Journal

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