

APOLOGY LEGISLATIONS AND IMPLICATIONS ON MEDICAL DISPUTES

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The medical profession in the early ages



- Highest pedestal
- Medicine was a matter of mystery
- Medicine was then interwoven with bonds of religion, superstition and magic.
- Ability to heal was not judged by competence but by their ability to communicate with demons and gods
- They functioned as priest, witch, and at the same time a lawgiver and judge

Society's expectations changed in response to professionalism and societal needs...

- ❖ The Desire to **Retaliate**
- ❖ Demands for **Accountability**
- ❖ **Patient Autonomy** and **Right of Self-Determination**
- ❖ **Technology** and Advancement of **Knowledge**

- **Increasing awareness amongst members of the society on medico-legal issues.**
- **Growth of consumerist attitude – rising expectations - claims triggered if the provision of medical services below expectation.**
- ***Changing trend causing judicial and legislative interventions.***

The Changing Trends

THE CURRENT TRENDS

1. High Amount of Damages

Personal injuries claims not just limited to Special and General Damages as in section 28 and section 7 &8 of the Civil Law Act 1956 (amendments 1984)

2. 'Aggravated Damages' Can Be Available For Medical Negligence Claims

Federal Court judgment in *Dr Hari Krishnan & Anor v Megat Noor Ishak & Tun Hussein Onn Hosp* [2017]

Dr Hari Krishnan & Anor v Megat Noor Ishak & Tun Hussein Onn Hosp [2017]

- Federal Court Judgment
- “Aggravated damages can be and have been awarded as a separate head of damage in tort. For example, aggravated damages are frequently awarded in defamation cases for injury to a person’s reputation. **There is no reason to exclude this kind of damages from medical negligence cases,** which involve real injury to a person’s body.”

3. The Standard of Care is a matter of Law and no longer a Medical Judgment

- *No longer judicial deference to Medical Opinion*
- *Medical opinion no longer decisive*

Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors [2017]

- Raus Sharif CJ: “Different consideration ought to apply to the duty to advise of risks as opposed to diagnosis and treatment. That duty is said to be noted in the right of self-determination. As decided by the Australian High Court in **Rogers v Whitaker** and followed by this Court in **Foo Fio Na**, it is now the courts’ (rather than a body of respected medical practitioners) which will decide whether a patient has been properly advised of the risks associated with a proposed treatment. The courts would no longer look to what a body of respectable members of the medical profession would do as the yardstick to govern the standard of care expected in respect of the duty to advise.”

4. The Growth of Patient Autonomy in all areas in Medical Law

Examples....

1. Medical Negligence
2. Abortion
3. Euthanasia
4. Sterilisation
5. Confidentiality

Presently, there is a growth of medical negligence claims...

- Presently, there is certainly a rise in the number of claims brought to court...because
- Presently, patients are much more aware of their rights..... **And demanding for more and more accountability and the growth of PATIENT AUTONOMY**

The Pains of Court Litigation

- ❑ **Medical Negligence Litigation has never been a haven for neither patient nor doctor.**
- ❑ **Although one is innocent until proven guilty, a medical negligence claim assaults doctor's credibility, insinuate faulty judgment even though at the end of the trial the doctor is found not guilty.**
- ❑ **For the patient, there are so many obstacles in bringing a successful claim in negligence.**

Problems with Court Litigation

- Adversarial nature of the legal process
- Difficulties inherent in the substantive as well as procedural law
- **Name, shame and blame**
- Destroy doctor-patient relationship
- Costly, lengthy and complex
- Uncertainty and strong element of lottery
- Unjust
- Not able to provide non-legal remedies

Name, Blame and Shame

- ❑ The threat of litigation compels the doctor to view his **patient as a future adversary in a courtroom proceeding.**
- ❑ “For 7 years it went on, months of sitting in court **listening to what a terrible person you are**, no one recovers from that. It is on your mind every day, every minute. It changed the whole way I practiced. **The empathy I had, that I was known for, just wasn’t there anymore. Every patient was a potential law suit.**” - *Canadian retired doctor*

Silversides, A. “Fault/no fault: bearing the brunt of medical mishaps, CMAJ News, August 12, 2008, 179(4).

The Need for Non-Legal Remedies

- According to Witcomb, H. (1991),
- “for many people the cathartic effect of establishing **what happened, that the person responsible will be held to account and that such incidents will be prevented from happening in the future**, is as important as, if not more so, than obtaining compensation”

Not All Errors are Negligent

- Medical negligence...
 - Failure to meet the standard of practice of an average qualified physician practicing in the specialty in question
 - ❖ *Occurs not merely when there is an error, but when the degree of error exceeds the accepted norm*
 - ❖ **TO ERR IS HUMAN**

Why Patients Sue?

They want:

- JUSTICE?
- COMPENSATION?
- TO NAME, SHAME AND BLAME?
- FAILURE TO GET NON-LEGAL
REMEDIES – EXPLANATION,
APOLOGY...?

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 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.**

Role of Apology very significant in Open Disclosure Process

The process of “open discussion of incidents that result in harm to a patient while receiving health care”

(Australian Commission on Safety and Quality in Health Care, 2013)

Elements of Open Disclosure

factual explanation of what happened;

discussion of the potential consequences of the adverse event;

opportunity for the patient, their family and carers to relate their experience;

apology or expression of regret; and

an explanation of the steps being taken to manage the adverse event and prevent recurrence

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**”

Characteristics of Apology

- Four salient characteristics of an apology:
- (i) the **acknowledgement of the offense** which includes the identity of the offender(s), appropriate details of the offense and validation that the behaviour was unacceptable;
- (ii) the **explanation for committing the offense** as it may mitigate or aggravate the offense;
- **(iii) the expression of remorse, shame, forbearance and humility and**
- (iv) **reparation** which can range from an early scheduling of the next appointment to cancelling the bill to a financial settlement including the fact that the medical practitioner and healthcare facility are committed to correct faulty procedures and avoid similar offenses.

Aaron Lazare. (2006). Apology in Medical Practice An Emerging Clinical Skill. Journal of American Medical Association . 296(11) : 1401- 1404

Amongst Reasons for awarding Aggravated Damages in *Dato Stanley Isaacs case* (2019)...

- Failure on the part of the defendants **to follow up on the blood investigations** and this led to a downhill spiral in the deceased's condition.
- Failing to ensure that **an accurate and speedy diagnosis** of the deceased's ailment was made is one of the aggravating factors which entitles the plaintiff to be compensated for the injury to his feelings.
- The negligent act **of administering tramadol to the deceased despite her history of intolerance to the drug** caused the deceased to be disoriented and nauseous and to suffer prolonged retching on the night of her admission and the early hours of the next day.
- **Words and conduct during the doctor's meeting** with the deceased's family members following her death were disturbing, **appalling and an insult to his profession** and to the plaintiff and his family. It was painfully cruel for the plaintiff and his family members who attended the meeting to hear such utterances from a professional medical doctor.

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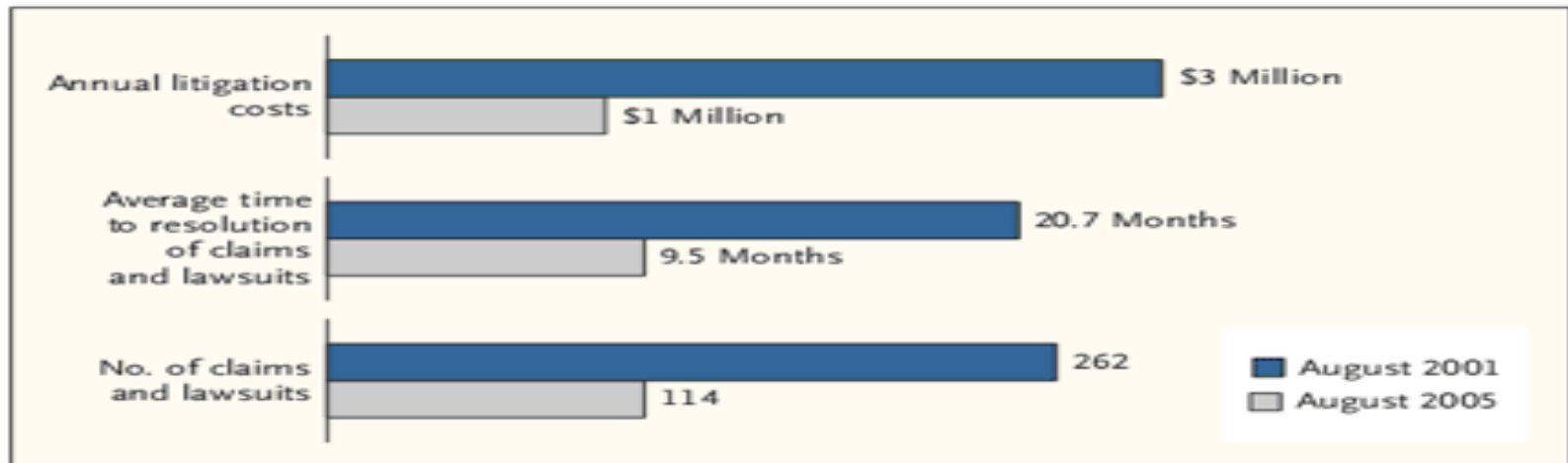
Malpractice suits drop when doctors admit mistakes, apologize

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By Jenifer Goodwin, HealthDay

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Results of Medical Error Disclosure Program at the University of Michigan Health System.

THE DRAWBACKS OF MAKING APOLOGIES

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 Tung 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”.

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**

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.

Development of Apology Laws in Selected Jurisdiction

United States of America - Australia - Canada

United States of America

Background

The initiative to legislate 'apology' can be traced back to the 1980s from the state legislature of Massachusetts in 1986 **to create 'safe harbour' provisions** to allow a person to apologise to the injured party in a tortious claim.

Massachusetts General Laws ch.
233 in sec. 23D



*“statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, death of person involved in an accident and made to such person or to the family of such person **shall be inadmissible**”*

'Partial Apology Law' introduced in Texas

- Introduced improved version of Massachusetts Law
- The **ambiguity** as to the position of fault **was made clear**.
- The legislature in Texas **adopted 'partial apology law'**
- This model was adopted in 35 other states in the US.

Texas Civ Prac and Rem Code Ann, sec. 18.061

*“a **communication**, including an excited utterance...which also includes a statement or statements concerning negligence or culpable conduct pertaining to an accident or event, is admissible to prove liability”*

'Full Apology Law' introduced in Oregon & Colorado

- Introduced '**Full Apology Law**' limited only to medical **negligence cases**.
- It was **criticized** as it only granted blanket immunity to medical practitioners and not to other civil suits.
- The law was later **extended for all civil suits** as in Connecticut



Colorado Rev Stat 13-25-135

*“any and all statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence which are **made by a health care provider or an employee** of a health care provider to the alleged victim, a relative of the alleged victim, or a representative of the alleged victim.... shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest.”*

Connecticut General Statute Ch 899 tit 52 (2001),

“in any civil action brought by an alleged victim of an unanticipated outcome of medical care, or in any arbitration proceeding related to such civil action, any and **all statements, affirmations, gestures or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion or a general sense of benevolence that are made** by a health care provider or an employee of a health care provider to the alleged victim, a relative of the alleged victim or a representative of the alleged victim and that relate to the discomfort, pain, suffering, injury or death of the alleged victim as a result of the unanticipated outcome of medical care **shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest the law provides that in any civil action which results in personal injury or wrongful death,** “the use of an expression of apology, whether oral or written, by such party shall not be admissible in evidence to establish culpability or state of mind”.

Hawaii Rev Stat 626-1 (2007),

“evidence of written or oral apologies issued by or on behalf of an individual, corporation, or government entity, whether made before or during legal or administrative proceedings relating to the subject matter of the apology, is not admissible to prove liability....evidence of benevolent gestures made in connection with such apologies is likewise not admissible”.

Australia

Background

- 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 Columbia** 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 11th Malaysian Plan

Government of Malaysia had also reiterated in Provision 5.21 of the 11th Malaysian Plan for 2016-2020 of the need to review and formulate legislations and policies to improve system delivery for better health outcomes. Developing a safe health care system necessitates the institutionalization of a culture of quality and safety.

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...

- If you need more details on medical law, please purchase my books on
 1. **Nursing Law and Ethics”**
 2. **Medical Negligence Law in Malaysia**
 3. **Cases and Commentary on Medical Negligence**
 4. **Law and Ethics relating to Medical Profession**
- Email: nemie@iium.edu.my