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### Safety of candour

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## Safety of candour: how protected are apologies in open disclosure?

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*Doctors need more certainty about whether and how they can safely apologise to patients, warn **Gilberto Leung and Gerard Porter***

### Key messages

[to A: Please provide 4-5 short key messages to summarise your paper]

- **Apology statements in open disclosure could amount to an admission of fault and liability, be used in court as evidence, and affect professional indemnity coverage.**
- **Apology statutes around the world aim to encourage apologies by protecting apology-makers in this regard but the degree of protection varies.**
- **Apology protection in Great Britain does not appear to be sufficiently clear or comprehensive, and thus offers doctors little assurance as to the legal consequences of apologies now mandated by the statutory duties of candour.**
- **There is a need to clarify the law so to facilitate open disclosure to the benefit of patients, their carers and healthcare professionals.**

Doctors are often unsure about whether apologising to patients will leave them open to legal consequences.<sup>1</sup> Among the many [to A: ok?] implications of the Bawa-Garba case, the idea that even a doctor's written reflections in their portfolio could later be used against the doctor in court has raised concerns in the medical

community.<sup>2</sup> This uncertainty could affect doctors' willingness to disclose mistakes and to give patients the apologies they deserve.

The situation is complicated by the fact that the statutory duties of candour in England and Wales<sup>3</sup> and in Scotland,<sup>4</sup> now require health service organisations and practitioners to give a factual explanation and to apologise to the affected parties after a notifiable incident. Although it is widely held that existing apology laws in Great Britain would confer sufficient protection,<sup>5-6</sup> a closer look at the complex matter of apology protection indicates that the situation is far from straightforward. This paper examines some of the legal issues of apologies **[of apologies?]** and their implications for healthcare professionals.

### **Protecting apologies to benefit patients**

Saying sorry for a medical error, whether legally required or not, is an ethical and professional duty of doctors. A proper apology can show respect and empathy towards patients and their families, lessen emotional distress, and promote a strong sense of partnership in the patient journey. It may also reduce legal action that can otherwise add financial and psychological burden to patients; studies have shown that most patients want and expect an apology after things have gone wrong.<sup>1</sup> Conversely, failure to apologise or an evasive "partial" apology could increase psychological distress and exacerbate dispute. Unfortunately, patients' experiences with apology and disclosure continue to fall short of their expectations.<sup>7</sup> The importance of encouraging proper apologies through the availability of clear and appropriate legal protection cannot be over emphasised.

### **Apology protection in law**

There are over 50 apology laws around the world that aim to encourage apologies by preventing them from amounting to an admission of fault and liability.<sup>8</sup> In medicine, an apology statement, when not legally protected, can potentially lead to legal or disciplinary proceedings against a doctor who apologised, with serious consequences for their career and registration. **[to A: Do you mean this could happen without the laws? Otherwise these first two sentences seem to contradict each other?]** The scope of protection varies, depending on the definition of apology, the applicable subject matter and proceeding, and the evidential admissibility of apology statements according to individual statutes (table 1).<sup>8</sup>

**Table 1** Examples of apology protection

Country	Scope of protection	Examples in practice
United States	Subject matter	State laws may protect apologies related to accident only, healthcare only, or both
	Evidential admissibility	Some states (eg, Arizona) protect an acknowledgment of fault for “unanticipated outcome” in healthcare; some (eg, Delaware) expressly exclude it from protection; some (eg, Iowa) are silent on the matter
Canada	Evidential admissibility	Most—but not all—provinces and territories protect “words or actions” that “admit or imply an admission of fault” in connection with “any matter.” An apology cannot be admitted as evidence in court to determine fault or liability, nor does it affect insurance coverage
Australia	Evidential admissibility	Admissions of fault are protected in some states (eg, New South Wales, Queensland) but not others (eg, Northern Territory, Victoria)
Hong Kong	Applicable proceeding	Judicial, arbitral, administrative, disciplinary, and regulatory proceedings
	Evidential admissibility	Protection for an expression of regret, sympathy or benevolence, admission of fault and liability, and statement of fact. An apology does not void or affect any insurance cover

Evidential admissibility is a particularly important issue: a medical apology can contain different types of statement, some of which might point towards the standard of care and be used as evidence in court to establish liability, even if the apology statements do not by themselves amount to a direct admission of fault and liability. From a legal perspective, it comes down to how a particular apology provision within a legal statute is worded [**to Au: provision is a specific legal term – could you expand a little, for example “how a particular apology provision is worded within a legal statute”?**] and applied. For a narrowly drafted or narrowly construed apology provision, for example, an expression of sorrow (eg, “I am sorry that the complication happened”) might be legally protected, but an admission of fault or a statement of fact (eg, “I made a mistake and tied off the wrong artery”) might still be used as evidence in court against the doctor.<sup>8</sup> The sheer existence of an apology statute does not guarantee that all medical apologies will be protected to the same extent.<sup>9</sup> Against this backdrop, we further explore the apology laws in Great Britain.

## England and Wales

The Compensation Act 2006 in England and Wales contains a single provision aimed at preventing an apology from amounting to “an admission of negligence or breach of statutory duty” (box 1). But unlike apology statutes in many other countries [**to A: do you mean statutes that exist in other countries? Or can one country have several different statutes?**], there is no mention of whether and how apology

statements can be used as evidence in court. An explanatory note in the act states that “the provision is intended to reflect the existing law,” which is not helpful, as English courts have previously either denied<sup>10</sup> or accepted<sup>11</sup> an admission of fault in apologies as establishing liability.<sup>9</sup>

### **Box 1: Apology protection and the statutory duty of candour in England and Wales**

Section 2 of the Compensation Act 2006 provides 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.

Under Regulation 20 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, which governs the duty of candour, a notification to the affected parties must: (a) be given in person by one or more representatives of the health service body; (b) provide an account, which to the best of the health service body’s knowledge is true, of all the facts the health service body knows about the incident as at the date of the notification; (c) advise the relevant person what further enquiries into the incident the health service body believes are appropriate; (d) include an apology; and (e) be recorded in a written record which is kept securely by the health service body. (s. 20(3))

The 2006 Act does not give a definition of apology. It is defined under the separate duty of candour statute as “an expression of sorrow or regret” that is treated as distinct from other elements in a notification (box 1).<sup>3</sup> When read in conjunction with the “of itself” part of the 2006 Act provision, there is no reason to think that any statement other than one that expresses sorrow or regret would be legally protected.

The 2006 Act has not been invoked in legal actions concerning medical apologies and open disclosure **[to A: can you explain what this means?]**, but the inherent legal uncertainties cannot be disregarded. Notably, the Medical Protection Society recommends to its members that an appropriate apology should take the form of “I am sorry this happened to you” as opposed to “I am sorry I caused this to happen to you and it is my fault.”<sup>12</sup> Whether this advice is commensurate with the duty of candour requirement, and deemed satisfactory by patients, is subject to debate. But since the 2006 Act does not apply to disciplinary or criminal proceedings, one can reasonably argue that an apology admitting fault could put the doctor in an unfavourable position. A doctor whose error had caused patient death, for example, might find that their fault admitting apology is admitted as evidence for a charge of medical manslaughter. The irony is that these are precisely the circumstances that require and deserve a full apology.

Furthermore, an admission of fault or liability by the doctor could potentially void professional indemnity coverage. Apology statutes in some other countries contain

specific provisions to prevent this [**in other countries?**], but the 2006 Act does not. Thus, despite the existence of an apology statute, doctors in England and Wales cannot have full confidence about the available level of legal protection in terms of evidential admissibility or any assurance concerning the other implications of an apology.<sup>9</sup>

## Scotland

In Scotland apology is defined under the duty of candour statute as a “statement of sorrow or regret” that “does not of itself amount to an admission of negligence or a breach of a statutory duty.” There is no provision on evidential admissibility.<sup>4</sup> The use of apologies as evidence in general is disallowed under the Apologies (Scotland) Act 2016 but this does not apply to apologies made under the duty of candour—the reason given for this exception is to avoid “any overlap” between the two statutes. This is unsatisfactory as it remains unclear whether apology statements are admissible as evidence or not (box 2).<sup>13</sup> As in England and Wales, apology protection in Scotland does not extend to disciplinary hearing or criminal proceeding; the effect of an apology on professional indemnity coverage is similarly unclear.

### **Box 2: Apology protection and the duty of candour in Scotland**

The Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016, which governs the duty of candour procedure, defines apology as a “statement of sorrow or regret in respect of the unintended or unexpected incident”(s. 23(1)) and provides that “an apology or other step taken in accordance with the duty of candour procedure under section 22 does not of itself amount to an admission of negligence or a breach of a statutory duty” (s. 23(2)).

The Apologies (Scotland) Act 2016 provides that an apology “is not admissible as evidence of anything relevant to the determination of liability in connection with that matter” and “cannot be used in any other way to the prejudice of the person by or on behalf of whom the apology was made” (s. 1).

The Apologies (Scotland) Act 2016 Act “does not apply to an apology made in accordance with the duty of candour procedure” (s. 2(2)). An explanatory note states that “the inclusion of this exception avoids any overlap between this procedure and the act in terms of how apologies made in the context of the duty of candour procedure are treated.” Does it mean that an apology made under the duty of candour is inadmissible because the two statutes are supposed to direct the same treatment of apologies, or that it is admissible because it is not covered by the Apologies (Scotland) Act 2016?

## Protecting mandated apologies

The lack of sufficient and clear apology protection can deter doctors from tendering “full” apologies, or indeed any apology, which is ultimately detrimental to patient welfare. That apologies are mandated under the duty of candour statutes also

puts the responsible person in a difficult position as non-compliance is a punishable offence in England and Wales and reportable in Scotland.<sup>14</sup>

More worrisome is the general lack of awareness about the limitations of existing apology protection. The legal requirement under the duty of candour is that a doctor's notification to the affected parties must also be in writing. A (mistaken) assumption could be made that simply because an apology statute exists, all apology statements contained in a notification will be legally protected. But, as mentioned, the scope of apology protection is not necessarily comprehensive, and courts in other common law jurisdictions have redacted and protected some apology statements while leaving others, such as those pointing to the standard of care, admissible in evidence.<sup>15</sup> Although such legal precedents from overseas are not binding in Great Britain, they might still be given considerable weight. As such, a compliant healthcare professional could have tendered a full apology, both orally and in writing, without realising the potential legal risks that it might incur.

Presently, official guidance simply re-states the existing apology provision without additional explanation.<sup>16-17</sup> Many stakeholders are probably unaware that their apology statements are potentially admissible evidence; that an apology could potentially void professional indemnity coverage; and that existing apology protection does not apply to criminal and disciplinary proceedings. There is little doubt that professional education and training on the nuances of apologising should be enhanced, but the lack of legal certainty renders it difficult, if not inappropriate, to make any strong recommendations on how doctors should apologise and disclose error. Good communication skills and a sincere and empathetic approach towards disclosure continue to be the best approach to redressing harm to patients and reducing legal action.

One further consideration is that, even if an apology was given "full protection" legally, the doctor who apologised might still be sued for negligence. The apology, however, would not form part of the evidence used to prove negligence.

What is of utmost importance and urgency is to clarify or improve the laws. The least that legislators in England and Wales can and should do is provide a working definition of apology in the Compensation Act. We also need clearer guidance on evidential admissibility and the effect of apologies on professional indemnity coverage in both jurisdictions.

Whether the scope of apology protection should be expanded is a more complex and contentious issue. Some experts have said that apology laws should be drafted in more expansive terms where disclosure and apology are integrated.<sup>18</sup> The Victorian government in Australia, in the wake of introducing mandatory open disclosure, sought such amendments to its apology law.<sup>19</sup> Others have argued that a healthy degree of judicial discretion is necessary in deciding whether to admit apology statements of high probative value lest apology protection interferes with a claimant's rights to justice.<sup>9</sup> In this regard, the recently enacted Hong Kong Apology Ordinance has been criticised for prohibiting evidential admission of factual statement in apologies.<sup>20</sup> There is no ready solution, but a conceivable compromise is to avail but limit more expansive protection to medical apologies by amending the duty of candour statutes while preserving the original provision and intent of the apology laws.

Yet, a substantial change in apology protection is unlikely in Great Britain in the near future. The two duty of candour statutes are still in their early days. In its post-legislative assessment of the Compensation Act, the Ministry of Justice found no reason for changing the apology provision.<sup>21</sup> During implementation of the Apologies (Scotland) Act, the proposal to protect statement of fact in apologies had to be withdrawn due to strong political opposition.<sup>22</sup> The continuous engagement of professional peers in informed discourses and a concerted effort at lobbying will be critical to bring about the necessary changes and improvement.

## **Conclusion**

The prevailing notion that apology laws in Great Britain provide sufficient protection to complement the statutory duties of candour is not well supported. We affirm a previous concern that the inclusion of a requirement for apologies under the statutory duty of candour can be problematic.<sup>23</sup> The lack of sufficiently clear apology protection can potentially put compliant apology makers at risk and hamper the implementation of the statutory duties of candour.

This is not to say that stakeholders should refrain from making apologies; rather, they should harness the positive effect of apologies and adopt an empathetic approach towards open disclosure. We should also pursue parallel initiatives that encourage institutions to proactively offer compensation to patients in deserving cases. This is



likely to bring coherence to the process and greatly reduce litigation. **[there is no reference 25 in the list – please provide or delete]**

The law is supposed to protect patients' rights, and their right to proper apologies warrants our full and appropriate attention. We need greater clarity in the way the apology laws in Great Britain are interpreted and applied. Legislative steps to bring more certainty to the scope of apology protection, though challenging and contentious, will facilitate the safer use of mandated apologies to the ultimate benefit of patients and their carers.

Contributors and sources: GKKL is an academic neurosurgeon at the University of Hong Kong and holds a degree in medical law and ethics from the University of Edinburgh. He is the guarantor of the article. GP is a lecturer in medical law and ethics at the University of Edinburgh. Both authors contributed to the central arguments and the writing of this Analysis. The authors declare that this article represents their original work based on primary literature research. The corresponding author attests that all listed authors meet authorship criteria and that no others meeting the criteria have been omitted.

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