

APOLOGIES (SCOTLAND) BILL



A parliamentary briefing from the Association of Personal Injury Lawyers (APIL)

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About APIL

The Association of Personal Injury Lawyers (APIL) was formed by pursuers' lawyers to represent the interests of personal injury victims. APIL is a not-for-profit organisation with 24 years' history of working to help injured people gain the access to justice they need. APIL currently has around 4,000 members, 163 of whom are in Scotland. Membership comprises solicitors, advocates, legal executives and academics whose interest in personal injury work is predominantly on behalf of pursuers.

Introduction

No one can be against the idea that persons and parties should be free to make expressions of sorrow or regret about matters which have occurred, and for which they bear some responsibility. If a meaningful apology does illustrate a degree of liability, however, it would be illogical and unjust if no consequences were to be attached to that apology.

The policy memorandum which accompanies the Bill states that the Bill should reduce the "blame culture" which allegedly exists in Scotland, but the Bill should not be used as a solution to a problem which does not exist. It is important, therefore, to reflect on what Sheriff Principal Taylor said in his recent Review of Expenses and Funding of Civil Litigation in Scotland. In his report, Sheriff Principal Taylor said figures from data published by the Scottish Government confirmed there has been a declining level of litigation in Scotland's civil courts¹, and so there are no grounds for wholesale reform as suggested. Good intentions should not produce bad law.

Definition of apology

Clause three of the Bill defines an apology as containing 'an express or implied admission of fault'. The current law is based on the case of *Gordon v Stewart* (1842), in which the issue was whether the defender had punched the pursuer. After the incident the defender was heard admitting that such a punch took place. Under rules at that time against hearsay evidence in civil proceedings, the admission should have been excluded from evidence, but it was allowed. Since then, Scots law has attached great importance to admissions after an event on the very simple but powerful grounds that those admissions are very likely to be true. The same logic has been applied to the criminal law system, whereby confessions by an accused person are treated as exceptions to the hearsay rule.

¹ The Taylor Review, Review of Expenses and Funding of Civil Litigation in Scotland, page iii.

Any justice system which attaches such importance to the establishment of the truth of factual matters should think very carefully before abandoning such a highly potent mechanism for truth seeking. We are aware of the comments made the Bill's sponsor, Margaret Mitchell MSP, during her evidence to the Justice Committee that she would be willing to redraft clause three of the Bill, and we hope that more details of this will be announced during the debate.

The Apologies (Scotland) Bill goes much further than the law in some other jurisdictions. The Compensation Act 2006 includes a section on apologies in England and Wales but which does not prevent apology being used in evidence. Section two of the Act reads:

'Apologies, offers of treatment or other redress

An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty.'

Section two of that Act meets the principle of encouraging appropriate expressions of regret, whilst retaining the capability to use that expression where there is a clear acceptance of legal responsibility. If the Scottish Parliament is persuaded that there needs to be an encouragement to provide an apology, then the terms of that legislation will suffice.

Unintended consequences

The Bill, as drafted, would have unintended consequences affecting the pre-action protocol for personal injury cases. Under the current voluntary protocol, any admission of liability is binding, but the Bill would override this provision if an apology inadmissible as evidence.

Compulsory pre-action protocols were recommended by the Scottish Civil Courts Review.

Following a consultation in November 2014, the Personal Injury Committee of the Scottish Civil Justice Council has agreed that the personal injury pre-action protocol should become compulsory, and should apply to all local sheriff courts as well as the specialist personal injury court. If the Bill were to override the provisions on admission of liability in the protocol, this would provide a loophole to defenders which would seriously undermine the effectiveness of a supposedly compulsory process.

Apologies in evidence

We recognise that receiving an apology is often an important part of obtaining justice, and there is nothing to prevent an apology being made when something has gone wrong. A court will not currently make a ruling on a case based solely on an apology, and instead will review carefully all evidence which is presented before the court.

There is nothing to stop NHS Scotland apologising if it believes there has been a mistake, as it is the long established *Hunter v Hanley* test which a court will take into consideration – an apology alone will not suffice. The case of *Hunter v Hanley* established a test to show that a doctor must have adopted the usual and normal practice expected. If, however, the doctor has failed to meet the minimum standard, and something has gone wrong resulting in injury or death, all evidence, including an apology, will be made available to the court. While an apology is often an important piece of evidence to show that something has gone wrong, the courts will decide if the apology is the most relevant piece of information.

There is evidence to show that a court will dismiss the suggestion that an apology is an admission of liability, and the case of *George King v Quarriers* is an example of this. In this case, the pursuer, who as a child was a resident in a home run by the defenders, had sought damages in respect of physical injuries sustained as a result of alleged assaults in the home. As part of his case, the pursuer referred the court to a petition lodged with the Scottish Parliament in 2002, calling on the Parliament to urge the (then) Scottish Executive to conduct an inquiry into past institutional child abuse.

In response to an invitation from the Public Petitions Committee to comment on the petition, “the defenders stated that if any individual suffered abuse in their home then they apologised”². The case was heard by Lady Smith, who when reviewing the evidence ruled that the apology does not “amount to an admission of liability”, and that it does not “amount to an admission that anything happened to this pursuer whilst he was resident in the home”.

An apology was also presented as evidence in the case of *Lockhart Bryson v BT Rolatruc Limited*³. In this case, the pursuer suffered an injury at work in which his left foot was run over by one of the rear wheels of a reach truck, causing soft tissue injuries in the foot.

² <https://www.scotcourts.gov.uk/opinions/2006CSOH158.html>

³ <https://www.scotcourts.gov.uk/opinions/OSB0210.html>

In evidence, it was reported that the driver of the truck had “apologised to him for running over his foot; however, he was unable to remember his exact words”. There were also two other witnesses who heard the driver apologise, with one of the witnesses thinking “that the apology was in the nature of an expression of concern”.

Presiding over the case, Lord Osborne said that in the issue of liability “the crucial factual question which has to be resolved is what happened immediately before the rear of the reach truck ran over the left foot of the pursuer”, and Lord Osborne would have to consider the evidence of what happened before the event, and not the subsequent apology. In his conclusion, Lord Osborne made no reference to the apology which had been made. While the apology was submitted in evidence, it appeared to play no part in the decision reached by Lord Osborne to find in favour of the pursuer.

The effect of the Bill

The Apologies (Scotland) Bill risks turning the Scottish civil justice system into a second rate system, compared with the criminal justice system. In the criminal justice system where a defender is facing an assault charge and apologises for that offence, society would never tolerate that apology not being used as evidence to the court of wrongdoing by the defender. It would be absurd and unjust if the same apology could not then be used as evidence if a civil case were also to be brought against the same defender.