

Justice Committee

Apologies (Scotland) Bill

Written submission from the Faculty of Advocates

Further to the call for evidence by the Scottish Parliament's Justice Committee in connection with the general principles of the Apologies (Scotland) Bill, which was introduced in the Scottish Parliament on 3 March 2015.

General comments

1. The Faculty of Advocates (the Faculty) responded in 2012 to a consultation document issued on 29 June 2012 in connection with a draft proposal by Margaret Mitchell MSP, Member for the Central Scotland Region, with a view to introducing a Member's Bill in the Scottish Parliament. At that time there was no draft Bill.

2. The Faculty supported the general aim, which was to improve complainer satisfaction and reduce the incidence of litigation and the unnecessary prolongation of complaints and grievance procedures; but doubted whether legislation was necessary, or would have the desired effect. The Faculty noted the lack of empirical studies cited by the consultation document that clearly demonstrated the causal potency of apologies legislation, and the absence of obvious effect notwithstanding the practice of apology in the National Health Service in England and Wales, and in Scotland. The Faculty suggested that there was little evidence of apologies currently having an impact on the outcome of Scots civil litigation, noting that only one example was given by the consultation document and that there was nothing to suggest that the apology had played any significant part in that decision.

3. The Faculty has concerns arising from the definition of "apology" in the Bill, and the intended application of the section 1 protection to all civil proceedings, with the exception of Fatal Accident Inquiries and defamation actions.

4. The Faculty notes the inclusion in the Financial Memorandum accompanying the Bill of references said to support causal efficacy. However the Faculty is concerned that (a) the references may not in fact be supportive, and (b) the quotation from a 2011 paper by Ho and Liu in paragraph 10 of the Financial Memorandum has been taken out of context.

5. The principal object of the Bill is that, by the protection of apologies (as defined), a culture of apology would be promoted, and resort to litigation would reduce. The Faculty is not clear how this might come about, or what the effects might be. The merit of such protection is intrinsically bound to its effects, which, in our view, remain to be demonstrated.

6. The Faculty would draw attention to an error in paragraph 11 of the Financial Memorandum. It is not, and has never been, the case that "all personal injury claims for £5,000 or more are heard at the Court of Session". Claims for less than £5,000 (now £100,000) could not be brought in the Court of Session. Claims for sums in excess of £5,000 have always been able to be brought in the Sheriff Court.

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

7. The Faculty notes that the definition of apology in section 3 of the Bill extends to an apology “which contains -

- (a) an express or implied admission of fault in relation to the act, omission or outcome,
- (b) a statement of fact in relation to the act, omission or outcome ...”

8. In the documents supporting the Bill the paradigm example used is an action of damages arising from personal injuries. The Faculty suggests that if the matters set out in section 3(a) and (b) are to remain within the definition of apology then it might be better to restrict the scope of any legislation to personal injuries actions, for the reasons discussed below.

9. Even in the personal injuries paradigm there is the potential for conflict between the Bill and existing measures seeking to simplify and expedite proceedings. Pre-action protocols in personal injuries cases usually seek to clarify from the outset whether fault is in issue and, to this end, encourage early and frank exchange of factual information. In Scotland pre-action protocols covering personal injury claims and industrial disease claims, provide for admissions of liability to be binding. [<http://www.lawscot.org.uk/rules-and-guidance/section-f-guidance-relating-to-particular-types-of-work/division-d-court-work/advice-and-information/pre-action-protocol-in-personal-injury-cases/>] Where an unequivocal admission of fault has been made the Bill, if passed, would seem to prevent a party from founding upon the admission. The result might be individual injustice. More generally attempts to encourage the adoption of pre-action protocols might be undermined. Any negative impact upon the effective use of existing personal injury pre-action protocols would in our view be counter-productive.

10. More generally the Faculty is concerned that section 3(a) would render inadmissible in evidence an apology that also incorporates an admission of fault. We note that an identical admission of fault would be admissible or not depending upon whether it included an apology. We would regard such a consequence as unfortunate. It appears arbitrary. Whether or not an extra-judicial admission of fault is binding is normally a matter of intent: *Van Klaveren v Servisair UK Ltd* 2009 SLT 576 [<http://www.scotcourts.gov.uk/search-judgments/judgment?id=a23386a6-8980-69d2-b500-ff0000d74aa7>]

11. A similar point arises in connection with section 3(b) and extra-judicial admissions of fact: why should these be rendered inadmissible because they are conjoined with an apology?

12. In its response to the consultation document issued on 29 June 2012, the Faculty expressed doubt that apologies falling short of an admission of liability had any real impact upon the outcome of civil litigation. Reference was made to the case of *Bryson v BT Rolatruc Ltd* as an example of an apology being admitted as evidence. The evidence in the case included an alleged verbal apology given spontaneously by a fork lift truck driver in the immediate aftermath of an accident.

The making or withholding of a spontaneous apology of that sort, which might be said to be part of the event itself, or “de recenti”, does not appear to us to be liable to influence by the legal protection created by the Bill. The admissibility in legal proceedings of such apologies is unlikely to encourage or discourage spontaneous apology at or shortly after an adverse event. If the Bill is passed as presently worded, the injured recipient of a de recenti apology would be unable to rely upon it in legal proceedings. That would be, in our view, an unwelcome outcome. We suggest that consideration is given to excluding de recenti apologies from the scope of any protection provided by legislation.

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

13. As drafted, the Bill will apply to all civil proceedings except Fatal Accident Inquiries and defamation actions. It is not intended to apply to criminal proceedings.

14. The Faculty agrees that Fatal Accident Inquiries and defamation actions should be excluded from the scope of section 2 of the Bill.

15. The documents accompanying the Bill, and the material referred to in those documents, focus primarily on personal injury actions: in particular on medical negligence actions.

16. For the reasons discussed below, the Faculty doubts whether the experience in other jurisdictions cited by the support documents can be relied upon. The Faculty is concerned that the evidential focus is solely on personal injury cases and that no evidence is adduced dealing with the potential impact of the Bill on other areas, e.g., family law, the law of contract, debt actions, commercial litigation, administrative law, etc.. The Faculty suggests that consideration is given to restricting the applicability of any legislation to personal injury actions in the first instance. If the Bill is enacted, then its effect on personal injuries actions can be analysed and a decision made as to whether its provisions ought to be extended to other civil proceedings.

17. The Faculty suggests that the Bill should provide, specifically, that it does not apply to pre-litigation personal injury claims proceeding on the basis of Pre-action Protocols where those Protocols provide for the making of binding admissions of fault: although such protocols are not “proceedings”.

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

18. The Faculty does not agree with the definition, as presently worded. We do not think it desirable to include “de recenti” apologies in the protection given by the Bill: see above. Such apologies are not, in our view likely to be susceptible of encouragement by legislation, and by defining apologies in such a wide way [“any statement”] and applying the Bill to any statement made outside proceedings, the advantage of being able to refer to “de recenti” apologies is lost for no obvious gain.

19. We suggest that consideration is given to altering the definition of apology by excluding “de recenti” statements. What counts as de recenti could be decided by

the court, In our view, such a change would have no real impact on the giving of the kind of apology which the Bill seeks to encourage, which is a considered response.

20. The Faculty has already commented above on the consequences of the provisions in section 3(a) and (b)

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?

21. The Faculty would like to believe that such a simple change in the law would have the dramatic effect suggested, but remains sceptical that the Bill will achieve its desired end. Indeed, by providing that an apology is inadmissible, it might promote the view (in the recipient) that an apology is not worthwhile because it has only been made with view to avoiding (or lessening) consequences, and is, therefore, not a “real” apology.

22. So far as the Faculty can determine there is no convincing empirical evidence that an apologies law per se has the dramatic effects contended for, or that it may have such effects in all types of case. This is despite the widespread adoption in other jurisdictions. If the effect is so dramatic we would expect this to be demonstrable. We consider the evidence base put forward in support of the Bill below.

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

23. The Faculty suggests that the evidence in respect of foreign jurisdictions in paragraphs 6 to 10 of the Financial Memorandum requires careful scrutiny. We note that the example of New South Wales is no longer cited in support of the cost savings suggested in the Memorandum: the apologies legislation there being part of a wider package of measures including a high minimum sum for claims of damages for pain and suffering (circa Aus \$75,000). Express reliance is now placed only on the experience in claims against medical professionals in the USA: the Michigan Model and papers by Ho and Lui.

24. We understand that of the thirty-six US states that have apologies laws California, Massachusetts, Florida, Tennessee, Texas, and Washington have general apology statutes that apply across all industries while the other 30 States have specific laws that only protect the statements of apology made by healthcare providers. The US data will therefore tend to be skewed towards the impact of apologies laws on only one economic sector. Moreover some US states have full apology laws rendering admissions of fault inadmissible whereas other states have partial apology laws under which admissions of fault are not protected.

25. We note the prevalence of private medicine in the US and the direct interest US clinicians have in the outcome of claims, including the effect on their malpractice insurance premiums and their professional reputation among potential private patients. In Scotland most healthcare is delivered by the NHS and doctors have the benefit of Crown indemnity.

26. The funding of claims in Scotland differs from the US. The US systems of funding might mean a higher frequency of claims. The ability and willingness of US lawyers to take cases on a contingency fee basis is thought to provide a relatively low barrier to litigation. The US figures might then include cases that would not result in claims in Scotland.

27. Anecdotally awards in the US are higher than in Scotland. Jury awards tend to be higher than judge awards and are common in the US but rare in Scotland. There might then be greater scope in practice to reduce settlement figures in the US.

28. Much of the US data involves patients choosing not to sue their doctors, or if they do so then accepting lower settlement amounts than they might otherwise. From the perspective of the health provider this might be a good thing. From the point of view of the patient the benefit is less certain: arguably the healthcare provider's saving is the patient's under-compensation.

29. We append a brief analysis of the Michigan Model and papers by Ho and Lui, being the sole evidence base in the Financial Memorandum, and suggest that neither source provides much, if any, support for the contentions as to causal efficacy made in the Memorandum.

30. It is not clear how the Michigan Model could apply outwith the institutional healthcare setting.

31. Most personal injuries actions raised in Scotland are not against healthcare providers.

32. The Faculty is therefore unable to understand the suggestion in paragraph 12 of the Financial Memorandum that, based on the experience of the Michigan Model, the passing of the Bill might result in a reduction in the number of Scottish personal injury cases "of around 50% in eight years". This is the approximate reduction in medical malpractice claims achieved by the Michigan Model between 1999 and 2006.

33. Lest the Faculty be accused of having regard to its own members' interests in this matter we note that the Michigan Model is said in practice to benefit lawyers.

34. We offer no criticism of the Michigan Model, which appears to work well in Michigan. However Faculty is uncertain that very much can be taken from the example of the Model in support of the current Bill.

35. Turning to Ho and Lui, we are unable to express any view on the mathematical or statistical methods used by them. We assume the journals in which their articles are published are reputable but do not know what degree of peer review articles are subjected to before acceptance. The economic "game model" used seems to us to be capable, if at all, of capturing the motivations of the players if the doctors are in the private healthcare sector. We cannot see how the analysis can say much about the likely impact on claims arising from NHS care where Crown indemnity applies and payments of damages are made (ultimately) by the State, or

on claims outwith the healthcare sector. We suggest that the patient's "psychic cost" is also not so obvious in NHS care. Moreover the game model assumes the patient will incur costs of litigation, and this has to be seen in the context of US practice. The US state rules on the recoverability of litigation expenses from a losing party vary but a successful claimant may not be able to recover their costs and a successful defendant will seldom be able to do so: making it problematic to transpose to Scotland an economic litigation game model designed for US claims. As matters stand a successful party in Scotland will usually recover their judicial expenses from their opponent. A patient in Scotland who has the benefit of legal aid will have only a very limited potential exposure to litigation costs.

36. In any event the game model does not appear to us capable of easy extension to non-medical cases even in other types of personal injury case e.g., road traffic cases, employers' liability, and industrial disease.

37. The quotation in paragraph 10 of the Financial Memorandum appears at pages 182-3 of the Ho and Lui article relied upon. In our view it has been taken out of context in the Memorandum. In the article it appears as part of the setting out of the authors' "Conceptual Framework". It is an explanation of the causal mechanism being postulated on the basis of a whole series of assumptions about the specific economic game model being used. We do not read it as a general statement of fact relating to all claims: and would be surprised were the authors to support such a view.

38. No mention is made in the Financial Memorandum of any impact that the apology provisions of Section 2 of the Compensation Act 2006 might have had either on the number of apologies issued or on the volume and cost of litigation in England and Wales. We are not aware of any evidence suggesting that the provision has had a substantial effect.

39. It appears to the Faculty that despite the numerous jurisdictions (including 36 US states) that have adopted apologies legislation the Memorandum does not cite evidence of a clear and obvious general effect. The only evidence relied upon is from the US and is either of doubtful relevance or is specific to private US healthcare provision.

Appendix

The Michigan Model

The Michigan Model is a voluntary system originating with the University of Michigan Health System, which has since been adopted at a number of other US hospitals. It extends beyond a simple willingness to apologise for adverse outcomes. It is explained in the article cited in paragraph 9, footnote 6, of the Financial Memorandum: *A Better Approach to Medical Malpractice Claims?*

The University of Michigan Experience, Journal of Health and Life Sciences Law, January 2009, Vol 2, No 2, page 143

<http://www.med.umich.edu/news/newsroom/Boothman%20et%20al.pdf>

The article is by lawyers and doctors who devised and/or implement the Model. It appears from the article that the success of the Model in reducing claims arises from its institutional risk management, policy of full disclosure, claims handling and processes for improving patient care rather than specifically from any practice of apology. The Michigan state law claims procedures might also contribute materially. The article does not suggest that apologies are a significant factor in the decline in claims against the hospital: the word “apology” appears at pages 131, 132, 133, 142, 148, 157 and 158 of the thirty-eight page article.

Paragraph 9 of the Financial Memorandum refers to evidence given by one of the Michigan Model administrators to a US Senate Committee:

<http://www.help.senate.gov/imo/media/doc/boothman.pdf> Neither the word “apology” nor the word “apologies” appears in the testimony.

The point is made on the University of Michigan Health System website: “You may have heard something about our policy of “saying sorry”, or apologizing and having an open discussion, when clinical care does not go as planned. And while apologies are certainly part of our approach, there’s much more to it than that. Communication, full disclosure, and learning from our experiences are all vital.”

<http://www.uofmhealth.org/michigan-model-medical-malpractice-and-patient-safety-umhs#summary>

Michigan has an apology law but the Bills’ supporting documents do not give any obvious indication as to how that law works in conjunction with the Model. It is our impression from the supporting documents that the Model includes the healthcare institution making early admissions of fault in appropriate cases. The supporting materials do not include anything indicating that the Michigan Model relies to any extent on the non-admissibility of apologies.

Ho and Lui

Paragraph 10 of the Financial Memorandum appears to cite two papers by Ho and Lui published in the Journal of Empirical Legal Studies. However the citations in footnotes 7 and 8 are both incorrect. The quotation is from Ho and Lui, *What’s an Apology Worth? Decomposing the Effect of Apologies on Medical Malpractice Payments Using State Apology Laws*, Journal of Empirical Legal Studies, Vol 8, Issue S1, 179-199, December 2011.

There is a slightly earlier paper than that quoted from by the same authors, *Does Sorry Work? The Impact of Apology Laws on Medical Malpractice*, (2011) 43(2) J. of Risk & Uncertainty 141. The earlier paper might be of greater assistance for present purposes as it considers apology as a factor in a patient’s decision to sue their doctor. It claims to be the first economic study to investigate the impact of State-level apology legislation on claim frequency and claim “severity”. It makes the point that findings associated with hospital-level apology programmes (including the Michigan Model) are of uncertain “generalizability”. The paper concludes that the US state apology laws’ combined effect is to increase apologies and decrease expected settlement time, and over the long-term should speed up settlements and reduce the total number and value of malpractice payments. Reduced payments are good for payers (here doctors) but less obviously so for payees (patients)

The authors' analysis proceeds on the basis of an initially simple Games Theory economic model: "healthcare provision, apology, and litigation". Layers of complexity are then added. The game model assumes an individual doctor who requires to make any payment arising from a claim (or, presumably, whose malpractice insurer requires to do so, subject to any uninsured excess). The claims payment data the authors use does not include payments made by healthcare institutions.

The later Ho and Lui paper quoted by the Financial Memorandum uses the same data set and the same economic game model. The point of the study is to seek to quantify how the value of an apology in medical malpractice litigation depends on the characteristics of the case. The authors look at instances where claims and payments have been made: their data does not include cases where a claim has been made but no payment made. The overall finding is that the passage of an apology law accounts for a \$32,342 (12.8 per cent) decrease in the size of malpractice payments. But the effect is concentrated e.g., on cases involving obstetrics and anaesthesia, infants and male patients. There therefore appears to be a gender and age bias: the payments made to the young and to males are disproportionately reduced.

Faculty of Advocates
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