

III APPLYING THE RESTORATIVE JUSTICE MODEL TO MEDICAL MALPRACTICE

By Christopher B. McNeil

Introduction and Premises: The Apology and Medical Malpractice

Consider the apology: what an amazingly simple yet complex linguistic convention, particularly in the context of the practice of medicine. Through the words "I'm sorry," a message is conveyed that can strengthen bonds of trust, can heal psychic wounds (and perhaps help heal physical wounds as well), or jeopardize a practitioner's license. The apology poses real risks to its owner – the risk that its offer (and its implicit request for reconciliation) will be rejected and then used against its owner, perhaps in the context of a lawsuit based on a claim of medical malpractice. Those risks are well-known, to the doctor tempted to express regret, to the lawyer giving advice to the doctor, to the putative victim (and the victim's legal counsel), and to the judges and juries appointed to determine whether there's been a breach of duty warranting the imposition of damages.

Given its complexity and its capacity to both do good and wreck havoc, it is probably not surprising that the apology has been given substantial attention in a host of academic and professional venues. In the context of the practice of medicine, it has been thoroughly studied, by risk managers, by judicial interest groups, by legislators, and by the trial bar, to name but a few stakeholders having an interest in its use and abuse. Notably, within the past twenty years there has been a highly focused, well-informed debate about the efficacy of apologies in the context of the practice of medicine. Doctors, after all, are human and with their humanity comes the innate ability to make mistakes. Those mistakes result in the full spectrum of adverse consequences, and as a society we're used to having access to systems that will help restore us if we've been injured as the result of someone else's mistake.

Author's Preview

Author's Preview

2

In other contexts, the apology is a natural and sometimes essential facet of that restoration process; yet in medicine (and in litigation relating to the practice of medicine) the apology vexes us. Consider the case of Patient #1: the patient's family physician determined that the appropriate response to the patient's difficult pregnancy was a dilation and curettage.¹ Costs of the procedure would be covered by insurance only if the patient secured a second opinion, so Patient #1 visited with Dr. A. The patient went to Dr. A's office, told the receptionist she was there for a second opinion, and this fact was duly noted in two places on the patient's chart. That fact, however, was missed by Dr. A, who proceeded to not only examine Patient #1 but to perform the D & C. Afterwards, Patient #1 let it be known that she had not wanted Dr. A to do anything other than render an opinion, and in an instant the two became adversaries.

In a letter to the family physician, Dr. A effectively pleaded guilty to negligence, writing: "I do hope that you will pardon my 'goof'. I only wish [Patient #1] at the time I was doing the procedure, had mentioned to me more clearly why she was sent to the office. If she did, it fell on deaf ears."² Now as apologies go, this one was a bit tepid. Seeking pardon for a goof seems well within reason, but following that with a partial indictment of the patient, suggesting she was at least partially at fault for not making her intentions more clear, might well have left a sour taste in the mouth. The jury, indeed, awarded Patient #1 \$5,000 in actual damages and \$25,000 in punitive damages, a result that was sustained on appeal.³ Nevertheless, the apology was consistent with moral norms, which is to say it seems like it was the right thing to do. But is that how we regard an apology in this kind of case?

Perhaps there is something unique about apologies in the context of the practice of medicine that warrants a more focused

1 *Tisdale v. Pruitt, Jr. M.D.*, 394 S.E.2d 857 (S.C. Ct. App. 1990) (cited in Barry R. Furrow et al., *HEALTH LAW* 404 (5th ed.2004)).

2 *Id.* at 406.

3 *Id.* at 404.

study. If the apology has a legitimate role in healing a victim of medical negligence, shouldn't there be some well-reasoned way for the negligent medical provider to say "I'm sorry" so that both the provider and the patient benefit from the apology? As it turns out, state legislators have in fact recognized the role of the apology in the context of medical malpractice. Over the past two decades several states have enacted legislation that offers a "safe harbor" for medical providers who express regret after committing a negligent act. This legislation bears some scrutiny, however, and may be the source of some unintended negative consequences for both patient and physician. Indeed, one of the premises of this article is that in several states, legislation purporting to protect the apology process may well be working against both the best interests of the parties to such negligence and the interests of the public as a whole.

3

With more than twenty years of experience working with safe harbor statutes, there is now a substantial body of evidence addressing the efficacy of such laws. Recent studies, including substantial empirical analyses, give reason to question safe harbor statutes and other controls over the process of apologies in the context of medical negligence. At the same time, increased awareness of and empirical support for the use of restorative justice tools suggest there is perhaps a better approach than safe harbor laws; that perhaps in contrast to safe harbor laws, restorative justice can in some cases provide an effective structure in which the apology may be more effectively incorporated, leading to better results for both the medical provider and the victim.

This article proposes that restorative justice structures offer a meaningful alternative to traditional adversarial proceedings in which medical malpractice is the central cause of legal action. It proposes that traditional adversarial proceedings depend on denials by the injurer, denials that are both inappropriate and counterproductive but that are seemingly inescapable in traditional medical malpractice litigation. The article then reviews current applications of restorative justice both within and outside of criminal litigation, drawing from those applications links to the medical malpractice litigation structure. Drawing from this review, the article then proposes that restorative justice structures that fa-

Facilitate appropriate apologies offer real benefits in the context of medical malpractice actions.

The Role of the Apology in Medical Malpractice Actions

Medical malpractice is a creature of state law, evolving through both case-driven common law and state statutory enactments. Proof of malpractice generally requires that a putative victim establish three things: that the medical provider was obliged to practice in accordance with a standard of care for the profession; that the provider failed to exercise the applicable degree of care; and that as a proximate result of such failure the victim suffered a compensable injury.⁴ For example, one of the benchmarks of negligence is failing to conform to the applicable "standard of care" for a given medical procedure. One standard of care in surgical operations is that the surgeon account for all instruments present in the operating room, noting the number going in and the number going out. Thus, the surgeon who performs a resection of an abdominal aortic aneurysm and inadvertently leaves a five-inch stainless steel hemostat in the area of the patient's pelvis can be said to have failed to exercise the applicable degree of care by failing to notice that one instrument was present at the start of the operation and was not accounted for at the operation's end.⁵

The negligence, however, may be attributed to several actors, including the surgeon (for failing to reconcile the instrument count), the nursing staff (if the surgeon delegated the counting process to the nursing staff), the hospital (if it has been negligent in training those working in the operating room), or any combination of these actors. A preliminary question then is whether the negligence has been correctly attributed to the right bad actor. If we limit our inquiry to those cases involving only one possible negligent actor (for example, the case of Dr. A and the second opinion that became a D & C), then the question can be better focused: is there a role for an apology?

4 See, e.g., *Phinney v. Vinson*, 605 A.2d 849, 849 (Vt. 1992).

5 See, e.g., *Williams v. Gamble*, 912 So.2d 1053 (Miss. Ct. App. 2005).

A fairly compelling case can be made, it seems, for the proposition that medical malpractice actions can, under some circumstances, benefit from a structure that encourages the negligent actor's apology. One view supporting this proposition is founded on the notion that if one person injures another, the wrongdoer has a moral as well as a legal obligation to admit the wrongdoing and take responsibility for the misconduct. In his article "The Immorality of Denial," Professor Jonathan Cohen considers denials that, in the context of litigation, constitute a "conscious disavowal of an allegation."⁶ Professor Cohen focuses on this kind of "external denial," where "the injurer is either aware, or if he bothered to investigate would become aware, of having committed the injury, but nevertheless asserts his innocence."⁷ He distinguishes two categories of cases: one, where the injurer correctly knows he or she is at fault; and two, where he or she is unsure of the source or degree of fault (as where there may be contributing negligence by the victim or third parties).

5

Referring to the actor who knows the actions cause injury, Professor Cohen proposes that the injurer "should take responsibility for the harmful act and its consequences of his own initiative."⁸ This should include an apology and a discussion with the victim as to what further remedial steps might be appropriate. Notably, Professor Cohen suggests that the injurer should have a much greater role in fashioning a remedy than currently is the case:

The ordinary, one-size-fits-all legal remedy of monetary compensation cannot be presumed. Ideally, the injurer should propose a variety of remedial options to the injured party. . . . The ethical response involves a much more active role for the injurer in

6 Jonathan R. Cohen, *The Immorality of Denial*, 79 Tul. L. Rev. 903, 910 (2005).

7 *Id.* at 912.

8 *Id.* at 920.

constructing a remedial response than is common. When a judge or jury makes an award, the injurer typically plays no role in fashioning it. In contrast, when the injurer seeks to take responsibility of his own initiative, he must think about what he has done and how to respond to it.⁹

6

Actively taking responsibility for the harm done, the injurer under this approach has a greater stake in both the process and the outcome. The apology is a key feature of this approach, but if invoked in the common litigation structure – where advocacy equals adversarial techniques that depend heavily on the denial of all allegations – the apology may skew the results sufficiently against the injurer as to render the approach unattractive at best. As such, the apology is discouraged by the doctor's risk manager. Nevertheless, when the injurer fails to take responsibility, when the doctor who leaves the sponge or scalpel behind follows the advice of the risk manager or legal counsel and falsely denies the allegations, there are attendant and adverse consequences, including "guilt, shame, diminished self-esteem, negative social feedback, and narcissism."¹⁰ Denial in this context is a "form of lying,"¹¹ notwithstanding that it is inspired by the advice of counsel. While we as a society may have come to accept such lies, that acceptance comes at a cost. Litigation and its adversarial structure do not insulate the injurer from these psychic risks. True, some injurers may elevate money over morals and feel quite comfortable denying the injured party redress. The same is true with criminal offenders who bear no sense of remorse or obligation to their victims. Nevertheless, there may be good reason to consider shifting at least some medical malpractice claims towards a structure that permits, or at least does

9 *Id.* at 921.

10 Cohen, *supra* note 6 at 934.

11 *Id.* at 943.

not inhibit, the injurer from owning up to the injury. As will be discussed later, restorative justice techniques may prove to be especially useful in some of these cases, most notably where liability is clear and where an apology may be elevated among all of the injured party's goals.

Safe Harbor Statutes in the Context of Medical Malpractice Actions

There are at least four reasons for offering an apology: to salvage or restore a damaged relationship, to express regret and remorse in order to diminish pain and suffering, to escape punishment, and to relieve a guilty conscience.¹² The premise that the apology has a vital role in the resolution of medical malpractice actions has not been lost on key stakeholders, each of whom may have their own reasons for either offering or accepting an apology. But the apology itself can take several forms: One form, expressing remorse, indicates regret for one's own action; while another form, expressing sympathy, avoids one's own complicity in the event and instead expresses regret for another's misfortune.¹³ The driver who has just run her car into the back of the car ahead of her will likely be cautioned by her insurance company that it is acceptable to express concern for the other driver but at the same time refrain from expressing remorse for having followed too closely. The insurer's admonition comes from experience: drivers at the scene of an accident which they have caused may well tend to follow a moral, rather than a legal, code of conduct, one that militates in favor of expressing remorse and not just showing a neighborly concern for the other driver.

In the context of medical malpractice, the role of apology receives special attention. Consider the checklist of actions a

12 Peter H. Rehm & Denise R. Beatty, *Legal Consequences of Apologizing*, 1966 J. Disp. Resol. 115, 115, citing Aaron Lazare, *Go Ahead, Say You're Sorry*, Psychology Today, Jan/Feb 1995 at 45.

13 *Id.* at 117.

medical provider is directed to consider, this by the Harvard Risk Management Foundation.¹⁴ In the event of an "unexpected outcome," the medical provider is advised to attend to the patient's medical needs, talk to the patient or family, confer with other providers, contact the risk manager, talk to the patient or family again, and "[i]f appropriate, acknowledge and apologize for the patient's distress[, but] do not accept blame or assign blame to others."¹⁵ While the provider is encouraged to "accept responsibility for follow-up of serious complaints," there is no similar direction calling for the provider to accept responsibility for injuring the patient.¹⁶ It thus stands to reason that over time the law has come to treat different forms of apologies in different ways.

Broadly stated, apologies representing the admission of fault are admissible as evidence in civil litigation, to prove liability.¹⁷ Some noteworthy exceptions to this broad rule include a restriction against using, in some jurisdictions, apologies that are uttered in the course of mediation or settlement, or in the course of making an offer to pay for medical or similar expenses, or in the course of taking remedial measures subsequent to the injury.¹⁸ These and other similar rules are evidentiary; rules that guide a judge in deciding what types of information will be presented during the trial. These rules evolve over time, on a state-by-state basis, and generally reflect legislative or judicial expectations about what may fairly be introduced to juries in the course of a trial.

14 <http://www.rm.f.harvard.edu/files/documents/AECHKLST.pdf> (last visited May 16, 2006).

15 *Id.*

16 *Id.*

17 See Fed. R. Evid. 801(d)(2) (admission by a party opponent is not hearsay).

18 See Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. Cin. L. Rev. 819, 824-27 (2002), citing Fed. R. Evid. 501 (witness testimonial privileges are determined by state, and not federal, law), Fed. R. Evid. 408 (statements made in compromise negotiations), Fed. R. Evid. 407 (subsequent remedial measures), Fed. R. Evid. 409 (payment of medical and similar expenses).

A more specific provision affecting the admissibility of apologies has evolved, however, reportedly in response to a legislator's frustration at the need to be on guard against admissions of liability in negligence lawsuits:

In 1986, Massachusetts became the first state to exclude expressions of sympathy and benevolence after accidents from admissibility to prove liability. Massachusetts General Laws ch. 233, section 23D ("Admissibility of Benevolent Statements, Writings or Gestures Related to Accident Victims") provides, **"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 such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action."** The law's genesis is poignant. As Lee Taft describes: "In the 1970s, a Massachusetts legislator's daughter was killed while riding her bicycle. The driver who struck her never apologized. Her father, a state senator, was angry that the driver had not expressed contrition. He was told that the driver dared not risk apologizing, because it could have constituted an admission in the litigation surrounding the girl's death. Upon his retirement, the senator and his successor presented the legislature with a bill designed to create a 'safe harbor' for would-be apologizers."¹⁹

Left uncertain with this legislation, however, was whether the safe harbor was limited to expressions of regret and sympathy, or whether it would also bar expressions of remorse and respon-

19 Cohen, *supra* note 18, at 827, quoting Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 Yale L.J. 1135, 1151 (2000).

sibility.²⁰ For example, would the statement be kept out during the trial if the driver said "I'm sorry I hit your daughter", thereby expressing fault? Or would such a statement be admissible, and would the safe harbor be limited to "I'm sorry for the loss of your daughter"?

Apologies that Admit Fault vs. Partial Apologies that Express Sympathy

When it addressed the same topic in 1999, the Texas Legislature expressly *excluded from the safe harbor* any "excited utterance . . . which also includes a statement or statements concerning negligence or culpable conduct" pertaining to the accident, thereby leaving open the possibility that the injurer's apology would be admissible (if it included an expression admitting fault).²¹ Later, California passed legislation virtually identical to that in Texas,²² so that in Texas and in California, if the injurer says "I'm sorry that you are hurt," the statement would be excluded as within the scope of the safe harbor, while the statement "I'm sorry that I hurt you" would not be within the safe harbor and would thus be admissible.²³

At least two states, Connecticut and Hawaii, took a different approach in establishing safe harbors, by expressly restricting the use of apologies even if offered for the purpose of proving liability.²⁴ The Connecticut legislation, limited to apologies made after an accident, shields the apology against use in trial "to establish culpability or state of mind".²⁵ Hawaii's legislation is not

20 Cohen, *supra* note 18, at 828.

21 *Id.*, citing Texas Civil Practice & Remedies Code section 18.061.

22 *Id.*, at 829, citing Cal. Evid. Code section 1160 (LEXIS through 2001 Sess.).

23 *Id.* at 829-30.

24 *Id.* at 831-33, citing 2001 Bill Text CT S.B. 577 (version March 7, 2001), available at <http://www.lexis.com> and S.B. 1477, 21st Leg. (Haw. 2001) (version Jan. 6, 2001) available at <http://www.lexis.com>.

25 *Id.* at 831, citing 2001 Bill Text CT S.B. 577 (version March 7, 2001), available at <http://www.lexis.com>.

limited to accidents, and indeed may shield apologies even for intentional injuries (but only in civil cases).²⁶ Through it, courts would exclude testimony relating the injurer's apology if the testimony is offered to prove the injurer's liability, even if the apology includes an admission of fault.²⁷

This state of evidentiary law thus suggests a studied approach to apologies is in order, whenever malpractice claims arise. If fault is clear and the injurer wishes to make a clean breast of the matter, he or she will apologize, regardless of the legal consequences. In all other cases, however, the injurer will be restrained by risk managers and lawyers, and will be told to consider offering, at most, a partial apology, at least in states other than those having legislation like that found in Hawaii. The partial apology will express sympathy or condolences, but will not admit responsibility.²⁸ One legal analyst explained it this way:

[S]ome legal commentators suggest that defendants might "safely" offer apologies that are incomplete[,] apologies that express sympathy, but do not admit fault or responsibility for the incident. . . . Relying primarily on anecdotes, commentators assert that even these partial apologies can avoid lawsuits and facilitate settlement. While the intuition is that such apologies will not be as effective as more complete apologies that acknowledge responsibility, partial apologies are thought by some to be better than failing to apologize at all. Some attorneys offer such expressions of sympathy, without admitting fault, in the belief that it is the right thing to do and that it helps to settle cases more quickly and favorably.²⁹

26 *Id.* at 832-33, citing S.B. 1477, 21st Leg. (Haw. 2001) (version Jan. 6, 2001) available at <http://www.lexis.com>

27 *Id.*

28 See Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, Mich. L. Rev. 460, 468 (2003).

29 *Id.* at 469 (internal footnotes omitted).

The assertion that partial apologies are better than nothing deserves additional attention, because it seems to have been implicitly accepted, at least in those states that shield from use at trial the injurer's expression of sympathy – the apology that falls short of admitting responsibility. In her study of the subject, Professor Jennifer Robbennolt, J.D., Ph.D., tested the assumptions that support this assertion.³⁰ In two studies conducted in 2002, Professor Robbennolt had participants visit a website and read a set of facts in which they were to assume the role of an injured person and evaluate settlement offers from the other party. They were asked not only to discuss whether they would accept the settlement, but also to discuss the sufficiency of the apology. The first study compared partial apologies (offering sympathy but not admitting responsibility) and full apologies (offering both sympathy and acknowledgement of responsibility), with no apologies at all. This study tested whether the presence of an apology would influence settlement decision-making:

Where no apology was offered, 52% of respondents indicated that they would definitely or probably accept the offer, while 43% would definitely or probably reject the offer and 5% were unsure. Where a partial apology was offered, only 35% of the respondents were inclined to accept the offer, 25% were inclined to reject it, and 40% indicated they were unsure. In contrast, when a full apology was offered, 73% of respondents were inclined to accept the offer, with only 13-14% each inclined to reject it or remaining unsure.³¹

The results thus suggest the injurer who offers a full apology obtains a substantial benefit in terms of settlement, over the injurer who offers a partial apology or no apology at all. Further, Professor Robbennolt found that victims were more willing to

³⁰ *Id.*

³¹ *Id.* at 485-86.

forgive the injurer who offered a full apology, and expected that less damages would have to be paid in those cases, when compared with either the partial apologizer or the injurer who offered no apology.³² Also, victims expressed greater sympathy and less anger at the full apologizer, and regarded the injurer as experiencing more regret, as being more moral, and as being more likely to be careful in the future, than the non-apologizer or the partial apologizer.³³

In a second study that followed many of the same protocols as the first, Professor Robbennolt found that not only are there times when a partial apology is no better than offering no apology at all (and was less effective than the offer of a full apology), there are times when the partial apology was worse than offering no apology at all.³⁴ Professor Robbennolt found that in cases where the injury is severe or where evidence of the injurer's responsibility is strong, if presented with a partial apology – where the offender refuses to take responsibility for the injury – the settlement offer was less likely to be seen as sufficient; and the offender's careless behavior would be seen as more likely to persist.³⁵ These results attenuated in those cases where the injury was relatively minor or the question of liability less clearly resolved: in those cases, a partial apology was generally more effective than no apology at all, but still less effective than a full apology.³⁶

If a partial apology suffers from the weaknesses revealed in Professor Robbennolt work, what then is the utility of safe harbor statutes? As Professor Robbennolt observed: "The data reported here provide no support for the intuition that evidentiary protection for apologies will affect the ways in which apologies are perceived. . . . Across the two studies, the different evidentiary

32 *Id.* at 488.

33 *Id.* at 487.

34 *Id.* at 497.

35 *Id.* at 497-98.

36 *Id.* at 499.

rules did not produce significant differences in settlement rates or in participants' perception of the negotiation situation of the other party."³⁷ Professor Robbennolt proposed that this may be attributable to "a psychological heuristic known as the fundamental attribution error, or correspondence bias. As a general matter, observers have a tendency to attribute people's attitudes and behavior to dispositional factors rather than situational factors. Thus, in understanding the behavior of another person, we tend to explain their behavior with reference to their character more than to their circumstances."³⁸ If this is true, then indeed the evidentiary safe harbors relied upon by states other than Hawaii may, as Professor Robbennolt observes, "be protecting the wrong apologetic expressions."³⁹

The Utility of Restorative Justice Structures in Medical Malpractice Actions

Consider then the case of Dr. A: through his negligent review of the patient's records, he performs a D & C, even though all the patient wanted was a second opinion. Bereft of a process by which he could safely apologize and deal directly with the aggrieved patient, Dr. A writes what amounts to a confession of negligence, addressing it to the patient's primary care provider (and in the process attempts, in part, to suggest the patient was herself somewhat responsible for the error). The adversarial process offers little help here: in the absence of statutory protections like the one found in Hawaii, his out of court statement can be used as evidence, as a statement against his interest. Now this may be wholly appropriate: Dr. A may indeed be willing to accept responsibility for his action, and have no regrets about having admitted so plainly his "goof". But even in those instances (rare though they may be) where the provider agrees to confess fault, the results are limited to remedies traditionally available in

37 *Id.* at 502.

38 *Id.*

39 *Id.* at 505.

our adversarial form of litigation, i.e., they're limited to monetary compensation and punitive damages.

The adversarial process is not, however, the only model available to us. In her recent article *Law as a Healing Profession: The 'Comprehensive Law Movement'*,⁴⁰ Professor Susan Daicoff explores "therapeutic" alternatives to the adversarial litigation model. Taken as a whole, these alternatives reexamine the purposes and goals of conflict resolution models whose common ground was a recognition of the "law's potential as an agent of positive interpersonal and individual change" that "seeks to bring about a positive result (such as healing, wholeness, harmony or optimal human functioning) as part of the resolution of legal matters."⁴¹ The innovation here is substantial as well as procedural in nature, taking into account "factors beyond strict legal rights and duties" including "needs, resources, goals, morals, values, beliefs, psychological matters, personal well-being, human development and growth, interpersonal relations, and community well-being."⁴²

Certainly, as the disposition of Dr. A's case proved, there was little concern shown for interests beyond those of the injured patient: nothing suggests that the community was better off for Dr. A having to pay damages, nor that the patient was better off for having received the awarded compensation. One can readily imagine that the lawsuit, if it followed the normal path, was marked by litigation-driven denials, adversarial examinations, and conflict-driven settlement efforts, designed not to produce a healthy accord among stakeholders but instead to resolve a specific claim for damages. As Prof. Daicoff observes, however, there are alternatives to the litigation model, in which a more diverse body of disciplines have "begun to merge, integrate, coalesce, or link, based on similarities in their overall purposes and goals."⁴³ This

40 Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement,"* 6 Pepp. Disp. Resol. L.J. 1 (2006).

41 *Id.* at 4.

42 *Id.*, citing Jean Hellwege, "Comprehensive Law" Makes the Case for a Kinder, Gentler Law Practice, *Trial*, Apr. 2003, at 12-13.

43 *Id.* at 3.

coalescence towards what she refers to as "vectors" – i.e., the "forward movement of the disciplines into the future and their convergence toward common goals" includes the restorative justice movement.⁴⁴

Through restorative justice, stakeholders – most commonly in the criminal context – are brought together with the intention of addressing a broad range of concerns, concerns well beyond the interests of the victim and the perpetrator. Restorative justice "seeks to restore the relationship between the criminal offender and his or her community and seeks to restore harmony."⁴⁵ Widely used in Australia, New Zealand, Canada and the United Kingdom, the process brings together representatives of the community as well as peers of the perpetrator, and is "designed to produce 'therapeutic shame,' which facilitates responsibility-taking, accountability, and personal growth and development of the offender. It emphasizes restitution and relationships between the offender, victim, and community instead of a top-down, hierarchical system focused on imposing punishment."⁴⁶ As Prof. Daicoff reports (quoting from the website of The Center for Restorative Justice & Peacemaking at the University of Minnesota School of Social Work):

Through restorative justice, victims, communities, and offenders are placed in active roles to work together to . . . empower victims in their search for closure; impress upon offenders the real human impact of their behavior; [and] promote restitution to victims and communities. Dialogue and negotiation are central to restorative justice, and problem solving for the future is seen as more important than simply establishing blame for past behavior. Balance is sought between the legitimate needs of the victim, the commu-

44 *Id.*

45 *Id.* at 30.

46 *Id.* at 31.

nity, and the offender that enhances community protection, competency development in the offender, and direct accountability of the offender to the victim and victimized community.⁴⁷

Consider again the case of Dr. A: is there any reason to believe that by paying \$25,000 (after denying liability) he is any closer to a healed relationship with Patient #1? Is there any hope that he is less of a threat to the community (if indeed he was a threat to begin with)? Is the medical community any better off, after seeing how Dr. A's (presumably) well-meaning apology was used against him? Restorative justice, if applied in this context, could significantly alter both the goals of conflict resolution and the process by which resolution is obtained. Notably, it could establish a structure that focuses on a meaningful apology – not one fashioned by statutes designed to allow only for the expression of sympathy without regard for acknowledging fault.

It should be noted, of course, that civil litigation has long recognized mediation as an alternative to litigation. There are reasons, however, to question the continued efficacy of mediation in medical malpractice actions, particularly where fault is clearly established and the injuries are substantial. In *Apology and Mediation: The Horse and Carriage of the Twenty-First Century*, Dean Donna Pavlick writes that apologies – specifically the recognition for a victim's pain and suffering – seem to lie at the very core of dispute resolution through mediation.⁴⁸ Yet mediation (at least in the context of civil litigation) may not serve as an ideal, or even a very good, vehicle for apologies. As Dean Pavlick notes, the presence of third-parties (i.e., the mediator and the parties' attorneys) can have an impact on the efficacy of apologies extended by the defendant to the plaintiff. The plaintiff's

47 *Id.*, citing Center for Restorative Justice & Peacemaking, <http://ssw.che.umn.edu/rjp/> (last visited Oct. 8, 2005).

48 Donna L. Pavlick, *Apology and Mediation: The Horse and Carriage of the Twenty-First Century*, 18 Ohio St. J. on Disp. Resol. 829, 831 (2003).

lawyer may focus on the "bottom line" – i.e., the amount of compensation to be paid – rather than any offer of apology; and defense counsel may be reluctant to encourage apology because it constitutes an admission of fault.⁴⁹ Even the mediator may be an impediment to a meaningful apology, particularly if the mediator seeks to force an apology, thinking it will facilitate a settlement.⁵⁰

While Dean Pavlick concludes that mediation "despite perceived limitations, seems to be the correct forum for the use of apology,"⁵¹ some thought should be given to appropriating the restorative justice model as an alternative forum for the apology in medical malpractice cases, at least in cases where fault is clear and the injuries are substantial. Consider the role of apology in a restorative justice setting in contrast with its use in mediation: where in mediation the presumption is that there will be negotiations leading to a private resolution, restorative justice typically involves a "collaborative, community-wide process."⁵² This process would seem to be equally impressive upon the victim as well as the perpetrator, particularly if the victim falsely claims to seek an apology when in fact the goal is an excessive financial settlement. The "community," here, could easily include medical peers, whose presence would likely temper the shaming that is part of restorative justice, particularly if the negligent act was isolated and out-of-character for the medical provider. The point here is that restorative justice structures are designed to encourage accountability – on both sides – and through such accountability bring about prospective healing. Nothing like that occurs when a jury renders a \$25,000 verdict occasioned by a doctor's hasty reading of a patient's chart.

49 *Id.* at 859.

50 *Id.* at 860.

51 *Id.* at 862.

52 See Daicoff, *supra* note 40, at 32-33.

Conclusion

As Prof. Cohen observed, accepting responsibility through full apology will not always be economically beneficial to the offender – nor should it be: “in many cases, responsibility-taking may well be economically costly” particularly when compared to denying liability in cases where liability is unclear.⁵³ But using the adversarial process and its dependence upon unwarranted denials is costly too: “At its core, denying an injury one has caused is one form of lying” and “in all but extremely unusual cases, denial is an act of moral regression, and hence poses significant spiritual and psychological risks to the injurer. In some cases, particularly when long-term effects are considered, it is likely to be economically costly as well.”⁵⁴

Restorative justice anticipates that the perpetrator of wrongdoing will account for the error, and will do so in the presence of those with a community of interest. At least in cases where liability is clear and the injury is substantial, restorative justice offers a structure in which a meaningful and full apology may be tendered in the presence of persons whose insight and connection to the wrongdoing would enhance both the process of apologizing and the impact of the apology. Unlike twelve members of a jury, those participating in a restorative justice circle would have a real stake in the prospective impact of any resolution. By focusing on the wrongdoer’s contrition, as expressed through his or her apology, the restorative justice circle may offer a significantly more effective forum for resolving medical malpractice claims.

53 Cohen, *supra* note 6, at 943.

54 *Id.*

End Notes

- 1 *Tisdale v. Pruitt, Jr. M.D.*, 394 S.E.2d 857 (S.C. Ct. App. 1990) (cited in Barry R. Furrow et al., *HEALTH LAW* 404 (5th ed.2004)).
- 2 *Id.* at 406.
- 3 *Id.* at 404.
- 4 *See, e.g., Phinney v. Vinson*, 605 A.2d 849, 849 (Vt. 1992).
- 5 *See, e.g., Williams v. Gamble*, 912 So.2d 1053 (Miss. Ct. App. 2005).
- 6 Jonathan R. Cohen, *The Immorality of Denial*, 79 *Tul. L. Rev.* 903, 910 (2005).
- 7 *Id.* at 912.
- 8 *Id.* at 920.
- 9 *Id.* at 921.
- 10 Cohen, *supra* note 6 at 934.
- 11 *Id.* at 943.
- 12 Peter H. Rehm & Denise R. Beatty, *Legal Consequences of Apologizing*, 1966 *J. Disp. Resol.* 115, 115, citing Aaron Lazare, *Go Ahead, Say You're Sorry*, *Psychology Today*, Jan/Feb 1995 at 45.
- 13 *Id.* at 117.
- 14 <http://www.rm.f.harvard.edu/files/documents/AECHKLST.pdf> (last visited May 16, 2006).
- 15 *Id.*
- 16 *Id.*
- 17 *See* Fed. R. Evid. 801(d)(2) (admission by a party opponent is not hearsay).
- 18 *See* Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 *U. Cin. L. Rev.* 819, 824-27 (2002), citing Fed. R. Evid. 501 (witness testimonial privileges are determined by state, and not federal, law), Fed. R. Evid. 408 (statements made in compromise negotiations), Fed. R. Evid. 407 (subsequent remedial measures), Fed. R. Evid. 409 (payment of medical and similar expenses).
- 19 Cohen, *supra* note 18, at 827, quoting Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 *Yale L.J.* 1135, 1151 (2000).
- 20 Cohen, *supra* note 18, at 828.
- 21 *Id.*, citing Texas Civil Practice & Remedies Code section 18.061.
- 22 *Id.*, at 829, citing Cal. Evid. Code section 1160 (LEXIS through 2001 Sess.).
- 23 *Id.* at 829-30.
- 24 *Id.* at 831-33, citing 2001 Bill Text CT S.B. 577 (version March 7, 2001), available at <http://www.lexis.com> and S.B. 1477, 21st Leg. (Haw. 2001) (version Jan. 6, 2001) available at <http://www.lexis.com>.
- 25 *Id.* at 831, citing 2001 Bill Text CT S.B. 577 (version March 7, 2001), available at <http://www.lexis.com>.
- 26 *Id.* at 832-33, citing S.B. 1477, 21st Leg. (Haw. 2001) (version Jan. 6, 2001) available at <http://www.lexis.com>
- 27 *Id.*

- 28 See Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, Mich. L. Rev. 460, 468 (2003).
- 29 *Id.* at 469 (internal footnotes omitted).
- 30 *Id.*
- 31 *Id.* at 485-86.
- 32 *Id.* at 488.
- 33 *Id.* at 487.
- 34 *Id.* at 497.
- 35 *Id.* at 497-98.
- 36 *Id.* at 499.
- 37 *Id.* at 502.
- 38 *Id.*
- 39 *Id.* at 505.
- 40 Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement,"* 6 Pepp. Disp. Resol. L.J. 1 (2006).
- 41 *Id.* at 4.
- 42 *Id.*, citing Jean Hellwege, "Comprehensive Law" Makes the Case for a Kinder, Gentler Law Practice, *Trial*, Apr. 2003, at 12-13.
- 43 *Id.* at 3.
- 44 *Id.*
- 45 *Id.* at 30.
- 46 *Id.* at 31.
- 47 *Id.*, citing Center for Restorative Justice & Peacemaking, <http://sww.che.umn.edu/rjp/> (last visited Oct. 8, 2005).
- 48 Donna L. Pavlick, *Apology and Mediation: The Horse and Carriage of the Twenty-First Century*, 18 Ohio St. J. on Disp. Resol. 829, 831 (2003).
- 49 *Id.* at 859.
- 50 *Id.* at 860.
- 51 *Id.* at 862.
- 52 See Daicoff, *supra* note 40, at 32-33.
- 53 Cohen, *supra* note 6, at 943.
- 54 *Id.*

Chris McNeil is Professor of Legal Writing at Capital University Law School. Chris received his JD from the University of Kansas and his MJS from the University of Nevada – Reno. Chris is currently undertaking his PhD, in Judicial Studies, at the University of Nevada – Reno.