

Say Sorry and Save: A Practical Argument for a Greater Role for Apologies in Medical Malpractice Law

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I. INTRODUCTION – MAKING A PLACE FOR APOLOGY IN THE LEGAL LEXICON

“Say you’re sorry!” Thinking of this command may conjure up the image of an elementary school teacher admonishing a student for teasing a classmate, or perhaps a grandmother mediating a broken toy dispute between her two grandsons. Sadly, one is less likely to think of a lawyer giving this advice to a client. While television programs such as Law and Order and Boston Legal beam enough images of bickering attorneys to make any viewer think that lawyers are an uncompromising lot, the very real practices of stalling and procedural stonewalling used by lawyers clog the judicial arteries with gridlock and delay resolution of legal disputes. Professor Jonathan Cohen has even argued that the legal system has made the “immoral the normal” by encouraging denial over responsibility.¹ Apologies have the power to mend the bruised psyche and yet they are avoided by lawyers and clients, and in several instances, discouraged by the law.²

This article examines both the potential benefits and detriments of the use of an apology in a legal setting. This article uses the specific environment surrounding a medical malpractice case to help illustrate how and why an apology should or should not be proffered by the Defendant. Ultimately, the reader of this article should have a solid

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¹ Jonathan R. Cohen, *The Immorality of Denial*, 79 Tul. L. Rev. 903, 904 (2005).

² *Id.*

understanding of how an apology can be admissible as evidence in the litigation of a medical malpractice lawsuit.

The introduction of apologies as a commonly used legal tool has the power to revolutionize medical malpractice law. Research indicates that an apology given by a doctor to a patient harmed by medical error has beneficial effects for both parties.³ Yet, there is a tendency among defendants to withhold apologies out of the fear that such statements will be used against them as evidence at trial.⁴ As legal scholars Peter H. Rehm and Denise R. Beatty state, “Since an apology usually can be admitted into evidence, and because some plaintiffs choose to understand an apology as an admission of guilt, it seems safest not to apologize.”⁵ Applying Rehm and Beatty’s words to the field of medical malpractice law, it can be seen that before doctors and other health care professionals can embrace apologies on a wide scale, two obstacles must be overcome. First, doctors must learn when the law allows them to apologize without the fear of an apology returning in the form of evidence against the doctor at trial. Second, lawmakers must be encouraged to knock down legal barriers that prevent doctors from apologizing to patients.

Doctors, hospitals, and other medical professionals may wonder why they should apologize to patients in the wake of a harmful medical error. “Because it is the right thing to do” is the straightforward answer that may come to mind for subscribers of Cohen’s claims that denial is immoral and acceptance of responsibility is moral.⁶ A moral argument can indeed be made that those who have wronged others should take responsibility for their actions and accept the consequences.⁷ The apology scholar, Aaron Lazare, has

³ The Sorry Works! Coalition, *What is the Sorry Works Coalition?* <http://www.sorryworks.net/WhatIs.phtml> (last visited Oct. 20, 2006).

⁴ Peter H. Rehm and Denise R. Beatty, *Legal Consequences of Apologizing*, 1996 J. Disp. Resol. 115, 118 (1996).

⁵ *Id.*

⁶ Cohen, *supra* note 1, at 904.

⁷ *Id.*

argued that a doctor's apology is a crucial component in a patient's recovery from harm caused by medical error.⁸ While an apology may never help a harmed patient or his or her family recover faith in the medical system, the receipt of an expression of sorrow can help repair the emotional damage suffered by a patient who trusted a doctor with his health, or family members who trusted a doctor with the life of a loved one, only to be gravely disappointed.⁹ As Lazare explains: "[P]atients are often ashamed of their illness and sometimes humiliated by their physicians. Apologies, I have learned, are perhaps the only way to heal, or at least to minimize, the harm of humiliations."¹⁰

"Minimizing the harm of humiliations" is indeed a noble reason for a doctor to give an apology. There is of course the valid argument that an apology does not repair the physical damage caused by medical error. Indeed, it would be absurd to suggest that patients should be forgiving to the point that they forego all compensation for their injuries caused by malpractice as long as an apology is received. However, keeping with Lazare's line of reasoning, doctors must realize that while they cannot repair the physical damage of their mistakes, they can, through an apology, ease the emotional damage experienced by patients who have been harmed by a doctor's mistake.¹¹ People already suffer from feelings of indignity when they experience health problems that force them to become patients.¹² Trusting in a doctor's care, only to later learn that this trust worsened the patient's injury, leads to humiliation that only an apology can alleviate.¹³

Cohen has argued that there is a psychological benefit to the apologizer in that he will not suffer the inner turmoil caused by not taking responsibility for harm he has caused to another person.¹⁴ "Getting away with it," Cohen states, can

⁸ AARON LAZARE, ON APOLOGY 20 (2004).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Cohen, *supra* note 1, at 932.

have more severe personal ramifications for a wrongdoer than being held accountable by an “external authority.”¹⁵ Since, as Rehm and Beatty have suggested, an apology yields psychological benefits to both the apologizer and the apology recipient, and it is unfortunate that fear of legal reprisal often keeps sorrow from being expressed.¹⁶

The numbers themselves provide another argument for a greater need for apologies within medical malpractice law.¹⁷ The Greek physician Hippocrates once said, “Whenever a doctor cannot do good, he must be kept from doing harm.”¹⁸ Even in an era long past, the founder of modern medicine realized that while doctors have the power to heal, they also have the ability to worsen a patient’s condition. Doctors, according to the Hippocratic view, must be allowed to do what they can to help, and refrain from activity that causes a patient further harm. In modern times, it appears that Hippocrates’ words have gone unheeded. A report by the Institute of Medicine estimates that as many as 98,000 people die in U.S. hospitals each year as the result of medical errors.¹⁹ Stated differently, nearly 100,000 people a year die from a mistake committed by a medical worker they trusted their lives to. This staggering figure alone supports the position that there is a moral argument that doctors should apologize for their mistakes, and the removal of these legal barriers to apologies is essential. With patients dying at such a rapid rate due to medical error, the medical profession as a whole has a duty to take responsibility, explain how individual errors were made, and determine how such errors can be avoided in the future.

¹⁵ *Id.*

¹⁶ Rehm & Beatty, *supra* note 4.

¹⁷ Familydoctor.org, Medical Errors: Tips to Help Prevent Them, <http://familydoctor.org/736.xml> (last visited Oct 18, 2006).

¹⁸ Thinkexist.com, Hippocrates Quotes, <http://en.thinkexist.com/quotes/hippocrates/2.html> (last visited Oct 30, 2006).

¹⁹ Rehm & Beatty, *supra* note 4.

An apology may be the right thing to do, but the unfortunate, yet realistic, truth is that members of the medical profession, being part of a multi-million dollar industry, do not have an incentive to embrace apologies until they can be convinced that apologizing is the financially beneficial thing to do.²⁰ Promoting the morality behind acceptance of responsibility is a lofty goal. On the other hand, individual doctors or hospitals facing potential costly verdicts may understandably decide that fiscal solvency outranks morality. Accordingly, before apologies can ever become an accepted part of the medical malpractice lawyer's legal toolbox, the following two assertions must be examined thoroughly: 1. in situations where the law does not treat an apology as admissible evidence, an apology is in the doctor's and patient's best financial interest; 2. as for situations where the law does treat an apology as admissible evidence, lawmakers have an opportunity to make changes that will financially benefit both doctors and patients.

II. THE FIRST ASSERTION: INADMISSIBLE APOLOGIES

Utilizing a review of how the law of evidence applies to apologies, doctors will gain a better understanding of when they can freely apologize without the fear of legal liability. In contrast, they will also learn that in certain situations, an apology is unprotected by the law and it could return in the form of evidence against them. Since research indicates that there is a correlation between apologies and better settlements for the apologizer, it is in the best interest of parties faced with a medical malpractice lawsuit to learn to recognize when they should and should not apologize.²¹

²⁰ Sorry Works!, *supra* note 3.

²¹ Jennifer K. Robbenolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 Mich. L. Rev. 460, 482 (2003).

A. HOW APOLOGIES ARE AFFECTED BY THE FEDERAL RULES OF EVIDENCE

The Federal Rules of Evidence provide rules that apply to a variety of different statements, including apologies.²² The “hearsay” rules, Fed. R. Evid. 800, and two rules that limit the admissibility of relevant evidence, Fed R. Evid 408 and Fed. R. Evid. 409, are of particular interest to the issue of when apologies are admissible against defendant doctors in medical malpractice actions.

i. HEARSAY EVIDENCE

The Federal definition of the term hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”²³ In less complex terms, as a general rule, whatever is said outside of the courtroom cannot be offered as testimonial evidence inside the courtroom.²⁴ Without delving further into the issue, one might therefore assume that a doctor is free to apologize “ad nauseum” to his patient without fear of legal reprisal, as long as he apologizes anywhere but inside the courtroom. However, due to the many exceptions to the hearsay rule that allow otherwise inadmissible out of court statements to be admitted into evidence, this assumption is an incorrect one.

One exception to the hearsay rule allows admissions by party opponents to be admitted into evidence against the opposing party.²⁵ This rule includes statements by an opponent, as well as the agents or other representatives of an

²² While the evidentiary rules of most states closely resemble the Federal Rules of Evidence, there are often deviations among the states. Medical malpractice lawyers and doctors can turn to the Federal Rules for guidance, but are advised to research how the evidentiary rules of their practice states affect them. In state law based suits, state evidentiary law obviously trumps the Federal Rules.

²³ FED. R. EVID. 801(c).

²⁴ *Id.*

²⁵ FED. R. EVID. 801(d)(2).

opponent.²⁶ When applied to a medical malpractice case, this exception to the rule renders a doctor's out of court apology admissible against the doctor, and potentially the health care organization the doctor is employed by. By apologizing, the doctor has admitted to wrongdoing, and the apology cannot be kept out of court using the hearsay rule.²⁷

ii. LIMITS TO RELEVANT EVIDENCE

Only relevant evidence may be admitted at trial.²⁸ Relevant evidence is defined as evidence that tends to make a "fact of consequence to the determination of the action" more or less likely than it would be without the evidence.²⁹ If a piece of evidence makes it likely that a crucial point in the case occurred or did not occur, then the evidence is relevant and admissible.³⁰ In many respects, this rule provides efficiency to the trial process. Perhaps a plaintiff wishes to introduce evidence in a medical malpractice case that the defendant doctor has a bad temper and routinely shouts obscenities at the hospital staff. Although, this evidence would most likely bring the defendant into disfavor with the jury, it does not make it more likely than not that the doctor committed a medical error upon treatment of the patient. Unless the plaintiff can show that the doctor's temper led to the medical error, a court will not admit this evidence. The Federal Rules of Evidence embrace the notion that trials are to be won on the merits of the case and are not to descend into a popularity contest.³¹

What is the potential result if a doctor makes an attempt to settle a malpractice case? From a quick glance at the rules of evidence, one might assume that if a doctor apologizes while attempting to settle a case, such statements would be

²⁶ *Id.*

²⁷ *Id.*

²⁸ FED. R. EVID. 402.

²⁹ FED. R. EVID. 401.

³⁰ *Id.*

³¹ *Id.*

relevant and admissible against the doctor.³² Thus, the plaintiff could argue that a doctor would not offer to settle or apologize if he had not committed any medical error, and accordingly, the doctor's apology should be admitted as evidence of medical error.³³ However, to prevent the clogging of judicial arteries with cases that could be disposed of through settlement, there is an exception to the relevant evidence rule with regard to settlement negotiations.³⁴ When dealing with a legal dispute that has already arisen, evidence of "compromise or offers to compromise," which includes evidence of an offer to settle a case, is inadmissible.³⁵ This inadmissibility shield extends not only to the settlement offer, but to any statements made by the parties during the settlement negotiations.³⁶

With respect to a medical malpractice dispute, the key problem with the "compromise" exception is that a doctor's apology is only protected once a legal dispute arises.³⁷ Effectively, the doctor who wishes to apologize for an error must wait, in order to avoid the admission of his apology as evidence, until the patient threatens to sue him.³⁸ The doctor who recognizes his mistake early on and takes the initiative of offering a settlement before the patient threatens legal action is punished in that his statements, including apologies, will be admissible evidence.³⁹

Turning once more to Fed. R. Evid. 401, there is another exception to the hearsay rule in the area of offers to pay medical expenses.⁴⁰ It could be argued that a doctor's offer to pay a patient's medical expenses should be admissible under the theory that a doctor would not pay for expenses that he did not cause, thus making it more likely than not that he

³² *Id.*

³³ *Id.*

³⁴ FED. R. EVID. 408.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ FED. R. EVID. 409

or she caused the additional expenses.⁴¹ This argument, however, would fail under Fed. R. Evid. 409, which protects the action of a defendant paying or offering to pay for medical expenses from admissibility.⁴² This rule specifically states: “[E]vidence 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.”⁴³

When this rule is broken down, it can be seen that a doctor who offers to pay the medical bills of a patient who has been harmed by his or her conduct does not have to fear that evidence of this offer will be admitted against them. Unlike the compromise exception of Fed. R. Evid. 408, a doctor may freely offer, without fear, to pay for medical expenses even before a legal dispute arises.⁴⁴ However, Fed. R. Evid. 409 lacks the protection that Fed. R. Evid. 401 gives to certain additional statements.⁴⁵ Doctors must be advised that while they may freely pay for medical expenses before a legal dispute arises, an apology under these circumstances can be admissible in court.⁴⁶ To illustrate, imagine a doctor stating, “I would like to pay for your medical bills. I’m sorry I made an improper incision during your operation.” Under Fed. R. Evid. 409, the first statement would be inadmissible, but the second statement, made before a legal dispute and outside of settlement negotiations, is not protected and is admissible.⁴⁷

iii. APOLOGIES INCREASE THE LIKELIHOOD OF SETTLEMENT ACCEPTANCE

During settlement negotiations, doctors may feel free to apologize for anything and everything they feel responsible

⁴¹ See *supra* note 29.

⁴² See *supra* note 40.

⁴³ *Id.*

⁴⁴ See *supra* note 34.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

for and not worry about the attachment of evidentiary value.⁴⁸ Yet, a reasonable question to be asked is, “Why take the chance?” As Rehm and Beatty have argued, defendants fear apologizing and plaintiffs often attempt to turn an apology against the apologizer.⁴⁹ A doctor, hospital administrator, or other medical professional may simply decide the safest option is to offer a sum of money to make the case disappear, but refuse to apologize in fear of making the situation worse.⁵⁰

According to the research of legal scholar Jennifer K. Robbenolt, taking the “no apology” approach during settlement negotiations is unwise.⁵¹ Robbenolt discusses the results of a study in which participants were asked to essentially “step into the shoes” of a person injured in a pedestrian-bicycle accident.⁵² The study called for the participants to log on to a website, read a scenario, and then answer questions.⁵³ Among the participants, the scenarios varied with different information given regarding the opponent’s apology, or lack thereof.⁵⁴ The results created an intriguing window into how apologies can impact the acceptance of proposed settlement offers.⁵⁵ As Robbenolt reported:

When 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. When a partial apology was offered, only 35% of respondents were inclined to accept the offer, 25% were

⁴⁸ *Id.*

⁴⁹ Rehm & Beatty, *supra* note 4.

⁵⁰ *Id.*

⁵¹ *See supra* note 21.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

inclined to reject it, and 40% indicated that 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.⁵⁶

This study indicates that there is a correlation between apologies and willingness to settle.⁵⁷ While only half of the participants were willing to accept the proposed settlement offer without an apology, three-fourths of the participants accepted the offer when a full apology was given.⁵⁸ Interestingly, while the study shows that a full apology carries the best chance of a settlement acceptance, one is actually better off not to apologize at all rather than give a partial apology.⁵⁹ Only thirty-five percent of those surveyed were willing to accept a settlement when faced with an expression of sorrow that did not encompass the entire situation.⁶⁰ Moreover, this study indicates that no apology, or worse yet, a partial apology, or one that appears less than fully sincere, leads to a decreased likelihood of settlement.⁶¹ Increased feelings of sympathy and decreased feelings of anger were generated by a full apology. As Robbenolt stated:

While an offender offering a full apology was seen as believing that he or she was more responsible for the incident than one who offered a partial or no apology, the conduct of the full apologizer was judged more favorably than that of offenders who offered either a partial or no apology.⁶²

⁵⁶ *Id.* at 485-86.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 487-88.

Robbenolt's research generates a clear rule for parties to consider in their settlement negotiations. A full apology increases the chances that a settlement will be accepted while no apology or a partial apology decreases the chances of a settlement.⁶³ Overall, these results demonstrate the ability of a full apology to elicit a compassionate feeling of forgiveness in the plaintiff leading to an increased likelihood to accept a settlement offer.⁶⁴ Conversely, they also demonstrate how anger over a failure to accept responsibility can reduce the possibility of settlement.⁶⁵

These results are open to criticism in that mere participants reading a scenario on a computer screen will react differently than someone with an actual injury. Someone with only a hypothetical injury may be more willing to forgive than a party with a real injury. However, despite this criticism, the study shows that there is, at least, a stronger likelihood of settlement acceptance when a full apology is rendered.⁶⁶ In other words, one who apologizes during settlement negotiations has nothing to lose and everything to gain. The best possible result is that the plaintiff, feeling compassion as a result of the apology, may be willing to settle the case for an amount much lower than the cost of a trial and subsequent finding of liability against the defendant.⁶⁷ In the case of a less forgiving plaintiff, Fed. R. Evid. 408 prevents statements made during settlement negotiations from being admissible at trial, meaning the apologizing party need not fear the possibility that the apology will be used as evidence against him. Indeed, a party who feels he has not made an error may reject on principle the concept of apologizing for the sake of settlement. However, based on Robbenolt's research, one who feels comfortable giving an apology should be strongly encouraged by his attorney to do so within the context of settlement

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

negotiations.⁶⁸ Apologizing during settlement negotiations is a “win-win” situation. In doing so, the defendant stands a better chance of having his settlement offer accepted, but will still be protected against the opponent who refuses to settle and wishes to use the apology as evidence at trial.⁶⁹

iv. SELF-HELP: THE SORRY WORKS METHOD

Robbenolt’s research supports the concept that it is in one’s best financial interest to apologize for wrongdoing during settlement negotiations.⁷⁰ The Sorry Works Coalition has taken this concept a step further with the proposition that hospitals should adopt a policy of full disclosure when dealing with medical errors.⁷¹ As intriguing as an argument based on the likelihood of better settlements may be, the research of this lobbying organization reveals actual evidence of financial savings stemming from a policy that embraces the expression of remorse.⁷²

Under the Sorry Works approach, hospitals are to conduct an internal review of all medical errors.⁷³ If hospital representatives determine that a medical error stemmed from a failure to adhere to the requisite standard of care, then the hospital is to contact the patient, seek settlement, apologize for the mistake, and answer the patient’s questions openly.⁷⁴ If the hospital has not engaged in activity that fell below the standard of care, hospital representatives are still required communicate with the patient and be forthcoming with

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ The Sorry Works! Coalition is a lobbying organization comprised of doctors, medical malpractice lawyers, and other interested parties who have come together for the purpose of bringing apologies to the forefront of medical malpractice law. Their website is located at www.sorryworks.net and provides a wealth of articles, reports, statistics, and other information regarding the topic of apologies in medical malpractice law.

⁷² Sorry Works!, *supra* note 3.

⁷³ *Id.*

⁷⁴ *Id.*

information requests from patients wishing to know more about how they were harmed.⁷⁵ A critic might wonder why a hospital representative would communicate with a patient at all if the hospital has not done anything wrong. The Sorry Works Coalition explains that in such cases being honest with patients relieves them of the suspicion that a cover-up has taken place, reducing the likelihood of a lawsuit filed in an attempt to learn more about the medical error through discovery.⁷⁶

Two hospitals have adopted this full disclosure approach and experienced great savings in legal fees according to the coalition.⁷⁷ During the 1980s, the Veteran's Administration Hospital in Lexington, KY was the first to adopt the approach that would later become the cornerstone of the Sorry Works movement.⁷⁸ After initiating the program, the hospital saw significant results when it came to settlements.⁷⁹ Within a seven year period after initiating the program, the Lexington Veterans Hospital's average payment per settlement dropped to \$16,000, compared to the average of a \$98,000 payout per settlement for other VA hospitals nationwide at the time.⁸⁰

In another situation, after adopting the full-disclosure approach, the University of Michigan hospital system reported a significant reduction in legal costs as well.⁸¹ The number of pending lawsuits against the Michigan hospital system was cut by half.⁸² In addition, the defense litigation costs dropped from an average of \$65,000 per case to \$35,000 per case, which the hospital maintains has led to a total savings of \$2 million a year.⁸³

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Sorry Works! *Excited Actuaries at the University of Michigan Hospital System*,

<http://www.sorryworks.net/media22.phtml> (last visited Sept. 30, 2006).

⁸² *Id.*

⁸³ *Id.*

The figures reported by these hospitals demonstrate that by embracing apology as a remedy, hospitals benefit from reduced legal costs. These examples lead us to imagine the cost savings that could be realized if apologies were embraced and encouraged in medical malpractice law on a nationwide scale. Sorry Works attributes these savings to a multitude of factors benefiting both the defendant and the plaintiff.⁸⁴ Plaintiffs benefit in reduced legal fees as they do not have to expend large sums of money in the search of how their medical care went awry.⁸⁵ Instead, the doctor or hospital, the parties with the most information of what went wrong, supplies it.⁸⁶ In turn, hospitals save legal costs by avoiding protracted legal battles over information the patient is likely to gain anyway during the discovery process.⁸⁷ A common practice in medical malpractice law is to name several doctors as defendants who turn out later to be vindicated simply because the plaintiff was unable to determine at the time of filing which specific doctor caused the harm.⁸⁸ Therefore, a full disclosure approach protects doctors who have committed no error from being named as defendants.⁸⁹ Ultimately, medical professionals, by apologizing up front and taking responsibility, are able to benefit by convincing a patient that responsibility has been accepted, no “cover up” is being engaged in, and a reasonable settlement to compensate the patient’s injuries can be reached without moving forward to trial.⁹⁰

⁸⁴ Robbenolt, *supra* note 21.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Medical professionals, in reviewing the Sorry Works! full disclosure policy, should still keep in mind FED. R. EVID. 408. While Sorry Works! advocates a full disclosure approach, the safest move is to wait until the patient has threatened legal action, thus giving rise to a legal dispute. Offers to settle and corresponding statements of apology are only protected from admissibility if they are made after the initiation of a legal dispute under FED. R. EVID. 408.

Plaintiffs and patients are not the only ones to benefit from an apology policy. Medical malpractice trial lawyers benefit as well.⁹¹ Sorry Works reports that when working on medical malpractice cases on a contingency basis, lawyers often front between \$50,000 and \$500,000 with only a thirty-three percent chance of a successful outcome.⁹² Seventy-seven percent of lawyers expend large sums of money and effort without a financial reward in the end.⁹³ A full disclosure policy of apology results in a ninety-five percent success rate, with cases being resolved between two and six months.⁹⁴ Lawyers do not have to suffer through years of having cash tied up in cases that may never result in a profit.⁹⁵

III. THE SECOND ASSERTION: CHANGING THE LAW IN SITUATIONS WHERE APOLOGIES ARE ADMISSIBLE

When a medical professional apologizes outside the context of settlement negotiations, his apology is fair game and can be used as evidence against him at trial.⁹⁶ As the research of Sorry Works has shown, significant savings in legal fees result from a policy that embraces apology.⁹⁷ In light of these findings, judges and legislators have an opportunity to change the law in ways that encourage apologies even before a plaintiff raises the lawsuit specter. Judges must be encouraged to follow the example of the Vermont Supreme Court in preventing a doctor's apology to be used as the sole evidence of a deviation from the standard

⁹¹ The Sorry Works! Coalition, *Just the Facts*
<http://www.sorryworks.net/article6.phtml> (last visited Oct. 28, 2006).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ FED. R. EVID. 408.

⁹⁷ *See supra* note 72.

of care.⁹⁸ Lawmakers interested in changing the evidentiary laws of their individual states can obtain guidance by analyzing what other states have accomplished in this area.

A. CASE LAW ANALYSIS: PREVENTING A DOCTOR'S APOLOGY FROM BEING THE SOLE EVIDENCE OF DEVIATION FROM THE STANDARD OF CARE

i. DEFINING THE STANDARD OF CARE

A successful medical malpractice action usually requires the existence of three factors: “(1) a duty of care on the part of the defendant to the plaintiff; (2) a violation of that duty through a failure to conform to the requisite standard; and (3) causation of the injury resulting from that failure.”⁹⁹ Medical malpractice actions are negligence based claims and accordingly establish what level of care a doctor is to provide, and whether there was a deviation from that level of care.¹⁰⁰ These are crucial points that, if left unproven, could lead to a loss for the plaintiff.

The individual states have the power to set forth what standard a doctor practicing within the state will be held to.¹⁰¹ For example, in *Palandjian v. Foster*, the Supreme Judicial Court of Massachusetts explained the standard of care that doctors in Massachusetts are to follow.¹⁰² In doing so, the court distinguished between what is required of general practitioners versus what is expected of doctors who specialize in a particular field of medicine:

“The proper standard is whether the physician, if a general practitioner, has exercised the degree of care and skill of the average qualified practitioner, taking into account the

⁹⁸ *Senesac v. Assoc. in Obstetrics and Gynecology*, 449 A.2d 900, 903 (Vt. 1982).

⁹⁹ *Rehm & Beatty*, *supra* note 4, at 119.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² 842 N.E.2d 916, 920–21 (Mass. 2006).

advances in the profession [A] specialist should be held to the standard of care and skill of the average member of the profession practising [practicing] the specialty, taking into account the advances in the profession.” Because the standard of care is based on the care that the average qualified physician would provide in similar circumstances, the actions that a particular physician, no matter how skilled, would have taken are not determinative.¹⁰³

Here, the Supreme Judicial Court set forth an objective standard of care for doctors to follow.¹⁰⁴ This language recognizes the fact that while medicine is not an exact science, there is a certain level of competency that all doctors must display in their work.¹⁰⁵ Indeed, there are doctors who strive beyond what is considered “average” in their profession.¹⁰⁶ However, under the Supreme Judicial Court’s opinion, the fact that a more diligent than usual doctor would take notice of a possible error and prevent its occurrence is of no consequence.¹⁰⁷ While doctors with exceptionally high skills are to be applauded, the appropriate inquiry is how the average doctor practicing in that particular field of medicine would have reacted under the same set of circumstances.¹⁰⁸ A doctor will be held liable only if he fails to meet the standard applied to all doctors in the given field, but will not be held liable for failing to achieve above average results in his practice.¹⁰⁹

¹⁰³ *Id.* (quoting *Brune v. Belinkoff*, 235 N.E.2d 793, 798 (Mass. 1968)).

¹⁰⁴ *Id.* at 920–21.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 920–21.

¹⁰⁹ *Id.*

ii. SENESAC AS A BREAKTHROUGH IN MEDICAL MALPRACTICE LAW

In states that promote this objective standard, there is a danger that courts will be persuaded to allow a doctor's apology for an alleged mistake to be admitted as evidence of the doctor's deviation from the requisite standard of care.¹¹⁰ However, the Supreme Court of Vermont became a pioneer in the realm of medical malpractice law by rejecting the admission of a doctor's apology as the main evidence of the doctor's deviation from the standard of care.¹¹¹

The facts of the Senesac case reveal a story of a physician's error and her subsequent apology.¹¹² In 1973, the plaintiff, Mary Senesac, underwent a therapeutic abortion performed by the defendant, Associates in Obstetrics and Gynecology, through its doctor, Mary Jane Grey.¹¹³ During the operation, the plaintiff's uterus was perforated, requiring plaintiff to undergo an emergency hysterectomy.¹¹⁴ The plaintiff filed suit, and a key issue at trial was the legal effect of Dr. Grey's statement during cross-examination that she "made a mistake, she was sorry, and it [the perforation of the uterus] had never happened before."¹¹⁵ At the close of the plaintiff's evidence, the defendant successfully argued a motion for a directed verdict, based on the failure of the plaintiff to introduce expert testimony regarding an alleged deviation from the proper standard of care on the defendant's part.¹¹⁶ The plaintiff appealed, arguing that Dr. Grey's apology and admission of a personal mistake was sufficient for the jury to determine that the doctor had deviated from the governing standard of care.¹¹⁷ The Supreme Court of Vermont disagreed by holding that Dr. Grey's apology:

¹¹⁰ See *supra* text accompanying note 90.

¹¹¹ *Senesac v. Assoc. in Obstetrics and Gynecology*, 449 A.2d 900 (Vt. 1982).

¹¹² *Id.*

¹¹³ *Id.* at 901.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 903.

¹¹⁶ *Id.* at 902.

¹¹⁷ *Id.* at 903.

Does not establish a departure from the standard of care ordinarily exercised by a reasonably skillful gynecologist. The fact the physician may have believed, and, if so, verbalized the belief that her performance was not in accordance with her own personal standards of care and skill, is not sufficient in the absence of expert medical evidence showing a departure from the standards of care and skill ordinarily exercised by physicians in similar cases.¹¹⁸

An intriguing rule of law was generated by *Senesac*.¹¹⁹ The Supreme Court of Vermont determined that a doctor's apology was not sufficient on its own to hold a doctor liable for medical malpractice.¹²⁰ Dr. Grey admitted she made a mistake, and that in her experience of performing abortions, uteruses were not normally perforated.¹²¹ In other words, Dr. Grey's words only established that she deviated from her personal standard of care, that she made a mistake she did not normally make.¹²² To prevail, the plaintiff needed expert testimony showing that Dr. Grey's mistake in this particular case showed conduct that fell below the overall standard of care that she, as a member of a greater medical community, was required to follow.¹²³ It was not enough to show that Dr. Grey made a mistake that she did not normally make.¹²⁴ The plaintiff needed to show, through expert testimony, that Dr. Grey made a mistake that most reasonably skilled gynecologists did not make.¹²⁵

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

According to Rehm and Beatty, the result of Senesac was that a doctor's apology became a legal nullity in terms of evidentiary value.¹²⁶ In an analysis of Senesac, they argued:

This case appears to say that plaintiffs, supposedly armed with an apology, must prove their cases just as if the apology did not exist. A mere apology does not prove any of the elements of the case because evidence about particular medical facts or events is still missing from the plaintiff's case. Since a mere apology pertains to a doctor's self-image and feelings, it is not evidence of any particular medical fact or event. This leaves the plaintiff legally in the same position as one who did not receive an apology.¹²⁷

Courts across the country should be encouraged to follow the Senesac example. Medical malpractice liability should only be imposed when a plaintiff provides sufficient evidence of deviation from the requisite standard of care.¹²⁸ A doctor's apology, at most, is an expression of the doctor's remorse at an undesirable result or his personal opinion that his conduct amounted to a mistake.¹²⁹ An apology may be relevant to the question of whether the standard of care was deviated from, but should not be the sole decisive factor.¹³⁰ The appropriate inquiry is not whether the individual doctor believes he has committed a wrong, but whether, in light of the standard of care that he is required to comport his conduct to, his action was unreasonable.¹³¹ If the plaintiff is unable to procure such evidence, typically in the form of expert testimony, then a mere doctor's apology should not be allowed to become a legal "trump card" of sorts, allowing the plaintiff to abandon

¹²⁶ Rehm & Beatty, *supra* note 4, at 120.

¹²⁷ *Id.*

¹²⁸ *Senesac*, 449 A.2d 900.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

the deviation of care standard and simply rest his case on a doctor's expression of sympathy.¹³² To allow this would be to punish the doctor who gives an honest opinion of how a medical mistake was made.¹³³

Senesac was expanded upon by the Supreme Court of Vermont in *Phinney v. Vinson*.¹³⁴ In this case, plaintiff Robert Phinney underwent a transurethral resection of the prostate, performed by the defendant, Dr. Robert Vinson.¹³⁵ Significant pain following the procedure caused the plaintiff to see another doctor, who determined that the operation was "inadequate."¹³⁶ Dr. Vinson told the plaintiff that he had been informed by the second doctor "that he had performed an 'inadequate resection' and he apologized . . . 'for his failure to do so'."¹³⁷

Like the plaintiff in *Senesac*, Phinney attempted to base his case solely on Dr. Vinson's apology as evidence that the doctor fell below the requisite standard of care.¹³⁸ Again, the court ruled that a personal apology is not enough to prove that the doctor failed to meet the requisite standard of care, and that further evidence, typically in the form of expert testimony, would be needed.¹³⁹

Cases such as *Senesac* and *Phinney* recognize that the practice of medicine, despite modern advances, is not an exact science.¹⁴⁰ It is possible, and even reasonable, for certain mistakes to be made. Without the benefit of medical training, the jury must be given evidence from an expert that explains what the defendant doctor did, why the doctor's action fell below the appropriate standard of care, and why

¹³² *Id.*

¹³³ *Id.*

¹³⁴ 605 A.2d 849 (Vt. 1992); (see *Senesac*, 605 A.2d 900).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 850.

¹⁴⁰ See *Senesac v. Associates in Obstetrics and Gynecology*, 449 A.2d 900 (Vt. 1982); *Phinney*, 605 A.2d 849.

the doctor's action was not simply an uncommon, non-negligent mistake. Rehm and Beatty argue:

The lesson Phinney teaches is how difficult it is for a plaintiff to win based on an apology alone. It appears safe for a practitioner to apologize for an inadequate outcome or result, as long as there is no admission that the inadequate outcome was caused by the practitioner's [sic] negligence. It appears that there is an understanding that the result of an operation is not guaranteed, not every operation will be successful, and an apology for the inadequacy of an operation does not mean the doctor is liable for negligence. This is a practical precedent in that it allows a doctor to express sympathy or empathy, without fear of reprisal, when the result of a procedure is not as good as was hoped for. Such expressions usually help heal the feelings and relationships of all persons involved.¹⁴¹

Courts across the country are well-advised to continue with the Senesac-Phinney line of reasoning when it comes to medical malpractice cases. As these cases illustrate, a doctor may apologize to a patient for any number of reasons, ranging from personal sympathy to regret stemming from a belief that a mistake has been made. While perfection is often hoped for from a doctor's work, the practice of medicine is never completely devoid of error. The mere recognition by the doctor that he made a mistake should not be enough to hold a doctor liable in a medical malpractice action. The key inquiry, to come typically from expert testimony, is whether the mistake made is one that is not unusual within the medical field and thus excusable, or if it is one that shows a failure on the doctor's part to perform in accordance with the requisite standard of care.

¹⁴¹ Rehm & Beatty, *supra* note 4, at 121–22.

iii. EXPANDING ON SENESAC: WHEN AN APOLOGY PROVIDES MORE THAN A SIMPLE “I’M SORRY”

What if a doctor makes a statement that provides, in addition to an expression of sorrow, clearer evidence of a deviation from the standard of care? The Supreme Court of Michigan was faced with such a case.¹⁴² Unlike the simple apology made by Dr. Grey in Senesac, the defendant in Pachtman, Dr. Judith Pachtman, made statements to a patient’s family member that she knew she had used a needle that was “too small.”¹⁴³ The needle broke inside the patient’s muscle tissue, causing doctors to search for it for twenty minutes.¹⁴⁴ The majority of the court determined that this statement on its own was insufficient to establish a prima facie case of medical malpractice.¹⁴⁵

The Pachtman dissent, written by Justice Charles Levin, provides a better compromise.¹⁴⁶ Justice Levin pointed to Senesac as an example of a case where the doctor’s statement did not “explain with relative precision what the physician should have done.”¹⁴⁷ Justice Levin added that an Idaho case provided another example of a doctor’s expression of error that did not provide sufficient evidence to impose legal liability.¹⁴⁸ Justice Levin argued that in Maxwell, the Idaho Supreme Court correctly determined that malpractice liability cannot be imposed upon a doctor for his simple statement that he “obviously messed up.”¹⁴⁹ Justice Levin pointed to a third case out of California, where a doctor’s statement that he

¹⁴² Locke v. Pachtman, 521 N.W.2d 786 (Mich. 1994).

¹⁴³ *Id.* at 789 (*compare Senesac*, 449 A.2d at 903).

¹⁴⁴ *Id.* at 788.

¹⁴⁵ *Id.* at 792–93.

¹⁴⁶ *Id.* at 794–97.

¹⁴⁷ *Id.* at 796.

¹⁴⁸ *Id.* at 796–97; (*see Maxwell v. Women's Clinic*, 625 P.2d 407 (Idaho 1981)).

¹⁴⁹ *Id.*

“blamed himself” for the patient being in the hospital was insufficient to show deviation from the standard of care.¹⁵⁰

Justice Levin agreed that simple statements of sorrow are not enough to show deviation from the standard of care, but the statement of the physician in Pachtman was more complex.¹⁵¹ In admitting that she “knew” the needle she was using was “too small,” in Levin’s opinion, Dr. Pachtman provided evidence that there was a standard practice of needle usage in the medical community, the doctor was aware of this practice, yet knowingly went against it.¹⁵²

Indeed, simple apologies should not be allowed as evidence of a deviation from the standard of care. Highly non-technical expressions such as “I messed up” or “I blame myself” should not be the sole basis on which liability for medical malpractice is imposed. However, Justice Levin makes a strong argument that statements that go beyond simple apologies and provide evidence of unreasonable error should be admissible.¹⁵³ Dr. Pachtman’s words indicated that in her field of medicine, there was a properly sized needle to use for that particular procedure, and that she knew she did not have the proper size, but she went forward using the improper needle anyway.¹⁵⁴ Dr. Pachtman effectively became an expert against herself as her words established a standard of care in regard to needle usage and a corresponding failure to adhere to it.¹⁵⁵

The Supreme Court of Michigan disagreed with the dissent, and in doing so, effectively decided it would be unfair to punish Dr. Pachtman for vocalizing her mistakes by

¹⁵⁰ *Id.* at 797 n. 4 (see *Cobbs v. Grant*, 502 P.2d 1 (Cal. 1972)).

¹⁵¹ *Id.* at 795 (Justice Levin asserts that “Pachtman’s statements explain exactly what a reasonably prudent physician would have done in the same situation: A reasonably prudent physician would have used a larger needle. This is not a case in which a physician merely expressed general dissatisfaction with her overall performance or merely expressed regret.”).

¹⁵² *Id.*

¹⁵³ *Id.* at 794–97.

¹⁵⁴ *Id.* at 789.

¹⁵⁵ *Id.*

making her words the main basis for establishing liability.¹⁵⁶ Justice Levin made a valid argument in that, while simple apologies should be protected, more complex statements involving clear evidence should be admissible.¹⁵⁷ Given the impact of Rule 408 of the Federal Rules of Evidence, and its state counterparts, doctors should be forewarned that in speaking outside of settlement negotiations, the more detailed an apology is, the more evidence it provides.¹⁵⁸

B. LEGISLATIVE ANALYSIS: ENCOURAGING LAWMAKERS TO PROTECT APOLOGIES FROM ADMISSIBILITY

The Senesac case achieved much in the way of preventing apologies from becoming admissible evidence.¹⁵⁹ Yet, even in following the Senesac line of reasoning, courts cannot completely wipe out apologies at trial.¹⁶⁰ As seen in the Pachtman dissent, there is a dispute among legal minds when it comes to the treatment of detailed versus simple apologies.¹⁶¹ Moreover, Senesac does not keep an apology out altogether.¹⁶² Senesac merely limits the apology from becoming the sole evidence for finding liability against a physician defendant.¹⁶³

Courts can only do so much, as the task of clarifying the evidentiary value to be attached to doctor's apologies is the

¹⁵⁶ *Id.* at 792–93.

¹⁵⁷ *Id.* at 794–97.

¹⁵⁸ Fed. R. Evid. 408 (Rule 408 prevents statements made during settlement negotiations from becoming admissible evidence. Accordingly, when this is done outside of settlement negotiations, doctors apologize at their own peril. The more details doctors offer concerning their error, the greater the risk that those same details could be used against them as evidence).

¹⁵⁹ *See supra* text accompanying note 90.

¹⁶⁰ *Senesac v. Associates in Obstetrics and Gynecology*, 449 A.2d 900 (Vt. 1982).

¹⁶¹ *Locke*, 521 N.W.2d at 794–97.

¹⁶² *Senesac*, 449 A.2d at 903.

¹⁶³ *Id.* (*see also supra* text accompanying note 90).

duty for state and federal legislators. Several states have created laws that protect apologies from being admissible against the doctor/apologizer at trial.¹⁶⁴

Generally, there are two types of apology protection laws.¹⁶⁵ Both typically protect apologies from being used as evidence against the apologizing doctor.¹⁶⁶ The main difference between them is whether the doctor is legally mandated to disclose details regarding medical errors.¹⁶⁷

i. MANDATORY DISCLOSURE LAWS

Approximately five states have “mandatory disclosure” laws, meaning that the hospital has no choice when it comes to disclosing medical errors.¹⁶⁸ Nevada’s mandatory disclosure law for hospitals is one example.¹⁶⁹ Under the Nevada law, medical errors are referred to as “sentinel events” and each hospital must designate a representative who is required to notify a patient of the details behind a sentinel event within seven days of its occurrence.¹⁷⁰ This notification, being a legal duty, is not an acknowledgement or admission of liability under the Nevada law.¹⁷¹

Pennsylvania’s mandatory disclosure law provides more detail than the Nevada law.¹⁷² The Pennsylvania law requires all health care workers, when they reasonably believe a “serious incident” has occurred, to report that incident according to the hospital’s safety plan.¹⁷³ The hospital then

¹⁶⁴ The Sorry Works! Coalition, *States with Apology Laws*, <http://www.sorryworks.net/media25.phtml> (last visited Oct. 28, 2006).

¹⁶⁵ The Sorry Works! Coalition, *Use of Sympathy/Apology Law Slides*, http://www.sorryworks.net/files/states_with_apology_laws.ppt (last visited Oct. 29, 2006) (the two types of laws are mandatory disclosure laws and non-mandatory apology protection laws).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See *supra* note 164 (Nevada, Florida, New Jersey, Pennsylvania and Vermont).

¹⁶⁹ NEV. REV. STAT. ANN. § 439.855 (LexisNexis 2006).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² 40 PA. STAT. ANN. § 1303.308 (2006).

¹⁷³ *Id.*

has a duty to report the event to the patient.¹⁷⁴ The law extends “whistleblower” protection to the health care worker by preventing the hospital from taking retaliatory actions against the health care worker for reporting the event.¹⁷⁵

The problem with the Nevada and Pennsylvania laws is that they state the legal duties of hospitals in terms that are general and open to interpretation. For example, under the Nevada law, hospitals must report on “sentinel events,” but the law does not state what exactly the hospital representative must tell the patient about the event.¹⁷⁶ Pennsylvania leaves it up to the health care worker to designate what to disclose and arguably, a great deal of interpretation comes in to play if the standard is determined by what the health care worker believes to be “serious.”¹⁷⁷

If states are going to impose a burden of mandatory reporting, then hospitals should be given clear instructions on what they are to report. New Jersey provides a comprehensive statute, complete with definitions of key terms.¹⁷⁸ This statute defines an “adverse event” as “a negative consequence of care that results in unintended injury or illness, which may or may not have been preventable.”¹⁷⁹ New Jersey hospital workers thus have a clearer standard on which to guide them.¹⁸⁰ Interestingly, while the law’s definition of adverse events incorporates preventable events, the law also states that health care facilities must report “preventable adverse events.”¹⁸¹ Specifically, facilities must report these events to patients and to the State Department of Human Services.¹⁸² Health care workers are encouraged to report adverse events not covered by the law to the department and are protected from retaliatory action for doing

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ NEV. REV. STAT. ANN. § 439.855 (LexisNexis 2006).

¹⁷⁷ 40 PA. STAT. ANN. §1303.308 (2006)

¹⁷⁸ N.J. STAT. ANN. § 26:2H-12.25 (2005).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

so.¹⁸³ The law goes on to provide a complex explanation of when documents and other information created during the mandatory reporting process can and cannot be used as evidence.¹⁸⁴

ii. NON-MANDATORY APOLOGY PROTECTION LAWS

Roughly twenty-nine states have apology laws that protect expressions of sympathy or sorrow from being used as evidence against the apologizer.¹⁸⁵ States vary in whether protection is given to those involved solely with medical errors or to other non-medical incidents. Massachusetts was the first state in the nation to provide an apology protection law. The Massachusetts apology protection statute, which applies to all accidents and not simply those of a medical nature, reads:

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.¹⁸⁶

The statute is relatively short, but it says a great deal. It allows a person who has caused an accident to apologize without fear of that apology being used as evidence against him.¹⁸⁷ This law denies admissibility to an apology whether the apologizer was indeed at fault or even if he merely gave an apology based on human emotions that arise from being involved in a disturbing accident.¹⁸⁸ Laws such as the one in

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *See supra* note 165.

¹⁸⁶ MASS. ANN. LAWS ch. 233, § 23D (LexisNexis 2006).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

Massachusetts do not prevent an accident victim from suing.¹⁸⁹ Instead, they ensure that the victim will prove his case through actual evidence of the defendant's wrongdoing, and not based simply on an apology.¹⁹⁰

IV. CONCLUSION: AN OVERALL NEED FOR APOLOGIES IN MEDICAL MALPRACTICE LAW

Apologizing to a patient harmed by a medical error is the moral thing for a doctor to do. Yet, there is an overwhelming fear among doctors that while saying "I'm sorry" is the right thing to do, an apology could turn costly as well. From reviewing the Federal Rules of Evidence, and the research of Robbenolt and the Sorry Works Coalition, it is shown that doctors need not fear apologizing during settlement negotiations, and doing so leads to a stronger likelihood that a patient will accept a proposed settlement rather than seek a costly trial. As for situations where apologies are admissible, courts and lawmakers across the country can learn from the strides made by their counterparts in other states.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*