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PROCEEDING

INTERNATIONAL CONFERENCE ON
**LAW AND
SOCIETY**



YOGYAKARTA, 04 – 07 APRIL 2017

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

— P R O C E E D I N G —

INTERNATIONAL CONFERENCE ON
**LAW AND
SOCIETY**

Yogyakarta, 04 – 07 April 2017

LP3M & Faculty of Law Universitas Muhammadiyah Yogyakarta
2017

PROCEEDING

International Conference on Law and Society

Yogyakarta, 04 – 07 April 2017

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Iwan Satriawan

Yordan Gunawan

M. Endrio Susila

Design: Djoko Supriyanto

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Message from Chairman

Yordan Gunawan

Chairman, International Conference on Law and Society 6,
Universitas Muhammadiyah Yogyakarta

Assalaamu’alaikumWarahmatullahiWabarakatuh,

In the Name of Allah, the most Gracious and the most Merciful. Peace and blessings be upon our Prophet Muhammad (S.A.W).

First and foremost, I felt honoured, on behalf of the university to be warmly welcomed and to be given the opportunity to work hand in hand, organizing a respectable conference. Indeed, this is a great achievement towards a warmers multilateral tie among UniversitasMuhammadiyah Yogyakarta (UMY), International Islamic University Malaysia (IIUM), UniversitiIslam Sultan Sharif Ali (UNISSA), Universiti Sultan ZainalAbidin Malaysia (UNiSZA), Fatoni University, Istanbul University, Fatih Sultan Mehmet Vakif University and Istanbul Medeniyet University.

I believe that this is a great step to give more contribution the knowledge development and sharing not only for eight universities but also to the Muslim world. Improving academic quality and strengthening our position as the procedures of knowledge and wisdom will offer a meaningful contribution to the development of Islamic Civilization. This responsibility is particularly significant especially with the emergence of the information and knowledge society where value adding is mainly generated by the production and the dissemination of knowledge.

Today’s joint seminar signifies our attempts to shoulder this responsibility. I am confident to say that this program will be a giant leap for all of us to open other pathways of cooperation. I am also convinced that through strengthening our collaboration we can learn from each other and continue learning, as far as I am concerned, is a valuable ingredient to develop our universities. I sincerely wish you good luck and success in joining this program

I would also like to express my heartfeltthanks to the keynote speakers, committee, contributors, papers presenters and participants in this prestigious event.

This educational and cultural visit is not only and avenue to foster good relationship between organizations and individuals but also to learn as much from one another. The Islamic platform inculcated throughout the educational system namely the Islamization of knowledge, both theoretical and practical, will add value to us. Those comprehensive excellent we strived for must always be encouraged through conferences, seminars and intellectual-based activities in line with our lullaby: The journey of a thousand miles begin by a single step, the vision of centuries ahead must start from now.

Looking forward to a fruitful meeting.

Wassalamu’alaikumWarahmatullahiWabarakatuh

.....

Foreword

Trisno Raharjo

Dean, Faculty of Law, Universitas Muhammadiyah Yogyakarta

Alhamdulillah all praise be to Allah SWT for his mercy and blessings that has enabled the Fakultas Hukum, Universitas Muhammadiyah Yogyakarta in organizing this Inaugural International Conference on Law and Society 6 (ICLAS 6).

This Conference will be providing us with the much needed academic platform to discuss the role of law in the society, and in the context of our two universities, the need to identify the role of law in furthering the progress and development of the Muslims. Muslim in Indonesia and all over the world have to deal with the ubiquity of internet in our daily lives life which bring with it the advantages of easy access of global communication that brings us closer. However, internet also brings with it the depraved and corrupted contents posing serious challenges to the moral fabric of our society. Nevertheless, we should be encouraged to exploit the technology for the benefit of the academics in the Asia region to crat a platform to collaborate for propelling the renaissance of scholarship amongst the Muslims.

This Conference marks the beginning of a strategically planned collaboration that must not be a one off event but the beginning of a series of events to provide the much needed platform for networking for the young Muslim scholars to nurture the development of the Muslim society.

UMY aims to be a World Class Islamic University and intend to assume an important role in reaching out to the Muslim ummah by organising conferences hosting prominent scholars to enrich the developmment of knowledge. This plan will only materialise with the continous support and active participation of all of us. I would like to express sincere appreciation to the committee in organising and hosting this Conference.

.....

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The Legal and Economic Ramifications of Apology in Civil Dispute Resolution Process

MUHAMMAD RIDHWAN SALEH AND PUTERI NEMIE JAHN KASSIM

Ahmad Ibrahim Kuliyah of Laws, International Islamic University Malaysia
ridhwansaleh89@gmail.com ; puterinemie@hotmail.com

ABSTRACT

In recent years, the role of apology in resolving conflicts and preventing litigation has gained much prominence. Particularly, in civil litigation, apology has the potential to promote negotiations, generate settlements and to some extent mitigate and absolve liability. During the civil dispute resolution process, apology can exist and be used at various stages from the moment the wrong has been committed until the end of the pre-action and pre-trial procedures. Further, apology has been long recognised as an effective tool in the alternative dispute resolution process and a mitigating factor in cases on defamation and contempt of court. Studies have also shown that apology has been efficient in settling family disputes by expediting the reconciliation process. Although some apologies may be protected under the principle of “without prejudice communication” which promotes settlement out of court, it nevertheless, has the effect of being a “double-edged sword” and be used against the party who offered the apology as an evidence to establish guilt. In view of this, several jurisdictions have developed legal mechanisms to counter the negative effects of apologies while at the same time, trying to safeguard the benefits of apologies in promoting early settlements and reducing the number of litigated cases. By doing so, positive consequences whether financially as well as economically, can be seen in relation to the amount of compensation awarded as well as the relevant legal costs incurred at the end of the civil dispute resolution process. As such, this research paper seeks to discuss the ramifications of apology from the legal as well as economic perspectives in relation to civil disputes with the aim of safeguarding the benefits of apologies as well as promoting the use of apologies at various stages of the civil dispute resolution process.

Keywords: *Legal, Economic, Civil Dispute, Resolution Process*

I. Introduction

The role of apology in resolving conflicts has become very significant. Particularly in civil cases, apology have been recognised to promote negotiations, generate settlements and to some extent mitigate and absolve liability. In the words of Shuman, “an apology has the potential to help people who have suffered serious emotional harm through the wrongdoing of others in ways that monetary damages alone cannot” [1]. This statement suggests that, although monetary compensation has long been the main objective of the tort system, apology may be able to provide more benefits to the plaintiffs as it is able to assists them to procure non-legal remedies in the form of explanation and statements of regret from the defendants. The tort system has long been criticised as being ill-equipped to provide these kind of remedies, other than being a system that is costly, cumbersome and inefficient. By incorporating apologies at various stages of the civil dispute resolution process may allay concerns regarding the deficiencies of the tort system in providing the necessary redress and justice for persons suffering from harm, whether physical or emotional.

II. Discussion

1. The Various Definitions of Apology

The variety of definition of apologies has emerged due to the difference in the cultural and disciplinary background of the scholars [2]. According to Cohen, the term "apology" has its roots in the Greek word of "logos" which means "speech" or "word" and it is usually associated with formal justification, defense or explanation [3]. It actually refers to any statement or remarks made following any intentional or unintentional injury and a working definition of apology include "an admission of one's fault combined with an expression of regret for having injured another as well as an expression of sympathy for the other's injury"[4]. According to Lazare, apology is the expression of responsibility for an offense together with an expression of remorse. The offence here refers to violation of any rule, ethical principle or careless behaviour that results in injury or discomfort towards another in the form of hurt feelings, degradation or humiliation [5]. Further, apologies also may refer to admissions of blameworthiness and regret for any undesirable event which includes transgression, harmful act and embarrassing incident [6]. From the sociological perspective, according to Tavuchis, in defining apology, there must be two fundamental requirements which include that the offender has to be sorry and he also must say so or communicate his apology to the one who has been offended [7]. In commenting on Tavuchis' definition, Macleod stated that, in his definition, the apology should at least include an admission of responsibility and whatever statement that follows the admission must express sorrow on the part of the wrongdoer [8].

Major works on apology comes from the psychology field of study whereby from the psychological perspective, apology has been regarded as a form of remedial behaviour that is an attempt to explain about the harmful act so that it will become acceptable to the injured party [9]. From an ethical perspective, authors such as Taft regards apology as an internal process whereby in apologizing, a person will engage with himself to identify the offence and will later communicate it to the offended party. In doing so, the offender will move towards willingness to admit his fault and to express his remorse for the act done by him [10]. Further, a statutory definition of apology can be found from Ontario Apology Act 2009 whereby, the statute define apology as "an expression of sympathy or regret, a statement that a person is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit fault or liability or imply an admission of fault or liability in connection with the matter to which the words or actions relate" [11]. Since the definition of apologies varies from various perspective, it is important to identify the core elements of an apology as discussed in the existing literature to determine the basis of a complete apology which this paper seeks to discuss [8].

2. The Core Elements of an Apology

According to Lazare, there are five elements of an apology namely: (1) there must be an acknowledgement of the offence, (2) there must be expression of remorse, (3) the offender must make appropriate reparation, (4) there must be an expression of care towards the injured party, (5) there must be an element of restoration of the offended party's dignity and self-respect [5]. Similarly, in the opinion of Macleod, there are seven core elements in an apology. They are (1) recognition of the wrongful act that involves the identification and acknowledgement of the wrong, (2) remorse which consist of genuine expressions relating to regret for the harm committed, (3) the wrongdoer assume responsibility or blame for the wrongful act, (4) repentance which includes regret, shame, humility, and sincerity at the part of the wrongdoer (5) providing reasons

or justifications for the harm done toward the wronged party, (6) reparation or restitution for the harm inflicted on the other party, and (7) reform on the part of the wrongdoer to enable both parties to learn from the incident and move forward [8].

Marrus, on the other hand identifies four major components of apology whereby, it must include (1) acknowledgement of a wrong committed including the harm it caused, (2) an acceptance of responsibility, (3) an expression of regret or remorse for the harm done, and (4) a commitment for reparation and non-repetition of the wrongful act [12]. According to Smith, a philosopher, the purpose of apology is to finally satisfy certain emotional expectation by the parties involved and according to him, there are several elements that must be fulfilled. (1) there must be a factual records of the event whereby the material facts must be identified by the parties involved, (2) there must be an acceptance of blame on the part of the wrongdoer, (3) the wrongdoer must be morally responsible for the fault, and (4) the wrongdoer must convey their regret and commitment for non-repetition of the fault [13].

Therefore, although authors have different opinion about the elements of a true apology, there are some similarities amongst them, particularly, that it must contain an admission or acknowledgement of fault, the person must take responsibility over the wrongdoing and there must be some sort of remorse or regret on the part of the wrongdoer. This findings is consistent with the findings of Zammint, whereby the most important and contentious elements of apology are (1) there must be an acknowledgement of fault and (2) the wrongdoer must take responsibility over the fault [14].

3. The Position of Apology in Dispute Resolution Process

Apology can exists at various stages in the dispute resolution process including spontaneously after the event, during the negotiation, mediation or even when the adjudication takes place. The implications of apologies differ according to the various stages that they have been offered [8].

3.1. Spontaneous Apology

At the first instance, apology can be made right after the injury was committed by the defendant. According to Mcleod, spontaneous apologies usually have the highest possibility to be accepted as being sincere and therapeutic in nature towards the parties. This is possible due to the fact that since the apology has been made promptly after the injury, it will usually pacify the wronged party before any legal action is initiated. However, spontaneous apology usually take place in an environment in which there is no proper legal advice and no legal privilege [8]. Despite apology at this stage can be seen as very sincere and might have the ability to disarm anger, nevertheless, apology at this stage have the effect of a "double-edged sword" whereby it can be used against the party who offered the apology as an admission of guilt in any legal proceedings [15]. Such negative implications have deterred parties from offering spontaneous apology and particularly in medical negligence cases, legal advisors often advise their clients not to apologise due to the fact that it can backfire against them during the legal proceedings [15].

3.2. Apology during Out of Court Settlement

The current civil litigation process promotes parties to settle their dispute amicably outside the court at any time before the decision is being made by the judge where it can be in the form of settlement agreement or by way of consent judgement. Therefore, apology may exists at this juncture and it may promote settlement out of court. During this out of court settlement process, apology offered by the parties might not be admissible as evidence as they might fall under the hearsay rule [16]. However, in some jurisdictions including Malaysia, the statement might still be

admissible as they can be considered as statement made by the party to the litigation as provided in section 18 of the Evidence Act 1950. Hence, apology at this stage may again be seen as an admission of guilt on the part of the defendant and this is the main reason why defendants will refuse to apologise towards the injured party.

3.3. Apology in Mediation Process

The role of apology has been said to be more significant in the alternative dispute resolution (ADR) mechanism such as mediation rather than litigation as this process offers higher hope and potential for healing the relationship between the parties before the dispute is brought to court [17]. According to the Oxford Law Dictionary, mediation is one form of the alternative dispute resolution mechanism which involve a neutral third party known as the mediator who will assist the parties involved in the dispute or negotiations to achieve a mutually acceptable resolution of the points in conflict. According to Levi, although apology can only come from the parties themselves, mediators are recommended to propose for an apology even when it was not initiated by either parties whenever appropriate because it can be an effective tool in resolving the dispute [18]. Apology at this juncture will reduce anger as well as the hostility between the parties and since mediation process does not restricted to the rules of evidence nor procedure, this would be a great avenue for the wrongdoer to offer sincere apology to the victim as the apology offered cannot be used as an admission of guilt in the court of law should the mediation failed in its process [19]. Further, many states has enacted mediation legislations which promotes the usage of mediation as a form of ADR to encourage and promote the usage of mediation to resolve civil disputes. In Malaysia, the Mediation Act 2012 was enacted to promote mediation as a dispute resolution mechanism and recognised its benefit in providing a fair, speedy and cost-effective process [20]. This legislation has made it clear that any communication made during this process is privileged and is not subjected to discovery and they are inadmissible as evidence for any proceedings as provided in Section 16 of the Act. According to Carroll, similar provisions exist in jurisdictions such as Australia [21], several states in the United States [22], and Hong Kong [23]. Therefore, by virtue of this provision, parties will be convinced to make statements which includes apology and statement of fault without any legal implication for it to be used against them in any other further proceedings. In some jurisdictions, mediation has been incorporated in their civil dispute litigation process whereby with the establishment of court annexed mediation [24]. Court-annexed mediation means that mediation that is part of the procedure and sponsored by the court whereby the mediator may be any officer of the court such as the registrar, court-annexed mediation will take place after the case has been filed by the court and incorporated into the civil dispute litigation process. It is clear that apology given by the parties if it's made during the court-annexed mediation session will be protected by the law from being used as admission of guilt by the court. During mediation process, the parties involved will have the opportunity to make any retraction or corrections of statements, offering statements of regrets as well as apology and this will likely affect the outcome of the dispute resolution process itself.

Carroll further stated that, there are several aspects of the mediation process that make it the best setting to apologize which includes, providing an opportunity for direct participations by the parties in the negotiation process and at the same time, allow it to be confidential as well as a meaningful dialogue between the parties without taking into account the legal complications of the apology. Besides that, it will also allow the parties to be clear about what the dispute all about is and the expectation of both parties. As a neutral third party, the mediator needs to play the very important role to remind the parties that litigation is not the only way to settle their dispute.

Mediation will thus, empower the parties to resolve the dispute their way and may provide more psychological benefits to the parties [2]. Since apology may serve various benefits to the parties during the mediation process as it provides the best platform for the parties to apologise, this has created attention and interest of legal scholars and legislators for apology to be used beyond mediation in the resolution of dispute process [25].

3.4. Apology in Pre-Action & Pre-Trial Procedure

In Malaysia, before a case is fixed for hearing before the trial judge, the case will undergo the pre-trial case management process according to Order 24 of the Rules of Court 2012 whereby the court have the power at any time after the commencement of the proceedings on its own motion to direct any or both parties to the proceedings to appear before the court and give directions as the court thinks fit [26]. The objective of pre-trial case management is to ensure the smooth running of the case when it is to be heard by the court later. At this stage, the court will consider any matter which includes the possibility for settlement of some or all the issues in dispute and requires the parties to furnish the courts with all the information as the courts thinks fit [27] and make other appropriate orders to secure a just, expeditious, and economical disposal of the actions [26]. Apology made by the defendant at this juncture towards the plaintiff can be protected under the cloak of "without prejudice communication" shield. Besides that, during this pre-trial case management process also, the court may direct parties to go for the court-annexed mediation as stated above [28]. In some jurisdiction, the procedural law also provides for the pre-action protocols where it promotes settlement at the earliest stage, even before the case been filed into the court. Pre-action stage has been introduced in the United Kingdom for several types of civil actions including, defamation, personal injury claims, professional negligence, resolution of clinical disputes and many more. For instance, the specific objectives of the United Kingdom Pre-Action Protocol for the Resolution of Clinical Disputes, are among others, to encourage transparency and early communication between the patient and healthcare provider, to ensure sufficient medical and other information to be disclosed promptly, to promote early settlement and also to encourage the defendant to make an early apology to the patient if appropriate [29]. Based on this protocol, apology is encouraged to be offered by the parties at the earliest stage even before when the case was filed in the court. This would be the best avenue for the party who caused the injury to express their apology without the fear of it to be used against them in the court of law and at the same time might defuse the anger on the part of the patient and may avoid litigation in totality.

3.5. Apology during the Course of Trial

Even after the action has been taken to the court, apology can still be made and have the possibilities to be used for the purpose of settlement out of court. At this stage, there is also possibility for the wrongdoer to apologise and admit to the liability which may lead to the faster disposal of the case. Although apology at this stage can be used for very strategic purposes, it has been effective in promoting consent judgement, (a judgement by the judge which is based on the agreement of the parties) or promoting parties to enter into settlement agreement. The wronged party would be induced to accept the lesser amount of compensation coupled with apology due to the reason that they will speed up the fruit of the litigation. According to Shuman, apology at this stage can become a "commodity" that may be bargained for by the parties. Although the nature of apology in this setting would be in *quid pro quo* basis, therefore, it has been seen to have lesser degree of sincerity than the spontaneous apologies [1]. During this process, the wrongdoer will only apologise when there exist is a real prospect of negotiations. Due to the importance

of promoting negotiations, the law protects apologies by providing shield by virtue of the “without prejudice communication”. During this negotiation process, the parties involved can yield the benefits of apology whereby it will speed up the time for resolution as well as it have the possibility to reduce the expected liability of the wrongdoer in the action should the apology be accepted by the wronged party [30]. Since spontaneous apology take place right after the wrong has been committed, such apology might prevent the wrongdoing from becoming more severe and should the apology offered at the earliest time as possible, this might initiate the negotiations process between the parties [31]. Although apology has been primarily used to establish liability, there are also some apologies which are protected by the law during the trial itself which is apology given in the course of negotiation for settlement are protected under the “without prejudice communication”. This can be seen in the case of *Dusun Desaru Sdn Bhd & Anor v Wang Ah Yu & Ors* [32], Abdul Malik Ishak J has explained on the application of the rule of “without prejudice communication” whereby, before the principle to be activated, there must be two common features to be present before this privilege communication can be activated which are (1) the parties must be in dispute and due to that dispute, the parties are negotiating between each other, and (2) the communication between them must contain suggested terms that would finally lead to the settlement of the dispute [33]. From this case, it can be suggested that apology can be protected under this principle if they are given during negotiation after the dispute has arisen, but this principle would not protect spontaneous apology which has been given spontaneously or right after the injury was committed.

4. The Legal Ramifications of Apology in the Civil Dispute Resolution Process

Although apologies offer much benefits in defusing the desire for patients’ to litigate but it also has the effect of being a ‘double-edge’ sword and be seen as self-incriminating on the party who apologises [34]. However, apology is not a foreign concept in the legal system whereby it has become established principles in several areas of law in being used as an evidence to establish guilt, mitigate or absolve the liability of the parties.

4.1. Apology as an Admission of Guilt

From the perspective of the law of evidence, apology has long been used to prove liability in the case of negligence [34]. Apology made by the one who caused the injury can be considered as statements made out court and the court may treat them to be inadmissible to establish liability as they can be a form of hearsay evidence. However, apology may be admissible as a statement which falls outside the hearsay rule which is known as “admission by party-opponent”. In Malaysia, this is provided in section 18 of the Evidence Act 1950 whereby it is provided that;

18. Admission by party to proceeding, his agent or person interested

(1) Statements made by a party to the proceeding or by an agent to any such party whom the court regards under the circumstances of the case as expressly or impliedly authorized by him to make them are admissions.

Therefore, the fear of apology to be used against the one who offered them is real especially when such apology does not fall under the “without prejudice communication” privilege that is to be given to the one who offered apology for the purpose of settlement. Despite the fact apology can be used against the person who offered them as an admission of guilt, nevertheless, it can never be the sole evidence for the court to find that liability on the person who gave them [34]. This can be illustrated in the case of *Gurmit Kaur A/P Jaswant Singh v Tung Shin Hospital &*

Anor [35], whereby a woman sought treatment from the defendant which is a medical practitioner to remove a fibroid in her uterus. However, it was found out later that a hysterectomy procedure was conducted on her which caused her unable to have any more children. The medical practitioner was found liable and the apology given by him was considered as a proof for the negligence committed. The judge in her judgement stated *"My view, when the Second Defendant had apologized to the Plaintiff, proves that the Second Defendant had admitted to a mistake he had done"* [35]. This can be seen as a clear illustration on how an apology can be viewed as an admission of guilt.

4.2. Apology as a Defence and Mitigating Factor

In the tort of defamation, retraction, withdrawal, correction of statements, and apology can be offered as an evidence by the defamer to mitigate the damages awarded by the court. Apology is considered for this matter as it can be an evidence to weaken the inference of malice or bad faith on the part of defamer [36]. Apology as a mitigating factor has been long recognised in this area of law [37]. If the defamer provides apology as soon as he possibly can, it may have the effect of defusing the spur litigation by dissuading plaintiffs from initiating legal process. At this juncture, the apology given can be scrutinized by the court for the consideration for mitigation of damages [38]. It is important for the court to evaluate and consider apology offered by the defamer in defamation cases as the nature of defamation which aims to protect reputational interest of a person will reduce the mental and emotional distress on the plaintiff as well as having restorative effect that the money cannot sufficiently compensate [1]. The damages awarded in a defamation case will depends on the severity of the defamatory statement and how it affect the plaintiff. In assessing the severity of the defamatory statement, during the fact finding, the court may consider the apology to mitigate the damages to be awarded as defamation law does not only protect economic loses but non-economic loses as well, for example emotional distress suffered by the plaintiff. Therefore, by allowing the defendant to apologise, it will have the effect in reducing the mental or emotional distress which will ultimately restore the plaintiff in a way that money will not be able to do [39].

In Malaysia, before the court decides on the amount of damages to be awarded to the plaintiff in a defamation suit, the court will take into consideration the mitigating factors which may result in lowering the award of damages. If the defamer is able to give evidence to suggest that he has either made, or offered to make an apology to the plaintiff, the court will consider this as a mitigating factor as long as the apology was offered as soon as the defamer has opportunity to do so [40]. The position of apology in the law of defamation has also been codified in Section 10 of the Defamation Act 1957 where it reads as follows;

10. (1) In any action for defamation the defendant may (after notice in writing of his intention to do so duly given to the plaintiff at the time of filing his written statement of his case) give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of such action or as soon afterwards as he had an opportunity of doing so in case the action shall have been commenced before there was an opportunity of making or offering such apology.

Gopal Sri Ram JCA, as he then was, in the case of *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun & Other Appeals* [41] mentioned about apology in a defamation case by saying that although apology does not exonerating a defendant, it has the effect of reducing the quantum of damages, and in some cases it can substantially reduce the amount of damages. He later added

that, although apology have the mitigating effect towards the amount of damages, the court also may award aggravated and exemplary damages if such apology aggravates the libel to reflects the court's disapproval towards the defamer's conduct. However, for such apology to be considered, it must be a full and frank apology and there must not be any conditions or qualifications attached to it [42]. Apology also play roles in actions for libel contained in newspaper as provided in the subsection 2 of section 10 of the Defamation Act 1957.

(2) In an action for libel contained in any newspaper any defendant who has paid money into court under the provisions of any written law relating to civil procedure may state in mitigation of damages, in his written statement of his case, that such libel was inserted in such newspaper without actual malice and without gross negligence and that, before the commencement of the action or at the earliest opportunity afterwards, he inserted or offered to insert in such newspaper a full apology for the said libel, or, if the newspaper in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper to be selected by the plaintiff in such action.

For any defamation suits taken against any newspaper or broadcast, the defamer may use apology to mitigate the damages if the defamatory statements were inserted without any actual malice and it must not be caused by any gross negligence on the part of the newspaper or broadcast in the making statements. However, for the mitigation to be effective, the law also requires that the defamer to make a full apology in the in the newspaper or broadcast before the commencement of the action or as soon as the defamer has opportunity to do so [40].

Apology also plays a significant role in the law governing the 'contempt of court'. Contempt of court refers to any conduct that tends to bring the authority and the administration of the law into disrespect or disregard or to interfere with or prejudice parties, litigants, their witnesses during the litigation. The principal aim of this branch of law is not to protect the dignity of the judges but to protect the administration of justice and the fundamental supremacy of the law [43]. In an action of contempt of court an apology by the contemnor may "purge" a contempt of court charge or further suspend or mitigate the sentence for the charge [37]. The superior courts in Malaysia are given the power to punish contempt of court by virtue of Article 126 of the Federal Constitution.

126. Power to punish for contempt The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself.

For the apology to be effective in a contempt of court case, the apology offered by the contemnor must be sincere and unconditional [44]. It must also be made clearly and done as soon as possible as a delayed apology can be considered by the court as an after-thought and intended merely to avoid punishment [45].

5. The Economic Ramifications of Apology in the Civil Dispute Resolution Process

The tort system requires the wrongdoer to compensate its victims for the pecuniary and the non-pecuniary losses he or she has suffered. The principle of *restitutio in integrum* requires the victim to be placed in the pre-accident position so far as money can do so. In some of the jurisdictions, apology laws has been enacted whereby apology has been given full protection from being admissible in the court whereby the law makes them inadmissible and this will create a conducive environment to promote apology. There are some economic considerations that

must be highlighted with regards to the application of apology law in the civil dispute resolution process.

5.1. Apology may reduce the Number of Litigation

Amongst the economic implications of having apology laws is that it will decrease the number of cases filed as well as lowering settlement amounts in civil cases [46]. Enacting apology laws will encourage faster and more cost-effective resolution of medical disputes as it can be an effective means of preventing litigation [47]. This is due to the fact that medical practitioners are given the legal platform to make an apology which have the possibility to disarm the anger on the part of the patient. In Australia, it is believed that the introduction of apology laws has been able to reduce the number of litigated cases as the practice of apology will 'reduce the propensity of victims of accidents to sue'[48] Although there is no direct empirical data to show the reduction of medical disputes due to apology law, it has been found that there is significant reduction in number of new claims for compensation, increased number of closed claims and a reduction as to the proportions of large damage awards after the notable tort law reform in Australia which had allowed the defendants to apologise without the fear of that it will be considered an admission of guilt [49]. In the United States of America, effective disclosure has been found successful in reducing cost of a medical dispute process which had improved patient safety, and restore trust between the medical practitioner and the patient [50]. Although there are differences in the workings and approach on apology laws taken by several states, the culture of transparency through disclosure and apology has been manifested in the enactment of the apology laws in more than 35 states. In a research conducted by the Michigan Health Services reported that since the introduction of their apology and disclosure program, 'per case payments' had decreased by 47% and the settlement time had reduced from 20 months to 6 months [51]. Although the research was only conducted at hospital level, it can be seen that apology, disclosure and transparency do not only have ethical benefits but also financial & economic benefits as well.

5.2. The Effect of Apology towards the Amount of Compensation

In the state of Kentucky, after seventeen years of introducing a policy of full disclosure and apology, only three cases have gone to trial, with an average settlement of \$16,000 [15]. Although lowering settlement amount is something good to the medical practitioner and the relevant institutions, the concern would be whether or not the patient will be sufficiently compensated for the injury suffered by the medical practitioner [47]. When medical practitioners are given the legal shield from liability for apologizing after a medical mishap, the patient will no longer perceive the medical professional as a personal threat [52]. Thus, it will reduce the tension and open the door to forgiveness and will create emotional vulnerability on the part of the patient which might encouraged them to accept settlements that are inappropriately lower than what they actually deserved [8]. Therefore, when apology is being exploited, it may contribute to the victims being under-compensated for the harm done towards them. The victim will no longer be in a position as though the accident did not occur and this will defeat the purpose of damages which is to place the patient in such position. This would be one of the economic implications as particularly, in medical negligence cases, where many of the victims usually wanted the medical practitioner to be responsible for the injury and to avoid causing the same harm to others [15].

5.3. Reducing the Cost of Civil Litigation

Further, the enactment of apology legislation has significantly reduced legal cost. Lawyers' fees had also dropped from three million dollars to one million dollars, and malpractice suits and notices of intent to sue have dropped from 262 in 2001 to approximately 130 per year [53]. Thus,

by allowing medical practitioners to apologise without fear of any negative legal consequence, will eventually encourage natural, open and direct dialogue between the parties and reduce the tension, antagonism and anger which will, ultimately, disarm the desire on the part of the patient to retaliate [3].

III. Closing

It can be seen that the making of apologies has legal and economic ramifications in the civil dispute resolution process. With the use of strategic apology in the legal system, it will bring positive outcome towards the parties in resolving the dispute between them. Although there are already some protection given by the law to parties who offered apology, this protection is still insufficient as it is always believed that apology will bring adverse consequence to the one who apologized and this has been proved by several jurisdiction such as the United States of America, Australia and Canada which had triggered them to introduce and implement apology legislations to give certainty to the implications of apologies made by relevant parties. Undeniably, the use of apologies during the dispute resolution process will eventually reduce the number of potential lawsuits, promoting prospects of settlement and inculcate a sustainable culture of honesty and openness that is fundamental in gaining public trust within any legal system.

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