Reforming the Law of Apologies in Civil Proceedings in England and Wales

A response by the Association of Personal Injury Lawyers

May 2024

Introduction

APIL recognises the importance of apologies to injured people. Meaningful apologies can make a huge difference to those who are injured or bereaved, by providing an acknowledgement that harm has occurred and that someone is sorry for what has happened. In cases where a catastrophic injury has been suffered, or in cases of fatal injury, where there is no possibility of obtaining the injured party's instruction, families can find some respite in knowing that the defendant is sorry for what has happened to their loved one. Those who represent survivors of historic abuse, and those suffering asbestos related disease due to employer negligence report that apologies would be hugely welcomed by most of their clients.

Members across a range of specialisms also report that apologies are currently rare, and more should be done to encourage apologies to take place. We do not believe, however, that the correct approach would be to mimic the law in Scotland. Feedback from members in that jurisdiction indicates that the Apologies (Scotland) Act 2016 (the Apologies Act) has not led to defenders apologising more frequently, nor has it led to a reduction in litigation. Instead, provision in the act for apologies not to be used as part of civil litigation may actually cause more distress to pursuers than if no apology had been made at all. Legislating to provide that apologies have no resonance in any other forum simply robs those apologies of their meaning.

We suggest that the Compensation Act 2006 (the Compensation Act) strikes the correct balance between encouraging apologies and allowing relevant evidence to be presented in civil litigation, and that there should be clarification that the provisions of the Act apply to cases involving vicarious liability. Aside from this clarification, there should be no change to the primary legislation. The focus should instead be on amendment to the pre-action protocols and further, broadly applicable guidance similar to that contained in the NHSR Saying Sorry literature. We also suggest that a broadening out of the duty of candour should be considered.

Q1 Do you consider that there would be merit in the Government introducing primary legislation to reform the law on apologies in civil proceedings? Please provide reasons for your answer.

We do not believe that primary legislation should be introduced to reform the law on apologies in civil proceedings. While we agree that more could be done to encourage apologies, amendment to the Compensation Act would not achieve this aim. At best, there would be no impact following change to primary legislation. The consultation document itself acknowledges that the impact of the Apologies Act is low. APIL members in Scotland report that the Apologies Act has had little to no impact on litigation in that jurisdiction. The aim of the Act was to reduce litigation – the belief being that people engaged in litigation in order to get an apology, an explanation of what went wrong, and for someone to be held accountable. Anecdotally, there has been no fall in the number of claims pursued since the Act was introduced.

At worst, it could be argued that the Apologies Act may have a detrimental effect on pursuers. The Apologies Act allows for defenders to provide fulsome and detailed apologies that are not then admissible as evidence of liability in civil proceedings. It is very difficult to explain to a pursuer that when they have received a detailed apology, the decision maker in any subsequent civil case should not be permitted to consider that apology as part of the evidence. Pursuers can find it extremely distressing that they have received information about what happened, why, and who was responsible, to then find that the information cannot be used in a civil trial. Arguably this is worse than not receiving an apology at all. This situation renders the apology meaningless, effectively, and may, if anything, lead to increased litigation as claimants feel that there has not been any real accountability.

Q2 Do you agree that this legislation should broadly reflect the approach taken in the Scotland Apologies Act 2016? Please provide reasons for your answer.

We do not agree – please see question 1 above.

Q3 What do you believe the impacts and potential consequences would be on claimants or defendants should a Scottish style Apologies Act be introduced in England and Wales?

As above, we do not believe that a Scottish style Apologies Act should be introduced in England and Wales.

Q4 Should the legislation provide a definition of an apology? Please provide reasons for your answer.

We do not believe there should be a change to the Compensation Act, save for clarification that it applies in cases involving vicarious liability. Anecdotally, following the implementation of the Apologies Act, there is no evidence to suggest that defining an apology has made it more likely that apologies are given.

Apologies must also be meaningful if they are to be worthwhile, and this can mean different things to different people in different scenarios. Apologies are also personal in nature – the method of delivery, timing, and even whether the injured person would like to receive an apology at all are all dependent on the injured individual and/or their family. There must be flexibility in apologies, and this cannot be achieved if there is a statutory definition.

We suggest that instead of a statutory definition, it would be more beneficial to broaden out the approach applied in NHS claims, including guidance which gives defendants the confidence to provide a sincere apology, amendment to the other pre-action protocols in line with the protocol for clinical disputes to encourage apologies, and a broadening out of the duty of candour. Please see our answer to question 8.

Q5 Should the legislation apply to all types of civil proceeding, apart from defamation and public inquiries? If not, what other types of civil proceeding should be excluded? Please provide reasons for your answer.

In relation to our proposals for improved guidance, amended pre-action protocols and a broadening of the duty of candour, we would suggest that this should apply to all types of civil proceeding.

Q6 Would there be any merit in the legislation making specific reference to vicarious liability (on the basis it would clarify the position on apologies in historic child sexual abuse claims)

We believe that there would be merit in making specific reference to vicarious liability within the Compensation Act. Anecdotally, for a large number of survivors of abuse, an apology would be beneficial as an acknowledgement of the harm that has been suffered, and to reassure that there has been accountability for the wrongdoing. We believe that clarifying the situation under the Compensation Act as recommended by IICSA, accompanied by guidance as set out below in Q8, would help apologies in these situations to become more forthcoming.

Q7 Should the legislation be clear that it is not retrospective?

We do not understand how the legislation could be applicable to historical abuse claims if it were not retrospective. An amendment to the Compensation Act to clarify the situation in relation to vicarious liability must be retrospective.

Q8 Are there any non-legislative steps, e.g. Pre-Action Protocols, that the Government should take to improve awareness of the law in this area? If so, what should these be and should they be instead of – or in addition to – primary legislation?

As set out above, we do not think further primary legislation will aid the giving of apologies. As pointed out in the consultation paper, apologies tend to occur more readily in clinical negligence cases than in other specialisms. We believe that the reason for this is three-fold – the presence of the NHS Saying Sorry guidance; the pre-action protocol for clinical disputes (which includes a specific objective of encouraging the defendant to make an early apology to the claimant if appropriate); and, to varying degrees, the duty of candour.

The NHSR guidance is based on the Compensation Act provisions, and reiterates that saying sorry, of itself, is not an admission of liability. It includes guidance on how to say sorry in a meaningful way, and provides reassurance that the NHSR have never and will never refuse cover on a claim because an apology has been given. We believe that instead of amending primary legislation, it would be more beneficial if similar guidance were produced by other Government departments that self-insure, the Association of British Insurers (ABI) and the Local Government Association (LGA). We see no reason why this guidance can be produced and applied in an NHS setting, but not elsewhere. We note that following recommendations from IICSA, both the ABI and LGA have produced codes of practice on responding to civil claims for historic child abuse. While these codes state that insurers should “never prevent or discourage policy holders from apologising to a claimant”, they stop short of setting out in plain language, as the NHSR guidance does, that cover will never be refused if an apology is given. We believe this is key - as IICSA highlighted in its final report, one of the reasons institutions gave for not being forthcoming with apologies was that they risked invalidating their insurance by apologising. We believe that clear guidance from Government departments, the ABI and LGA, which is applicable to all civil claims, setting out that an apology will not lead to a refusal to indemnify, would have far greater impact on a defendant’s willingness to apologise than any amendment to the Compensation Act.

As set out above, there is also a right way to apologise, and a poor apology can do more harm than no apology at all. There should be consideration of the timing of an apology, the method of delivery of an apology, and indeed whether an individual would welcome even welcome an apology at all. Primary legislation cannot assist with these considerations, but robust guidance based on the existing law within the Compensation Act should provide more assistance in ensuring that apologies received are meaningful and of benefit to claimants.

We would also welcome amendment to all pre-action protocols to mirror the pre-action protocol for clinical disputes, which includes a specific objective of encouraging the defendant to make an early apology to the claimant if appropriate, and a flag that discussion

and negotiation may include an apology. Integrating an encouragement to make an apology within the pre-action protocols should help to normalise “saying sorry”, and reassure defendants that an apology, of itself, does not amount to an admission of liability.

We are currently responding to the Department for Health and Social Care review of the statutory duty of candour. We believe that the duty of candour is a step in the right direction and that the framework is sound in encouraging transparency and openness. Unfortunately, there are clear issues with consistency and enforcement of the duty, which means that at present, it is not as effective as it should be. We would suggest that once the review is concluded, and steps are taken to improve consistency with the duty of candour, there should be consideration of broadening out the duty to apply to other public bodies.

Q9 Do you have any evidence or data to support how widely the existing legislative provisions in the Compensation Act are used?

We have anecdotal evidence from a range of personal injury specialisms to suggest that apologies are not forthcoming. A number of members reported that they have never received an apology for their client.

Q10 What is your assessment of the likely financial implications (if any) of the proposals to you or your organisation?

Not applicable.

Q11 What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform? Please give reasons.

We note that a formal impact assessment has not been prepared due to the limited evidence concerning the impacts of the proposals.

We set out throughout the response above that consideration must be given to the method of delivery and timing of apologies, and that this is something that could be aided more readily through guidance as opposed to primary legislation. With any guidance, there must be consideration of any special measures or concessions that would need to be made to support particularly vulnerable parties, or those with protected characteristics. For example, apologies should be given in the injured party’s native language; and where the injured person is a child or protected party, care should be taken to explain matters and provide an apology in simple terms. Where a meeting has taken place to provide an apology, it may also be beneficial in the circumstances to follow up with a written record of the apology provided.

Any queries in relation to this response should, in the first instance, be sent to:

Alice Taylor

Legal Policy Manager

Alice.taylor@apil.org.uk