Saying sorry – should a 'safe space' be created to allow effective communication between healthcare practitioners and aggrieved parties after an iatrogenic event in South Africa?

M S Khan,[1] LLB, LLM ; **M C Laubscher,**[2] LLB, LLM

[1] *Steve Biko Centre for Bioethics, School of Clinical Medicine, Faculty of Health Sciences, University of the Witwatersrand, Johannesburg, South Africa*
[2] *Faculty of Law, North-West University, Potchefstroom, South Africa*

Corresponding author: *M S Khan (siraaj.khan@wits.ac.za)*

The incidence of medical negligence claims is well documented in South Africa (SA). Civil and criminal processes are in place to deal with this, and the matter may be reported to the Health Professions Council of SA (HPCSA). There is a school of thought that suggests that these processes do not provide sufficient relief to an affected party. The processes are not always satisfactory; an aggrieved party may wish to know the reasons why a particular error occurred and why a healthcare practitioner acted in a particular manner. In addition to this, they may want to receive a sincere apology. Medical practitioners may also want to communicate with patients or family members of a patient who has passed away as a result of an iatrogenic event, but may be fearful of litigation. This article considers the current position in SA in relation to issuing an apology related to an iatrogenic event, and consults foreign jurisdictions for further guidance on the topic.

Keywords: *apology laws, medical negligence, confidentiality, disclosure*

S Afr Med J 2024;114(8):e1881. https://doi.org/10.7196/SAMJ.2024.v114i8.1881

South Africa (SA) has a significant incidence of medical negligence claims.[1] Litigation[2] is normally conducted in the civil courts, and in some instances, negligence can be tried in a criminal court. Matters involving medical negligence can also be reported to the Health Professions Council of SA (HPCSA). The other option available to an aggrieved party is to make use of the various alternative dispute resolution (ADR) processes, including mediation and arbitration. While these options offer various types of compensation or redress, they might not fully alleviate the aggrieved party of their pain or enable them to move on. It is often said that the patient or their family wishes to receive a sincere apology in the event that an iatrogenic event occurs.[3] Healthcare practitioners are reluctant to issue such apologies for various reasons, including the fear of litigation against them.[4] A situation thus occurs that gives rise to two competing interests, namely the patient or their family members wishing to receive an honest apology, and the healthcare practitioners needing to safeguard themselves against litigation. There is a lack of academic literature that addresses this clash of interests in the SA context. This article sets out what the default legal position is, and then turns to foreign law for further guidance. Section 39(1) of the Constitution of the Republic of SA states: 'when interpreting the Bill of Rights, a court, tribunal or forum … (c) may consider foreign law.'[5] While not necessarily binding as such, it provides us with the opportunity to consult foreign jurisdictions that have a much more developed jurisprudence relating to disclosure of information relating to iatrogenic events. The article will conclude with providing recommendations as to how this issue can be dealt with.

Legal position in South Africa on issuing apologies

There is no legislation in SA that protects healthcare practitioners from litigation should they issue an apology to a patient. Should a healthcare practitioner issue an apology, such communication can be used by a prospective plaintiff in court. In order for evidence to be admissible, the general rule is that it must be relevant. This is of course subject to the Constitution, but for all intents and purposes, relevance is the point of departure.[6] Zeffert and Paizes[6] make reference to several judgments, including R v Mpanza,[7] which held that 'any facts are … relevant if from their existence inferences may be properly drawn as to the existence of the fact in issue.' Inferring from this, if a medical practitioner were to apologise to a patient for a particular act, this would be relevant, as an inference could be drawn from such statement to prove a fact, and thus would be admissible in a SA court. This may be construed as an admission of liability by the healthcare practitioners. Even if they wished to make an apology, they would refrain from doing so owing to there being no protection. An apology could be offered as part of settlement negotiations in terms of rule 34 of the Uniform Rules of Court,[8] or rule 18 of the Rules Regulating the Conduct of Proceedings in the Magistrates' Court of SA,[9] but this would mean that litigation has already been initiated, and would not address the issue at hand. It is clear that there is a gap in SA law that needs to be considered. This will be covered in the next part of this article by considering how foreign jurisdictions have dealt with the matter.

Foreign jurisdictions

Section 39 of the Constitution[5] states: 'when interpreting the Bill of Rights, court, tribunal or forum …(1) (c) may consider foreign law.' Foreign law is not necessarily binding, but can be consulted to provide guidance when an issue is not adequately addressed by domestic law. We will look at the position in the USA and Ireland, as they have relatively well-developed bodies of law on the matter. 'At least 37 states and the District of Columbia have laws that offer physicians some kind of legal protection for expressing regret or

empathy to patients who experience some kind of negative results at the physician's hand.'[10] Nevertheless, there is still a variance of laws in terms of what can protect a doctor from evidence being admissible in court, and as a result doctors are discouraged by medical insurers from apologising for fear of being sued.[10] At a federal level in the USA, much like the SA position, 'there is almost no evidentiary protection provided to apologies; they are generally admissible in order to prove liability.'[10] However, state regulations do provide some protection, the most famous being the Massachusetts statute – admissibility of benevolent statements, writings or gestures relating to accident victims.[10] This Act basically provides protection for expression of sympathy by an individual involved in an accident to one who was injured or their family, and render such any statement, writing or benevolent gestures in this context inadmissible as evidence of an admission of liability.

Several states have promulgated similar legislation that protects medical practitioners in similar contexts, albeit not in all circumstances, including: 'Alaska, Delaware, the District of Columbia, Idaho, Louisiana, Maine, Michigan, Nebraska, Ohio and Virgina.'[10]

In Ireland, the Civil Liability (Amendment) Act 2017[3] was passed. Section 9 reads as follows:

> 'Where a health services provider discloses, in accordance with this Part, at an open disclosure meeting, to – (a) a patient that a patient safety incident has occurred in the course of the provision of a health service to him or her, (b) a relevant person that a patient safety incident has occurred in the course of the provision of a health service to the patient concerned, or (c) a patient and a relevant person that a patient safety incident has occurred in the course of the provision of a health service to the patient, that disclosure shall be treated as an open disclosure by the health services provider of that patient safety incident and section 10 shall apply to – (i) the information, in respect of the patient safety incident, provided to the patient or relevant person (or both of them) at the open disclosure meeting, additional information provided at the additional information meeting and information provided in a clarification under section 19, (ii) an apology, in respect of the patient safety incident, where an apology is made at that meeting, or the additional information meeting.'

Tumelty[3] is of the view that the enactment of this law is significant as it advances legislative protection for medical practitioners making apologies; however, she argues that it does have 'somewhat limited remit and the impact remains to be seen'.

Recommendations

In the USA, a medical liability programme known as the Communication and Resolution Program (CRP), was developed to address issues of unexpected and adverse healthcare outcomes and medical errors.[11] In 2012, in the state of Massachusetts, six hospitals implemented a programme called CARe – (Communication, Apology and Resolution), which is an example of a Communication, Resolution and Prevention programme.[12] This programme basically aimed to allow hospitals and liability insurers 'to communicate with patients when adverse events occur; investigate and explain what happened; and, where appropriate, apologise and proactively offer compensation.'[13] The objective clearly is to avoid litigation and reach a settlement as well as deal with more than just financial compensation, and in this way reach a more amicable resolution for all parties concerned. This involves a series of conversations between the patient and healthcare provider, and often offers opportunities to work with healthcare to gain some suggestions and even implement safeguards to prevent this type of harm from happening again in the future.[14] It is important to note that authentic CRPs are comprehensive, systematic and have clear principles driven by a culture change that is fundamental and that highlights patient safety and learning.[15]

In October 2017 an article was published that documented research that had been done at two of these six hospitals in order to ascertain the effectiveness of the CARe programme. The results were promising.

By August 2016, of the 47 of the 929 cases (or events, as the programme calls them) that ultimately resulted in legal action, 14 had been deemed ineligible for compensation by insurers, 22 had been deemed as qualifying for compensation and of those, 20 were settled at the time of the collection of the data. At that same stage, 11 cases still remained undetermined. Additionally, the programme did not trigger an escalation in litigation.[15] Implementation of such a programme seemed to have been a step in the right direction in addressing the issue of dealing with medical negligence claims in a timeous and more effective manner, as well as fostering more amicable relationships between patients and health professionals, and might be something the SA health fraternity should be investigating. However, CRP programmes such as CARe do offer various challenges – these range from support from institutional leaders and risk management, substantial investment in educating physicians, cultivation of relationships between stakeholders, establishing protocols and guidelines to enhanced collaboration.[16]

A study at six healthcare facilities in Washington State in the USA found that the implementation of such a programme required time and commitment from all stakeholders. In this study, the insurer and academic researchers, in collaboration with legal practitioners and other project team members, developed a set of key elements and guiding principles for CRP, and added event eligibility. This process took 20 months and culminated in a 50-page workbook that assisted in aligning the different policies and procedures with the CRP key elements. Project team members also conducted interviews with relevant parties, and training was supplied to the various relevant staff members and stakeholders. Feedback from participants in the programme indicated that they were of the opinion that a well-implemented CRP programme has great value, but it was clear from the study that active engagement from the leaders in this process was essential for it to be truly effective.[17]

SA is country with a diverse population and culture, which offers its own unique challenges. Individuals may have differing beliefs on how iatrogenic events should be dealt with, and may not take kindly to a simple apology being issued. Medical practitioners might also be hesitant to participate in such programmes, particularly if this is not legislated for. In order for a practitioner to be absolved of liability, legislation would in all likelihood have to be implemented. The Civil Liability (Amendment) Act 2017 of Ireland could be used as a point of departure. The promulgation of legislation, however, can take a significant amount of time, so this is not an overnight solution. Another option would be to develop existing HPCSA booklets, for example, including a section in the general ethical guidelines for the healthcare professions.[17] This could include a provision along the lines of expressing sympathy for how the patient feels and what has transpired, without admitting liability. With that said, it is important to note that the HPCSA guidelines are not legislation, and do not supersede the common law or any statute that regulates a person's right to institute litigation should they wish to do so. Lastly, this matter lends itself to international co-operation and knowledge exchange. SA healthcare practitioners can learn from experiences

in other countries, potentially through conferences, seminars, or collaborative research initiatives.

Conclusion

This article arose from the basis that SA has a very high incidence rate of medical malpractice claims. While there are measures in place to address this, one aspect that is often overlooked is the role of an apology. We looked at the position in SA law in terms of liability, and found that if a medical practitioner were to issue an apology to a patient or the family members of a patient, then this will most likely be construed as an admission of liability. The law of evidence in SA deems relevance as one of the most important factors in determining admissibility. Such an apology will most likely fall under this ambit. We then looked at the position in foreign jurisdictions, namely the USA and Ireland. While the USA does not have federal laws in place to protect medical practitioners from litigation in the event that they issue an apology, several states have statutes that do (albeit not in all instances) protect such disclosure. We also noted that Ireland in fairly recent times has also passed the Civil Liability (Amendment) Act 2017, which likewise affords a degree of protection to healthcare practitioners issuing apologies in circumstances where their actions may have resulted in harm to the patient. We also noted that programmes that promote communication and resolution between healthcare practitioners and aggrieved parties are gaining momentum in foreign jurisdictions, and this should be something that should perhaps be implemented in SA.

Data availability. N/a.

Declaration. None.

Acknowledgements. None.

Author contributions. Both authors contributed equally to the formulation of the title, research and write up of the article.

Funding. None.

Conflicts of interest. None.

1. Prinsen L. The leading causes of medicolegal claims and possible solutions. S Afr Med J 2023;113(4):1140 -1142. https://doi.org/10.7196/SAMJ.2023.v113i4.134
2. South African Law Reform Discussion Paper. Discussion Paper 154 Project 141 Medico-Legal Claims. 2021. https://www.saflii.org/za/other/ZALRC/2022/9.pdf (accessed 29 February 2024).
3. Tumelty M. Medical negligence litigation and apologies: An empirical examination Euro J Health Law 2020;27(4):386-403. https://doi.org/10.1163/15718093-BJA10021
4. McLennan S, Rich LE, Truog RD. Apologies in medicine: Legal protection is not enough, CMAJ 2015;187(5):156-158. https://doi.org/10.1503/cmaj.131860
5. Constitution of the Republic of South Africa 1996. https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1 (accessed 14 January 2024).
6. Zeffert DT, Paizes AP. The Law of Evidence. 3rd ed. LexisNexis: Cape Town, 2017.
7. R v Mpanza 1915 AD 348.
8. Supreme Court of South Africa. Uniform rules – rules regulating the conduct of proceedings of the several provincial and local divisions of the High Court of South Africa. Rule 34. https://www.saflii.org/images/superiorcourts/Uniform%20Rules%20of%20Court%20[F].pdf (accessed 17 January 2024).
9. Government of South Africa. Rules regulating the conduct of proceedings in the Magistrates' Court of South Africa. Rule 18. https://www.saflii.org/images/magistratescourts/MCR%20[R].pdf (accessed 17 January 2024).
10. Bulver A. Should doctors be allowed to apologise? A closer look at medical malpractice laws. Drake Law Rev Discourse 2020;69:101-119. https://doi.org/10.29158/jaapl.200107-20
11. LeCraw F R, Stearns SC, McCoy MJ. How US teams advanced communication and resolution program adoption at local, state and national levels. J Patient Safety Risk Manage 2021;26(1):34-40. https://doi.org/10.1177/2516043520973818
12. Mello MM, Kachalia A, Roche R, et al. Outcomes in two Massachusetts hospital systems give reason for optimism about communication and resolution programs. Health Affairs 2017;36(10):1795-1803. https://doi.org/10.1377/hlthaff.2017.0320
13. Jean-Pierre P. Medical error and vulnerable communities. Boston Law Rev 2022;102(1):327.
14. Gallagher TH, Boothman RC, Schweitzer L, Benjamin EM. Making communication and resolution programmes mission critical in healthcare organisations. BMJ Qual Safety 2020;29(11):875-878. https://doi.org/10.1136/bmjqs-2020-010855
15. Mello MM, Armstrong SJ, Greenberg Y, McCotter PI, Gallagher TH. Challenges of implementing a communication-and-resolution program where multiple organizations must co-operate. Health Services Research 2016;51(S3):S2550-S2568. https://doi.org/10.1111/1475-6773.12580
16. Mello MM, Roche S, Greenberg Y, Folcarelli PH, Van Niel MB, Kachalia A. Ensuring successful implementation of communication-and-resolution programmes. BMJ Qual Safety 2020;29(11):895-904. https://doi.org/10.1136/bmjqs-2019-010296
17. Health Professions Council of South Africa. Guidelines for Good Practice in Health Care Professions – General Ethical Guidelines for the Health Care Professions. Booklet 1, Pretoria: HPCSA, 2021. https://www.hpcsa.co.za/Uploads/professional_practice/ethics/Booklet_1_Guidelines_for_Good_Practice_vDec_2021.pdf (accessed 29 February 2024).

Received 18 January 2024; accepted 14 April 2024.