

## **The Role of Apologies in Resolving Medical Disputes**

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### **ABSTRACT**

In the wake of medical errors and potential lawsuits, apologies made by medical practitioners to their patients have the ability to defuse prospects of litigation. Often, when things go wrong, patients want to know what actually happened, why it happened and be assured that it will not happen again. At this juncture, apologies which are ‘statements acknowledging error and its consequences, including accepting responsibilities and communication of regrets’ can reduce the anger as well as patient desire to retaliate. Nevertheless, apologies may also have the potential to be seen as admissions of guilt by the medical practitioner, thus, exposing him to risks of impending lawsuits. In weighing the drawbacks of apologies against their benefits, several countries have enacted ‘apology laws’ that mandate open disclosure of medical errors but shield those who apologise from legal liability. This paper seeks to discuss the role of apologies in the resolution of medical disputes and the barriers faced by medical practitioners in subjecting themselves to acts of open disclosure after a mishap. Nevertheless, the inculcation of a sustainable culture of honesty, openness and respect is fundamental to improve patient safety and public trust in the healthcare system.

*Keyword:* Apology, apology law, medical error, negligence, open disclosure

### **INTRODUCTION**

Apology has always been viewed as an important social conduct that is able to heal and preserve relationships. By apologising,

a person shows respect and empathy towards the wronged person. Subsequently, if it is done sincerely and effectively, the negative consequences of the wrong actions can be avoided. A person who has been harmed is usually overwhelmed by anger, frustration and a desire to retaliate. An apology made by the wrongdoer has the ability to disarm a person’s anger as well as vengeance and subsequently, opens the door to forgiveness towards the wrongdoer

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(Etienne & Robbennolt, 2007). In the case of medical negligence that results in injuries and death of a person, it is almost inevitable that the affected person and his families will be consumed by anger. Consequently, the injured victims or their families will resort to court litigation as a means of showing their anger as well as dissatisfaction and at the same time, demand monetary compensation to ensure medical practitioners pay for their losses (Robbennolt, 2009). Apologies made by the medical practitioner at this point may prevent prospects of litigation and reduce the anger of the affected parties. However, medical practitioners are in constant dilemma fearing that apologies may be interpreted as admissions of guilt and used against them in legal proceedings (Mastroianni, Mello, Sommer, Hardy, & Gallagher, 2010). It is thus, pertinent to explore benefits and the drawbacks of apologies in resolving medical disputes and the legal implications if apologies are being placed in a proper regulatory framework to ensure its validity of its consequences.

### **THE CONCEPT OF APOLOGY IN MEDICAL DISPUTES**

Apologies are statements acknowledging errors and their consequences, including accepting responsibilities and communication of regrets. Apologies can be defined as a “written or spoken expression of one’s regret, remorse or sorrow for having insulted, failed or injured, or wronged another” (Dictionary.com). Besides expressing one’s regret, apologies may signify an admission of responsibility

or become part of a confession (Slocum, Allan, & Allan, 2011).

The act of apologising is remedial and has healing values to both parties. Studies have also shown that anger is the main motivator for the start of a litigation process, thus, an apology offered at this time may be able to defuse the desire to litigate as it is able to reduce the patient’s anger and creates an open communication between the doctor and the patient to voice their concerns (Slocum et al., 2011). At this juncture, possibilities of settling matters out of court may be forthcoming (Allan, 2008). Settlements out of court may be beneficial to both parties as it not only able to reduce the confrontational attitudes amongst the parties in the court room but would also be able to reduce the backlog of cases in the court of law (Hodge & Saitta, 2011).

### **THE BENEFITS OF APOLOGISING IN MEDICAL DISPUTES**

Apology is recognised for its psychological effect as it is a remedial behaviour with a potential to make wrongful behaviour acceptable either verbally or by acts that attempt to explain the real situation and showing of compassion and regret (Ohbuchi, Kameda, & Agarie, 1989). Although apology cannot undo the outcome of the negligent act, the words of empathy may have the ability to defuse anger and can undo the negative effect or consequences of the act of negligence (Hodge & Saitta, 2011). Other than offering psychological benefits, the law on apology also provides legal benefits which are discussed below.

### **Discourage Litigation**

Apology encourages or influences reconciliation. As anger is the main motivation for litigation related to medical negligence, apologies has been found to be effective in reducing patient's anger, increase communication between the medical practitioner and patient which ultimately reduces the latter' desire to litigate (Slocum et al., 2011). Although the patient realises the outcome of the act cannot be reversed, in certain circumstances, the affected party only wants to know how and why the incident happened and they also want to be assured that the medical practitioner will take preventive measures so the incident is not repeated (Szostak, 2011). Besides that, apology promotes emotional healing as it will remove the hatred between the patient and medical practitioner. Subsequently, the patient will no longer perceive the medical practitioner as a personal threat (Engel, 2002) and there will be no issue of prospective litigation fostering the 'name, blame and shame' culture.

### **Promote Fast Settlement of Claims**

Litigation is a lengthy and tedious process both to the patient as well as the medical practitioner. The substantive law of medical negligence coupled with complex procedural aspect of a tort based civil claim will not assist the patient much in procuring compensation for the physical and psychological injuries suffered (Kellett, 1987). In some cases, the court takes years

to come up with a decision after the claim has been initiated by the patient. This will not only delay the patient's right to get compensation for the losses suffered but it will also increase the tension as well as anger between the patient and the medical practitioner. At this juncture, encouraging mediation and apologising can promote settlement and protect the emotional well-being of both parties (Barcena, 2013).

### **Promotes Disclosure and Transparent Communication**

Good communication incorporating an apology is important in maintaining a cordial relationship between a medical practitioner and the patient after an adverse event (Ebert, 2008). If there is a breakdown in communication, it will have adverse consequences for the relationship. Further, good communication tends to decrease the likelihood of a lawsuit and increase positive perceptions portrayed by the medical practitioner. It will undeniably lead to better outcome and automatically discourage litigation (Lester & Smith, 1993). In certain circumstances, a medical practitioner tries to prevent himself from making any contact with the patient after an adverse event. However, if the medical practitioner has been more transparent, the patient's anger will not be aroused. When the medical practitioner apologises, it will usually be accompanied with justification or explanation of what really happened which is desirable to the patient (Szostak, 2011).

## **THE DRAWBACKS OF APOLOGISING IN MEDICAL DISPUTES**

Although apologising has its benefits, their drawbacks need to be weighed against their benefits. Medical practitioners are often hesitant to apologise fearing the negative consequences of such actions. The setbacks of apologising are discussed below.

### **Admission of Fault**

An admission is a statement against a person's own interest, and is generally considered in the court of law to determine the liability of the parties (Rehm & Beatty, 1996). The rationale for such acceptance is that, a person will not make a statement against his own self or interest unless it is true. In the course of litigation, an apology may constitute an admission because in the normal course of human behavior, a person will not make a testament against themselves unless they were true (Taft, 2005). This is the most important factor which prevents medical practitioners from apologising.

### **Fear of Litigation**

Although a patient is amenable to an apology by the medical practitioner, the fear of litigation has always been a major impediment for the latter. This fear has led to defensive and strategic disclosure practised by the medical practitioners (Taft, 2005). Lawyers usually encourage medical practitioners not to apologise and label such action as a "legal suicide" as it

can be used by the patients against them in court, which in turn may jeopardise their insurance claims (Ebert, 2008). The medical practitioner is usually required not to make any form of admission in the insurance coverage. Thus, medical practitioners are not encouraged to apologise fearing their insurance will not cover such actions (Cohen, 1999). Medical practitioners are wary of being dragged into the intricacies of court trials which are usually lengthy and cumbersome. The threat of litigation compels the doctor to view his patient as a future adversary in a courtroom proceeding. Even if the negligence claim is settled out of court, there is still an effect on the doctors as settlements out of court leave them with no chance of vindicating themselves. They may still feel a cloud hanging over their head.

### **Personality of the Medical Practitioner**

Society always have high regard towards medical practitioners due to the nature of their profession. This perception has created the 'non-apologetic' culture among the medical practitioners as by apologising, a person is in a way admitting his fault and consequently, lowering his position amongst his peers (Ebert, 2008). Therefore, when a mishap occurs, medical practitioners do not want to apologise as they believe that they are in higher position than the patient. These egos on the part of the medical practitioners, unfortunately, shield them from expressing apologies or remorse whenever there is a dispute with their patients.

## **THE ROLE AND WORKINGS OF 'APOLOGY LAW' IN MEDICAL DISPUTES**

Although apologies offer much benefits in defusing the desire for patients to litigate, it also has the effect of being a 'double-edge' sword and be seen as self-incriminating. In other words, apology made by the medical practitioner can be seen as an admission of guilt and be tendered as evidence in court proceedings. This has led to several countries enacting 'apology laws' that mandate open disclosure of medical errors but at the same time, shielding those who apologise from legal liability (Raper, 2011). There are two types of apology law (Wheeler, 2013). The first is the 'full apology law' that protects the medical practitioner against any expression of regret and remorse for what has happened, statements of sympathy and also any acknowledgement of that person's wrongdoings including statements that contain admission, fault, mistake, errors and liability (Carroll, 2014). The second type is the 'partial apology law', which only protects the medical practitioner against statements of sympathy, commiseration, condolences and compassion alone without any expression of admission (Ho & Liu, 2011). In some jurisdictions, the law give protection over apology made by a medical practitioner and will not allow it to be used in determining his liability in court. However, such apology may be used by the medical board in a licensure actions brought by the state (Mongiello, 2012). In such cases, the medical practitioners will still be subjected to internal or domestic inquiry by the

relevant authority. The workings of apology law differ from one jurisdiction to another and it is thus, important to examine the relevant jurisdictions that have implemented apology law for resolving medical disputes.

### **Australia**

The issue of legislating apologies was initiated by a Legal Process Reform Group with support from Australian Health Ministers' Advisory Council after they were asked to report on issues concerning medical negligence. They recommended for legislation that provides an apology "made as part of an open disclosure process to be inadmissible in an action for medical negligence" (Vines, 2005, p. 2). This recommendation was made in reference to the development of the Open Disclosure Project and the National Open Disclosure Standard for Public and Private Hospitals developed by the Australian Council for Safety and Quality in Health Care, which included expression of regret as part of important element in an effective disclosure (Australian Commission on Safety and Quality in Health Care, 2008). This reform was aimed to ensure that an effective disclosure will be made to help the patients in the healing process, better learning for the medical practitioners and ultimately, reduce the rate of medical negligence litigation (Vines, 2005). The application of apology law in Australia is rather unique because the types of apology vary in different states throughout Australia (Barr, 2009). States such as New South Wales, Australian Capital Territory and Queensland enact

the 'full apology law' whereas the rest such as Victoria, Northern Territory, South Australia, Tasmania and Western Australia offer the 'partial apology law' (Wheeler, 2013), which only 'protects expression of regret and sympathy alone (Carroll, 2014) and will no longer protect the apology if it contains any *mea culpa* ('through my fault') statements (Studdert & Richardson, 2010). For states that offer 'full apology law', the definition of apology does not only cover expression of sympathy or regret but it also includes expression that implies admission or fault related to the matter (section 68 Civil Liability Act 2002) (section 72C Civil Liability Act 2003 Queensland) (section 13 of Civil Law (Wrongs) (Australian Capital Territory) 2002). The law in these states specifically provides that an apology is not admissible in any civil proceedings as evidence of fault or liability. This can be seen from the provisions in the above stated legislations that these states give full legal protection for all types of apologies made by any member of the community including admission of fault by a medical practitioner (Wheeler, 2013). The workings of 'full apology law' require three main elements that concern the position and consequence of such apology, i.e. declaratory element, relevance element and procedural element (Wheeler, 2013). For instance, in the Civil Liability Act 2002 (NSW), section 69(1)(a) declares that apology is not an admission of fault or liability. This refers to the first element which is the 'declaratory element'. Second, in determining a fault or liability on the part of the defendant, section 69(1)

(b) excludes apology from being taken into account as a relevant fact in determining fault. This provision is concerned with the 'relevance element'. Third, with regards to the 'procedural element', from the law of evidence perspective, apology made is inadmissible as evidence of fault and therefore, cannot be used in court against the person who gave it according to section 69(2). Although the application of apology in Australia is not uniform (Finlay, Stewart, & Parker, 2013), its workings in the tort law reform has significantly reduced number of new claims for compensation, increased number of closed claims and eventually, reduced proportions of large damage awards (Corbett, 2011).

### **Canada**

The bill on apology law in Canada was drafted based on New South Wales Civil Liability Act 2002 (Barr, 2009). However, the British Columbia Apology Act incorporated not only the essential elements based on the Australian legislation but also included specific provisions for insurance contracts. This is an extension of the protection where the law does not only render such apology inadmissible in court but also prevent the insurance contract from becoming void if apology was made (Ministry of Attorney General (Canada), 2006). Legislators in Saskatchewan, Manitoba, Alberta and Ontario have also passed similar law reform as British Columbia. Further, the protection given by the Canadian apology law is applicable to all civil claims (Worton & Pavlovic, 2015) except in the province of

Prince of Edward Island where the protection for apology is exclusive for healthcare related cases only (Barr, 2009). The Apology Act in British Columbia was given royal ascent in 18<sup>th</sup> May 2006. The Act defines apology as “an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate” (Apology Act (BC) 2006). The Act also provides that an apology does not constitute an express or implied admission of fault or liability and does not void, impair or otherwise affect any insurance coverage that is available, or that would be available by the person who is connected to the apology. It further provides that apology must not be taken into account in any determination of fault or liability in connection with that matter (Apology Act (BC) 2006). Currently, most states in Canada have adopted the Uniform Law Conference of Canada Uniform Apology Act (Worton & Pavlovic, 2015). The purpose of this uniform legislation is to promote uniformity on the substance of the law as well as the application of apology law throughout Canada (Uniform Law Conference of Canada [ULCC], 2007). Before the enactment of apology law in Canada, some apologies are already protected by law such as admission made without prejudice and also apologies made in the course of confidential dispute resolution proceedings such as mediation. However, after the apology legislations

in Canada came into force, the law now explicitly precludes parties from relying on the apology as an admission of fault or as evidence to prove liability of the parties (Worton & Pavlovic, 2015). Nevertheless, even though the Canadian apology law protects apology from being admissible in court, it does not protect all types of apology. The law only gives statutory protections over apologies that fall under the definition of “apology” under the legislation. Therefore, it does not cover extraneous statements that are not part of the apology such as statement about restitution and repayment of debt or any admission related to the facts of the dispute (Worton & Pavlovic, 2015). One of the major implications of this is the contract of insurance as the apology laws prevent insurance company from refusing to give protection to the insured medical practitioner on the grounds that the latter apologised and thus did not cooperate with them to defend the case (Barr, 2009).

## CONCLUSION

The benefits of apologising are beyond dispute and it is understandable that patients want a sincere apology and acknowledgement of the harm they have suffered. However, in encouraging medical practitioners to practice a culture of transparency and openness, the legal consequences of apologising need to be stated in a clear legal framework so that medical practitioners are aware of the outcome of apologising to their patients. Malaysia should enact apology laws that allow medical practitioners to receive legal protection in certain circumstances when

apologies for unintentional wrongdoings are made. Lessons can be learned from the Canadian and Australian experiences in drafting and legislating apology laws as well as making amendments to the law of evidence in their quest to resolve medical disputes in a more amicable manner. A structured apology law will reduce the number and severity of medical practitioners' liability claims, prevent or minimise prospects of litigation and ultimately, preserve the relationship between medical practitioners and their patients.

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