

A banner image showing two healthcare professionals in blue scrubs walking through a hospital corridor. A blue semi-transparent box is overlaid on the left side of the image, containing the text 'Healthcare Update.' and 'August 2017'.

Healthcare Update.

August 2017

When (and where) is an apology an admission of liability?

Over recent years there has been an increased focus on the importance of ensuring that when matters go wrong, particularly in the healthcare field, the aggrieved person is provided with an early explanation of what has happened and, when appropriate, an apology. Investigations like the Mid-Staffordshire NHS Foundation Trust Public Inquiry have underscored the importance of this approach. Few, if any, people would disagree that this is a worthy objective, so why does it seem so hard to put this principle into practice.

One challenge to implementing this approach is concern by individuals that, in making an apology, they may also be admitting legal liability.

It is important to recognise that the circumstances in which an apology may be merited do not always equate to circumstances in which legal liability will be established. For example, an error could occur in medical treatment which may result in no harm. In such cases a patient would quite properly expect an explanation and apology but would not be entitled to recover damages in Court. Medical practitioners may often want to offer an explanation or apology at an early stage, when it may not yet be apparent whether an individual will suffer any harm as a result of an error or, indeed, what the precise underlying causes of an incident have been. Practitioners may also be concerned that offering an apology will void their (or their employer's) indemnity or insurance cover. Steps have been taken in some jurisdictions to address this challenge.

The key provisions of the [Apologies \(Scotland\) Act 2016 \('the Act'\)](#) came into force on 19th June 2017. Whilst there are some limited exceptions, the Act applies to most civil proceedings in Scotland, including clinical negligence claims.

The legislation enables parties to apologise for an unfavourable outcome or omission without their apology being admissible in Court as evidence pointing to a determination of liability. This is particularly relevant in a clinical setting, where an early apology to an injured or wronged patient can reduce animosity and may discourage Court proceedings or referral to regulatory bodies.

Within the legislation, an apology is defined as "any statement made by or on behalf of a person which indicates that the person is sorry about, or regrets, an act, omission or outcome and includes any part of the statement which contains an undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing a recurrence".

It is important to note that the protection afforded to apologies by the Act only applies to apologies made outside the proceedings themselves. The Act does not have retrospective effect.

It is essential to ensure that any apology to be made will be covered by the terms of the Act, to avoid inadvertently making an admission of liability.

It should be noted that the Act does not extend to proceedings before regulatory bodies, such as the GMC and GDC. Any apology made would, therefore, remain admissible in such proceedings.

Similar legislation is in force in [England & Wales, with Section 2 of the Compensation Act 2006](#) detailing that "An apology, an offer of treatment or other redress shall not of itself amount to an admission of negligence or breach of statutory duty".

Unlike in Scotland, however, the legislation in England & Wales does not define what constitutes an apology and makes no provision around admissibility.

In Ireland, the proposed [S.32D of The Civil Liability and Courts Act 2004](#) provides that “(1) An apology made in connection with an allegation of clinical negligence – (a) shall not constitute an express or implied admission of fault or liability, and (b) shall not, despite any provision to the contrary in any contract of insurance and despite any other enactment, invalidate or otherwise affect any insurance coverage that is, or but for the apology would be, available in respect of the matter alleged. (2) Despite any other enactment, evidence of an apology referred to in subsection (1) is not admissible as evidence of fault or liability of any person in any proceedings in a clinical negligence action.” However, this section has not yet been implemented and it may be some time before this takes effect.

To date, and despite calls for change, there is no equivalent legislation in Northern Ireland, where clinicians and their advisers remain concerned about apologies being misinterpreted as an admission of liability by patients and their solicitors. The need for such a legislative change is highlighted by the NI Public Services Ombudsman’s (‘the NIPSO’) [‘Guidance on issuing an apology’](#). Practitioners should be aware that the NIPSO considers that an apology will only be ‘meaningful’ if there is an acceptance of (i) wrongdoing and (ii) the effect that that wrongdoing has had. In a clinical setting, this, of course, could amount to an admission of breach of duty and causation, that is, an admission of liability. It is to be hoped that the legislators in Northern Ireland will enact similar legislation to the rest of UK and Ireland. Ensuring that there is a clear distinction between apologies and admissions of legal liability will assist clinicians in feeling more confident in meeting those professional duties; a position which is ultimately to everyone’s benefit.

Irrespective, of the legislative position across the UK and Ireland, individual medical and dental practitioners must also comply with their professional duties (as placed on them by their regulators) to ‘say sorry’ and to be candid.

For more information, contact Laura Menary or Roger McMillan from Carson McDowell’s Healthcare Team.



Laura Menary
Associate

+44 (0)28 9034 8833
laura.menary@carson-mcdowell.com



Roger McMillan
Partner, Head of Healthcare

+44 (0)28 9034 8868
roger.mcmillan@carson-mcdowell.com