

Singapore Healthcare Management Congress 2019

The Role of an Effective Apology in Conflict Resolution

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An apology is never easy to make, because once a doctor apologises over unfortunate incidents such as the death of a patient or complications arising from surgery, **you are seen as admitting fault.**

*Kwok Ka-ki
Member, Legislative Council, Hong Kong SAR
Legislative Council's debates on the Apology Bill*

Outline



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What is an apology?

4

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2

Why should healthcare providers consider apologising?

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What are the legal implications of an apology?

What is an apology?

What is an apology?

Expression of regret,
sympathy, benevolence,
compassion

“Partial apology”

What is an apology?

Expression of regret,
sympathy, benevolence,
compassion



Acknowledgment of
responsibility for having
caused the injury
Express or implied
admission of liability or
wrongdoing

“Full apology”

Why should healthcare providers apologise?

Why should healthcare providers apologise?

1

Intangible aspects

2

Tangible aspects

Why should healthcare providers apologise?

Intangible aspects

- Beneficial to the patient who has suffered an injury or loss during the course of treatment
- therapeutic value for the patient - believed to have the power to restore dignity, assuage anger and heal humiliation caused by the care provider's lapse
- allows the patient to look beyond the attribution of fault to the offender to other reasons which may have been beyond the offender's control
- Social benefit – restores, maintain relationship of trust between patients, doctors, and healthcare system

Why should healthcare providers apologise?

Intangible aspects

- Ethical duty on the part of medical practitioners to do right and be truthful with patients
- *“You must engage in good communication with patients based on openness, truthfulness and honesty”*

Singapore Medical Council Ethical Code and Ethical Guidelines, 2016 Edition, paragraph C2(1)

- *“When something goes wrong during your care of patients, you have a responsibility to put things right as quickly as possible. Responsible handling of such situations means:*

(1) When an adverse outcome is identified, you must ameliorate harm, openly and honestly inform patients as soon as possible of the adverse outcome ...”

Singapore Medical Council Ethical Code and Ethical Guidelines, 2016 Edition, paragraph C13(1)

Why should healthcare providers apologise?

Tangible aspects

- In mid-2001 and early 2002, the University of Michigan Health System implemented its “*Apology and Disclosure*” programme
- After an unanticipated outcome occurs, “[p]atients and families receive acknowledgement of, and an apology for, true mistakes. They receive a thorough explanation nonetheless.”
- Richard C Boothman et al., “A Better Approach to Medical Malpractice Claims? The University of Michigan Experience” (2009) 2(2) Journal of Health & Sciences Law 127 at 135

Why should healthcare providers apologise?

Tangible aspects

- Results:
 - Claims processing dropped **from 20.3 months to about 8 months**
 - Average litigations costs **more than halved**
- Suggests that, done properly, system of open disclosure and appropriate apologies can reduce average processing time and costs

Why should healthcare providers apologise?

An example closer to home – Hong Kong's Apology Ordinance

passed by the Hong Kong Legislative Council in July 2017

Object of the Apology Ordinance:

Section 2 – *“The object of this Ordinance is to promote and encourage the making of apologies with a view to preventing the escalation of disputes and facilitating their amicable resolution.”*

An “apology” is defined in the Ordinance to mean an expression of regret, sympathy or benevolence, and includes an admission of fault or liability and any statement of fact.

Why should healthcare providers apologise?

Tangible aspects

- **? Caveat:** apology and disclosure may be insufficient to achieve tangible results unless done under a proper system, and physicians trained under such a system
- A recent study found that, on average, “*apology laws*” increase, rather than limit, medical malpractice risk
- The authors suggest that this unintended outcome may be attributed to lack of training on the part of individual doctors
- McMichael et al., ““Sorry” is Never Enough: How State Apology Laws Fail to Reduce Medical Malpractice Liability Risk” (2019) 17 Stanford Law Review 341

Why should healthcare providers apologise?

Tort reform

- Apology laws as a type of tort reform
 - purpose of the US state laws – designed to reduce the high levels of litigation (specifically medical malpractice litigation)
- However, empirical evidence of the impact since the introduction of the apology laws is unclear

Legal implications of an apology

Legal implications of an apology

Is the fact that doctor had apologised admissible in evidence against him/her?

- Presently, Singapore does not have an apology law (similar to those in USA and Hong Kong) specifically excluding evidence of apologies in the event of (later) litigation
- In general, admissions are *admissible* as evidence as against the person who makes them (section 21 of the Evidence Act)
- However, admissions may be protected by “*without prejudice*” privilege and excluded from evidence

Legal implications of an apology

Is the fact that doctor had apologised admissible in evidence?

- “Without prejudice” privilege extends to admissions where:
 - the admission is made on an **express condition** that evidence of it is not to be given; or
 - the Court can **infer** that the parties had agreed that evidence of it is not to be given
- The privilege cannot be invoked where no dispute exists
 - *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd and another* [2006] 4 SLR(R) 807 at [30]

Legal implications of an apology

Is the fact that doctor had apologised admissible in evidence?

- If there has been an “*admission of liability*” (e.g. where debtor acknowledges that he is liable), there is no dispute and “without prejudice” privilege does not apply
- *Sin Lian Heng Construction Pte Ltd v Singapore Telecommunications Ltd* [2007] 2 SLR(R) 433 at [44]
- Partial apologies (without admission of liability) are likely captured by “without prejudice” privilege (as long as accompanied by appropriate statements)
- Even full apologies may be captured by “without prejudice” privilege since unlike a simple debt, the issue of whether a doctor has fallen below the standard of care is a matter within the purview of the Courts

Legal implications of an apology

How will evidence of an apology be construed?

- Even if admissible as evidence, apologies may not necessarily lead the Court to conclude that there has been negligence
- *Bank of China v Asiaweek Ltd* [1991] 1 SLR(R) 230
 - Publisher of magazine published apology stating that its report “*cast a bad light on the reputation and position of Bank of China*”
 - Held: that this was a “*material admission*” and the defendant cannot maintain that the words complained of were not libellous
- *Dovuro Pty Ltd v Wilkins* [2003] HCA 51
 - Distributor of canola seed (mixed with weed seed) apologised to its customers and stated that “*this does not excuse Dovuro from failing in its duty of care ... we got it wrong in this case*”
 - Held: the “*admissions*” did not provide basis for finding of negligence

Legal implications of an apology

How will evidence of an apology be construed?

- Until an appropriate case is heard and decided by our local Courts, unclear how such apologies will be construed
- Unlikely that a partial apology (without an admission of liability) of itself will lead the Court to decisively conclude that a doctor has been negligent

Legal implications of an apology

Why an apology of itself may not accelerate resolution of dispute

- Different elements in a dispute
 - liability
 - quantum
- Possible effect on closing a settlement

What should healthcare providers do?

What should healthcare providers do?



Before an incident occurs

1

Train doctors to be receptive towards the offering of apologies to patients

2

Encourage doctors to check with indemnity providers / malpractice insurers on their stance on the offering of an apology

What should healthcare providers do?



After an incident occurs

1

Communicate with patient / family **as soon as possible**

2

Consider: that the communication is to be done by the doctor concerned together with somebody **sufficiently senior**

3

Consider what the patient is or may be after. Patients may sue not only for compensation, but also because they are concerned with the standard of care (so that others in future would not have same experience) and/or want an adequate and honest explanation

What should healthcare providers do?



After an incident occurs

4

Consider to offer at least a “**partial apology**” (expression of sympathy) to the patient

5

Address patient's need for information (as far as possible)

- What exactly happened and how?
- What are the implications for the patient?
- How will you prevent the same from happening in the future?
- Be familiar with policies relating to **disclosure of patient information / documents**

What should healthcare providers do?



After an incident occurs

6

Where details of the incident are still being investigated, to **follow up** with patient

7

Do not make commitment(s) relating to compensation if this has not yet been brought up, but healthcare provider can consider holding back bills while investigation is ongoing

Q&A

References

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