

THE APOLOGY IN EMERGENCY MEDICINE

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**CURRENT
TREND**

**INCREASING
NUMBER OF
MEDICAL
NEGLIGENCE
CASES**

High Amount of Damages / Monetary Compensation

Compensation for Medical Negligence Claims
...not just limited to Compensatory Damages
under the rule of *Restitutio in integrum* –

Special and General Damages

But also presently include...

AGGRAVATED DAMAGES

Cases are constantly Publicised in Social Media

HOME / MALAYSIA

OPINION SPORTS TECH/GADGETS DRIVE VIDEOS

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Action for Victims of Medical Accident (AVMA)

- “...what they want is ‘satisfaction’...what that means is a full explanation of what went wrong and if appropriate, an apology for what actually happened.... there are times when financial compensation is also necessary and that will form part of the ‘satisfaction’ that the patient wants.”

The Role of Apology Laws in Medical Malpractice

Nina E. Ross, MD, and William J. Newman, MD

Apologies are an integral part of human communication and can repair damaged relationships. Within the medical system, apologies remain controversial. Physicians often wish to apologize to patients harmed by medical errors, but they may not disclose errors to patients and their families because of the concern that disclosing errors could increase the likelihood of a malpractice claim. Yet physicians who apologize to patients may instead mitigate many of the communication problems known to prompt patients to pursue legal action. This idea has prompted many state governments to pass apology laws, legislation that aims to reduce rates of malpractice by encouraging physicians to apologize. These laws have not yet had their intended effect of reduced malpractice rates, likely because most apology laws protect expressions of regret but do not protect error disclosure. Apology laws therefore do not facilitate the type of communication that would improve physician transparency and overall patient satisfaction.

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Key words: malpractice; negligence; apology; medical error; disclosure

An apology can have tremendous therapeutic potential for both parties. Apologies can reduce anger, promote healing, and repair damaged relationships.¹⁻³ To have positive effects, an apology must be given well. An effective apology generally contains four elements: the acknowledgment of harm, evidence of

two parties and how motivated they are to reconcile the relationship.

A bad apology is often worse than no apology at all.⁵ Apologies perceived to be inadequate can be met with anger, hurt, and criticism.^{4,5} Ineffective apologies are so common that the word nonapology has

The Importance of Apology

"an apology has the potential to help people who have suffered serious emotional harm through the wrongdoing of others in ways that monetary damages alone cannot"

Definition of Apology

- Literally, apology means **“saying you are sorry”** .
- In a more specific context, **apology refers to “an acknowledgment of responsibility for an offense coupled with an expression of remorse”**.
- In a healthcare setting, when the services provided result in negative outcomes such as death and personal injuries, it is rather common **for community’s expectation to include the desire for explanation of what had actually happened and consoling expressions from the healthcare providers.**

Carol B. Liebman and Chris Stern Hyman Liebman. (2004). A Mediation Skills Model To Manage Disclosure Of Errors And Adverse Events To Patients. Health Affairs. 23(4) : 22-32

“...a sincere and timely apology can have a powerful impact on the patient as well as the affected family and this may serve as a critical step in defusing anger and rebuilding trust”

Beverly Engel. (2002). The Power of Apology - Healing Steps to Transform all your Relationships. Canada: John Wiley & Sons Inc

“Apology as an important factor in creating and **maintaining healthy relationships** as the power of apology can **disarm the anger** of others, **prevent further misunderstandings, soothe wounds, rehabilitate an individual, resolve conflicts, and restore professional harmony**”

THE DRAWBACKS OF MAKING APOLOGIES

**Is Apology as Admission of
Guilt?**

**Is Apologising an Act of
Suicide?**

Legal Ramifications of Apology

Norizan bt Abd Rahman v Dr Arthur Samuel [2013] - the court held that the apology made by the medical practitioner to the patient reflected the guilt which the defendant failed to deny, thereby, establishing negligence on the part of the defendant

Gurmit Kaur A/P Jaswant Singh v Tunq Shin Hospital & Anor [2013] - Rosilah Yop JC stated that; “[in] my view, when the second defendant had apologized to the plaintiff, proves that the second defendant had admitted to a mistake he had done”.

TYPES OF APOLOGY

1. Full Apology
2. Partial Apology

FULL APOLOGY

“Full apology” which includes statement or an expression of heartfelt regret and remorse for what has happened, sympathy for victim and acknowledgement of the wrongdoing committed .

The most important element in “full apology” is acknowledgement of fault and the acceptance of responsibility on the part of the wrongdoer .

PARTIAL APOLOGY

Partial apology is only concern with expression or **statements of sympathy, commiseration, condolences and compassion alone without any expression of admission or taking responsibility.**

This type of apology **has lesser legal consequences compared to full apology** because the statements are only mere expressions of sorrow without involving any statements signifying responsibility, admissions of liability or accountability for the wrong committed.

THE NEED FOR APOLOGY LEGISLATIONS

Several countries enacting 'apology laws' that mandate open disclosure of medical errors but at the same time, shielding those who apologise from legal liability

Development of Apology Laws in Selected Jurisdiction

Australia - Canada

Background

Australia

- Law reform in Australia was initiated by the government due to the belief that **litigation rates concerning medical practice** has been **significantly increasing** and coupled with **a crisis in medical insurance.**
- In resolving these issues, a Legal Process Reform Group with the support from Australian Health Ministers' Advisory Council **recommended for a legislation** that provides an **apology “made as part of an open disclosure process to be inadmissible in an action for medical negligence”**
- **The application of apology law in Australia is rather unique because the types of apology vary in different states throughout Australia**

Full Apology Law

- New South Wales
- Australian Capital Territory
- Queensland

Partial Apology Law

- Victoria
- Northern Territory
- South Australia
- Tasmania
- Western Australia

Part 10 of the Civil Liability Act 2002 (NSW)

“Apology means an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter”

- The workings of 'full apology law' requires three main elements concerning the position and consequence of such apology;

Declaratory Element

- **the law declares that apology is not an admission** of fault or liability
- Section 69(1)(a) Of Civil Liability Act 2002 (NSW)

Relevance Element

- **in determining a fault or liability on the part of the defendant, the law exclude apology from being taken into account as a relevant fact** in determining fault/liability - Section 69(1)(b) of Civil Liability Act 2002 (NSW)

Procedural Element

- **from the law of evidence perspective, the apology is made inadmissible as evidence** and therefore, cannot be used in court against the person who gave it - Section 69(2) Of Civil Liability Act 2002 (NSW)

Background

Canada

- The Bill for **apology law in British Colombia was drafted** by **referring to** the **New South Wales Civil Liability Act (2002)** as the basic foundation.
- The legislation also provides statutory protection to **prevents the insurance contract from becoming void** if such apology was made.
- The protection given by the Canadian apology law is **available to all civil claims except** in the province of **Prince of Edward Island** whereby the protection for apology is exclusive for healthcare related cases only.
- Currently, most states in Canada adopted the **Uniform Apology Act 2006**.

Section 1, Chapter 19 of the Apology Act 2006

“apology means 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. “

Uniform Apology Act (2006) Section 2

Effect of Apology on Liability

2(1) An apology made by or on behalf of a person in connection with any matter;

- (a) **does not constitute an express or implied admission of fault or liability** by the person in connection with that matter,
- (b) does not constitute [a confirmation of a cause of action or acknowledgment of a claim] in relation to that matter for the purposes of [appropriate section of the applicable limitation statute],
- (c) **does not, despite any wording to the contrary in any contract of insurance and despite any other enactment or law, void, impair or otherwise affect any insurance coverage that is available**, or that would, but for the apology, be available, to the person in connection with that matter, and;
- (d) **may not be taken into account in any determination of fault or liability** in connection with that matter.

Can apology legislations reduce medical negligence claims?

Although there is yet to be any empirical evidence showing the efficacy of apologies in reducing subsequent legal suits in Malaysia, but there have been studies conducted in several jurisdictions to show that **the effectiveness of 'apologies and disclosure of errors' in reducing the number and severity of medical practitioners' liability claims, defusing the spur of litigation and ultimately, preserving the sanctity of the relationship between the medical practitioner and the patient.**

Effectiveness of Apology Programs

- In **Australia**, a study on medical complaints cases showed that where **97% of complaints had resulted in an explanation and/or apology, not one of the cases had proceeded to litigation.**
- ‘Apology programs’ conducted at individual hospitals in Pennsylvania and Tennessee had also found that **effective apologies and disclosure of mistakes can dramatically reduce malpractice payments.**
- In addition, a study conducted at the University of Michigan Health Service reported that their **per case payments decreased by 47% and the settlement time dropped from 20 months to 6 months** since the introduction of their 2001 apology and disclosure program.

In tandem with patient safety goal...

One of the main Patient Safety Goals, promoted by the Malaysian Ministry of Health is “to stimulate healthcare organisations to improve key patient safety areas as well as patient safety in general.” The first Patient Safety Goal

Amongst the key patient safety areas that need to be improved is ensuring that “**patient complaints and other grievances are dealt with in an effective manner.**” This is considered to be in tandem with the move towards open disclosure’ practices that are considered to be more ethical

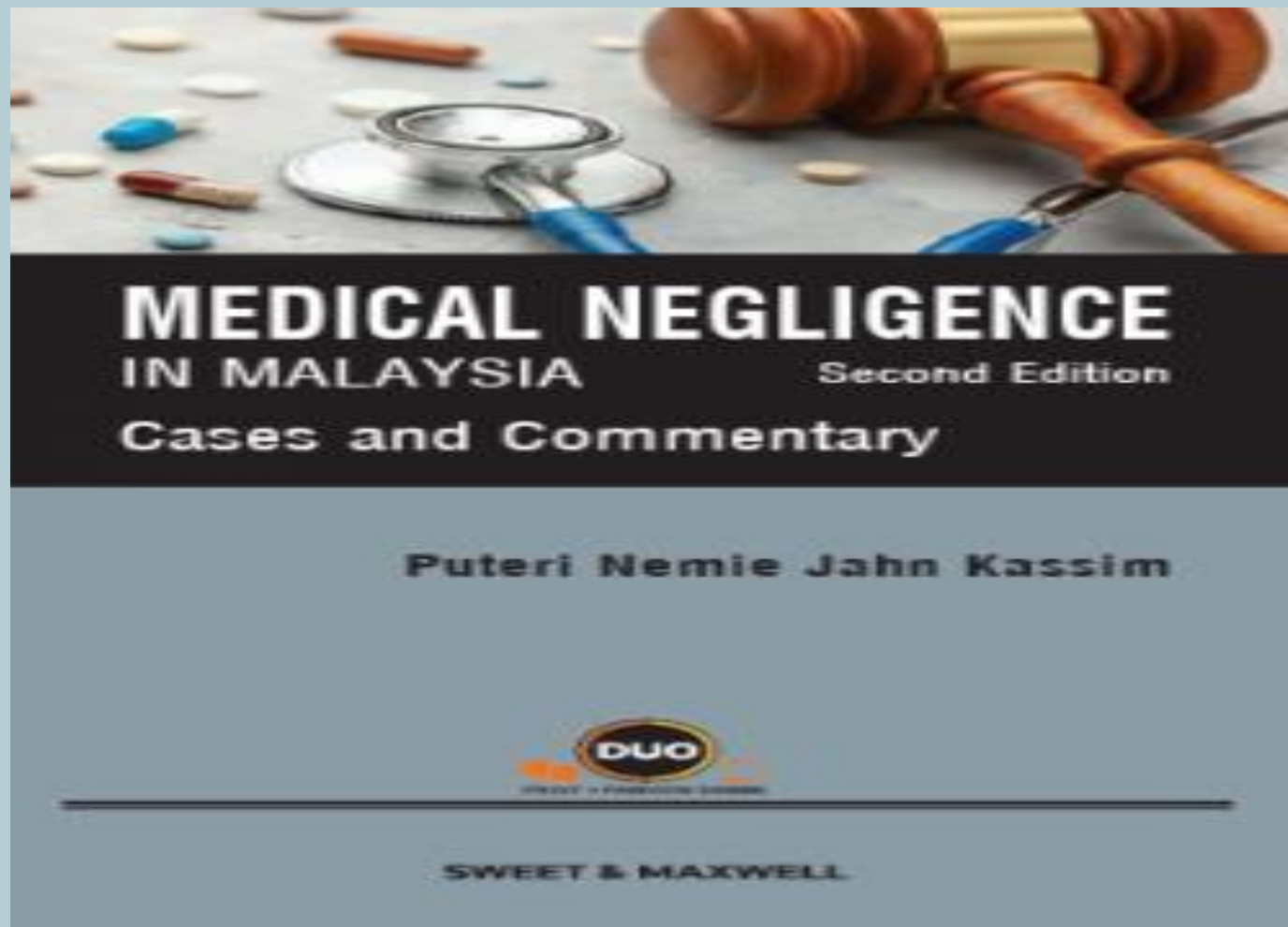
ENACTING APOLOGY LEGISLATION IN MALAYSIA

Problems & Prospects

Conclusion

- ❑ Although apology cannot be a substitute for monetary compensation, it is nevertheless, a powerful tool that can lead to the closure of an ongoing dispute and facilitate the dispute resolution process for the benefit of relevant parties.
- ❑ But in encouraging medical practitioners to apologize, a clear legal framework need to be established to protect the apologies made in certain circumstances for unintentional wrongdoings.
- ❑ The enactment of apology legislation for the protection of apologies in the legal system will offer various benefits to the parties in dispute and encourage faster and more cost-effective resolution of medical disputes as it can be an effective means of reducing as well as preventing litigation.

Thank you...



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