

Justice Committee
Apologies (Scotland) Bill

Written submission from the Law Society of Scotland

Introduction

The Law Society of Scotland (the Society) aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members, but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

To help us do this, we use our various Society committees which are made up of solicitors and non-solicitors to ensure we benefit from knowledge and expertise from both within and out with the solicitor profession.

The Law Society of Scotland's Health and Medical Law Sub-committee (the committee) welcomes the opportunity to consider and respond to Justice Committee's call for written evidence on the Apologies (Scotland) Bill. The committee has the following comments to make.

General

These comments are confined to apologies made within a healthcare context only. As the Society noted previously¹, the proposed purpose of the bill is laudable, however it remains a little unclear how the outlined proposals will actually achieve its aims and consideration should be given to how these proposals can make a positive and beneficial contribution to existing legislation and practice?

An apology can be delivered in many ways and is not easily conducive to formula. It relies upon interpretation, emotion and often spontaneity of the parties, both giving and receiving the apology. Such things are difficult to capture within a legislative framework.

There is also the possibility that the proposals result in duplication of process and remedy. Many NHS boards already have such procedures in place whereby an apology can be made without admission of fault, so would such proposal merely be providing a duplication of processes which already exist- what does it propose to add to these processes? In addition, the proposal acknowledges that 'making a mistake is not the same as being negligent' and Scots law already has a well established body of case law which addresses this point. These points will be considered further below:

¹ Correspondence dated 15 August 2013 to M Mitchell (Appendix 1)

Comments

1. Is there merit in providing legal protection to an expression of apology as set out in the Bill?

It is our understanding that there is no legal duty requiring health care professionals to give an apology or an explanation, although there are existing guidelines for doctors to apologise. The General Medical Council Guidance states '*You must respond promptly, fully and honestly to complaints and apologise when appropriate*'². Similar provisions are made by the General Dental Council, the General Pharmaceutical Council,³ and the Nursing & Midwifery Council. Although non-statutory, these are established professional standards and a breach can result in a disciplinary hearing and an adverse finding.

As we understand it, there is a general move by the NHS towards an open acknowledgement when treatment goes wrong. This is a framework supported by, among others, the Department of Health, Medical Defence Organisations and several Royal Colleges. Given the existing guidelines outlined above, it is not clear if there is anything to be gained beyond this which the Apologies (Scotland) Bill seeks to add. In addition, as there are currently existing guidelines then there is a possibility that the proposals may result in duplication of process and remedy.

2. Do you agree with the legal proceedings covered under section 2 of the Bill, and the exceptions for fatal accident inquiries and defamation proceeding?

From a legal perspective, we recognise the professionals have real concerns about the legal consequences of an apology. They will worry whether an apology amounts to implied negligence. They will also worry that by making an apology, they may face disciplinary or fitness to practice proceedings, with potentially very serious consequences for the healthcare professional involved.

An apology may be misinterpreted by the patient involved or their representative as an admission of liability possibly leading to lengthy, complex, distressing and costly claims. Unfortunately not all legal advisers recognise that an acceptance that treatment has not progressed as might have hoped does not go very far towards the meeting the legal test of clinical/medical negligence. As a result the patient's expectations may be built up, sometimes erroneously and any remaining relationship which they have with the clinicians or the health service in general may be adversely affected.

In bringing a successful claim in medical negligence, it is well established that the pursuer has to prove that there is a duty of care owed by the healthcare professional to the pursuer, that there was a breach of that duty, and that any loss or injury suffered has been caused by the breach.

² http://www.gmc-uk.org/guidance/good_medical_practice/treat_fairly.asp

³ <http://www.pharmacyregulation.org/standards/conduct-ethics-and-performance>

3. Do you agree with the definition of apology in section 3 of the Bill?

The parameters of the apology are open to Interpretation, even as defined. As defined it is recognised that as explained in response to question 1 the NHS Internal Complaints Procedure already provided this mechanism.

Regulation cannot insure the presence of sincerity or genuineness in an apology. The Patients Rights (Scotland) Act 2011⁴ may now address many of the issues and provide both routes and a communication mechanism which a party can use to raise concerns and complaints.

4. Do you agree that the Bill will facilitate wider cultural and social change as far as perceptions of apologies are concerned, as suggested in the Policy Memorandum on the Bill?

It remains a little unclear how the outlined proposal will actually achieve its aims in this regard and consideration should be given to how the proposed legislation can make a positive and beneficial contribution to existing legislation and practice.

5. Are there any lessons that can be learned from how apologies legislation works in practice in other legislatures?

It is always interesting to view the practice of other countries. However, no comment is made in relation to how they would translate into our system.

Appendix 1

Margaret Mitchell MSP
The Scottish Parliament
Edinburgh
EH99 1SP

Date: 15 August 2013

Dear Ms Mitchell,

Re: Proposals for an Apologies (Scotland) Bill

The Society responded to the original consultation in 2012, supporting the principle aims and objectives of the proposals. At that time, this was considered by the Society's Obligations Sub-committee.

In April 2013, the views and comments were sought of the Society's newly formed Health and Medical Law sub-committee, whose membership includes professionals working in the medical law sector, including medical negligence (pursuers and respondent) the NHS and the Medical Protection Society.

⁴ <http://www.legislation.gov.uk/asp/2011/5/contents>

General observations on the proposals

The general view of the Health and Medical Law Sub-committee (the committee) reflects that of the response in 2012, in agreeing with the aims and objectives of the proposals. However, in the committee's view, it remains a little unclear how the outlined proposals will actually achieve its aims and consideration should be given to how these proposals can make a positive and beneficial contribution to existing legislation and practice.

The committee notes that there is currently no legal duty requiring Healthcare professionals to give an explanation or an apology, although there are existing guidelines for doctors to apologise. The General Medical Council guidance states: "Patients who complain about the care or treatment they have received have a right to expect a prompt, open, constructive and honest response including an explanation and, if appropriate, an apology." Similar provisions are made by the General Dental Council and the Nursing & Midwifery Council. While these are merely guidelines, a breach can result in a disciplinary hearing and an adverse finding.

As the committee understands, there is a general move by the NHS towards an open acknowledgment when treatment goes wrong. This is a framework supported by, among others, the Department of Health, Medical Defence Organisations and several Royal Colleges.

Given the existing guidelines outlined above, is there anything beyond those which the proposals seek to add? In addition, as there are currently existing guidelines then there is the possibility that the proposals may result in duplication of process and remedy.

It is acknowledged, that in some cases, a timely apology may save a situation from escalating to a more formal redress and litigation, however, the proposed

Outcomes would need to make it clear that they do not seek to be a substitution for transparency and accountability of the healthcare professional. In the light of recent events in the NHS in England, public reassurance would need to be provided that this was the case but it is also an opportunity to demonstrate that this can be achieved in Scotland.

A final point on general observation of the proposals, if the outcomes are to reduce litigation and enhance patient satisfaction then arguably a more fundamental change in approach as to how, in Scotland, we deal with alleged wrongdoing or complaint, may be required.

The nature of the apology

The parameters of the apology are open to interpretation. Other respondents note that research would indicate that other factors have to be considered. For example does the apology stand in isolation, or would an explanation of events accompany the apology? The proposals indicate the latter aiming to '[ensure] the same thing doesn't happen to anyone else'. An apology alone will not necessarily achieve that.

The inclusion of a 'review' would bring similar issues. Whilst a review may provide depth and meaning to the apology, in practice how would this work? Legislation cannot ensure the presence of sincerity or 'genuineness' in an apology. Would the review provide feedback to the party seeking the apology? What would happen if they were not satisfied with the review- could they appeal? If the review contained suggestions to modify or change a current practice in an attempt to mitigate reoccurrence, how would this be implemented and monitored?

The Patients' Rights (Scotland) Act may now address many of these issues and provide both routes of communication and mechanisms in which a party can raise concerns and complaints.

Legal perspective

From a legal perspective, the committee recognises that healthcare professionals clearly have real concerns about the legal consequences of an apology. They will worry whether an apology amounts to implied negligence. They will also worry that by making an apology, they may face disciplinary or fitness to practice proceedings, with potentially very serious consequences for the healthcare professional involved.

Often an apology may be misinterpreted by the patient or their representative as an admission of liability possibly leading to lengthy, complex, distressing and costly claims. Unfortunately not all legal advisers recognise that an acceptance that treatment has not progressed as might have been hoped does not go very far towards meeting the legal test of clinical / medical negligence. As a result the patient's expectations may be built up, sometimes erroneously and any remaining relationship which they have with the clinicians or the health service in general may be adversely affected.

In bringing a successful claim in medical / clinical negligence, the pursuer has to prove that there is a duty of care owed by the healthcare professional to the pursuer, that there was breach of that duty, and that any loss or injury suffered has been caused by the breach.

The test for medical negligence in Scotland as set down in the case of *Hunter v Hanley* 1955 SLT 213 requires that in order to establish the liability where deviation from normal practice is alleged, three facts require to be established on the balance of probabilities. First of all it must be proved that there is a usual and normal practice. Secondly, it must be proved that the clinician has not adopted that practice and thirdly and most importantly, it must be established that the course that the clinician adopted is one which no clinician in the same specialism would have taken if he/she had been acting with ordinary care.

In short, for liability to attach, it must be established:

- There is a usual and normal practice
- That practice was not followed; and
- The course followed (if not normal practice) was one which no clinician of ordinary skill would have taken if acting with ordinary care.

Where a healthcare professional has followed standard practice and a mistake has ensued, then he/she is not necessarily liable unless the 3 test rule is met.

Errors for which doctors may apologise do not necessarily amount to negligence. In a great deal of clinical negligence claims, patients may be 'injured' due to known complications of various procedures, and, provided that there is adequate consent, there will be no finding of negligence. In trying to diagnose a patient, doctors/surgeons may not always get it right at the outset but with hindsight, there may appear to be failings or fault. In many cases, the 'bad outcome' can be due to non-negligent errors, and recognised risk of a difficult surgical procedures.

If the healthcare professional has met the three fold test outlined above, he/she should, in the committees view, apologise without any fear of litigation.

However, the committee believes that the difficulty for healthcare professionals is that there will always be experts who criticise them with the benefit of hindsight, but any apology by the healthcare professional will not necessarily be construed as an admission of liability by the courts.

The original consultation document refers to the case of Bryson v BT Rolatruc (notably not a clinical negligence case but a PI case) Having reviewed the case report, the committee notes that this case turned on different accounts given by the witnesses as to the facts, and the apology was not a significant factor in the judgment of Lord Osborne. Indeed, the views of those within the committee is that apologies, which fall short of admitting liability, do not play a significant role in determination of liability, and each case turns on its own facts and will depend on the court's view of the evidence of the facts and apology made at the time of the event.

I hope you found the above comments of the committee helpful. If you wish to discuss further, please do not hesitate to contact me direct.

Alison Britton, Convenor of the Society's committee, and I look forward to attending the roundtable discussion event on 12 September.

If you have any questions in relation to this, or wish to discuss further, then please contact me direct.

Yours sincerely
Brian Simpson

Brian Simpson
Solicitor, Law Reform
1 May 2015