

I'm Sorry

Tort Reform Statutes and Disclosure

CAPSAC
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Presented by
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Federal health care reform bill

- HR 3950
 - Tort reform battle
 - Unintended consequences
 - Disclosure

State reforms

- General liability
- Health care provider liability
- Fault vs. compassion

Massachusetts GL 233, 23D (1986)

The General Laws of Massachusetts

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PART III. COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

TITLE II. ACTIONS AND PROCEEDINGS THEREIN

CHAPTER 233. WITNESSES AND EVIDENCE

WITNESSES

Chapter 233: Section 23D. Admissibility of benevolent statements, writings or gestures relating to accident victims

Section 23D. As used in this section the following words shall, unless the context clearly requires otherwise, have the following meanings:

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

“Benevolent gestures”, actions which convey a sense of compassion or commiseration emanating from humane impulses.

“Family”, 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.

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.

Tex. Civ. Prac. & Rem. Code § 18.061 (1999)

§ 18.061. Communications of Sympathy

(a) A court in a civil action may not admit a communication that:

(1) expresses sympathy or a general sense of benevolence relating to the pain, suffering, or death of an individual involved in an accident;

(2) is made to the individual or a person related to the individual within the second degree by consanguinity or affinity, as determined under Subchapter B, Chapter 573, Government Code; and

(3) is offered to prove liability of the communicator in relation to the individual.

(b) In this section, "communication" means:

(1) a statement;

(2) a writing; or

(3) a gesture that conveys a sense of compassion or commiseration emanating from humane impulses.

(c) Notwithstanding the provisions of Subsections (a) and (b), a communication, including an **excited utterance** as defined by [Rule 803\(2\) of the Texas Rules of Evidence](#), which also includes a **statement or statements concerning negligence or culpable conduct** pertaining to an accident or event, **is admissible** to prove liability of the communicator.

California Evidence Code § 1160 (2000)

1160. (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.

California AB 2723 (2002)

[Approved by Governor June 28, 2002. Filed with
Secretary of State June 30, 2002.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2723, Washington. Evidence: admissibility.

Existing law provides for the inadmissibility of certain evidence as a matter of public policy, including portions 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, which are inadmissible as evidence of an admission of liability in a civil action. However, a statement of fault which is part of or in addition to any of the above is not inadmissible.

This bill would extend this rule of evidence to the admissibility of evidence of an admission of liability in proceedings pursuant to the Administrative Procedure Act.

Colorado House Bill 1232 (2003)

13-25-135. Evidence of admissions - civil proceedings - unanticipated outcomes - medical care. (1) IN ANY CIVIL ACTION BROUGHT BY AN ALLEGED VICTIM OF AN UNANTICIPATED OUTCOME OF MEDICAL CARE, OR IN ANY ARBITRATION PROCEEDING RELATED TO SUCH CIVIL ACTION, ANY AND ALL STATEMENTS, AFFIRMATIONS, GESTURES, OR CONDUCT EXPRESSING **APOLOGY, FAULT,** SYMPATHY, COMMISERATION, CONDOLENCE, COMPASSION, OR A GENERAL SENSE OF BENEVOLENCE WHICH ARE MADE BY A HEALTH CARE PROVIDER OR AN EMPLOYEE OF A HEALTH CARE PROVIDER TO THE ALLEGED VICTIM, A RELATIVE OF THE ALLEGED VICTIM, OR A REPRESENTATIVE OF THE ALLEGED VICTIM AND WHICH RELATE TO THE DISCOMFORT, PAIN, SUFFERING, INJURY, OR DEATH OF THE ALLEGED VICTIM AS THE RESULT OF THE UNANTICIPATED OUTCOME OF MEDICAL CARE SHALL BE INADMISSIBLE AS EVIDENCE OF AN ADMISSION OF LIABILITY OR AS EVIDENCE OF AN ADMISSION AGAINST INTEREST.

Utah Code Ann. § 78B-3-422 (2006)

(2) In any civil action or arbitration proceeding relating to an unanticipated outcome of medical care, any unsworn statement, affirmation, gesture, or conduct made to the patient by the defendant shall be inadmissible as evidence of an admission against interest or of liability if it:

(a) expresses:

(i) apology, sympathy, commiseration, condolence, or compassion; or

(ii) a general sense of benevolence; or

(b) describes:

(i) the sequence of events relating to the unanticipated outcome of medical care;

(ii) the significance of events; or

(iii) both.

(3) Except as provided in Subsection (2), this section does not alter any other law or rule that applies to the admissibility of evidence in a medical malpractice action.

Utah Rules of Evidence, Rule 409 (2010)

H.J.R. 34

Enrolled Copy

(a) Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

(b) Statements, expressions, or conduct that express apology, sympathy, commiseration, condolence, compassion, or general sense of benevolence, or describe the sequence of events relating to the unanticipated outcome of medical care or the significance of events or both are not admissible against a health care provider or an employee of a health care provider to prove liability for an injury.

Section 2. Effective date.

This resolution takes effect upon approval by a constitutional two-thirds vote of all members elected to each house.

Source of timeline

Apology and Medical Mistake: Opportunity or Foil?

Lee Taft, *Annals of Health Law*, Winter 2005

14 *Ann. Health L.* 55, 81

“I’m Sorry” laws

- <http://www.ama-assn.org/ama1/pub/upload/mm/378/sorry-laws.pdf>
- I’m Sorry ama

I'm Sorry laws, continued

The screenshot displays the website for The Doctors Company, specifically the Knowledge Center section. The navigation bar includes links for HOME, WHY CHOOSE US, JOIN, KNOWLEDGE CENTER (highlighted), ABOUT, CONTACT US, and FOR MEMBERS. A search bar is located on the right. Below the navigation bar, there are sub-navigation links for PATIENT SAFETY, POLITICAL ADVOCACY, CHAIRMAN'S LIBRARY, PUBLICATIONS, and REFERENCES. Further down, there are links for ARTICLES, CME, ALERTS, DISCLOSURE RESOURCES (highlighted), SEMINARS, and INFORMED CONSENT. The main content area features a section titled "Disclosure Resources" with a sub-header "Disclosure Resources". The text explains the company's commitment to helping physicians do the right thing in the right way and provides guidelines for disclosing adverse events and complications. It also mentions the company's support for the American Medical Association's policy on disclosing adverse events. A sidebar on the right contains three sections: "THE DOCTOR'S ADVOCATE" (a quarterly newsletter), "CME COURSES" (offering convenient options for earning CME credits), and "PATIENT SAFETY SEMINARS" (reducing risk and improving patient safety). A highlighted box at the bottom left contains the title "The Doctors Company's Disclosure Program" and two links: "The Doctors Company's Disclosure Program" and "Adverse Outcome Flowchart".

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Disclosure Resources

We strive to help every physician do the right thing in the right way. We provide guidelines that physicians can use in their office practices to enhance their effectiveness when disclosing adverse events and complications.

The Doctors Company supports the American Medical Association's policy that following an unanticipated outcome, the physician is ethically required to inform the patient of all the facts necessary to ensure an understanding of what occurred. The ethical rationale is that the patient and his or her family have a right to know what happened. Simply put, it's the right thing to do.

In addition to our recommended guidelines, we encourage you to explore our range of additional disclosure resources.

The Doctors Company's Disclosure Program

The Doctors Company has developed guidelines that physicians can use in their office practices to enhance their effectiveness when disclosing adverse events and complications. The Doctors Company Patient Safety Department staff will work with you to provide psychological support, communication coaching, and assistance.

- [▶ The Doctors Company's Disclosure Program](#)
- [▶ Adverse Outcome Flowchart](#)

THE DOCTOR'S ADVOCATE

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