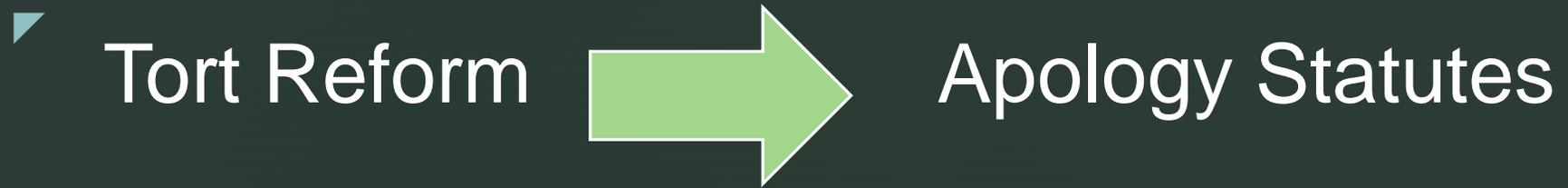


# Should I or Shouldn't I Say *"I'm Sorry"* in Pennsylvania?



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*Starting in the late 1990s, so-called “Apology Statutes” began to be enacted throughout the country*

# What are Apology Statutes?

- Approximately 38 states + DC have enacted these statutes
- Each state has its own version of the statute
- In states with apology statutes, they typically apply to medical negligence cases only
  - However, 6 states have expanded the concept to other torts (CA, FL, MA, TX, TN, WA)
- In general, the statutes provide legal protection to allow for a medical provider to express sympathy, apology, compassion, condolence or benevolence

# Goals of Apology Statutes

- A reduction in liability exposure, thereby leading to a decrease in the frequency of liability claims and the severity of claims
- An increase in resident/family satisfaction
- A decrease in complaints to the Department of Health
- Overall boost of employee morale
- Higher nursing home ratings

## ▶ Mandatory Notifications to Patients and Apology Laws

- In some states, including Pennsylvania, Florida, Nevada, New Jersey and Vermont there are also mandatory notification requirements that impose a duty on providers to inform patients of adverse medical outcomes.
- Generally, these notices can not be used as an admission of liability in a later legal action.

# Two Schools of Thought

## The (Slight) Majority View (at least 17 states + DC)

- All portions of an apology made by a provider are inadmissible, **including admissions of fault**

## The Pennsylvania Way (PA + at least 15 other states)

- Only expressions of apology are protected.
- **Admissions of liability or fault are still admissible**, even if contained within an apology.

# Bipartisan Agreement in Pennsylvania

- Pennsylvania adopted its version of an "apology statute" in 2013 in a bipartisan effort:
  - The Pennsylvania Benevolent Gesture Medical Professional Liability Act, 35 P.S. § 10228.1 *et seq.*
- It passed the PA Senate unanimously, 50-0.
- It proceeded the PA House where it passed 202-0.
- Signed by Gov. Tom Corbett (R) in October 2013

# Pennsylvania Benevolent Gesture Medical Professional Liability Act

Plaintiffs' attorneys were glad that admissions of guilt and factual statements continued to be admissible



Health care providers and their insurers/attorneys were glad that providers were able to offer up humanity at times

On the day the bill was signed by Governor Corbett, the Pennsylvania Medical Society, which lobbies on behalf of PA Physicians, issued a press release entitled:

*“Lawyers and Doctors Come Together And Agree It’s OK to Say I’m Sorry”*

## Impactful Tort Reform or Feel-Good Measure?

- Physicians News Digest at the time called the law a “giant leap forward” in the “historically aggressive malpractice climate” of Pennsylvania.
  - “As physicians, it is part of our job – part of our moral and ethical responsibility – to respond to patients and families when there are less than favorable outcomes. Medicine is not an exact science, and outcomes may be unpredictable. Benevolent gestures are always appropriate and physicians should not have to fear giving them.”
  - Dr. C. Richard Schott  
2012-13 President of the Pennsylvania Medical Society

## Impactful Tort Reform or Feel-Good Measure?

- On the contrary, Cliff Rieders, Esq., a plaintiffs' attorney based in Williamsport, criticizes the language of the PA law as “a ‘feel-good’ or one might say ‘benevolent gesture’ to the medical healthcare community.”
  - Rieders, opining in 2020, suggests the law “has changed nothing” in the years since enactment, and that providers already had incentives to apologize to patients and their families (even when admitting fault), because it results in fewer lawsuits.

# ▶ The Realities of Apologies

- Some recent studies show a lack of impact on liability in some specialties and care environments
- Increase in settlement/verdicts?
- Incentive to file a lawsuit?
- No impact either way?
- Is it worth the risk?

# ▶ Pennsylvania Benevolent Gesture Medical Professional Liability Act

## *Part 1: What is a benevolent gesture?*

- “**benevolent gesture**” is defined as “Any action, conduct, statement or gesture that conveys a sense of apology, condolence, explanation, compassion or commiseration **emanating from humane impulses.**” 35 P.S. § 10228.2
- This vague language has not yet been interpreted by a Pennsylvania Appellate Court.

# ▶ Pennsylvania Benevolent Gesture Medical Professional Liability Act

## *Part 2: Are there timing concerns?*

- YES!
- The benevolent gesture must be made **before** the commencement of a lawsuit, administrative action, mediation, or arbitration. 35 P.S. § 10228.3(a)
- Therefore, the benevolent gesture should be made as close in time to the triggering event as possible, prior to the commencement of an action
- Note that the statute specifically includes **administrative actions** as an event that will cause the Provider to be denied the benefit of the “apology statute”

# ▶ Pennsylvania Benevolent Gesture Medical Professional Liability Act

## *Part 3: Who does the statute apply to?*

- Provider side
  - Covers all health care providers, and specifically includes assisted living residences. 35 P.S. § 10228.3(a)(1)-(2)
  - Also includes any “officer, employee or agent” of any healthcare provider or assisted living residence. 35 P.S. § 10228.3(a)(1)-(2)

# ▶ Pennsylvania Benevolent Gesture Medical Professional Liability Act

*Part 3: Who does the statute apply to? (continued)*

- Patient side
  - Covers benevolent gestures made to:
    - The patient or resident themselves
    - The patient or resident's **relative or representative**
      - Relative - broadly construed - spouses, parents, stepparents, grandparents, children, stepchildren, grandchildren, siblings, half-siblings, spouse's parents or **“any person who has a family-type relationship with a patient.”**  
35 P.S. § 10228.2
      - Representative – legal guardian, attorney, power of attorney, health care representative, advanced directive surrogate, etc. 35 P.S. § 10228.2

# ▶ Pennsylvania Benevolent Gesture Medical Professional Liability Act

## *Part 4: What does the statute do?*

35 P.S. § 10228.2(b) - Admissibility.--

- (1) Except as set forth in paragraph (2), any benevolent gesture described in subsection (a) shall be inadmissible as evidence of liability.
  
- (2) Notwithstanding any other provision of this act relating to benevolent gestures, paragraph (1) **shall not apply** to a communication, including an excited utterance, which also includes a statement or statements of negligence or fault pertaining to an accident or event.

# ▶ Pennsylvania Benevolent Gesture Medical Professional Liability Act

*Part 4: What does the statute do? (part 2)*

## ADMISSIBLE:

- Admissions of liability or fault

## NOT ADMISSIBLE

- 1) Any action, conduct, statement or gesture that 2) conveys a sense of apology, condolence, explanation, compassion or commiseration 3) which emanates from humane impulses, and 4) which regards the patient or resident's discomfort, pain, suffering, injury or death, regardless of the cause, 5) resulting from any treatment, consultation, care or service **or omission** of treatment, consultation, care or service

## ▶ Pennsylvania Rule of Evidence 409

- “Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.” Pa.R.E. 409
- In 2015, a Comment was added to Pa.R.E. 409 which refers readers to the Benevolent Gesture Medical Professional Liability Act
- The PA statute, by allowing providers to offer a simple apology at an early stage, is a logical extension of the Rule 409 evidentiary concept

# Applying the Law

## Delaware: A Case Study



- To date, there are NO appellate cases which apply the Pennsylvania Benevolent Gesture Medical Professional Liability Act
- Delaware adopted its apology statute in 2006 (seven years before Pennsylvania) but Delaware Courts did not apply the law until 2015, in Honey v. Bayhealth (Del. Super. Ct. 2015)

## Applying the Law Delaware: A Case Study

- Like Pennsylvania, Delaware's apology statute protects apologies, but does not extend the protection to admissions of fault or liability
  - The Delaware court refers to this as the "apology-admission dichotomy"
- In Honey, the Delaware court attempted to distinguish between apologies and admissions of fault, an exercise it called:

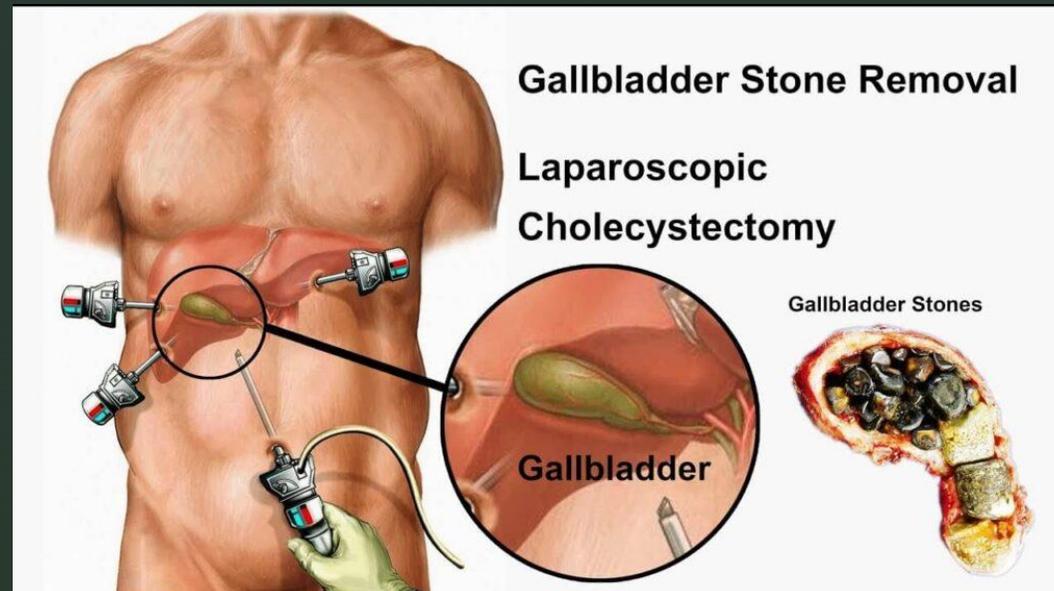
**"highly factually based and determined on a case-by-case basis"**

# Applying the Law

## Delaware: A Case Study

Honey v. Bayhealth (Del. Super. Ct. 2015):

- Defendant-doctor filed *motion in limine* to, in part, preclude post-operative conversations of apology made to the patient and patient's family members after performing a laparoscopic cholecystectomy



# Applying the Law

## Delaware: A Case Study

- The Delaware Superior Court parsed the statements, **GRANTED** the doctor's *motion in limine* in part, and determined the following:

### Inadmissible against the Doctor

- “I am so sorry, would you please forgive me...?”
- I am so sorry for what I have done and, believe me, I will be here by her side to take her back to where she was before.”

### Admissible against the Doctor

- The doctor's admission that the surgical cut he made was a “miscalculation.”
- The doctor's statement that he “made a mistake.”

## ▶ Stumbling Blocks involved with Saying “I’m Sorry”

- Apologizing before investigation or review of care is pursued
- Location and ability to reach out to family members, next of kin, POA
- Availability of physicians involved in care
- Time Sensitivity?



# How to Prepare for Post-Adverse Event Communication

## Communication and Relationships Prior to Adverse Events

- Provider/Entity should prepare for post-adverse event communications in advance of any adverse events
- Encourage nurturing relationships between providers and patients which will create a trusting environment for patients and their families
- Involve every member of the treatment team, including providers and administration

## Communication and Relationships Prior to Adverse Events

- Five-star culture from the moment the patients and their family members walk through your doors!
- This includes respectful interactions between staff, vendors and management
- Be mindful of body language, gestures, eye contact, tone of voice

## Communication and Relationships: It's Not Always Easy!

- Stressful environment
- Sick and ailing patients/residents
- Constantly being watched by patients/residents and their families
- Dealing with all types of personalities

# Are You Aware of What Your Staff Will Say?

Oh he was fired last week. Don't worry. This won't happen again.

I was told I am not allowed to tell you "sorry."

We are always short-staffed! If we had enough staff, this never would have happened.

It wasn't me. It was probably the other nurse on duty. She is a trouble maker.

Don't ask me. I just work here.

## ▶ How do you apologize and not live to regret it?

- Not every apology is admissible as proof of negligence, even in the absence of a statute that precludes its use as evidence at trial.
- “One can be sorry or apologize for an event without meaning to say one was at fault.”
  - *Schaaf v. Kaufman*, 850 A.2d 655, 664, Pa. Super. Ct., 2004
    - Pre-apology law in PA

# Apology: An Expression of Empathy

- Apologies:
  - Acts of kindness, humility and generosity
  - Should be authentic and sincere
  - Should not blame or make excuses
  - Should be focused on the other person and their disappointment

## POST EVENT DISCUSSION

### Apology or Admission?

- After dropping patient--“I’m sorry your mother is in pain.”
- Medication error--“I am sorry your father had a reaction to the medication.”
- “I don’t think we should have given your mother a shower after she fell and was crying in pain.”
- “I made a mistake, I am sorry, this has never happened before.”
- “We are so sorry this happened. Mr. Smith has a tendency of aggression towards staff but we never expected him to become violent with other residents.”

## What to Say--

- Communicate with the appropriate person as soon as possible.
- Explain what happened.
- Be as factual as possible.
- Explain what you are doing about the situation, or what investigation is underway.
- Express sympathy for the unanticipated event.

# Whatever You Do...

## **DO NOT JUMP TO ANY CONCLUSION**

- You are not likely to know the cause of a particular event immediately.
- It is not appropriate to admit fault or negligence when notifying the appropriate party of the event.

## Takeaways

- A statement of fault can be hidden within a statement of broader contrition. The statement of fault or liability is admissible in Pennsylvania.
- Sometimes, aggrieved parties are simply looking for an apology, explanation, or acknowledgement by the provider and a benevolent gesture can prevent litigation.
- However, benevolent gesture communications should be brief, and should be witnessed.
- “I’m sorry” is not the same as “I was wrong”.
- Courts will **meticulously parse** the statement(s) to determine admissible versus inadmissible portions.



Questions?



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Roseann concentrates her civil litigation practice in the defense of medical malpractice claims, long term care, insurance casualty and construction liability claims as well as insurance coverage and licensing issues.

Roseann has presented multiple Continuing Medical Education courses and seminars to healthcare providers on issues related to litigation including but not limited to: documentation, depositions, “never events”, wounds, data breaches, work place violence, and apologies. Roseann has also been an instructor of a trial advocacy course at Dickinson Law School.

Roseann was a member of the Editorial Board for the ALM publication, Medical Malpractice Law and Strategy; she has served as a member of the Board of Directors for St. Catherine LaBoure Medical Clinic, a non profit organization that provided healthcare for the uninsured. Roseann is a member of many professional organizations such as PDI, RIMS, ASHRM, PLDF.



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