The Proposed Apologies Act for Scotland: Good Intentions with Unforeseeable Consequences

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Apologies are very much in the news these days. David Cameron's recent public apology following the Hillsborough Enquiry seems to have been well judged;[1] others are less successful.[2] Margaret Mitchell's Apologies (Scotland) Bill Consultation suggests that Scotland would benefit from more of them.[3] As Apologies Acts have spread through the Common Law world over the last twenty five years it is perhaps unsurprising that Scotland has finally got round to it,[4] albeit via a Member's Bill.

The intention is "to provide legal certainty that an apology (as defined under the terms of the Bill) cannot be used as evidence in civil proceedings."[5] This analysis considers some of the complexities inherent in such an endeavour, and whether it is likely to achieve its wider aims. While the subject has been little considered in Scotland,[6] there is controversy internationally about the wisdom of legislating in this area.

A. THE APOLOGIES (SCOTLAND) BILL

The main premise of the Consultation is that fear of litigation inhibits the Scots from apologising.[7] This is bad for civil society because:

a) apologising is a normal, natural and socially useful way of putting things right; and

b) this very lack of apologies drives more people into litigation, at great expense.

An Apologies Act would make it clear that no-one will be penalised for apologising in certain circumstances. This protection would apply to both written and oral apologies, but not to

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[1] See http://www.bbc.co.uk/news/uk-politics-19569707.
[2] "The failure of apology in American politics: Nixon on Watergate", available at http://www.tandfonline.com/doi/abs/10.1080/03637757509375901.
[3] Apologies (Scotland) Bill Consultation (henceforth "Consultation"), available at http://www.scottish.parliament.uk/S4_MembersBills/20120708_Apologies_Consultation_corrected.pdf.
[4] Massachusetts' Act dates from 1986, and Vines identifies 46 jurisdictions from the USA, Canada, Australia and the UK (England & Wales) which have now passed Apologies Acts. See P Vines, "Apologies and civil liability in England, Wales and Scotland: the view from elsewhere" (2008) 12 Edinburgh L R 200.
[5] Consultation at 2.
[6] The one exception is written by a visiting Australian scholar: see Vines (n 4).
[7] Consultation at 11.

admissions of fault or statements of fact.[8] I consider below the nature of apologies and whether or not the Bill will deliver the sought-after benefits.

B. RISKS, BENEFITS AND UNINTENDED CONSEQUENCES OF APOLOGIES

As a practising mediator I can attest to the power of apologies delivered at the right moment and in the right manner. They can have both practical and emotional impact, sometimes unlocking longstanding conflict. There are, however, risks.

(1) The "Partial Apology"[9]

This is usually an expression of regret with no admission of fault or responsibility. Partial apologies can actually exacerbate the situation, tending to "fuel bitter vengeance rather than assuage the anger the gesture was strategically designed to alleviate."[10] Jack McConnell's 2004 apology for the historic abuse of Scotland's looked-after children has been described in these terms.[11]

(2) The Rejected Apology

It can be devastating when a sincere and unreserved apology is not accepted by the recipient. This generally chills the climate for further resolution. While legislation can address the legal consequences of apologies it cannot compel their mirror image, forgiveness.

(2) Litigation

The premise of this and other Apologies Acts is that claimants regularly found on the making of an apology in evidence. This risk may have been exaggerated. Vines found little evidence for it, also pointing out that "an apology could not amount to an admission of liability in negligence because it is for the court to determine that." [12]

So, while the legal risk of apologising may have been overplayed, the practical and ethical drawbacks of inept or rejected apologies seem not to have been considered. I now turn to the other side of the utilitarian equation: are apologies all they are cracked up to be?

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[8] Consultation at 18: "It is the intention that the proposed Bill should allow that where someone makes an admission of fault, in the context of an apology, it should still be possible to construe those statements as implying legal liability."

[9] P Vines, "The power of apology: mercy, forgiveness or corrective justice in the civil liability arena" (2007) 1 Public Space: The Journal of Law & Social Justice 1.

[10] R Lazare, cited in L E Jesson & P B Knapp, "My lawyer told me to say I'm sorry: lawyers, doctors and medical apologies" (2009) 35 William Mitchell Law Review at 36 (Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1417484).

[11] Mark Gould wrote in the Guardian on 8 December 2004: "McConnell's statement was carefully worded to take into account this concern: he said sorry on behalf of 'the people of Scotland,' rather than 'the Scottish executive'. The shrewd distinction was crafted to protect ministers from potential legal action by around 1,000 Scots who alleged that they suffered abuse in children's homes, some as long ago as the 1940s."

[12] Vines (n 4) at 18.

On the face of it, yes. Apologies have been significant to those making complaints against health professionals,[13] with one Canadian study finding that 88% of medical negligence plaintiffs sought an apology.[14] However, an even higher percentage (94%) wanted an admission of fault. US evidence pointed to significant savings once a less defensive approach to medical negligence claims was adopted,[15] but apologies were generally one element in a wider transformation of the previous "deny and defend" approach.[16] There are lessons for Scotland. The health providers who saw the most tangible results took a proactive approach to adverse medical events, appointing dedicated staff, offering apologies where justified and "defend[ing] medically reasonable care vigorously."[17] An Apologies Act is likely to have limited impact if not accompanied by a similarly proactive approach to the failings of public bodies. More dishearteningly for this Bill, the most comprehensive study of Scottish people's attitudes to legal problems found no evidence that apologies were sought.[18] We should exercise some caution before assuming that more apologies will equate to less litigation.

The intention behind the Bill is clear: to encourage more people to apologise for conduct that has harmed others. It achieves this by rendering such apologies inadmissible in subsequent litigation. It is, however, possible that a greater quantity of apologies may be obtained at the expense of their quality.

Academic commentators have suggested that formal legal protection may work against one of the key features of apologies: genuineness. Two US researchers assert that "evidentiary exclusions rob apologies of their moral content and, in so doing, undermine the sincerity and, ultimately, the healing efficacy of apologies."[19] Taft suggests that "when apology is cast into the legal arena, its fundamental moral character is dramatically, if not irrevocably, altered."[20] This is forcefully illustrated by Ireland's Mr Justice Ryan (who chaired that country's Commission on Child Abuse). Noting that some apologies appeared to

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[13] C Irvine, R Robertson and B Clark, *Alternative Mechanisms for Resolving Disputes: A Literature Review* (2011) at 22-27, available at http://www.hpc-uk.org/publications/research/index.asp?id=462.
[14] T Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties* (2009) at 142.
[15] S J Szmania, A M Johnson and M Mulligan, "Alternative dispute resolution in medical malpractice: a survey of emerging trends and practices" (2008) 26 Conflict Resolution Quarterly 71.
[16] R C Boothman, A C Blackwell, D A Campbell Jr, E Commiskey and S Anderson, "A better approach to medical malpractice claims? The University of Michigan experience" (2009) 2 Journal of Health and Life Sciences Law 125 at 127.
[17] *Ibid.* at 137.
[18] H Genn and A Paterson, *Paths to Justice Scotland* (2001) 186.
[19] Jesson & Knapp (n 10) at 31.
[20] L Taft, "Apology subverted: the commodification of apology" (2000) 109 Yale LJ 1135 at 1136.

have been drafted or heavily influenced by lawyers, he declared it "hard to know whether they were apologising at all".[21]

This illustrates that clients and lawyers may view apologies in different ways. Lawyers' training and experience can lead them to view apologies instrumentally, evaluating them according to their likely impact on liability: [22]

> <EXT>In contrast to laypeople, who show a tendency to be more amenable to settlement following an apology, attorneys set their aspirations higher and expect more as a fair settlement when an apology is offered.<EXT>

One Canadian scholar concluded that attorneys and clients occupied "parallel worlds". Parties repeatedly spoke of the importance of apology and explanation, of hearing and being heard; attorneys attached little importance to these factors.[23] We can surmise that Scottish lawyers may also find themselves conceptualising apologies in terms of their likely effect on damages, whether or not they are evidentially protected. This would defeat the purpose of the Bill, given that legal advice urging caution in apologising is its principal target.

C. CRITERIA FOR AN EFFECTIVE APOLOGY

International evidence and common sense suggest that the definition of an apology is critical. A comprehensive apology is the most desirable.[24] A partial or "botched" apology may do more harm than no apology at all.

The Bill defines an apology using three criteria:

1) A acknowledges that there has been a bad outcome for B;
2) A conveys regret, sorrow or sympathy for that bad outcome; and
3) A recognises direct or indirect responsibility for that bad outcome.

It also mentions a fourth: "an undertaking, where appropriate, to review the circumstances which led to the bad outcome with a view to making, if possible, improvements and or learning lessons." [25]

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[21] Irish Times, 13 February, 2012.
[22] J K Robbennolt, "Attorneys, apologies, and settlement negotiations" (2008) 13 Harvard Negotiation Law Review 349 at 396.
[23] Relis (n 14).
[24] Robbennolt (n 22) found that full apologies were rated more positively than partial apologies by both lawyers and clients (at 21-26).
[25] Consultation at16.

The third of these criteria is critical to the Bill. Scholars have examined the importance of fault in a proper apology. Vines puts it trenchantly: "... there is such a thing as a true apology and, whether public or private, an apology is not real unless it includes an acknowledgement of fault."[26] The role of apologies in society includes healing and re-balancing as well as the reinforcing of norms about what is right and wrong. Taft states: "in the context of apology, sorrow is equated with feelings of remorse, shame, and repentance."[27] The admission of fault is critical. Without it, there seems little to be gained by the apology. Most of us regret that bad things happen to other people: but if we cause those bad things the consequences are entirely different. We have a moral duty to put things right.

Apologies that omit admissions of fault will not be recognised by most people as apologies at all. The Consultation itself cites the example of Richard Nixon's "ineffective" apology: "Nixon fails to recognize the wrong he committed, the norm he violated, and in doing so fails to accept responsibility for his own wrongdoing."[28] And yet the Bill specifically excludes protection for admissions of fault. Here is the rub for the proposed Bill:

- if it does not protect admissions of fault, apologies are likely to be expressed in bland, general terms that are more insulting than healing;
- if it does protect such admissions and thus provides complete insulation from legal consequences, even apologies that acknowledge fault may be devalued in the eyes of the recipients.

One of the problems for the Bill (and the law) is the ineliminable link between apology and forgiveness.[29] We cannot legislate for forgiveness: yet without it apologies are little more than a PR exercise, expressing sorrow but impressing no-one. What matters in practice is the judgement of the forgiver, inevitably based on factors such as the authenticity of the apology and the belief that the perpetrator is genuinely sorry and will not do it again. It can be argued that, in attempting to remove the negative consequences of apology, the proposed Bill will remove the clearest evidence of genuineness and repentance. How will the recipients know that apologies are real if, as one US article puts it, "My lawyer told me to say I'm sorry"?[30] Also important in our evaluation of apologies is action to make things better. In ordinary language, how do I know you are sorry unless you do something about it? The definition of

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[26] Vines (n 9) at 5.
[27] Taft (n 20) at 1139.
[28] Consultation at 32.
[29] Taft describes apology as "the centerpiece in a moral dialectic between sorrow and forgiveness." (n 21) at 1143.
[30] Jesson & Knapp (n 10).

apology needs to include the remedial element, although some would say that this is implied by the words "I'm sorry".[31]

The guidance on apology issued by NHS Education for Scotland seems helpful.[32] It includes "Three R's":

- Regret – Meaningful, real, acknowledge wrongdoing; just say sorry; accept responsibility;
- Reason – Be honest – doesn't mean you will be sued; unintentional and not personal; trying hard to do the right thing;
- Remedy – Next steps – who will do what; investigate to find out why; provide feedback.

Finally, when might apologies take place? Little attention has been paid to this. One possibility is in the immediate aftermath of the "adverse event". If the Bill is passed, advisors and insurers may alter their longstanding instruction not to apologise; on the other hand they may lack confidence that these spur-of-the-moment, unpredictable apologies will be protected.[33] In that case little will change.

In the weeks and months following the harm what other opportunities exist for apologies to be given? It is difficult to imagine an efficacious apology emerging during litigation and the often lengthy period of agent-led written negotiation that precedes it. When, where and how would it be offered? How would the recipient judge whether it was genuine? The Bill provides no guidance on this and other practical questions, leading this writer to question its claim to provide legal certainty.

One interesting possibility that may address many of the concerns expressed above is the mediation meeting. Handled correctly, apologies given in this forum fulfil a number of the qualities suggested above: there is time for the apologiser to listen to the impact of the harm; s/he speaks directly to the person harmed; and, as well as admitting fault, the apologiser is encouraged to consider remedial action. All of this can take place under existing "without prejudice" protection. The majority of Scottish mediators ask their clients to sign an "agreement to mediate" which contains a detailed confidentiality clause. Typically this

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[31] Taft (n 20) at 1140.

[32] NHS Education for Scotland, "The Power of Apology" Focus, Spring 2010, available at http://www.nes.scot.nhs.uk/media/6338/Apology%20Spring%20Focus%202010.pdf.

[33] Vines (n 4) at 23 makes the same observation about the Compensation Act 2006 (which does not apply to Scotland): "A prudent negligence lawyer would not rely on section 2 as a basis for advising clients that it is safe to apologise".

provides for the non-compellability of the mediator and the inadmissibility of anything said in the course of the mediation.

With this reassurance in place apologies are not uncommon, and there are no examples, to date, of the Scottish courts attempting to look behind mediation's veil of confidentiality. While there are undoubtedly some limitations on mediation's absolute confidentiality,[34] these are likely to apply equally to any legislative protection for apologies. The non-compellability of mediators is already provided for in cross-border mediations.[35] If this protection were extended to all domestic mediation, much of what the Bill seeks is already available.

D. CONCLUSION

Like any human process, the giving of apologies does not lend itself to legislation. This analysis has attempted to outline some of the risks of unhitching apologies from legal consequences. Given that the Bill may undermine their genuineness; that lawyers may continue to view them instrumentally; that recipients may reject them; and that they may not diminish litigation anyway, it may be wise to exercise caution before legislating. It is to be hoped that the Scottish Parliament will debate thoroughly before taking a step whose impact is so difficult to predict.

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[34] Examples include evidence of a crime, impropriety, fraud and duress. See C Irvine, "Mediation confidentiality: limitations and a proposal" Kluwer Mediation Blog, available at http://kluwermediationblog.com/2012/09/12/mediation-confidentiality-limitations-and-a-proposal/.
[35] Cross-Border Mediation (Scotland) Regulations 2011 (SSI 2011, no. 234) S.3.