

The Application of Therapeutic Jurisprudence Theory for a Legislative Reform of Admission by Apologetic Discourse in Malaysia

Nurul Shuhada Suhaimi^{1*}, Haswira Nor Mohamad Hashim² & Noraiza Abdul Rahman^{3*}

^{1, 2, 3} Faculty of Law, Universiti Teknologi MARA

Corresponding Author: nurulshuhadasuhaimi@gmail.com

Abstract

While many other common law and Commonwealth jurisdictions have developed the legislative reform of admission by apologetic discourse, Malaysia is lagging. Under the existing legal regime in Malaysia, admission by apologetic discourse shall become an admission to negligence and misconduct in Malaysian courts. As a result, tortfeasors and wrongdoers including professional practitioners are known to avoid offering an apology, that further strained their relationship with clients. Hence, this paper aims to prove that the legislative reform of the law pertaining to admission by apologetic discourse is supported by the theory of therapeutic jurisprudence. The paper employs a thematic analysis of the therapeutic jurisprudence theory to explore the relationship between the therapeutic jurisprudence theory and legislative reform of admission by apologetic discourse in Malaysia. Based on the analysis, this paper finds that the therapeutic jurisprudence theory is able to absolve the adverse effects of professional negligence and misconduct. This paper concludes that the therapeutic jurisprudence theory serves as a supporting theory for the legislative reform of admission by apologetic discourse in Malaysia.

Keywords: *Therapeutic Jurisprudence; Apologetic Discourse; Admission; Legislative Reform; Professional Negligence; Misconduct*

INTRODUCTION

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Since the mid-21st century, there has been a worldwide movement towards legislative reform of the law pertaining to admission by apologetic discourse amongst Commonwealth and Common Law countries. The legislative reform provides a legal solution to the long-standing problem of adverse legal effects of admission by apologetic discourse made by professionals and practitioners who had breached their duty of care, code of ethics or conducts. A similar problem is reported in Malaysia due to similarity in evidentiary rules, insurance contract clauses and statutory limitation law between Commonwealth and Common Law countries. Despite the growing trend of such reform, Malaysia is lagging. Under the existing legal regime, admission by apologetic discourse shall become an admission to negligence and misconduct in Malaysian courts. As a result, tortfeasors and wrongdoers including the professional practitioners are known to avoid from offering an apology, that further strained their relationship with clients.

In this regard, apologetic discourse has been seen as a vital component of open disclosure practice among professionals in various sectors and industries. Founded on the duty of candour principle, it is also regarded as ethical social and professional conduct that has become a norm in many societies. Apologetic discourse serves as a remedial behaviour that reduces the negative consequences of the wrongful act and simultaneously restores the wrongdoer's damaged reputation (Kassim et al, 2017). During apologetic discourse, a person will recognise that a rule has been broken, reaffirming the value of the rule, and at the same time controlling as well as regulating social conduct by acknowledging interpersonal obligations between the parties (Macleod, 2008). It includes admissions of blameworthiness and regret for any undesirable event which includes transgression, harmful act and embarrassing incident (Darby & Schlenker, 1982).

The therapeutic jurisprudence theory strongly supports the protection of admission by apologetic discourse. The vital focus of therapeutic jurisprudence is in humanising the law and concerning itself with the human, emotional, psychological side of law and the legal process. Rather than defining law as a set of formal principles, therapeutic jurisprudence regards law as a social force that produces behaviours and consequences. It aims to achieve positive therapeutic consequences and eliminate or minimise antitherapeutic consequences for all parties involved (Wexler, 2000). Therapeutic jurisprudence serves as a lens or perspective through which other alternative forms of law practice may be viewed (Wexler, 2000). It is pertinent to note that the study of therapeutic jurisprudence includes apologetic discourse (Johnsen, 2016).

LITERATURE REVIEW

Therapeutic Jurisprudence

Therapeutic jurisprudence, first founded by law professors David B. Wexler and Bruce Winick in early 1987 is a multidisciplinary school of legal theory and practice (Wexler, 2014). It examines the therapeutic and anti-therapeutic properties of law, policy, and legal institutions (Backhouse, 2016). Central to the entire discipline of therapeutic jurisprudence is the role of the law as a therapeutic agent to promote positive behavioural change (Yamada, 2021).

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Admission by Apologetic Discourse

Since the past decade, literature acknowledges apologies as part of open disclosure framework (Parker, 2012), giving rise to the duty of open disclosure by a practitioner following negligence (Ritchie & Davies, 1995), and professional obligations to apologise (Finlay et al, 2013). In addition, literature positively identifies economics (Ho, 2006), psychological (Allan, 2007), and ethical implications of apologetic discourse in civil cases (Macleod, 2008). Led by the positive outlook of apologetic discourse, Smith published a trilogy of apologetic discourse that outlines the standards (Smith, 2005), meaning (Smith, 2008), and philosophical issues surrounding apologies (Smith, 2013).

Cross-cultural discourse on apologetic discourse evolves through the work of Lin (2105). Lin's work explores the Chinese notion of apology from a comparative legal perspective. Lin identifies three essential elements of apology comprising of acknowledgement of fault, admission of responsibility, and offer of reparation. Back in Malaysia, Kassim et al laud the role of apologies in the resolution of medical disputes, but lament the barriers faced by medical practitioners in subjecting themselves to acts of open disclosure after a mishap (Kassim & Salleh, 2017).

A more recent literature examines apologetic discourse from linguistic, socio-cognitive and theological understanding. From the linguistic and socio-cognitive standpoint, the word sorry indicates interruption, self-repair, and expressing regret, whereas I'm sorry was chiefly exploited to express regret and apology (Arizavi, S., & Choubasaz, 2018). On the other hand, from theology standpoint, apologetic discourse is a form of ethical reflection and ethical behaviour (Hübenthal, 2016). Robyn and Vines examine the place of apology in the legal system and further examine how the legal system responds to apology, the impact of an apology and its use in the criminal justice

system and on civil liability, how this differs across different legal systems and societies (Robyn & Vines, 2017).

While extant literature acclaims apologetic discourse as a legal solution to redress wrongdoing (Latif, 2001), Leung and Porter study finds that apology statements in open disclosure could amount to an admission of fault and liability, be used in court as evidence, and affect professional indemnity coverage (2019). To overcome the drawbacks, Leung and Porter call for statutory candour that encourages apologies, protects its maker and facilitates open disclosure for the benefit of patients, their carer, and healthcare professionals. The next section enumerates literature underpinning legislative reform of admission by apologetic discourse

Legislative Reform

Literature on legislative reform of admission by apologetic discourse started to intensify in the first decade of the 21st century. Literature on apology law denotes the legislative reform of admission by apologetic discourse that spreads throughout common law jurisdictions i.e. the US (Taft, 2013), Australia (Studdert & Richardson, 2010), Canada (Kleefeld, 2007), Hong Kong (Carroll, 2014), the UK (Vines, 2008), and Republic of Ireland (Corbett, 2014). In Scotland, the legislative reform of admission by apologetic discourse represents a concerted Scottish effort to encourage a culture of apologising (Agapiou & Cheung, 2017). Literature investigates the effect of legislative reform on admission by apologetic discourse on the law of evidence (Runnels, 2009); (Truesdale, 2012), insurance contracts (Barr, 2009), and dispute resolution (Carroll et al, 2015). Literature compares models of apology laws that covers types of apology, limit of protection and scope of protection, types of claim, and types of injury that may have potential impact of the laws (Macleod, 2008).

Literature observes that despite their common aims, legislative reforms of admission by apologetic discourse vary between jurisdictions (Saitta & Jr, 2012). Literature classifies the legislative reform either as a patchwork reform through an amendment to the Evidence Act, or as a *sui generis* legal reform (through a stand-alone piece of legislation (Barr, 2009). Literature further classifies the legislative reform into two broad approaches i.e., a narrow approach and a broad approach, with the former is restricted to protection of admission of apologetic discourse in a specific field (Ginn & Boyle, 2016), specific types of proceedings (Carroll & Unger 2015), or specific act of negligence (McDonnell & Guenther 2008).

Literature lauded legislative reform of admission by apologetic discourse as the most widespread tort reform in common law countries (McMichael et al, 2019). In this light, literature acknowledges the legislative reform in Hong Kong incorporates new features (Vines & Carroll, 2018), is wide ranging and the most comprehensive apology protection to date. Despite widespread support for legislative reform of admission by apologetic discourse, Helmreich's study finds the drawbacks of apology laws i.e., they only protect expressions of benevolence and sympathy, and exclude full apologies (Helmreich, (2011). In his later work, Helmreich proposed means of protecting full, self-critical apologies from evidentiary use, modelled on the US Federal Rules of Evidence (Helmreich, 2012). Helmreich's finding is supported by Mastroianni et al, who underscore the need to overcome the shortcomings of apology laws by improving the statutory design, legal requirements and protections of the apology laws (Mastroianni et al, 2010).

Khouri (2014) whose work examines the overseas experiences of apology legislation, argues for the enactment of similar legislation in New Zealand. In the same work, provides a set of recommendations about the optimal form of apology legislation for New Zealand. Vandebussche (2018) points out that apology legislation has not been enacted in continental Europe and other non-common law countries. On this note, Vandebussche explains that the lack of reform in the non-common law system is due to differences in tort law and rules of evidence between common law systems and civil law systems.

Review of local literature finds that legislative reform of admission by apologetic discourse receives strong support from Kassim et al (2017). In their later work, Kassim et. al. reiterate their calls for legislative reform of admission by apologetic discourse in Malaysia. Nonetheless, their recommendations are made in the light of negligence acts by medical practitioners (Kassim et al, 2017). The most recent work published by Hashim et al in 2020, provides a set of recommendations to exclude medical apology from being governed by strict evidentiary regime under the Evidence Act 1950 (Hashim et al, 2020). Similar to Kassim et al, their recommendations are also focused on legislative reform in cases involving medical negligence. Hence, this paper contributes to the current body of knowledge by extending the legislative reform to cover a broader spectrum of admission by apologetic discourse arising from professional negligence and misconduct.

METHODOLOGY

This paper employs thematic analysis involving legal texts of therapeutic jurisprudence theory, admission by apologetic discourse, professional negligence and misconduct, and legislative reform. This paper analyses therapeutic jurisprudence theory based on five inclusion criteria; comprehensiveness (encompass a greater scope or range of explanation for various phenomena); precision and testability (clearly defined, tightly interrelated, and readily open to reliable and valid measurement through falsifiable hypotheses); empirical validity (its ability to correctly predict and control phenomena); heuristic value (its ability to generate unique thoughts and perspectives and directions in other fields); and applied value (the extent to which it offers effective solutions to the problems) (Cramer, 2013).

The presentation of findings is divided into several themes, which are, the definition, principle, application of both therapeutic jurisprudence theory and apologetic discourse. Also, based on the thematic analysis, this paper presents the application of therapeutic jurisprudence theory and apologetic discourse in dealing with the adverse effects of professional negligence and misconduct.

FINDINGS

The findings of this paper are depicted in the table and diagram below.

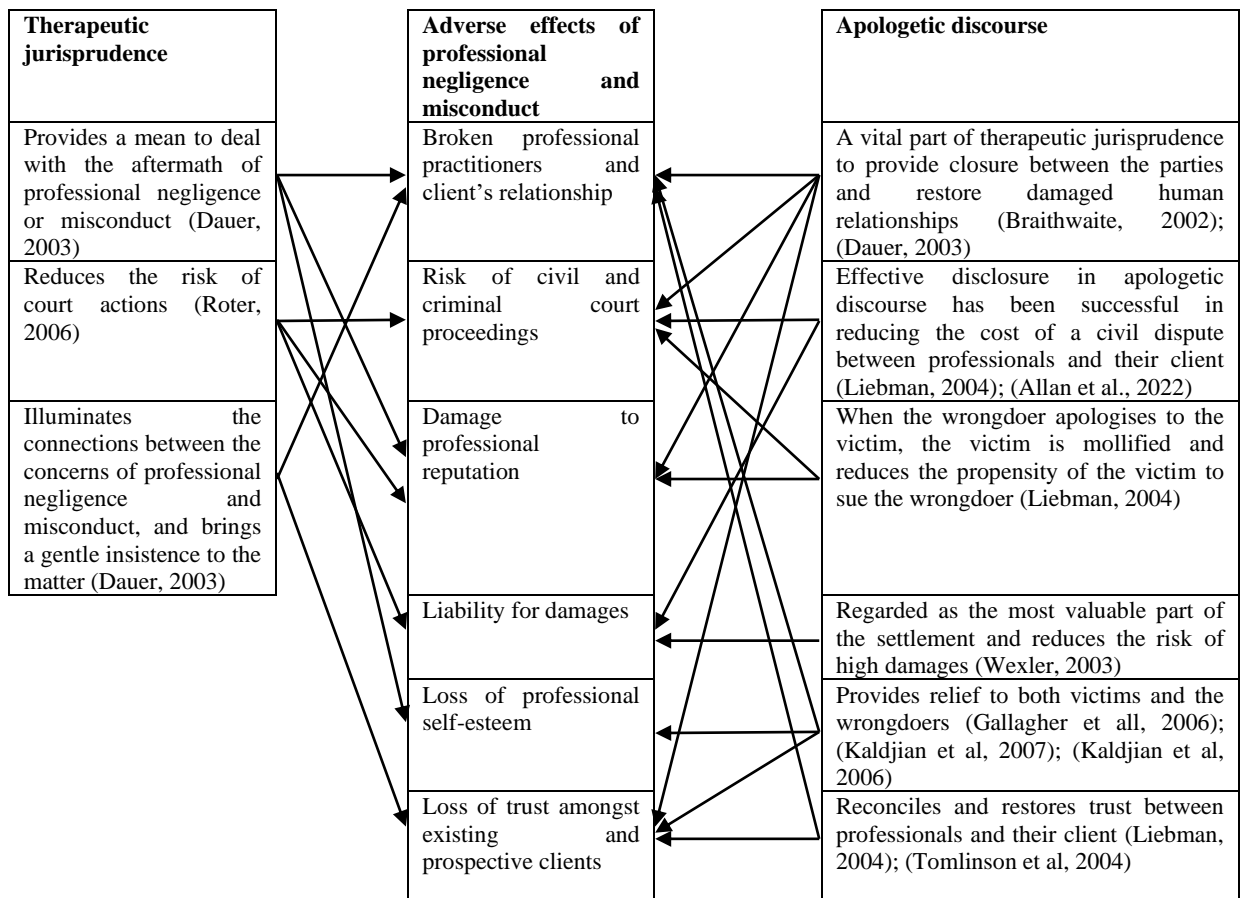
Table 1: *Definition, Principle and Application of Therapeutic Jurisprudence Theory and Apologetic Discourse*

Term	Definition	Principle/Application
Therapeutic jurisprudence	A theory that is humanising the law and concerning itself with the human, emotional, psychological side of law and the legal process (Wexler, 2000).	Regards law as a social force that produces behaviours and consequences (Wexler, 2014); (Backhouse, 2016); (Yamada, 2021). Aims to achieve positive therapeutic consequences and eliminate/minimise antitherapeutic consequences for all parties (Johnsen, 2016); (Wexler, 2000).
Apologetic discourse	The whole act of apologising, admitting wrongs and expressing regrets following the occurrence of, in the context of this thesis, professional negligence and	A vital component of open disclosure practice among professionals in various sectors and industries (Macleod, 2008).

misconduct (Parker, 2012); (Finlay et al, 2013); (Ho, 2006); (Allan, 2007); (Macleod, 2008); (Smith, 2008); (Smith, 2013); (Lin, 2015); (Kassim et al, 2017); (Arizavi & Choubsaz, 2018).

A recognition that a rule has been broken, reaffirmation of the value of the rule, controlling and regulating social conduct by acknowledging interpersonal obligations between the parties (Kassim et al., 2017)

Diagram 1: The Application of Therapeutic Jurisprudence Theory to Professional Negligence and Misconduct



DISCUSSION

In professional negligence and misconduct, there are adverse effects of the event that may worsened the scenario. Based on the thematic analysis, this paper finds that there are various adverse effects of professional negligence and misconduct. Amongst others, it includes broken professional practitioners and client's relationships (Eaves-Leanos, 2012), risk of civil and criminal court proceedings (Ma et al, 2019); (Tavuchis, 1991); (McCullough et al, 1998); (Shuman, 2000), damage to professional reputation (Johnsen, 2016); liability for damages (Vines, 2007), loss of professional self-esteem (Ma et al, 2019) and loss of trust amongst existing and prospective clients (Vines, 2007). It is therefore crucial to navigate the way to absolve the adverse effects of professional negligence and misconduct. Thus, this paper analyses the therapeutic jurisprudence theory to prove that the theory supports the protection of admission by apologetic discourse for professional negligence and misconduct in Malaysia.

Firstly, professional negligence and misconduct breaks the relationship between the professional practitioners and the client (Eaves-Leanos, 2012). In this regard, therapeutic jurisprudence provides a mean to deal with the aftermath of professional negligence or misconduct (Dauer, 2003). Based on the principles of therapeutic jurisprudence, it serves as a vehicle to reach the settlement of the dispute between the professional practitioner and the client. Similarly, apologetic discourse acts as a vital part of therapeutic jurisprudence to provide closure between the parties and restore damaged human relationships (Braithwaite, 2002); (Dauer, 2003).

Secondly, there is an imminent risk of court proceedings in a professional negligence and misconduct (Ma et al, 2019); (Shuman, 2000); (Tavuchis, 1991); (McCullough et al, 1998). It is important to deal with the imminent risk of court proceedings to prevent further aggravating damages post professional negligence and misconduct. Based on the principles of therapeutic jurisprudence, it has the ability to reduce the risk of court actions (Roter, 2006). There is a significant positive correlation between therapeutic jurisprudence and apologetic discourse to absolve this risk whereby apologetic discourse is a vital part of therapeutic jurisprudence to provide closure between the parties and restore damaged human relationships (Braithwaite, 2002); (Dauer, 2003). Further, effective disclosure in apologetic discourse has been successful in reducing the cost of a civil dispute between professionals and their client (Liebman, 2004). This is naturally so because when the wrongdoer apologises to the victim, the victim is mollified and reduces the propensity of the victim to sue the wrongdoer (Liebman, 2004).

The third adverse effect of professional negligence and misconduct is the gravity of the damage it causes to professional reputation (Johnsen, 2016). A professional practitioner is likely to avoid the damage to his professional reputation, as in professional practice, the preservation of reputation is crucial (Freckelton, 2020); (Studwell, 2016); (Sage, 2004). In professional negligence and misconduct, therapeutic jurisprudence provides a mean to deal with the aftermath of professional negligence or misconduct (Dauer, 2003) and reduces the risk of court actions (Roter, 2006). Similarly, apologetic discourse, which is a vital part of therapeutic jurisprudence, provides closure between the parties and restore damaged human relationships (Braithwaite, 2002); (Dauer, 2003). Pursuant to the restoration of the relationship, the victim in a professional negligence and misconduct is mollified and this reduces the propensity of the victim to sue the wrongdoer (Liebman, 2004).

Fourthly, a professional negligence and misconduct suit increases the risk of liability for damages (Vines, 2007). The application of therapeutic jurisprudence to professional negligence and misconduct reduces the risk of court actions (Roter, 2006), effective disclosure, as part of apologetic discourse has been successful in reducing the cost of a civil dispute between professionals and their client (Liebman, 2004). The apologetic discourse is often regarded as the most valuable part of the settlement and reduces the risk of high damages (Allan et al., 2022); (Wexler, 2003).

The fifth adverse effect of professional negligence and misconduct in this paper is the loss of professional self-esteem (Ma et al, 2019). Therapeutic jurisprudence absolves this adverse effect by providing a mean to deal with the aftermath of professional negligence or misconduct (Dauer, 2003). The mean, which in this context is apologetic discourse, Provides relief to both victims and the wrongdoers (Kaldjian et al, 2007); (Gallagher et all, 2006); (Kaldjian et al, 2006).

Lastly, professional negligence and misconduct causes the professional to lose the trust of existing and prospective clients (Vines, 2007). The application of therapeutic jurisprudence to the professional negligence and misconduct illuminates the connections between the concerns of professional negligence and misconduct and brings a gentle insistence to the matter (Dauer, 2003). Meanwhile, apologetic disuses, as a vital part of therapeutic jurisprudence to provide closure between the parties and restore damaged human relationships (Braithwaite, 2002); (Dauer, 2003). Simultaneously, the apologetic discourse provides relief to both victims and the wrongdoers (Kaldjian et al, 2007); (Gallagher et all, 2006); (Kaldjian et al, 2006). This

relief further reconciles and restores trust between professionals and their clients (Liebman, 2004); (Tomlinson et al, 2004).

SUMMARY

This paper summarises that the therapeutic jurisprudence theory forms the basis of theoretical foundation for the protection of admission by apologetic discourse. The theory outlines the therapeutic effect of apologetic discourse where it may heal and restore the damaged relationship of the parties. It also lays down a holistic approach in resolving the dispute between the parties without sacrificing the rule of law and the principles of the legal system, such as predictability and stability. Similarly, the concept of apologetic discourse is parallel with the values of therapeutic jurisprudence. Having analysed the relationship between the therapeutic jurisprudence theory and legislative reform of admission by apologetic discourse in Malaysia, this paper asserts that the therapeutic jurisprudence theory is able to absolve the adverse effects of professional negligence and misconduct.

The application and assertion of therapeutic jurisprudence in Malaysia is not new. The Malaysian court in the case of *Cy v Cc* [2015] MLJU 930 has been seen to uphold the principle of therapeutic jurisprudence in determining the custody and maintenance of an autistic child and his three other siblings. The court delved into the needs of each child in deciding for interim joint custody and the amount of maintenance for the children. The court highlighted the necessity for the autistic child to be with her mother and remarked that it is not good for him to be separated from his mother as nothing can replace a mother's love. The approach taken by the court in deciding the case is parallel with the principle of therapeutic jurisprudence. In 2018, Mohd Arshad et al highlight the importance of the adoption of a therapeutic approach by the family courts in adjudicating family matters in Malaysia. Mohd Arshad et al assert that therapeutic jurisprudence has the potential to bring about a more effective and holistic approach to dissolve the backlog cases in family courts in Malaysia. Similar call has been made by Chen & Fun in 2021 in the neighbouring country, Singapore.

Although the assertions and application of therapeutic jurisprudence are made in the context of family court proceedings, it is recognised that the role of therapeutic jurisprudence is significant in providing a holistic approach to resolve disputes without sacrificing the rule of law. Consequently, the holistic approach of the theory is able to heal and restore the damaged relationship of the parties. Therefore, it is concluded that

the therapeutic jurisprudence theory serves as a supporting theory for the much-needed legislative reform of admission by apologetic discourse in Malaysia.

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