

## **RESEARCH REPORT**

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**PROJECT TITLE: - FORMULATING A LEGAL FRAMEWORK FOR THE PROTECTION OF MEDICAL APOLOGIES IN CIVIL DISPUTE RESOLUTION PROCESS**

### **AUTHOR NAMES:**

- 1. DR DURYANA MOHAMED**
- 2. PROF DR PUTERI NEMIE JAHN KASSIM**
- 3. MUHAMMAD RIDHWAN SALEH**

### **DEPARTMENT/KULLIYAH:**

**LEGAL PRACTICE DEPARTMENT & CIVIL LAW DEPARTMENT,  
AHMAD IBRAHIM KULLIYAH OF LAWS, IIUM**

### **ABSTRACT**

The role of apology in resolving conflicts and preventing litigation has gained much prominence. Particularly, in civil litigation, apology has the potential to promote negotiations, generate settlements, mitigate and absolve liability as it can be used as an effective tool at various stages during the civil dispute resolution process. For civil disputes involving medical practitioners and patients, apologies have the ability to defuse the spur of litigation and restore the relationship of trust and confidence between them. This is because apologies give recognition to the error that has occurred and reflect a sincere sense of remorse by the medical practitioner for causing the harm. Nevertheless, medical practitioners fear that apologies made will be interpreted as an

admission of guilt and consequently, increases the possibilities of lawsuits causing negative effects on their medical indemnity coverage. In order to promote open disclosure standards amongst medical practitioners, several countries around the globe have enacted ‘Apology Laws’ which mandates the disclosure of medical errors under specific circumstances, while at the same time offering legal protection to those making the apologies. This research examines the possibilities of developing a legislative framework in Malaysia for the protection of apologies made by medical practitioners with the objective of safeguarding the benefits of apologies in promoting early settlements and reducing the number of litigated cases. Qualitative methods of research which include content analysis, random and structured interviews during field study will be employed to obtain the research output. The recommendations from this research will be a material source of reference for the Malaysian government to develop comprehensive ‘Apology Laws’ which will eventually reduce the number of potential lawsuits, promoting prospects of settlement and inculcate a sustainable culture of honesty and openness that is fundamental in gaining public trust within the healthcare system.

## **KEYWORDS**

Apology; Civil Litigation; Dispute Resolution; Evidence; Medical Profession

## **INTRODUCTION**

Apology has always been viewed as an important social conduct that is able to provide closure to a conflict situation. The aftermath of disputes and conflicts is usually fuelled with feelings of anger, injustice, mistrust and a tendency to sue. By making apologies which may include statements of regret and empathy, acceptance of responsibility as well as proper explanation of the events leading to the mishap, the severity of the aftermath situations can be significantly reduced. Further, studies have shown that proper apologising after a medical mishap can also be an effective dispute resolution mechanism that heals and preserves relationships as well as triggering settlement negotiations. However, medical practitioners are rather hesitant to apologise after the occurrence of adverse events fearing that this may be treated as an ‘admission of guilt’ and any statements made at this point may be admissible in judicial proceedings as

evidence of fault or liability. In Malaysia, the adverse effect of ‘medical apology’, became apparent from the outcome of two medical negligence cases, namely, Gurmit Kaur A/P Jaswant Singh v Tung Shin Hospital & Anor [2013] 1 CLJ 699 and Norizan bt Abd Rahman v Dr Arthur Samuel [2013] 9 MLJ 385. In both of these cases, the apology given by the medical practitioners has been construed as admissions of guilt and used in establishing liability. Thus, the negative implications of apology need to be addressed in Malaysia so as to preserve the immense benefits of apology, particularly, in medical negligence disputes. Lessons can be learned from several jurisdictions around the globe that have enacted ‘Apology Laws’ to explicitly preclude ‘medical apologies’ made after adverse events from being treated as admission of fault or as evidence to prove liability. This step has been considered beneficial in preserving the effectiveness of apologies within the parameters of a protective legislation.

## **BACKGROUND**

Victims in medical negligence disputes often pursue their claims out of anger and their desire for compensation over their physical and emotional harm. The common adjudication system, which is the tort system, allows victims of medical injuries to be financially compensated for the harm suffered but does not offer them non-legal remedies in the form of explanation, information, and sincere apology from the wrongdoer. 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”<sup>1</sup>. For some patients, it is important that they “know that someone has accepted responsibility or is willing to stand up and be held accountable for the injury”.<sup>2</sup> Hence, it can be seen that apology is an important social conduct that has become a

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<sup>1</sup> Witcomb, H. (1991). No-fault compensation. *New Law Journal.*, at p. 109. See also Ann J. Kellett. (1987). Healing Angry Wounds: The Roles of Apology and Mediation in Disputes between Physicians and Patients. *Journal of Dispute Resolution.* 10 : 111–31.

<sup>2</sup> Marie M. Bismark & Edward A. Dauer. (2006). Motivations for Medico-legal Action: Lessons from New Zealand. *Journal of Legal Medicine.* 27:55-70, at p. 62.

tradition in many cultures as it serves as a remedial behaviour that may reduce the negative consequence of the wrongful act and simultaneously, restore the wrongdoer's damaged reputation.<sup>3</sup> In making an apology, a person will recognise that a rule has been broken, reaffirming the value of the rule, and at the same time controlling as well as regulating social conduct by acknowledging interpersonal obligations between the parties.<sup>4</sup> Undoubtedly, 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.<sup>5</sup>

The healing effect of apology can be very significant and effective in conflict resolutions as apology encourages as well as influences the reconciliation or forgiving process. As anger is the main motivator in triggering medical negligence litigation, 'medical apologies' have been found to be effective in reducing patient's anger, increasing communication between the relevant parties and ultimately, reducing patient's motivation to litigate<sup>6</sup>. In majority of medical negligence cases, patients are aware that the outcome of the negligence act cannot be reversed. However, in such circumstances, patients need information on what actually happened and why it happened. According to Szostak, D.C. (2011), "studies have generally found that patients want to learn about all errors, regardless of their severity: they want to learn how and why the mistake happened, and they are concerned about preventive measures that the hospital will take in the

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<sup>3</sup> See Bruce W. Darby & Barry R. Schlenker. (1982). Children's Reactions to Apologies. *Journal of Personality and Social Psychology*. 43(4) : 742–53.

<sup>4</sup> *Ibid.*, at p. 742.

<sup>5</sup> 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, at p. 31.

<sup>6</sup> See Debra J. Slocum, Alfred Allan, and Maria M. Allan. (2011). An Emerging Theory of Apology. *Edith Cowan University, Joondalup*. 63: 83–92.

future to ensure that such a mistake does not happen to anybody else”<sup>7</sup>. Furthermore, by apologising, the negative emotions of anger and hatred felt by the patients can be reduced. Engel, B. (2002) described 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<sup>8</sup>. Apology at this stage will also be beneficial to the medical practitioner as it will comfort him emotionally and eradicate the feeling of guilt or self-reproach and eventually, promoting self-respect<sup>9</sup>.

The use of the tort system for medical litigation has been considered to be lengthy and tedious for both to the patient as well as the medical practitioner. The procedural law together with the demands of the substantive law in proving medical negligence further contributes to the delay in settling medical negligence disputes. The hurdles which the patient needs to overcome in the litigation process does not ultimately assist the patient much in procuring compensation for the injury suffered or even for any psychologically injuries suffered<sup>10</sup>. In some medical negligence cases, the court take years to come up with a decision after the claim have been being initiated by the patient. This will not only hinder the patient’s from procuring the much needed compensation for the loss he had suffered but it will also increase the tension and anger between the patient and medical practitioner. In a settlement discussion, an apology is very much needed before any

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<sup>7</sup> David C Szostak. (2011). Apology Not Accepted: Disclosure of Medical Errors and Legal Liability. *DePaul Journal of Health Care Law*. 16(3): 367-376, at p. 368. See also Juliana Wilson & Ruth McCaffrey. (2005). Disclosure of Medical Errors to Patients. *Medsurg Nursing*. 14(5) : 319-321.

<sup>8</sup> Beverly Engel. (2002). *The Power of Apology - Healing Steps to Transform all your Relationships*. Canada: John Wiley & Sons Inc., at p. 13.

<sup>9</sup> Nicole M Saitta & Samuel Hodge. (2011). Physician Apologies. *The Practical Lawyer*. 57(6): 35-44, at p. 35.

<sup>10</sup> See Ann J. Kellett. (1997). Healing Angry Wounds: The Roles of Apology and Mediation in Disputes between Physicians and Patients. *Journal of Dispute Resolution*. Art.10: 111-131.

discussion on the amount of the monetary compensation. This is because by apologizing, the healing process will be initiated on the part of the patient and ultimately encourages settlement discussion<sup>11</sup>. In many instances, when the medical practitioner did not apologize, the relationship between the patient and the medical practitioner tend to worsen. This does not only discourage negotiation but will prevent any chance of settlement. At this juncture, encouraging the use of apologies can promote settlement discussions and preserve the emotional well-being of both parties<sup>12</sup>. This is because since there is no more anger, the patient is demotivated to pursue the claim and this will encourage them to settle the matter out of court. Therefore, by defusing anger at initial stage, there will be a promotion of lesser litigation and faster settlement in medical negligence dispute<sup>13</sup>. Consequently, the harmonious and cordial relationship between the patient and the medical practitioner will be preserved.

## **OBJECTIVES**

1. To examine the concept and workings of apology in civil dispute resolution process;
2. To identify the role and implications of apology in the resolution of medical disputes;
3. To study the existing ‘apology laws’ developed for handling medical disputes in selected jurisdictions; and,
4. To propose recommendations on the development of ‘apology laws’ for the resolution of medical disputes in Malaysia.

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<sup>11</sup> See Robin E. Ebert. (2008). Attorneys, Tell Your Clients to Say They’re Sorry: Apologies in the Health Care Industry. *Indiana Health Law Review* 5 : 337–370.

<sup>12</sup> See Melissa Barcena. (2013). A Role for Apology in Medical Malpractice: Apology, Forgiveness and Reconciliation” Retrieved from <http://static1.1.sqspcdn.com/static/f/573702/22339308/1364861786247/ARoleforApologyinMedicalMalpractice.pdf>.

<sup>13</sup> See Benjamin Ho and Elaine Liu. (2011). Does Sorry Work? The Impact of Apology Laws on Medical Malpractice. *Journal of Risk and Uncertainty*. 43(2): 141–167.

## **METHODOLOGY**

This research had employed qualitative research methods, namely, content analysis and structured interviews during fieldwork according to the following:

**1. Content Analysis** - A review of the relevant literature issues pertaining to ‘apology laws’ in medical negligence claims. This entails significant time spent on library research. This means that the research is conducted based on the existing literature which includes textbooks, journals, newspapers articles, periodicals and case law. Unpublished materials such as seminar papers, thesis and various related materials are also analysed and examined. The internet and online databases will also be a useful tool in providing the necessary information. Furthermore, related legislations, policy, guidelines as well as decided cases on this issue from selected jurisdictions will be examined. The selected jurisdictions are states which already have developed ‘apology laws’ in handling medical disputes within their legal system including Australia, New Zealand, Canada and the United States of America.

**2. Field Study** - Interviews with relevant officials in organizations involved in legal and medical issues related patient safety such as the Attorney General Chamber, the Ministry of Health, Patient Safety Council, the Association of Private Hospitals Malaysia, the World Health Organization, Medical Defence Malaysia Berhad, Malaysian Medical Association, the Malaysian Society for Quality in Health Services and similar related institutions and relevant stakeholders in Australia and New Zealand. Site visits in Australia and New Zealand will be essential to build the country case and comparative studies. These visits will also help to determine potential impact, positive and negative, as well as the major constraints.

## **FINDINGS**

**The research findings are as follows:**

**Research Finding 1 - The Position of Apology in Civil Litigation**

Apology can exist at various stages in the dispute resolution process including spontaneously after the event, during the negotiation, mediation or even when the adjudication takes place. The implications of apologies differ according to the various stages that they have been offered.

### ***Spontaneous Apology***

At the first instance, apology can be made right after the injury was committed by the defendant. According to McLeod, spontaneous apologies usually have the highest possibility to be accepted as being sincere and therapeutic in nature towards the parties. This is possible due to the fact that since the apology has been made promptly after the injury, it will usually pacify the wronged party before any legal action is initiated. However, spontaneous apology usually takes place in an environment in which there is no proper legal advice and no legal privilege. Despite apology at this stage can be seen as very sincere and might have the ability to disarm anger, nevertheless, apology at this stage has the effect of a “double-edged sword” whereby it can be used against the party who offered the apology as an admission of guilt in any legal proceedings. Such negative implications have deterred parties from offering spontaneous apology and particularly in medical negligence cases, legal advisors often advise their clients not to apologise due to the fact that it can backfire against them during the legal proceedings .

### ***Apology during Out of Court Settlement***

The current civil litigation process promotes parties to settle their dispute amicably outside the court at any time before the decision is being made by the judge where it can be in the form of settlement agreement or by way of consent judgement. Therefore, apology may exist at this juncture and it may promote settlement out of court. During this out of court settlement process, apology offered by the parties might not be admissible as evidence as they might fall under the hearsay rule. However, in some jurisdictions including Malaysia, the statement might still be admissible as they can be considered as statement made by the party to the litigation as provided in section 18 of the Evidence Act 1950. Hence, apology at this stage may again be seen as an admission of guilt on the part of the defendant and this is the main reason why defendants will refuse to apologise towards the injured party.

### *Apology in Mediation Process*

The role of apology has been said to be more significant in the alternative dispute resolution (ADR) mechanism such as mediation rather than litigation as this process offers higher hope and potential for healing the relationship between the parties before the dispute is brought to court. According to the Oxford Law Dictionary, mediation is one form of the alternative dispute resolution mechanism which involve a neutral third party known as the mediator who will assist the parties involved in the dispute or negotiations to achieve a mutually acceptable resolution of the points in conflict. According to Levi, although apology can only come from the parties themselves, mediators are recommended to propose for an apology even when it was not initiated by either parties whenever appropriate because it can be an effective tool in resolving the dispute. Apology at this juncture will reduce anger as well as the hostility between the parties and since mediation process does not restricted to the rules of evidence nor procedure, this would be a great avenue for the wrongdoer to offer sincere apology to the victim as the apology offered cannot be used as an admission of guilt in the court of law should the mediation failed in its process. Further, many states has enacted mediation legislations which promotes the usage of mediation as a form of ADR to encourage and promote the usage of mediation to resolve civil disputes. In Malaysia, the Mediation Act 2012 was enacted to promote mediation as a dispute resolution mechanism and recognised its benefit in providing a fair, speedy and cost-effective process. This legislation has made it clear that any communication made during this process is privileged and is not subjected to discovery and they are inadmissible as evidence for any proceedings as provided in Section 16 of the Act. According to Carroll, similar provisions exist in jurisdictions such as Australia, several states in the United States, and Hong Kong. Therefore, by virtue of this provision, parties will be convinced to make statements which includes apology and statement of fault without any legal implication for it to be used against them in any other further proceedings. In some jurisdictions, mediation has been incorporated in their civil dispute litigation process whereby with the establishment of court annexed mediation. Court-annexed mediation means that mediation that is part of the procedure and sponsored by the court whereby the mediator may be any officer of the court such as the registrar, court-annexed mediation will take place after the case has been filed by the court and incorporated into the civil dispute litigation process. It is clear that apology given by the parties if it's made during the court-annexed mediation session will be protected by the law from being used as admission of guilt by

the court. During mediation process, the parties involved will have the opportunity to make any retraction or corrections of statements, offering statements of regrets as well as apology and this will likely affect the outcome of the dispute resolution process itself.

Carroll further stated that, there are several aspects of the mediation process that make it the best setting to apologize which includes, providing an opportunity for direct participations by the parties in the negotiation process and at the same time, allow it to be confidential as well as a meaningful dialogue between the parties without taking into account the legal complications of the apology. Besides that, it will also allow the parties to be clear about what the dispute all about is and the expectation of both parties. As a neutral third party, the mediator needs to play the very important role to remind the parties that litigation is not the only way to settle their dispute. Mediation will thus, empower the parties to resolve the dispute their way and may provide more psychological benefits to the parties. Since apology may serve various benefits to the parties during the mediation process as it provides the best platform for the parties to apologise, this has created attention and interest of legal scholars and legislators for apology to be used beyond mediation in the resolution of dispute process .

### ***Apology in Pre Action & Pre-Trial Procedure***

In Malaysia, before a case is fixed for hearing before the trial judge, the case will undergo the pre-trial case management process according to Order 24 of the Rules of Court 2012 whereby the court have the power at any time after the commencement of the proceedings on its own motion to direct any or both parties to the proceedings to appear before the court and give directions as the court thinks fit]. The objective of pre-trial case management is to ensure the smooth running of the case when it is to be heard by the court later. At this stage, the court will consider any matter which includes the possibility for settlement of some or all the issues in dispute and requires the parties to furnish the courts with all the information as the courts thinks fit and make other appropriate orders to secure a just, expeditious, and economical disposal of the actions. Apology made by the defendant at this juncture towards the plaintiff can be protected under the cloak of “without prejudice communication” shield. Besides that, during this pre-trial case

management process also, the court may direct parties to go for the court-annexed mediation as stated above. In some jurisdiction, the procedural law also provides for the pre-action protocols where it promotes settlement at the earliest stage, even before the case been filed into the court. Pre-action stage has been introduced in the United Kingdom for several types of civil actions including, defamation, personal injury claims, professional negligence, resolution of clinical disputes and many more. For instance, the specific objectives of the United Kingdom Pre-Action Protocol for the Resolution of Clinical Disputes, are among others, to encourage transparency and early communication between the patient and healthcare provider, to ensure sufficient medical and other information to be disclosed promptly, to promote early settlement and also to encourage the defendant to make an early apology to the patient if appropriate]. Based on this protocol, apology is encouraged to be offered by the parties at the earliest stage even before when the case was filed in the court. This would be the best avenue for the party who caused the injury to express their apology without the fear of it to be used against them in the court of law and at the same time might defuse the anger on the part of the patient and may avoid litigation in totality.

### ***Apology during the Course of Trial***

Even after the action has been taken to the court, apology can still be made and have the possibilities to be used for the purpose of settlement out of court. At this stage, there is also possibility for the wrongdoer to apologise and admit to the liability which may lead to the faster disposal of the case. Although apology at this stage can be used for very strategic purposes, it has been effective in promoting consent judgement, (a judgement by the judge which is based on the agreement of the parties) or promoting parties to enter into settlement agreement. The wronged party would be induced to accept the lesser amount of compensation coupled with apology due to the reason that they will speed up the fruit of the litigation. According to Shuman, apology at this stage can become a “commodity” that may be bargained for by the parties. Although the nature of apology in this setting would be in quid pro quo basis, therefore, it has been seen to have lesser degree of sincerity than the spontaneous apologies. During this process, the wrongdoer will only apologise when there exist is a real prospect of negotiations. Due to the importance of promoting negotiations, the law protects apologies by providing shield by virtue of

the “without prejudice communication”. During this negotiation process, the parties involved can yield the benefits of apology whereby it will speed up the time for resolution as well as it have the possibility to reduce the expected liability of the wrongdoer in the action should the apology be accepted by the wronged party. Since spontaneous apology take place right after the wrong has been committed, such apology might prevent the wrongdoing from becoming more severe and should the apology offered at the earliest time as possible, this might initiate the negotiations process between the parties. Although apology has been primarily used to establish liability, there are also some apologies which are protected by the law during the trial itself which is apology given in the course of negotiation for settlement are protected under the “without prejudice communication”. This can be seen in the case of *Dusun Desaru Sdn Bhd & Anor v Wang Ah Yu & Ors*, Abdul Malik Ishak J has explained on the application of the rule of “without prejudice communication” whereby, before the principle to be activated, there must be two common features to be present before this privilege communication can be activated which are (1) the parties must be in dispute and due to that dispute, the parties are negotiating between each other, and (2) the communication between them must contain suggested terms that would finally lead to the settlement of the dispute . From this case, it can be suggested that apology can be protected under this principle if they are given during negotiation after the dispute has arisen, but this principle would not protect spontaneous apology which has been given spontaneously or right after the injury was committed.

### **Research Finding 2 - The Legal Implications of Medical Apologies in Civil Litigation**

Although apologies offer much benefits in defusing the desire for patients’ to litigate but it also has the effect of being a ‘double-edge’ sword and be seen as self-incriminating on the party who apologises. However, apology is not a foreign concept in the legal system whereby it has become established principles in several areas of law in being used as an evidence to establish guilt, mitigate or absolve the liability of the parties.

#### ***Apology as an Admission of Guilt***

From the perspective of the law of evidence, apology has long been used to prove liability in the case of negligence. Apology made by the one who caused the injury can be considered as statements made out court and the court may treat them to be inadmissible to establish liability as they can be a form of hearsay evidence. However, apology may be admissible as a statement which falls outside the hearsay rule which is known as “admission by party-opponent”. In Malaysia, this is provided in section 18 of the Evidence Act 1950 whereby it is provided that;

18. Admission by party to proceeding, his agent or person interested

(1) Statements made by a party to the proceeding or by an agent to any such party whom the court regards under the circumstances of the case as expressly or impliedly authorized by him to make them are admissions.

Therefore, the fear of apology to be used against the one who offered them is real especially when such apology does not fall under the “without prejudice communication” privilege that is to be given to the one who offered apology for the purpose of settlement. Despite the fact apology can be used against the person who offered them as an admission of guilt, nevertheless, it can never be the sole evidence for the court to find that liability on the person who gave them. This can be illustrated in the case of *Gurmit Kaur A/P Jaswant Singh v Tung Shin Hospital & Anor*, whereby a woman sought treatment from the defendant which is a medical practitioner to remove a fibroid in her uterus. However, it was found out later that a hysterectomy procedure was conducted on her which caused her unable to have any more children. The medical practitioner was found liable and the apology given by him was considered as a proof for the negligence committed. The judge in her judgement stated “My view, when the Second Defendant had apologized to the Plaintiff, proves that the Second Defendant had admitted to a mistake he had done”. This can be seen as a clear illustration on how an apology can be viewed as an admission of guilt.

***Apology as a Defence and Mitigating Factor***

In the tort of defamation, retraction, withdrawal, correction of statements, and apology can be offered as an evidence by the defamer to mitigate the damages awarded by the court. Apology is considered for this matter as it can be an evidence to weaken the inference of malice or bad faith on the part of defamer. Apology as a mitigating factor has been long recognised in this area of law. If the defamer provides apology as soon as he possibly can, it may have the effect of defusing the spur litigation by dissuading plaintiffs from initiating legal process. At this juncture, the apology given can be scrutinized by the court for the consideration for mitigation of damages. It is important for the court to evaluate and consider apology offered by the defamer in defamation cases as the nature of defamation which aims to protect reputational interest of a person will reduce the mental and emotional distress on the plaintiff as well as having restorative effect that the money cannot sufficiently compensate. The damages awarded in a defamation case will depends on the severity of the defamatory statement and how it affect the plaintiff. In assessing the severity of the defamatory statement, during the fact finding, the court may consider the apology to mitigate the damages to be awarded as defamation law does not only protect economic loses but non-economic loses as well, for example emotional distress suffered by the plaintiff. Therefore, by allowing the defendant to apologise, it will have the effect in reducing the mental or emotional distress which will ultimately restore the plaintiff in a way that money will not be able to do.

In Malaysia, before the court decides on the amount of damages to be awarded to the plaintiff in a defamation suit, the court will take into consideration the mitigating factors which may result in lowering the award of damages. If the defamer is able to give evidence to suggest that he has either made, or offered to make an apology to the plaintiff, the court will consider this as a mitigating factor as long as the apology was offered as soon as the defamer has opportunity to do so. The position of apology in the law of defamation has also been codified in Section 10 of the Defamation Act 1957 where it reads as follows;

10. (1) In any action for defamation the defendant may (after notice in writing of his intention to do so duly given to the plaintiff at the time of filing his written statement of his case) give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such

defamation before the commencement of such action or as soon afterwards as he had an opportunity of doing so in case the action shall have been commenced before there was an opportunity of making or offering such apology.

Gopal Sri Ram JCA, as he then was, in the case of *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun & Other Appeals* mentioned about apology in a defamation case by saying that although apology does not exonerating a defendant, it has the effect of reducing the quantum of damages, and in some cases it can substantially reduce the amount of damages. He later added that, although apology have the mitigating effect towards the amount of damages, the court also may award aggravated and exemplary damages if such apology aggravates the libel to reflects the court's disapproval towards the defamer's conduct. However, for such apology to be considered, it must be a full and frank apology and there must not be any conditions or qualifications attached to it. Apology also play roles in actions for libel contained in newspaper as provided in the subsection 2 of section 10 of the Defamation Act 1957.

(2) In an action for libel contained in any newspaper any defendant who has paid money into court under the provisions of any written law relating to civil procedure may state in mitigation of damages, in his written statement of his case, that such libel was inserted in such newspaper without actual malice and without gross negligence and that, before the commencement of the action or at the earliest opportunity afterwards, he inserted or offered to insert in such newspaper a full apology for the said libel, or, if the newspaper in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper to be selected by the plaintiff in such action.

For any defamation suits taken against any newspaper or broadcast, the defamer may use apology to mitigate the damages if the defamatory statements were inserted without any actual malice and it must not be caused by any gross negligence on the part of the newspaper or broadcast in the making statements. However, for the mitigation to be effective, the law also

requires that the defamer to make a full apology in the in the newspaper or broadcast before the commencement of the action or as soon as the defamer has opportunity to do so.

Apology also plays a significant role in the law governing the ‘contempt of court’. Contempt of court refers to any conduct that tends to bring the authority and the administration of the law into disrespect or disregard or to interfere with or prejudice parties, litigants, their witnesses during the litigation. The principal aim of this branch of law is not to protect the dignity of the judges but to protect the administration of justice and the fundamental supremacy of the law. In an action of contempt of court an apology by the contemnor may “purge” a contempt of court charge or further suspend or mitigate the sentence for the charge. The superior courts in Malaysia are given the power to punish contempt of court by virtue of Article 126 of the Federal Constitution.

#### 126. Power to punish for contempt

The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself.

For the apology to be effective in a contempt of court case, the apology offered by the contemnor must be sincere and unconditional. It must also be made clearly and done as soon as possible as a delayed apology can be considered by the court as an after-thought and intended merely to avoid punishment.

### **Research Findings 3 - The Financial Implications of Apology in the Civil Litigation**

The tort system requires the wrongdoer to compensate its victims for the pecuniary and the non-pecuniary losses he or she has suffered. The principle of *restitutio in integrum* requires the victim to be placed in the pre-accident position so far as money can do so. In some of the jurisdictions, apology laws has been enacted whereby apology has been given full protection from being admissible in the court whereby the law makes them inadmissible and this will create a conducive environment to promote apology. There are some economic considerations that must

be highlighted with regards to the application of apology law in the civil dispute resolution process.

### ***Apology may reduce the Number of Litigation***

Amongst the economic implications of having apology laws is that it will decrease the number of cases filed as well as lowering settlement amounts in civil cases. Enacting apology laws will encourage faster and more cost-effective resolution of medical disputes as it can be an effective means of preventing litigation. This is due to the fact that medical practitioners are given the legal platform to make an apology which have the possibility to disarm the anger on the part of the patient. In Australia, it is believed that the introduction of apology laws has been able to reduce the number of litigated cases as the practice of apology will ‘reduce the propensity of victims of accidents to sue’. Although there is no direct empirical data to show the reduction of medical disputes due to apology law, it has been found that there is significant reduction in number of new claims for compensation, increased number of closed claims and a reduction as to the proportions of large damage awards after the notable tort law reform in Australia which had allowed the defendants to apologise without the fear of that it will be considered an admission of guilt . In the United States of America, effective disclosure has been found successful in reducing cost of a medical dispute process which had improved patient safety, and restore trust between the medical practitioner and the patient. Although there are differences in the workings and approach on apology laws taken by several states, the culture of transparency through disclosure and apology has been manifested in the enactment of the apology laws in more than 35 states. In a research conducted by the Michigan Health Services reported that since the introduction of their apology and disclosure program, ‘per case payments’ had decreased by 47% and the settlement time had reduced from 20 months to 6 months. Although the research was only conducted at hospital level, it can be seen that apology, disclosure and transparency do not only have ethical benefits but also financial & economic benefits as well.

### ***The Effect of Apology towards the Amount of Compensation***

In the state of Kentucky, after seventeen years of introducing a policy of full disclosure and apology, only three cases have gone to trial, with an average settlement of \$16,000. Although lowering settlement amount is something good to the medical practitioner and the relevant institutions, the concern would be whether or not the patient will be sufficiently compensated for the injury suffered by the medical practitioner. When medical practitioners are given the legal shield from liability for apologizing after a medical mishap, the patient will no longer perceive the medical professional as a personal threat. Thus, it will reduce the tension and open the door to forgiveness and will create emotional vulnerability on the part of the patient which might encouraged them to accept settlements that are inappropriately lower than what they actually deserved. Therefore, when apology is being exploited, it may contribute to the victims being under-compensated for the harm done towards them. The victim will no longer be in a position as though the accident did not occur and this will defeat the purpose of damages which is to place the patient in such position. This would be one of the economic implications as particularlry, in medical negligence cases, where many of the victims usually wanted the medical practitioner to be responsible for the injury and to avoid causing the same harm to others.

### ***Reducing the Cost of Civil Litigation***

Further, the enactment of apology legislation has significantly reduced legal cost. Lawyers' fees had also dropped from three million dollars to one million dollars, and malpractice suits and notices of intent to sue have dropped from 262 in 2001 to approximately 130 per year. Thus, by allowing medical practitioners to apologise without fear of any negative legal consequence, will eventually encourage natural, open and direct dialogue between the parties and reduce the tension, antagonism and anger which will, ultimately, disarm the desire on the part of the patient to retaliate.

### **FUTURE PLAN FOR RESEARCH**

Enacting apology laws that allow medical practitioners to receive legal protection in certain circumstances when apologies are made for unintentional wrongdoings should be introduced in Malaysia. Lessons can be learned from the American, 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. There is also a need for empirical evidence showing the efficacy of apologies in reducing subsequent legal suits to be conducted in Malaysia, by engaging relevant stakeholders in the industry to participate in the study. It is hoped that a structured apology law will reduce the number and severity of medical practitioners' liability claims, defuse the spur of litigation and ultimately, preserve the sanctity of the relationship between the medical practitioner and the patient.

## CONCLUSION

The enactment of apology legislation is considered timely and necessary for Malaysia in view of the rising number of medical negligence claims brought to the Malaysian courts.<sup>14</sup> The Government of Malaysia had also reiterated in Provision 5.21 of the 11<sup>th</sup> 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. 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.”<sup>15</sup> 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.”<sup>16</sup> This is considered to be in tandem with the move towards open disclosure' practices that are considered to be more

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<sup>14</sup> Although the latest statistics are not available but it can be seen that from the year 2006 to 2010, the Malaysian government has paid out an amount ranging from RM 2,184,406.21 to RM 12,919,083.12 as ex gratia payment (a form of out-of-court compensation afforded those suffering from medical injuries) to victims of 'potential' medical negligence (Ministry of Health Malaysia Annual Report, 2011).

<sup>15</sup> Ministry of Health Malaysia, “2013-2014 Malaysian Patient Safety Goals Report No1,” n.d., at p. 6, Retrieved from [http://patientsafety.moh.gov.my/uploads/book\\_inside.pdf](http://patientsafety.moh.gov.my/uploads/book_inside.pdf).

<sup>16</sup> *Ibid.*, at p. 14.

ethical.<sup>17</sup> Thus, it can be seen that by introducing apology legislation, medical practitioners in Malaysia would no longer be hesitant to engage in ‘open disclosure practices’ including making apologies after a medical mishap. Open disclosure practices are closely linked to the key components of incident management process and require open discussion of incidents that result in harm to a patient while receiving health care.<sup>18</sup> Elements of ‘open disclosure’ include (i) a factual explanation of what happened; (ii) a discussion of the potential consequences of the adverse event; (iii) an opportunity for the patient, their family and carers to relate their experience; (iv) an apology or expression of regret; and (v) an explanation of the steps being taken to manage the adverse event and prevent recurrence.<sup>19</sup> Therefore, being a key component in the open disclosure processes, apology promotes emotional healing as it will remove the hatred between the patient and the medical practitioner as apologies are statements acknowledging errors and its consequences, including accepting responsibilities and communication of regrets.<sup>20</sup> Openness, honesty and transparent communication are considered as positive attributes in patient safety policies as they will lead to better outcomes and able to discourage litigation.<sup>21</sup>

Although the Codes of Professional Ethics have always promoted for medical practitioners to be open and transparent, nevertheless, this is rather difficult to be achieved in reality, particularly, in Malaysia. The reason is because medical paternalism has been long rooted in Malaysia and this

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<sup>17</sup> See Stuart, McLennan, Leigh, E., Rich, & Robert D. Truog. (2015). Apologies in Medicine: Legal Protection is Not Enough. *Canadian Medical Association Journal* 187(5), E156–E159.

<sup>18</sup> Australian Commission on Safety and Quality in Health Care. (2013). *Australian Open Disclosure Framework: Better communication, A Better Way to Care*. 1–76. Retrieved from <http://www.safetyandquality.gov.au/wp-content/uploads/2013/03/Australian-Open-Disclosure-Framework-Feb-2014.pdf>, at p. 11.

<sup>19</sup> *Ibid.*

<sup>20</sup> Stephen E. Raper. (2011). No Role for Apology: Remedial Work and the Problem of Medical Injury. *Yale Journal of Health Policy, Law, and Ethics*, 11(2), 269–316, at p. 292.

<sup>21</sup> See Gregory W Lester & Susan g. Smith. (1993). Listening and Talking to Patients a Remedy for Malpractice Suits?. *Western Journal of Medicine*. 158(3) : 268-272.

undermines the importance of being transparent in the disclosure of medical errors. Medical practitioners still have the belief that not all information should be disclosed to the patient as they might react unfavourably which may not be in their best interest. Nevertheless, as medical paternalism is clearly diminishing in Malaysia as the judicial decisions in the Malaysian courts are moving towards patient-centred approaches in many aspects of medical care<sup>22</sup>, the introduction of any open disclosure policies that adheres to the developments of the law would presently be well-received. Furthermore, in the aftermath of medical errors, full disclosure of information has yet to be a norm amongst the medical practitioners as generally as they feel rather awkward in disclosing information after adverse events. The main reason is due to the fact that medical education trains them in the art of science rather than the art of communication. Although they are trained to convey bad news to the patient or their families, this training rarely includes any communication containing disclosure of errors and making apologies.<sup>23</sup> Before making any disclosure of errors, there is a need for medical practitioners to be equipped with trainings as such disclosure may implicate them legally and emotionally. Trainings on the importance of transparency and disclosure of medical errors will promote the ethical principle of veracity which encourages truth telling as ‘the right thing to do’ and will ultimately portray medical practitioners as being more responsible, professional and compassionate. Being honest, transparent and responsible should be inculcated in the medical school’s curriculum in order to produce a more responsible generation of medical practitioners in the future.<sup>24</sup>

## **OUTPUT:**

### ***Journal Articles:***

1. Jahn Kassim, Puteri Nemie and Saleh, Muhammad Ridhwan and Mohamed, Duryana (2019) Medical apology at a crossroad: a need for the enactment of apology legislations. *Malayan Law Journal*, 6. 1xxx-ciii.

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<sup>22</sup> This can be clearly seen in recent Malaysian Federal Court judgments, namely, *Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors* [2017] MLJU 1108 and *Dr Hari Khrisnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2017] MLJU 2093.

<sup>23</sup> See Yvonne Birks. (2014). Duty of Candour and the Disclosure of Adverse Events to Patients and Families. *Clinical Risk*. 20( 1–2): 19–23.

<sup>24</sup> General Medical Council. (2009). *Tomorrow's Doctors - Outcomes and Standards for Undergraduate Medical Education*. Retrieved from <http://www.gmc-uk.or>

2. Jahn Kassim, Puteri Nemie (2019) Achieving patient safety goals through enhancing legal knowledge and comprehensive disclosure policies. *Journal of Nursing and Patient Care*, 4 (1). p. 29. ISSN 2573-4571
3. Jahn Kassim, Puteri Nemie and Saleh, Muhammad Ridhwan (2017) The role of apologies in resolving medical disputes. *Pertanika Journal of Social Science and Humanities*, 25 (Spec.). pp. 1-10. ISSN 0128-7702

***Chapter in a Book:***

1. Saleh, Muhammad Ridhwan and Jahn Kassim, Puteri Nemie and Ramlee Saad, Zulfakar (2018) Apology as evidence of liability in medical disputes: a comparative study between the Shari'ah and civil law. In: *Contemporary and emerging issues in Syariah and Law*. USIM Press, Universiti Sains Islam Malaysia, Nilai, Negeri Sembilan, pp. 109-118. ISBN 978-967-440-588-5

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1. Jahn Kassim, Puteri Nemie (2019) Apology legislations and implications on medical disputes. In: *Continuous Medical Education (CME) Programme, Kompleks E1, Kementerian Kesihatan Malaysia Putrajaya*. (Unpublished).
2. Jahn Kassim, Puteri Nemie (2019) Implications of making apologies and the need for apology laws. In: *National Medico-Legal Conference 2019, 2-4 October 2019, City Bayview Hotel, Georgetown, Penang*. (Unpublished).
3. Jahn Kassim, Puteri Nemie and Saleh, Muhammad Ridhwan and Mohamed, Duryana (2018) The financial and legal implications of medical apologies in civil litigation. In: *7th RSEP International Social Sciences Conferences, 1st May - 4th May 2018, Amsterdam, Netherlands*.

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