The Scope of Ohio's Apology Statute

Earlier this year, the Ohio Supreme Court decided the case of *Estate of Johnson v. Smith*.[1] At issue in *Smith* was whether Ohio's Apology Statute – R.C. 2317.43 – applies retroactively to statements of apology, sympathy, and compassion made by physicians in the wake of an unfortunate medical outcome, and whether the statute was intended to exclude statements of fault within the scope of its protection. In the decision below, a divided Eleventh Appellate District held that the statute did not apply retroactively to exclude the statement "I take full responsibility" made by a physician for causing post-surgical medical complications to a patient.[2] The appeals court also held the physician's statement was admissible as a party admission, an admission against interest, and that its probative value outweighed any danger of unfair prejudice under the Ohio Rules of Evidence.[3] The doctor appealed the decision to the Ohio Supreme Court, which granted discretionary review on May 9, 2012, and heard oral arguments on February 5, 2013.[4] The Court issued a decision on the merits on April 23, 2013, holding that R.C. 2317.43 applies to any cause of action filed after September 13, 2004.[5]

Background – Ohio Apology Statute

R.C. 2317.43 was enacted by the Ohio General Assembly in September 2004. According to its stated intent, the purpose of the Apology Statute is to prohibit the use of a physician's statement of sympathy as evidence in a medical malpractice action.[6] The statute provides that all "statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence" made by a medical provider to a patient or a patient's relative or representative as a result of an unanticipated adverse outcome are "inadmissible as evidence of an admission of liability or as evidence of an admission against interest."[7] Similar to Ohio Evidence Rule 409, which addresses offers to pay medical expenses, the language of the Apology Statute does not draw a clear distinction as to whether an admission of fault is admissible as a party admission or admission against interest in subsequent litigation.[8] Ohio is one of only six states that have enacted apology statutes that fail to clearly distinguish between the admissibility of a physician's statement of sympathy and one acknowledging fault.[9]

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[1] *Estate of Johnson v. Randall Smith, Inc.*, 131 Ohio St.3d 1543, 966 N.E.2d 896, 2012-Ohio-2025, *discretionary appeal allowed* (May 9, 2012).
[2] *Johnson v. Randall Smith, Inc.*, 196 Ohio App.3d 722, 727, 965 N.E.2d 344, 449, 2011-Ohio-6000, at ¶22 (11th Dist. 2011).
[3] *Id.*, 196 Ohio App.3d at 729, 965 N.E.2d at 350, 2011-Ohio-6000, at ¶28-29; s*ee also* Ohio Evid.R. 801(D)(2)(a) (admission by a party), Ohio Evid.R. 804(B)(3) (statement against interest), and Ohio Evid.R. 403(A) (probative value v. danger of unfair prejudice).
[4] *Estate of Johnson, supra*.
[5] *Estate of Johnson v. Randall Smith, Inc.*, Slip Opinion No. 2013-Ohio-1507, syllabus.
[6] *See* Sub. H.B. No. 215, 150 Ohio Laws, Part III, 4146 ("H.B. 215").
[7] *See* R.C. 2317.43 (West 2013).
[8] *See* Ohio Evid. R. 409, which provides that "[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." Rule 409 does not exclude statements of responsibility or admissions of fault from admissibility.
[9] *See* R.C. 2317.43 (West 2013); Mont. Code Ann. 26-1-814 (2009); N.D. Cent. Code 31-04-12 (2009); Okla. Stat. Ann. Title 63, 1-1708.1H (West 2013); W.Va. Code Ann. 55-7-11a (West 2013); Wyo. Stat. Ann. 1-1-130 (2013).

Among the 36 states that have adopted physician apology statutes, the majority of them explicitly distinguish between statements of sympathy and admissions of fault. On the one hand, 17 of the states that have explicitly distinguished between expressions of compassion and admissions of fault have elected to admit statements of fault while excluding expressions of sympathy.[10] A good example is California's Apology Statute, which provides that only "the portions of statements or benevolent gestures expressing sympathy" are inadmissible against a treating physician in a later malpractice action.[11] On the other hand, 8 of the states that have explicitly drawn the same distinction have chosen to exclude both types of statements from admission into evidence.[12] A good example is Colorado's Apology Statute, which provides that "any and all statements expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence are inadmissible as evidence of a party admission or admission against interest.[13]

Ohio Cases Addressing the Apology Statute

There are only two reported cases in Ohio that have addressed R.C. 2317.43. The first is *Davis v. Wooster Orthopaedics & Sports Medicine, Inc.*[14] The facts in *Davis* were uncomplicated. Barbara Davis was 49 years old when she died following back surgery on July 23, 2004. Her husband filed a wrongful death action against her orthopaedic surgeon – Dr. Michael Knapic – and his practice group. Mr. Davis alleged medical malpractice against Dr. Knapic for negligently performing a lumbar microdisectomy by completely severing his wife's common iliac artery, lacerating her iliac vein, and failing to timely diagnose the medical condition that his wife developed after the procedure.[15] At trial, Mr. Davis testified that after the surgery, Dr. Knapic said "as far as the back surgery, everything went fine," but that when Mrs. Davis was rolled over on her stomach, her blood pressure started to drop, and an ultrasound was performed that revealed bleeding, indicating that at some point an artery was nicked. Mr. Davis then testified that Dr. Knapic said, "It's my fault. I take full responsibility."[16] Mr. Davis argued that while R.C. 2317.43 may exclude the admission of statements of sympathy, a direct

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[10] *See* La. Rev. Stat. Ann. 13:3715.5 (2013); Cal. Evid. Code 1160(a) (West 2013); Del. Code Ann. Title 10, Section 4318 (2011); Fla. Stat. Ann. 90.4026 (West 2013); Haw. Rev. Stat. Ann. 626-1, Rule 409.5 (West 2013); Idaho Code Ann. 9-207 (2013); Ind. Code Ann. 34-43.5-1-4 and 34-43.5-1-5 (West 2013); Me. Rev. Stat. Ann. Title 24, Section 2907 (2013); Md. Code Ann., Cts. & Jud. Proc. Section 10-920 (West 2013); Mass. Gen. Laws Ann. Ch. 233, 23D (West 2013); Mich. Comp. Laws Ann. 600.2155 (West 2013); Mo. Ann. Stat. 538.229 (West 2013); Neb. Rev. Stat. Ann. 27-1201 (West 2013); N.H. Rev. Stat. Ann. 507-E:4 (2013); Tenn. R. Evid. 409.1 (2013); Tex. Civ. Prac. & Rem. Code Ann. 18.061 (Vernon 2013); Va. Code Ann. 8.01-52.1 (2013). The Hawaii legislature explained its intent by commenting that its rule excluding expressions of sympathy while permitting the use of expressions of fault "favors expressions of sympathy as embodying desirable social interactions and contributing to civil settlements." *See* Haw. Rev. Stat. Ann. 626-1 (West 2013), Commentary to Rule 409.5.

[11] *See* Cal. Evid. Code 1160(a) (West 2013).

[12] *See* Ariz. Rev. Stat. Ann. 12-2605 (2013); Colo. Rev. Stat. Ann. 13-25-135 (West 2013); Conn. Gen. Stat. Ann. 52-184d (West 2013); Ga. Code Ann. 24-3-37.1 (West 2013); S.C. Code Ann. 19-1-190 (2013); Utah Code Ann. 78B-3-422 (West 2013) (excluding from evidence the sequence and significance of events relating to the unanticipated outcome of medical care); Vt. Stat. Ann. Title. 12, 1912 (2013); and Wash. Rev. Code Ann. 5.64.010 (2013).

[13] *See* Colo. Rev. Stat. Ann. 13-25-135 (West 2013).

[14] *See* 193 Ohio App.3d 581, 952 N.E.2d 1216, 2011-Ohio-3199 (9th Dist. 2011).

[15] *Id.*, 2011-Ohio-3199, at ¶1.

[16] *Id.*, at ¶14.

admission of responsibility should be admissible under the plain and unambiguous language of the statute. Dr. Knapic argued that that drawing a distinction between an acknowledgment of fault and an expression of sympathy violated the statutory intent behind R.C. 2317.43, which was to avoid the obvious detriment to the doctor-patient relationship that can follow an adverse medical outcome, particularly if the doctor refuses to speak to the patient or the family and feels uncomfortable expressing any compassion and regret. Dr. Knapic also argued that the nature of the word "apology" inherently incorporates an expression of fault or admission of error, and thus that statements such as his fell clearly within the ambit of the statute's protection.

The Ninth Appellate District concluded that the intent behind the Apology Statute was to protect pure expressions of sympathy but not admissions of fault.[17] The court held that Dr. Knapic's statements constituted an admission of liability and could be admitted into evidence. The court noted that this interpretation was consistent with the public policy espoused by the majority of states that have adopted apology laws, with an explicit distinction between sympathy and fault. Further, the court reasoned that a rule protecting a health care provider's expression of sympathy from use at trial, but not an admission of fault, would advance the goal of diminishing the obvious damage to the physician-patient relationship following a negative medical outcome.[18]

The second case is *Johnson v. Randall Smith, Inc*.[19] The facts in *Johnson* were similarly straightforward. In April 2001, Dr. Randall Smith performed a laparoscopic surgical procedure on Jeanette Johnson's gall bladder. Complications arose during the course of the operation, and Johnson experienced a condition in which the opening of the common duct in her gall bladder narrowed in size. Although she was released from the hospital soon after the procedure, Johnson had to be readmitted within three weeks for jaundice and obstruction of a bile duct. After Dr. Smith informed Johnson that she would have to undergo additional surgery at a different hospital to address her post-surgical complications, she became very emotional. Dr. Smith took her hand and stated before witnesses, "I take full responsibility for this."[20] Johnson subsequently underwent five additional procedures to repair the damage she suffered during the 2001 surgery. Within a year and a half of the initial procedure, Johnson and her husband filed a medical malpractice claim against Dr. Smith and his medical corporation.[21]

In September 2004, while Johnson's suit was pending, the Ohio General Assembly enacted R.C. 2317.43. After a long delay in the proceedings in her case, during which Johnson dismissed her original complaint in 2006 and filed a new one in 2007, the case was set for a jury trial in 2010. During pretrial proceedings, Dr. Smith's attorneys filed a motion in limine to exclude any reference to Smith's statement that he "took full responsibility" for Johnson's post-surgical condition, citing R.C. 2317.43. The trial court granted the motion. After a two-day trial during which no evidence regarding Dr. Smith's statement was considered, the jury returned a defense verdict.[22]

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[17] *Id.*, at ¶31.
[18] *Id.*, at ¶13.
[19] *See* 196 Ohio App.3d 722, 965 N.E.2d 344, 2011-Ohio-6000 (11th Dist. 2011).
[20] *Id.*, 2011-Ohio-6000, at ¶4.
[21] *Id.*, at ¶5.
[22] *Id.*, at ¶¶8-9.

Johnson appealed, arguing that the exclusion of Dr. Smith's 2001 statement was an unconstitutional retroactive application of the 2004 Apology Statute that deprived her of a fair trial. The Eleventh Appellate District agreed, and in a 2-1 decision, reversed the trial court's pretrial ruling excluding Dr. Smith's statement from evidence.[23] The court reasoned that because the General Assembly did not include specific language in the Apology Statute expressly indicating an intent to apply the law retroactively, the trial court erred by barring testimony regarding Dr. Smith's 2001 statement.[24] The court remanded the case for a new trial.

Dr. Smith sought and was granted discretionary review on appeal to the Ohio Supreme Court. Dr. Smith's attorneys argued that applying the Apology Statute to bar testimony about his statement during Johnson's 2010 trial was not a retroactive application of the law because R.C. 2317.43 bars such testimony "in any civil action brought" after the statute's September 2004 effective date.[25] They argued, and the dissenting appeals court judge agreed, that because Johnson's malpractice complaint was refiled in 2007, applying R.C. 2317.43 to bar testimony about Smith's statement in her case was a prospective application of the law to a lawsuit that was not actually "brought" until nearly three years after the new law took effect.[26]

In response, Johnson's attorneys argued that her injuries and the events leading up the injuries were established in 2001. Because the statement made by Dr. Smith admitting "responsibility" for her post-surgical complications was made three years before the enactment of the Apology Statute, they argued that the appeals court correctly held that applying the statute to prevent Johnson from presenting evidence of Dr. Smith's 2001 admission of liability to the jury would be an unconstitutional retroactive application of R.C. 2317.43.[27] They also contended that, even if the application of the Apology Statute to Johnson's refiled complaint was held to be prospective, the trial court still erred in excluding Dr. Smith's statement "I accept full responsibility for this" because the statement was in substance neither an apology nor an expression of "sympathy" or "condolence" under R.C. 2317.43.

Conclusion

Unfortunately, neither the *Davis* nor *Johnson* decisions provided much guidance on what *would* constitute a protected statement under Ohio's Apology Statute. The *Davis* Court did observe in dicta that it is common etiquette to say "I'm sorry" upon hearing that an individual's relative has died, and that no reasonable person would construe such a statement as a confession of having caused a death.[28] Presumably, such a statement would be protected by the Apology Statute, but the use of the word "apology" in the statute creates some ambiguity. The public policy arguments for admitting or excluding statements of fault cut both ways. On the one hand, physicians contend that statements of sympathy and fault following an unfortunate medical outcome should be excluded entirely from evidence, as it is desirable to promote candor and open communication in the doctor-patient relationship, and admitting such statements into

[23] *Id.*, at ¶29.
[24] *Id.*, at ¶20.
[25] *Id.*, at ¶15.
[26] *Id.*, at ¶31 (Cannon, J., dissenting).
[27] *Id.*, at ¶12.
[28] *Davis*, 2011-Ohio-3199, at ¶10.

evidence could have a "chilling effect" on communication between a physician and a patient. In that same vein, a colorable argument can be made that the word "apology" in R.C. 2317.43 reasonably includes an expression of fault, admission of error, or at least an implication of guilt for an offense. On the other hand, patient advocates argue that if the word "apology" is read in context with the list of other sentiments that are excluded under R.C. 2317.43, the statutory language clearly does not include statements of fault or admissions of responsibility within the scope of protection. Plaintiffs' attorneys stress that if the Ohio General Assembly had intended to prohibit the admission of all statements of fault uttered by medical professionals to injured patients or their families, it could have done so by including language excluding all "admissions of liability" or "statements against interest," rather than limiting its description of the prohibited statements to those "expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence."[29] In addition, the argument goes, under our adversarial system of justice, there is no reason to believe a doctor would say something against her interest if it were not true. Thus, a statement of fault or admission of responsibility should be deemed admissible against the doctor who made it.

An additional complication is a situation in which a doctor's sentiment includes both an expression of sympathy *and* an admission of fault in the same statement. Under the Apology Law, the statement of sympathy would be excluded as inadmissible, but the statement of fault would be admissible against the physician. From a public policy perspective, it seems perverse to exclude a doctor's expression of compassion to a patient or a patient's family, but then admit the doctor's admission of responsibility, particularly when both communications are made in the course of the same statement. The Ohio Rules of Evidence include a "doctrine of completeness" that would hopefully preclude such a predicament, as such a construction would surely subvert the legislative intent of the statute.[30] But until the Ohio Supreme Court gives us some clear guidance on the full scope of R.C. 2317.43, that possibility is real. Unfortunately, the Court's decision in *Estate of Johnson* did not provide clear parameters of the Ohio Apology Statute, as it merely held that Dr. Smith's statement "I take full responsibility" was "precisely the type of evidence that R.C. 2317.43 was designed to exclude as evidence of liability in a medical-malpractice case."[31]

In the wake of *Estate of Johnson*, health care providers should remain cautious when speaking with a patient or a patient's relatives following an adverse outcome to a medical procedure to ensure that any statements they make comply with the Apology Law and are not later deemed an admission of liability or a statement against interest. Attorneys representing health care providers in medical malpractice cases should advise doctors to have an impartial witness present during any meeting with an aggrieved family member or loved one, especially given how easily time and emotion can affect how a patient or family members feel about a well-intentioned statement made by a doctor in the immediate wake of a patient's injury or death. Attorneys representing patients in medical malpractice actions should remember that admissions of fault by health care providers may still be admissible in the aftermath of *Estate of Johnson*, even if statements of responsibility are not. Until the Ohio Supreme Court settles the uncertainty

[29] *See* R.C. 2317.43 (West 2013).
[30] *See* Ohio Evid. R. 106; *see also* Staff Note to Ohio Evid. R. 410 (July 1, 1991 Amendment).
[31] *Estate of Johnson*, Slip Opinion No. 2013-Ohio-1507, at ¶23.

surrounding the admissibility of statements of fault under R.C. 2317.43, the full scope of the Apology Statute remains unclear.