

Keynote Address of Ms Christina Cheung, Law Officer (Civil Law), Department of Justice, HKSAR Government

**Seminar on Medico-legal related matters in Hong Kong:
Apology, Disclosure, Patient Safety and Mediation
18 July 2020 (Saturday)**

Topic: Does the Apology Ordinance protect the healthcare professionals who apologize?

Ladies and Gentlemen

1. It is with pleasure that I speak at today's seminar, convened by DAADR Task Force under the newly established Professionalism & Ethics Committee of the Hong Kong Academy of Medicine.

2. Today, we have healthcare professionals from different specialties joining as speakers or as audience watching through the webinar. To begin with, I wish to express my sincere gratitude to members of the healthcare professionals for their commitment to the Hong Kong community during this unprecedented and challenging time.

3. The title of my keynote address today is, "Does the Apology Ordinance protect the healthcare professionals who apologize?" Apology is an integral part of everyday social interactions, especially when mishap happens. When it comes to medical practice, mishaps may occur due to a number of reasons but whatever the causes may be, concerns about admission of legal liability might deter healthcare professionals from apologizing to patients and their families.

Why is making apology so hard, and what is an apology?

4. So what are the concerns which hold back apologies in the

medical field? Before the Apology Ordinance came into effect, there was no certainty that an apology could not be relied on as evidence of admission of fault against an apology giver in the relevant legal proceedings. There was of course also the fear that an apology would affect the person's insurance cover on ground that an apology was made. This explains the reluctance to offer an apology, even when that person actually wanted to do so. The introduction of the apology legislation seeks to address these concerns and has proven to be effective in facilitating dispute resolution, especially when monetary compensation was not at the forefront of the victim's mind, as is often the case for disputes in the medical and health care sectors.

5. The Government was prompted to enact the Apology Ordinance, the first legislation of the kind in Asia, which came into operation in 2017. The Ordinance covers a wide range of applicable proceedings, and its objective is to foster a culture of amicable dispute resolution of nearly all types of civil disputes and proceedings, including medical disputes and disciplinary proceedings.

6. An apology may come in many different forms. It can be an expression of regret, sympathy or benevolence made orally, in writing or by conduct. It can also be accompanied by an admission of a person's fault or an explanation of how the unfortunate incident came about. A simple expression of "I am sorry" on its own, or that coupled with an admission of fault or any statement of fact, such as an explanation of the cause of the incident, all fall within the wide meaning of "apology" under the Ordinance.

Protection under the Apology Ordinance

7. What then is the protection given under the Ordinance to an apology maker? To begin with, healthcare professionals will not be sacrificing the protection covered by their professional liability

by giving an apology. With regards to possible legal or regulatory proceedings, the protection is three-fold. First, the apology does not constitute an express or implied admission of fault or liability in applicable proceedings. Second, the apology must not be taken into account in determining fault or liability to the prejudice of the apology maker. Third, an apology, including any accompanying statement of fact, is not admissible in applicable proceedings as evidence for determining fault or liability to the prejudice of the apology maker.

8. Inadmissibility of statements of fact is subject to an exception, but it has a high threshold. In highly exceptional circumstances, for example where there is no other evidence available for determining an issue, a “decision maker” may exercise discretion to admit a statement of fact in an apology as evidence in applicable proceedings, but only if the decision maker is satisfied that it is just and equitable to do so, having regard to the public interest or the interests of the administration of justice. “Decision maker” refers to a person such as a court, a tribunal or any other body or individual with the authority to hear evidence in the proceedings. These triple qualifiers for the circumstances as to when decision makers may exercise their discretion, namely “just and equitable”, “public interest” and “interests of the administration of justice”, are not novel concepts but have instead been well tested in case law.

9. We consider that this approach of general inadmissibility of apologies as evidence subject to exceptional circumstances strikes an appropriate balance between the policy objective of encouraging the making of sincere and meaningful apologies by offering certain protection to the apology maker; and ensuring that due respect is given to the fundamental right to a fair hearing guaranteed under the Hong Kong Bill of Rights. In the vast majority of cases, there would be evidence from other sources to prove certain facts and so there will be no need to rely on statements of facts in apologies to

establish liability.

10. In the context of medical mishaps, the willingness to disclose and explain how the mishap happened may already address the genuine need of the patients and their families, and may hopefully stop the dispute from becoming litigious. Research studies in fact show that “explanation and apology” can be effective in preventing litigation and can benefit patients as well as the healthcare professionals, which I’m going to share with you next. Even if litigation is inevitable eventually, an apology law which clarifies that making apologies generally does not attract legal liability offers incentive to the apology maker to do so.

What the research studies show

11. Explanation that comprises statements of facts I mentioned earlier on often involves disclosure as to what and why certain things happened. When healthcare professionals offer an apology upfront with an explanation, patients may well be more willing to engage in a constructive manner to clear their grievances and put the matter to bed.

United States and United Kingdom

12. Some of you may have heard about the Disclosure, Apology and Offer model, which received national attention of hospitals in the United States for its early success as an alternative to the existing legal liability system. The model promotes a principled institutional response to unanticipated clinical outcomes. In gist, it involves healthcare organizations proactively identifying the adverse events; distinguishing between injuries caused by medical negligence and those from complications of disease; offering disclosure and explanations; and offering apology with compensation if the standards of care were not met.

13. Despite the benefits of the model, at the individual level of healthcare professionals, some still fear that offering explanation and apology for the medical mishap may attract personal liability. The traditional legal ‘solution’ to the issue of patient safety has been the tort system, which focuses on redressing what went wrong, and who should be liable. The traditional legal advice to healthcare professionals has been to neither disclose nor apologize. Apology laws which provide that the one who apologizes generally does not attract legal liability, like the Apology Ordinance in Hong Kong, may come in useful to address the concern that healthcare professionals may have.

14. Studies showed that full disclosure and apology may reduce the number of claims and the average settlement value in the medical context. On average, per case payment following the introduction of apology and disclosure agreement decreased substantially by around 47%, while the settlement time dropped from 20 months to 6 months¹. Programs in hospitals which encouraged effective apologies and disclosure of mistakes brought about similar reduction of malpractice payments².

15. Research also showed that hospitals in places with apology laws have expedited their settlement procedures and thus an increase in the number of closed cases. The claim payout of the most severe cases was reduced by US\$58,000 to US\$73,000 per case. Apology laws were shown to reduce the amount of time involved in reaching a settlement as well, and there was evidence

¹ As per the introduction of an apology and disclosure agreement in 2001 at the University of Michigan Health Service. Boothman, M., Blackwell, A., Campbell, D., Commiskey, E., & Anderson, S. (2009) *A better approach to medical malpractice claims? The University of Michigan experience.* Journal of Health Life Science Law, Jan(2), 125-59.

² As per studies conducted in 2004 and 2005 in Pennsylvania: Liebman, C. B., & Hyman, C. S. (2004) *A mediation skills model to manage disclosure of errors and adverse events to patients.* Health Affairs, 23(4), 22-32; Liebman, C. B., & Hyman, C. S. (2005) *Medical error disclosure, mediation skills, and malpractice litigation: A demonstration project in project in Pennsylvania.* Health Affairs, 29(9), 1611-1619; and studies conducted in 1999 in Tennessee: Kraman, S. S., & Hamm, G. (1999) *Risk management: Extreme honesty may be the best policy.* Annals of Internal Medicine, 131(12), 963-967.

to suggest that there could be fewer cases overall in the long run³.

16. Aside from the more tangible benefits of saving time and costs through amicable settlement instead of litigation, from a humanitarian perspective, apology presented with explanations together with possible preventive measures going forward may serve as important healing factors for the patients⁴. To patients, how physicians treat them on an interpersonal level, and the time and care devoted to build rapport may sometimes be more important than the medical treatment itself. A study in the UK showed that one third of the patients affected by medical error expressed the desire to receive an apology⁵. The patients' focus may not be on damages but an assurance that something would be done so that similar unfortunate events would not be repeated in the future.

France

17. A more recent research in France that explored the function and meaning of apology in the medical context reinforced the benefits of apologies⁶. A majority of the doctors interviewed in a neonatal intensive care unit in a hospital in France agreed that apologies may enable healthcare professionals to acknowledge responsibility, to inspire forgiveness and to bring about a change of position in the patient-healthcare professional relationship, a means to bring together common humanities and shared values. However, the doctors interviewed generally showed little insight into apology. For instance, none of them had undergone relevant

³ As per a 2010 research conducted by Cornell University and the University of Houston: Liu, E. and Ho, B. (2010) *Does sorry work? The impact of apology laws on medical malpractice*. Johnson Research Paper Series, No. 04-2011.

⁴ Lazare A., Levy R.S. (2011) *Apologizing for humiliations in medical practice*. *Chest*;139: 746-751.

⁵ As per a 2012 study conducted in the UK: Saitta N., Hodge, S.D. Jr. (2012) Efficacy of a physician's words of empathy: An overview of state apology laws. *J Am Osteopath Assoc*;112: 302-306.

⁶ As per a 2017 research conducted in France: Dahan S, Ducard D, Caeymaex L. (2017) *Apology in cases of medical error disclosure: Thoughts based on a preliminary study*. *PLoS One*; 12(7).

training as to why apology could be useful. Therefore, the research recommended that specific instructions be given on how to communicate in a medical mishap. It also recommended more publicity to explain when and how to word an apology could be useful. Perhaps a seminar like the one we are having today could serve this useful purpose.

Canada

18. An apology after a medical mishap does not only benefit the patients. A research in Canada demonstrated that healthcare professionals could also suffer from medical mishaps such as anger, guilt and loss of confidence in their professional capabilities. For healthcare professionals, the benefits of dealing with these negative feelings by apology are both internal, and external.

19. Internal benefits of apology include the maintenance of self-esteem and the alleviation of guilt, especially when patients show forgiveness after the healthcare professionals apologize. Recent research⁷ showed that apologizing helped doctors restore confidence in their practice. One senior doctor interviewed in that research pointed out that apology legislation allowed healthcare professionals to take a different perspective in their relationship with patients, providing an opportunity to feel how the patients may feel.

20. External benefits of apology relates to the way that a healthcare professional is perceived by his patients, colleagues and the community. When healthcare professionals involved in medical mishaps apologize, they are demonstrating their commitment to medical ethics – to tell the truth and to act with

⁷ As per a 2018 research conducted in Canada: Levasseur, K., & MacDonald, F. (2018) *Mea culpa: apology legislation, accountability and care*. Canadian Journal of Political Science, 51(4), 749-769. (Abstract available at: <https://www.cambridge.org/core/journals/canadian-journal-of-political-science-revue-canadienne-de-science-politique/article/mea-culpa-apology-legislation-accountability-and-care/EAB3D9EFFEE89FED687AC2B48C13F44C>, accessed on 16.7.2020).

humanity. Research concluded that apology legislation created space for a new accountability and care relationship to emerge between healthcare professionals and their patients; and addressed the gaps in how society perceived healthcare system with the dominant notion that patients and their families merely assumed the role of “consumer of services”, while medical practitioners’ expertise took precedence over patients’ feelings⁸. That research came to a similar conclusion like the study with doctors in France that more work was needed to help healthcare professionals understand the protections of apology legislation and the benefits of apologizing.

Effect of the Apology Ordinance

21. Coming back to Hong Kong, since the enactment of the Apology Ordinance, it appears that healthcare professionals have been more forthcoming in saying sorry in medical incidents. We have seen examples of open acknowledgment of medical mishaps and apologies made to patient’s families.

Conclusion

22. The topic given for my keynote address today asks whether the Apology Ordinance protects healthcare professionals who apologize. The Declaration of Geneva⁹ provides that members of the medical profession are to solemnly pledge that the health and well-being of their patients are their first consideration. A well-worded and sincere apology may contribute to the well-being of patients in appropriate circumstances. The Apology Ordinance can therefore in fact empower healthcare professionals in the betterment of medical practice.

⁸ Ibid.

⁹ As updated with the latest version promulgated by the World Medical Association General Assembly in 2017: <https://www.mchk.org.hk/files/newsletter2018.pdf>, accessed on 16.7.2020.

23. As the saying goes, “An apple a day keeps the doctor away.” May I attempt to create the second line to this couplet, “An apology conveyed keeps patients’ grievance at bay”. On this note, I wish you all a very fruitful seminar today. And please stay safe. Thank you.