By Robyn Carroll

# Is **SORRY** still the **HARDEST WORD** to say?

## **Medical negligence** and **apologies**

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The Australian Commission on Safety and Quality in Health Care (ACSQHC) reports that over 700 Australians suffer serious adverse events in healthcare every year.[1]

Legal advisers are likely to become involved in decisions about how to respond to these events. Research and experience tell us that many patients expect to receive an explanation for what happened and an apology, and that if they receive them they are less likely to pursue legal action.[2] Researchers have found that people interviewed about their experience of medical adverse events who expressed satisfaction about the disclosure process are typically 'those whose expectations of a full apology ... and an offer of tangible support were met'.[3] There is also evidence that apologies can have psychological[4] and health[5] benefits. Not surprisingly, there have been concerted efforts in recent years by the health and legal professions and the law to encourage medical and health care professionals in Australia and overseas to make disclosure and offer apologies in a timely way following an adverse medical incident.[6]

This article considers why people apologise and the likely reasons for any reluctance or unwillingness. It identifies the ways the law has sought to address concerns about the legal consequences of apologising and how ongoing uncertainty and reluctance to apologise might be overcome.

The word 'apology' is used to convey a range of meanings in a wide variety of contexts.[7] A distinction is sometimes >>

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made between 'full' and 'partial' apologies. This is helpful to the extent that it recognises that an apology comprises a number of components. There is consensus that a 'full' apology incorporates an expression of heartfelt regret and remorse for what has happened, sympathy for the victim and acknowledges the transgression.[8] For some people, it must also offer some form of recompense and a commitment to change in the future.[9] A 'partial' apology will include some, but not all of these components; for example, it might be an expression of sympathy or empathy alone (for example, 'I'm sorry this happened to you'); or an acceptance of responsibility or fault without any expression of sympathy or regret (for example, 'I take full responsibility for what occurred').[10]

The distinction between 'full' and 'partial' apologies is less helpful if it leads to the assumption that only a full apology is morally acceptable and of any value. For this reason, it can be more helpful to speak about 'forms' of apologetic meaning.[11] This approach reflects the fact that what constitutes an apology depends on the particular situation and context.[12] Research shows that the response to an apology will depend on a recipient's perception of the seriousness of the harm, the level of responsibility they attribute to the wrongdoer and the perceived wrongfulness of the behaviour with reference to the principle that was violated.[13] Thus, which and how many of the components of an apology need to be present to be beneficial depends on many factors and will vary from person to person.

In a legislative context, the meaning attributed to 'apology' depends on the intent of the legislation.[14] Whether an apology is given in a legal context will have an impact on what people are willing to accept as an apology.[15]

## REASONS TO APOLOGISE AND THE BENEFITS

People apologise for a range of reasons. They may be influenced by internal, personal factors including politeness, temperament, conscience, regret, remorse, empathy and personal ethics.[16] They may also be influenced by external factors, including damage control, public image and the expectations of others.[17] The many benefits attributed to apologies include social, psychological, financial and systemic benefits. Full and meaningful apologies are understood to restore dignity, trust and relationships, promote forgiveness and reconciliation, and instil confidence that similar harm will be avoided in the future.[18] There is also evidence that partial apologies can increase the chance that a dispute will be settled[19] and that a partial apology is preferable in some circumstances to no apology at all.[20] At the same time, legal practitioners will be well aware that an apology that comes too late or is inadequate is likely to increase the hurt and anger experienced by the victim, inflame a dispute and prolong litigation.

## REASONS FOR RELUCTANCE TO APOLOGISE

There are numerous reasons why a person or organisation might not offer an apology. These can include internally focused reasons such as denial of wrongdoing or responsibility; inability to accept responsibility or ownership of a problem; not wanting to appear weak; avoiding a difficult interaction with the person who was wronged; and fear of rejection.[21] Externally focused reasons can include fear of damage to reputation and loss of face, dignity or respect; and concern that an apology will be regarded as confirmation of responsibility, an acknowledgement of incompetence or an acceptance of liability.[22]

These external factors play a particularly significant part where lawyers become involved or there is a concern that legal liability may result from an adverse medical event. Alter explains that:

> '[T]o apologise and do the "right thing" morally and in the interests of justice is generally considered to be the "wrong thing" to do to defend oneself in the adversarial system.'[23]

There is no doubt that rules of evidence, legal processes and contractual terms of indemnity insurance influence the advice that a legal adviser gives to their client about apologising. These constraints and a lawyer's duty to 'defend' their client cannot be lightly pushed aside. Some moves have been made to reduce these constraints, but more needs to be done to address underlying legal concerns.

Aside from concerns about a client's legal position, there may be a number of other reasons why a lawyer does not advise their client to apologise. These may include that the lawyer has overlooked it, does not want to look 'soft' by suggesting it, or to appear disloyal to the client and sympathetic to the other party. There may have been a pattern of denial established early on in the dispute and the lawyer may consider it too late to make an apology by the time they become involved. The lawyer might believe there has been no legal wrongdoing, in which case an apology would be inappropriate. Or the lawyer might be unaware that some 'forms' of apology do not incorporate an admission of wrongdoing and that, in any event, civil liability legislation limits the legal effect of apologies in civil liability proceedings.

## LEGISLATIVE ENCOURAGEMENT OF APOLOGIES IN CIVIL DISPUTES

The law recognises that the benefits of apologetic gestures are often outweighed by concerns that an apology might be used as evidence in subsequent in legal proceedings. To encourage apologies in the civil liability context, legislation in each state and territory now provides that apologies given in connection with an incident giving rise to a claim for damages do not constitute an admission of liability and are not admissible as evidence of fault or liability in any

civil proceedings. This general summary does not capture the significant variations in the protection provided by the various pieces of legislation.[24] In WA, for example, the legislation only protects an apology that is an expression of 'sorrow, regret or sympathy' and that does not contain an 'acknowledgement of fault'. This may well mean that the benefit of a full apology is less likely to be forthcoming in civil proceedings in WA. In contrast, the legislation in NSW and ACT provides protection to a full apology. This article does not attempt to detail the variation between the Australian jurisdictions, nor the variation between these and the apology provisions that have been enacted in the US, UK and Canada. It is clear, however, that doubts remain in Australia, even after the enactment of these provisions, about what forms of 'sorry' are protected by the law.

The law also encourages apologies indirectly by attaching a privilege to communications during settlement negotiations and mediation. This can render an admission in the form of an apology inadmissible in subsequent proceedings.[25] In addition, the confidentiality surrounding mediation (by agreement or legislation) provides further legal protection against disclosure of an apology. Various statutory provisions conferring privilege and prohibiting disclosure other than in specified circumstances apply to conciliations conducted under health quality complaints legislation,[26] and to court-based mediation of medical negligence claims.[27] While these statutory provisions and confidentiality clauses can provide some comfort to a defendant (potential or actual) to a medical negligence claim, legal advisers will remain wary about any apology that could be construed as an admission of liability where liability is not admitted.

There is also legislation that aims to improve the standard of healthcare by establishing committees to review, assess and monitor health services and to make findings and recommendations.[28] Information disclosed to a committee constituted under the legislation is privileged, and findings made by such committees are not admissible as evidence in any proceedings that seek to establish medical negligence. The legislation confers a qualified privilege on health professionals who disclose information to a committee. This 'information' could potentially include an expression of regret or remorse, or other apologetic gesture. Although the legislation theoretically creates a 'safe' place to give an apology, the process is not intended or designed for this and it cannot be regarded as legislation that encourages apologies. The legislation encourages disclosure about health services but the privilege attached to the committee process means that it is not an 'open' disclosure process.

## OPEN DISCLOSURE AND APOLOGIES

A significant development in recent years relevant to cases where medical negligence may be an issue is the Open Disclosure Standard. The Standard calls for open discussion about incidents that result in harm to a patient >>

while receiving healthcare. The National Open Disclosure Standard was developed by the former Australian Council for Safety and Quality in Health Care in 2002. It provides a structured approach for discussing incidents with patients and families. The elements of open disclosure include: 'an expression of regret; a factual explanation of what happened and the potential consequences; and the steps being taken to manage the event and prevent recurrence'.[29] The Standard was endorsed by health ministers in July 2003, and in January 2005, the ministers endorsed an implementation plan developed by the former Council, which included piloting the open disclosure standard in the public and private sectors. In April 2008, health ministers agreed to work towards the full implementation of the National Open Disclosure Standard in all healthcare facilities.[30]

The ACSQHC is now responsible for the implementation of the Open Disclosure Standard. Its Open Disclosure Program includes a number of initiatives that aim to ensure the effective implementation of Open Disclosure. These initiatives include a '100 Patients' Stories Project' that will collect patient narratives of both the experience of adverse events and the experience of open disclosure and the development of a practical guide to open disclosure. A third initiative is aimed at overcoming the legal variation surrounding open disclosure.

## MORE CONFIDENCE IN OFFERING APOLOGIES

Notwithstanding these efforts to encourage apologies in cases where medical negligence is potentially an issue, uncertainty remains about the consequences of apologising from a legal and insurance perspective. One explanation for this uncertainty is the variation in the circumstances in which an apology is 'protected' by civil liability legislation. Another uncertainty is created by confusion about the difference between apologies and statements of regret. While the research and data behind open disclosure refers to the benefits to patients of receiving apologies, the Standard refers to a statement of regret, not an apology, as an element of Open Disclosure. This was a deliberate attempt to avoid requiring medical professionals to apologise in a way that might be understood to be an admission of fault or liability. While this is understandable, the effect is that the Standard perpetuates the confusion about whether a statement of regret is an apology at all. In addition, questions remain about the value of a statement of regret when a patient is looking for some acknowledgement of fault on the part of the person who caused the harm. Allan reports the concern that professionals remain reluctant to disclose adverse incidents to patients and families because they fear that apologetic statements they make may be used against them in later litigation, and that this is hindering the introduction of the Standard in Australia.[31]

How can these uncertainties be overcome? One way is by law reform, where necessary, and another is through professional education. The ACSQHC's review of laws initiative is a positive step towards ascertaining whether law reform is needed. The ACSQHC has appointed Professor David Studdert of the University of Melbourne to identify a 'legal clear path' for Open Disclosure in Australia.[32] Professor Studdert's review will cover state apology laws, state and federal laws relating to qualified privilege, and any other laws that bear upon the practice of Open Disclosure or that may affect the status of information conveyed in Open Disclosures. It will also involve interviews with key hospital staff to explore how well the legal framework surrounding open disclosure is currently used and understood. The review will identify changes needed to implement and achieve a consistent national approach that will best enable health services to fully investigate an adverse event; share information with patients, family and carers about care that caused harm; and express regret or apologise.

There is also scope for law reform to bring greater consistency between the apology provisions in state and territory civil liability legislation and remove some of the ongoing uncertainties about the extent to which apologies are protected.

The second strategy, professional education, is equally important. Lawyers and other professionals who become involved when adverse events occur need to develop the confidence to advise their clients to say sorry without overplaying the likelihood that it will be used to establish liability in a medical negligence suit or to invalidate insurance cover. The academic literature presented here and the following extract from the *NSW Ombudsman Apologies: A Practical Guide* should assist this process:[33]

> 'The NSW Ombudsman has recently completed a brief survey of NSW judgments over the last ten years, concentrating on the period since the *Civil Liability Act* came into force. This work was centred on cases where some mention was made of an apology. … Only a small number of judgments referred to section 69 of the *Civil Liability Act*, and it had no bearing on the outcome. There does not appear to have been any change in the number of references to apologies in some form since the introduction of the *Civil Liability Act* … Since the incorporation of apology provisions into the NSW *Civil Liability Act*, every other state and territory has followed the NSW lead and brought in legislation that provides varying levels of protection for apologies or expressions of regret in relation to civil liability. While the scope of the protection provided in each jurisdiction varies significantly, it appears that a simple "I am sorry" will in most circumstances be protected in all Australian states and territories.'

## CONCLUSION

Developments in recent years have encouraged medical professionals to respond to adverse medical events in a timely and open manner and to offer apologies. Yet uncertainty remains about the legal implications of saying 'sorry', and it appears that for some, sorry is still the hardest word to say. This is despite case law and academic writing confirming that an expression of regret is not of itself an admission of fault and that even an admission of fault does not of itself establish liability in negligence.[34]

It has been said that:[35]

> '[A]pologies are not magic potions that work in every case,

but they can be remarkably effective in addressing the key needs of people who have experienced harm. There will be some circumstances where an apology will serve no good purpose, but these will be the exceptions not the rule.'

With this in mind, and for the reasons outlined above, efforts must continue to find the right way to say sorry where an apology is owed. ■

This article has been peer-reviewed, in line with standard academic practice.

**Notes:** **1** Information retrieved from the ACSQHC website http://www.safetyandquality.gov.au/internet/safety/publishing.nsf/Content/PriorityProgram-02, accessed 7 April 2010. **2** In a study of 227 patients and relatives who were taking legal action through medical negligence solicitors, an 'explanation and apology' was most frequently cited as the action after the incident that might have prevented litigation: Charles Vincent, Magi Young and Angela Phillips, 'Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action' (1994) 343 *Lancet* 1609, p1611. See also JR Cohen, 'Apology and Organisations: Exploring an Example from Medical Practice' (2000) 27 *Fordham Urban Law Journal* 1447, p1458. **3** R Iedema et al, 'Patients' and Family Members' Experiences of Open Disclosure Following Adverse Events' (2008) 20(6) *International Journal for Quality in Health Care* 421 at 430. **4** A Allan & B Munro, *Open Disclosure: A Review of the Literature* (2008), available at http://www.psychology.ecu.edu.au/staff/documents/allanA/87_Allan_OD_Legal_Review.pdf; R Iedema, *Open Disclosure: A Review of the Literature* (ACSQHC, 2008), available at http://www.safetyandquality.gov.au/internet/safety/publishing.nsf/Content/com-pubs_OD-Resources/$File/Open%20Disclosure%20literature%20review.pdf. **5** A Allan and D McKillop, 'The Health Implications of Apologising after an Adverse Incident' (2010) 22(2) *International Journal for Quality in Health Care*, 126. **6** This development forms part of health policy reform in many countries including the USA, Canada, Australia, New Zealand and the UK. **7** N Smith, *I Was Wrong: The Meanings of Apology* (2008). See also N Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (1991); A Lazare, *On Apology* (2004). **8** A Allan, 'Apology in Civil Law: A Psycholegal Perspective' (2007) 14 *Psychiatry, Psychology and Law*, p7. **9** *Ibid.* **10** NSW Ombudsman, *Apologies: A Practical Guide* (2nd ed, 2009), p1. Note that doubts have been expressed about the likelihood that a partial apology that does not express regret for wrongdoing will be acceptable or that an expression of regret will be sufficient without an offer to make restitution where tangible harm has been inflicted: D Slocum, A Allan and M Allan, 'An Emerging Theory of Apology' (2010) *Journal of Australian Psychology* (forthcoming). **11** *Ibid.* **12** This is demonstrated by reference to a range of legal contexts in A Allan, 'Functional Apologies in Law' (2008) 15 *Psychiatry, Psychology and Law* 369. **13** D Slocum, A Allan & M Allan, 'An Emerging Theory of Apology' (2010) *Journal of Australian Psychology* (forthcoming ). **14** R Carroll, 'Apologising "Safely" in Mediation' (2005) 16 *Australasian Dispute Resolution Journal* 40, pp42-3. **15** A Allan, D McKillop & R Carroll, 'Parties' Perceptions of Apologies in Resolving Equal Opportunity Complaints' (2010) *Journal of Psychiatry, Psychology and Law* (forthcoming). **16** NSW Ombudsman, above n10, pp5-10. **17** *Ibid.* **18** S Alter, *Apologising for Serious Wrongdoing: Social, Psychological and Legal Considerations*, Final Report for the Law Commission of Canada (1999) available at http://epe.lac-bac.gc.ca/100/200/301/lcc-cdc/apologising_serious_wrong-e/apology.html; NSW Ombudsman, above n10, pp5-10. **19** J Robbennolt, 'Apologies and Legal Settlement: An Empirical Examination' (2003) 102 *Michigan Law Review* 460. **20** S Sher and J Darley, 'How Effective are the Things People Say to Apologise? Effects of the Realization of the Apology Speech Act' (1997) 26 *Journal of Psycholinguistic Research* 127, n138. A recent qualitative study involving parties to complaints in the equal opportunity jurisdiction indicates that partial apologies and even apologies given under compulsion can have some value to the recipient: see A Allan, D McKillop and R Carroll, above n15. **21** NSW Ombudsman, above n10, p2. **22** *Ibid.* **23** S Alter, above n18, p2. **24** For analysis of the Australian legislation, see P Vines, 'Apologising to Avoid Liability: Cynical Civility or Practical Morality?' (2005) 27 *Sydney Law Review* 483. **25** See, for example, *Evidence Act* 1995 (NSW), s131; *Supreme Court Act* 1936 (WA), s72. **26** See, for example, *Health Quality and Complaints Commission Act* 2006 (Qld), s82; *Health Complaints Act* 1995 (Tas), s37. **27** See, for example, *Supreme Court Act* 1936 (WA), s71. **28** See, for example, *Health Service (Quality Improvement) Act* 1994 (WA), ss3, 7. **29** The Open Disclosure Standard is available at http://www.safetyandquality.gov.au/internet/safety/publishing.nsf/Content/3B994EFC1C9C0B22CA25741F0019FDEE/$File/NOD-Std%20reprinted%202008.pdf. The Open Disclosure Literature Review provides an overview of recent Australian and international publications on open disclosure. It includes summaries of articles from the legal, ethics and communications literature, as well as analysis of empirical studies and policy documents on open disclosure. See above n4. **30** Information retrieved from the ACSQHC website http://www.safetyandquality.gov.au/internet/safety/publishing.nsf/Content/PriorityProgram-02, accessed 7 April 2010. **31** A Allan, 'Implementing the Australian Open Disclosure Standard: The Legal Situation in Western Australia' (November 2008), p16, available at http://www.psychology.ecu.edu.au/staff/documents/allanA/86_Allan_OD_Literature_Review.pdf. **32** Information retrieved from the ACSQHC website http://www.safetyandquality.gov.au/internet/safety/publishing.nsf/Content/PriorityProgram-02_OD-Initiatives#OvercomeL, accessed 7 April 2010. **33** NSW Ombudsman, above n10, p26. **34** See, for example, Allan, above n32; Carroll, above n14; Vines, above n25. **35** NSW Ombudsman, above n10, at ii.

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