Oñati International Institute for the Sociology of Law
Instituto Internacional de Sociología Jurídica de Oñati
Oñati Socio-Legal Series
ISSN: 2079-5971

Oñati Socio-legal Series, v. 7, n. 3 (2017) – The Place of Apology in Law
ISSN: 2079-5971

The Doctor Has Apologised. Will I Now Get Compensation for my Injuries? Myth and Reality in Apologies and Liability

ANDREA M. ZWART-HINK*

Zwart-Hink, A.M., 2017. The Doctor Has Apologised. Will I Now Get Compensation For My Injuries? Myth and Reality in Apologies and Liability. *Oñati Socio-legal Series* [online], 7 (3), 497-510. Available from: https://ssrn.com/abstract=3029245

Abstract

Although in the Netherlands, like in many other jurisdictions, healthcare providers are expected to be open and honest to their patients and to apologise for any medical mistakes, in practice they are still not always completely open about mistakes that have been made. It is often assumed that healthcare providers' liability insurers do not allow them to apologise, and indeed that making certain statements, such as offering apologies, can constitute an admission of liability. This assumption is one of the reasons why literature has suggested that it is sensible, from a legal perspective, to exercise caution when offering apologies. This paper argues that this suggestion is both socially undesirable and not substantiated in law.

Key words

Apologies; admitting liability; professional liability; insurance cover

Resumen

Aunque se supone que en los Países Bajos, como en muchas otras jurisdicciones, los profesionales de la salud deben ser transparentes y honestos con sus pacientes, y disculparse por cualquier error médico, en la práctica todavía no son siempre completamente transparentes con sus errores. A menudo se asume que las aseguradoras de responsabilidad médica no les permiten disculparse, y que realmente realizar algunas afirmaciones, como pedir disculpas, puede constituir una admisión de responsabilidad. Esta asunción es una de las razones por las que la literatura ha sugerido que es sensato, desde una perspectiva legal, ser cauteloso al ofrecer disculpas. Este artículo defiende que esta sugerencia es indeseable desde el punto de vista social, y tampoco se sustenta en el derecho.

Palabras clave

Disculpas; admisión de responsabilidad; responsabilidad profesional; cobertura de seguro

The author would like to thank Professor A.J. Akkermans and dr K.A.P.C. Van Wees for their valuable comments on earlier versions of this article

* Andrea Zwart-Hink is a lecturer and researcher at the VU Amsterdam and attached to the Amsterdam Centre for Comprehensive Law. VU Amsterdam, Faculty of Law, Department of Private Law, De Boelelaan 1105, 1081 HV Amsterdam, The Netherlands. a.m.zwart-hink@vu.nl

Table of contents

1. Introduction

Healthcare providers in the Netherlands are expected to be open and honest to their patients about any mistakes made during medical treatment and, if appropriate, to apologise for them (see *inter alia* Laarman *et al*. 2016). It is nevertheless often assumed, not only by the general public but also by doctors themselves, that it is better not to apologise because this could be seen as an admission of liability. This despite the fact that a lack of openness and the absence of apologies – for whatever reason – is not only detrimental to patients' wellbeing (Van Dijck 2015, para. 2, Laarman *et al.* 2016, p. 13),[1] but also promotes unnecessary juridification (*inter alia* Smeehuijzen *et al.* 2013, paras. 2.4 and 3.4, Laarman *et al.* 2016, p. 14).

Under the Dutch Healthcare Quality, Complaints and Disputes Act (*Wkkgz* 2015),[2] which came into force on 1 January 2016, healthcare providers[3] are obliged to inform patients about the nature and circumstances of any adverse events. The legislation expects providers to be open and honest about "any unintended or unexpected event that relates to the quality of the care and has resulted, could have resulted or could result in harm to the client" (*Wkkgz* 2015, article 1.1).[4] An adverse event could include, for example, a mistake in treatment or care provided (Legemaate 2016, p. 115).

Although the Healthcare Quality, Complaints and Disputes Act has introduced a formal statutory duty for healthcare providers in the Netherlands to communicate openly and honestly to patients, this standard is in itself nothing new. For years, the professional standards applying to healthcare providers have included the duty of openness and honesty and a willingness to apologise for any mistakes occurring (Laarman *et al.* 2016, Legemaate 2016). Indeed, back in 2007, the Royal Dutch Medical Association (KNMG 2007) published a guideline *Dealing with incidents, mistakes and complaints: what can be expected of doctors?*, in which it emphasised that the professional responsibilities of doctors and other healthcare practitioners include "avoiding harm to patients and, wherever possible, preventing the worsening of any harm that has already arisen", while also describing a willingness to talk about and apologise for mistakes as "important and necessary" (KNMG 2007, p. 4). Since 2010, providers have also been bound by the Code of conduct on open communication after medical incidents and better resolution of medical malpractice claims (De Letselschade Raad 2010). An important provision of this Code of conduct holds that "If an investigation into the circumstances of an incident finds a mistake to have been made, the care provider should acknowledge this mistake and offer apologies to the patient" (De Letselschade Raad 2010, Part A, recommendation 8). Note should also be taken of the Dutch hospital patient safety programme (*VMS*), which, as stated on www.vmszorg.nl, provides support to most Dutch hospitals in the form of "knowledge and a collaborative structure" (VMS 2013b). Under the heading, on its website, of 'Actively dealing with incidents', the Dutch hospital patient safety programme states that healthcare professionals are expected to discuss "unintended healthcare-related harm" with patients promptly and comprehensively and, where appropriate, to offer apologies (VMS 2013a).

In recent years the two largest medical liability insurers in the Netherlands, Centramed and MediRisk, have also devoted considerable attention to the proper handling of adverse events. In, for example, an information brochure available on

[1] See Van Dijck (2015, footnote 9) for an overview of national and international empirical research in this field.

[2] The Dutch Health Care Inspectorate, which is responsible for ensuring compliance with the *Wkkgz*, states on its website that this Act "ensures that patients can rely on receiving good care and on good, fast and easily accessible procedures for handling complaints and disputes." (Inspectie voor de Gezondheidszorg, s.d.).

[3] The term 'healthcare provider' is used in the *Wkkgz* to mean "an institution or sole practitioner". Art. 1 Wkkgz.

[4] Unless stated otherwise, all translations are by the author.

the Centramed website titled *Sense and nonsense about medical liability*, doctors are encouraged to discuss incidents openly with patients. With regard to the "popular belief" that insurers do not allow doctors to apologise, Centramed explicitly points out that the opposite is the case. Referring to the above-mentioned Code of conduct, it emphasises that open disclosure is in fact very important and that effective communications can help to prevent claims (Centramed 2013).

Nevertheless, various studies have found that, in practice, healthcare providers are not always open (or wholly open) about mistakes that have been made.[5] The assumption that insurers do not allow doctors to apologise continues to persist. Indeed, support for a cautious approach on the part of healthcare providers can also be found in the literature. In their article entitled *Het verbod tot erkenning van aansprakelijkheid* [The prohibition to admit liability], for example, K.P. Hoogenboezem and M.C. Hees (2014) recommend that professionals who have made a professional mistake should "provide a limited, and very meticulous, explanation and be cautious about offering apologies" to the injured party so as to avoid the possibility that the latter may "reasonably" interpret this as constituting admission of liability. The latter, it is claimed, could lead to the professional's liability insurance being invalidated and to the injured party being given false expectations as to the opportunities for receiving compensation (Hoogenboezem and Hees 2014, para. 5).

This article will argue that the suggestion that it is necessary or advisable, from a legal perspective, to exercise caution when offering explanations or apologies is not only socially undesirable, but also not substantiated in law. Hoogenboezem and Hees (2014) target their advice at insured professionals in general. The focus in this contribution is specifically on healthcare providers and the attitudes they adopt in response to adverse events. An attempt will be made to rectify two common misperceptions regarding the consequences of openness and apologies on the part of healthcare providers. Section 2 will make it clear that the mentioned "popular belief" that insurers do not allow professionals to offer apologies neglects an explicit statutory provision and is therefore incorrect, while Section 3 will argue that openness and apologies by a healthcare provider after a medical mistake can never constitute an admission of liability.

2. Outdated provisions in insurance policies

As mentioned above, the largest medical liability insurers in the Netherlands now encourage insured persons to be open and to offer apologies in the event of an adverse event. Referring, for example, to the Code of conduct on open communication after medical incidents and better resolution of medical malpractice claims (De Letselschade Raad 2010), as well as to the Healthcare Quality, Complaints and Disputes Act (*Wkkgz* 2015), the websites of the largest insurers in this field, MediRisk and Centramed, emphasise how important it is for healthcare providers to be open and, where appropriate, to offer apologies.

Not all professional liability insurers, however, communicate this message to those they insure. On the contrary, many examples of provisions, specifically advising caution in this respect can still be found. Such provisions are known as a prohibition on admitting liability and state, for example, that an insured person is not permitted to admit guilt or liability in the event of a claim for damages or an event

[5] Figures, however, vary. For references to international research in this field, see Laarman *et al.* (2016, p. 9-10) and Smeehuijzen *et al.* (2013, para. 2.6.1). See also, for example, Reitsma *et al.* (2012), in which a quarter of doctors interviewed said that the healthcare sector was open and transparent if mistakes were made. In a survey among healthcare providers conducted by the Dutch insurer VvAA 2010 (VvAA Trendonderzoek onder zorgaanbieders 2011), one fifth of those surveyed admitted that they had failed to disclose a mistake at some time in the past. See also Stichting De Ombudsman (2008). Although almost 80% of patients surveyed and who had experienced an actual or supposed medical mistake stated that they had spoken to the healthcare provider about the mistake, almost half of them also stated that these discussions had not resulted in the mistake being acknowledged.

that could give rise to such a claim.[6] The broad wording of these and other comparable policy conditions gives the impression that an insured person is either not allowed to say anything at all after an incident or at least must exercise caution before making any comments or offering apologies. The impression created in this way is understandable, but not correct. The relevant provisions in these insurance policies have simply failed to keep up-to-date with developments in the field. Since 2006 they have been in contravention of the law, specifically Article 953, Book 7, of the Dutch Civil Code, which states that transgressing any prohibition on admitting liability "will not have any effect insofar as such acknowledgement is correct".[7] The same Article also states that any prohibition on making any acknowledgement of facts under an insurance policy "never has any effect."

Although the insurance policies of the major medical liability insurers in the Netherlands do not contain (or no longer contain) any such prohibitions, many of those issued by other insurers to other than medical professionals continue to mislead policyholders. Even today, many misperceptions as to what can and cannot be said after an incident continue to persist, even among healthcare providers themselves. This can be seen, for example, in the previously mentioned information brochure available on the Centramed website, which refers to – and, in no uncertain terms, rejects – the apparently persisting assumption that insurers do not allow doctors to apologise.

As shown above, however, any such assumptions no longer stand up to scrutiny. A person liable for a mistake is certainly allowed to acknowledge the mistake without having to fear that this will invalidate his liability insurance. Any 'outdated' insurance policy provisions stating the contrary will, by law, have no effect. The parliamentary history of Article 953, Book 7, of the Civil Code shows that this Article was specifically introduced in order to avoid insured persons who correctly admit liability being "excluded from their insurance cover" (Parliamentary Papers II 1999/2000, 19 529, no. 5, p. 32). Insurance policy provisions such as those referred to above have become outdated and should be replaced.

3. Apologies and admission of liability

The assumption that making certain statements after a medical incident, including offering apologies, can have undesired consequences extends beyond the assumption that such statements could possibly impact on how the matter is dealt with under the relevant liability insurance. A related, albeit different misperception is that an apology by a healthcare provider could constitute an admission of liability. This section argues that although making certain statements after a professional mistake can have legal consequences in some (very rare) situations, this certainly does not apply to healthcare providers who communicate openly with their patients and apologise for incidents that have occurred.

3.1. Rather than signifying a professional mistake, acknowledgement can inspire confidence

In contrast to what is sometimes assumed, the question of whether a person is liable for malpractice does not, in principle, depend on the nature and contents of any statements made by the insured person, but is instead dependent simply on

[6] An arbitrary search of policy conditions freely available on the internet found, for example, Article 5.1 of the General Conditions of Casualty Insurance of VvAA (s.d.). These general conditions form "the basis of any casualty insurance" arranged with VvAA and so include – I assume – medical (or other) professional liability insurance. Other examples include Article 6.1 of Delta Lloyd's (s.d.) General Conditions of Professional Liability Insurance; Article 6.1.6 of the General Conditions of Professional Liability Insurance of Allianz, and Article 7.1 of the Univé General Conditions of Professional Liability Insurance (Univé Verzekeringen 2016).

[7] All translations from the Dutch Civil Code are from Wolters Kluwer; Warendorf, Thomas & Curry-Sumner.

the facts of the case and the legal assessment of those facts.[8] Whether liability exists is a legal matter, and thus one on which only lawyers can decide. In formal proceedings it is obviously the court that has the final word. However, in out of court negotiations too, it is ultimately legal professionals who take the final decision. Liability insurance policies provide explicitly that acceptance or rejection of liability is up to the insurer, not to the insured. The right to take a position on such matters is transferred by the insured person to the insurer when the insurance contract is entered into. In other words, what the insured person thinks is not decisive. It is up to the insurer, not the insured person to accept or reject liability (Smeehuijzen and Akkermans 2013, p. 42-43, Wijntjens 2016, para. 2). Centramed explains this to its policyholders as follows in the brochure *Eerste hulp bij aansprakelijkstelling* [First Aid for Liability Cases] available on its website:

> Talk to the patient and the patient's family about what has happened. Be open and sincere about what you feel about it and, where appropriate, apologise for what has happened. Statements about liability and compensation can be left to us. As a liability insurer it is our responsibility to deal with these legal matters. (Centramed s.d.)

The above can be illustrated by a well-known case in which a patient's facial nerve was damaged during an ear operation. Afterwards, certain that he had made a mistake, the ear, nose and throat (ENT) specialist who had performed the operation tearfully offered flowers and an apology and said the patient should hold him liable. The doctor's insurer, however, who was the only party authorised to assess liability, was not convinced that a mistake had been made, given that an expert witness stated that damage to the facial nerve is a risk inherent in any ear operation. Owing to limitations in medical techniques, it is impossible to eliminate that risk entirely. In other words, the fact that something *goes* wrong does not automatically mean that something has been *done* wrong. On these grounds, the insurer rejected liability.[9]

For lawyers, it is easy to understand the insurer's viewpoint. Explicit statements and reactions by a doctor cannot lead to the doctor being held liable for an alleged medical mistake that he has not actually made. Where there was no mistake to begin with, none can be 'created' by an unwarranted admission. This does not mean, however, that what the doctor says or does is completely irrelevant from a legal perspective. If a healthcare provider or other professional practitioner indicates that he has or may have made a mistake and offers his apologies, it is understandable that this may create certain expectations with regard to issues of liability and compensation (Smeehuijzen and Akkermans 2013, p. 42). This, in turn, prompts the question of whether these expectations give rise to any legal (or other) consequences and, if so, which consequences in particular? In Dutch law, this question is at the heart of the will/reliance doctrine (*wilsvertrouwensleer*) set out in Articles 33 and 35, Book 3, of the Civil Code.[10]

It follows from the will/reliance doctrine that, when it comes to the question whether certain statements or conduct actually constitute an admission of liability,

[8] In the Netherlands, the establishing of liability in the event of medical malpractice is based on the criterion of whether the care accords with the standards that can be expected to be observed by a "good provider" and whether this provider acted "in accordance with the responsibility falling upon him as a result of the professional standards applicable to providers of care." This follows from Article 453, Book 7, of the Civil Code.

[9] Example from the District Court of Zwolle, 6 November 2002, case no. 7194/HA ZA 01-1367 (not published), as discussed by Legemaate (2007, p. 3). Given that the judgement in this case was not published, all the comments in this article relating to this judgement are based on Legemaate.

[10] Article 33, Book 3, of the Civil Code states that "A juridical act requires an intention to produce juridical effects manifested by a declaration." Article 35, Book 3, goes on to state that "The absence of intention in a declaration cannot be invoked against a person who interpreted another's declaration … in conformity with the sense which he could reasonably attribute to it in the circumstances …" In that case, the juridical act is regarded as having been performed. On this, see the 'Asser' manual by Hartkamp and Sieburgh (2014, specifically numbers 133 and 134).

the meaning that the injured party could *reasonably* attribute to these statements or conduct, is of overriding importance. In a judgement by the Dutch Supreme Court in 1992, admittedly relating to an admission of liability vis-à-vis the injured party by an insurer, the Supreme Court ruled as follows:

> The answer to the question of whether this insured person can be bound by a third party to an admission made by the insurer, such that the insured person becomes liable to the third party, depends on whether the third party took the statement by the insurer to constitute a statement addressed to him by the insurer and giving rise to legal consequences, and was also justified, in the circumstances, in taking such statement to constitute this. (Dutch Supreme Court, 10 January 1992, para. 3.4.)

It is possible, therefore, that liability arises as a result of certain statements being made, even if the insured person did not make a mistake or committed any other wrong that gives rise to liability. No mistake can be 'created' where there was none, but the obligation to compensate can nonetheless be called into life by unfortunate statements. It should be remembered, however, that the Supreme Court judgement in this case concerned statements by an insurer, who is legally empowered to accept liability, and not statements by the insured person who, as mentioned earlier, is not empowered to this effect.

The question is whether statements made by an insured person after committing what is alleged to be a professional mistake, could produce the same conclusion. An argument in favour of an affirmative answer is that there is no reason why the injured party, as a layman in legal terms, should be aware of which powers are assigned to the insurer and which to the insured, and that the injured party is also a third party outside the scope of the insurance contract and therefore cannot be bound by it. This would mean that any statement made by an insured person and taken by the injured party to constitute an admission of liability in circumstances where the latter could reasonably be justified in assuming the insured person to be liable could indeed result in this insured person being ordered to compensate the harm suffered as a result of the mistake. Indeed, this is exactly what happened in the case discussed earlier, in which the insurer made such a statement. In practice this would not change anything in situations where an insured person is genuinely liable for a mistake. If, however, the insured person is not actually liable (or is later found not to be liable) for the supposed mistake, it is conceivable in this scenario that liability could nevertheless arise – not on the grounds of the supposed mistake, but rather on the grounds of the admission made. The obligation to compensate injuries would then result from a new obligation that did not arise between the insured person and the third party until the insured person made the statement that could reasonably be interpreted in a certain manner. Strictly speaking, therefore, no mistake occurred, but liability nevertheless arose.

3.2. What if the insured person is a lawyer?

In their article *Het verbod tot erkenning van aansprakelijkheid* referred to earlier, Hoogenboezem and Hees (2014, para. 5) recommend that professionals who have made a professional mistake should "provide a limited, and very meticulous, explanation and be cautious about offering apologies" to the injured party so as to avoid the possibility that the latter may "reasonably" interpret this as constituting an admission of liability. These authors align, in this respect, with the will/reliance doctrine, referring *inter alia* to the above Supreme Court case, in which the insurer itself had made certain statements to the injured party concerning admission of liability (Dutch Supreme Court, 10 January 1992). In seeking to determine whether certain statements by an insured person can have legal consequences, the authors

refer to a judgement by the District Court of Assen,[11] in which the crucial question concerned whether a letter from a personal injury firm could be construed as an admission of liability for a professional mistake. This personal injury firm had agreed with an individual who had become occupationally disabled as a result of exposure to the toxic substance beryllium during his work that it would claim compensation from the individual's former employer for the injuries suffered. The personal injury firm send an interruption letter to the former employer in 1994, followed by a second letter over six years later. The former employer's insurer responded by stating that the employee's claim was, by then, time-barred. Two years later, the personal injury firm sent a letter to the injured party; this contained several passages that were difficult for the employee to interpret as constituting anything other than an admission by the personal injury firm that it was liable for a professional mistake. These included sentences such as "(…) as this means that it would seem in all likelihood that (…) has been remiss and will be held liable for this" and, more unambiguously, "As a result, he overlooked this important fact, for which we can (…) obviously be held liable". The court ruled that the injured party could indeed assume the personal injury firm to have admitted in this letter to having committed a professional mistake, given that the mistake was not disputed and in view of the personal injury firm's "chosen wording taken in the context of and in conjunction with" the situation, *particularly* given that the firm had legal expertise on which the injured party was entitled to rely.[12]

This judgement clearly illustrates that certain statements and comments on possible professional mistakes can reasonably be taken, in certain circumstances, to constitute an admission of liability.[13] It would nevertheless be incorrect to conclude from this that the general advice in cases involving a professional mistake should be to "provide a limited, and very meticulous, explanation and be cautious about offering apologies" to the injured party, as recommended by Hoogenboezem and Hees (2014, para. 5). This is because the District Court explicitly added that the injured party was entitled to rely on the personal injury firm's admission of liability for a professional mistake particularly in view of the firm's legal expertise. To this extent, therefore, this consideration would seem to substantiate the view that the nature of certain statements, including apologies, made by someone other than a legal expert – a doctor, for example – should be interpreted differently.[14]

3.3. Different for non-lawyers

The above was confirmed in the judgement issued in the legal proceedings relating to the case of the ENT specialist discussed earlier. Although the doctor was, in the end, held liable, the District Court explicitly stated that the admission of liability and apologies offered by the doctor had not played any role in the court's decision.[15] More recently, too, it has also been ruled in various proceedings – both within and outside the medical world – that offering apologies does not constitute an admission of liability. Two such judgements are discussed below.

[11] District Court of Assen, 1 February 2006, case no. 47277 / HA ZA-04-475 (not published). Given that the judgement in this case was not published, all the comments in this article relating to this judgement are based on Hoogenboezem and Hees (2014).

[12] For more details of this judgement, see Hoogenboezem and Hees (2014, para. 4).

[13] Wijntjens (2016, para. 2) also reached the same conclusion.

[14] Hoogenboezem and Hees (2014, para. 5) would seem to take a different view on this. As they see it, the advice to "provide a limited, and very meticulous, explanation and be cautious about offering apologies" applies – at least, as far as I can see – to all practitioners, but particularly to practitioners with legal expertise.

[15] District Court of Zwolle, 6 November 2002, case no. 7194/HA ZA 01-1367 (not published), confirmed on appeal: Arnhem Court of Appeal, 2 December 2003, ECLI:NL:GHARN:2003:AO0863. On this, see Legemaate (2007, p. 3).

3.3.1. District Court of The Hague, 25 October 2012: "Apologies (…) should be regarded as strictly distinct from admissions of liability"

In a 2012 decision by the District Court of The Hague, the court explicitly stated that apologies offered should be viewed separately from any admission of liability. The background to this case was a complaint by the (later) respondent concerning the treatment provided by her doctors. The respondent believed that the treatment she had received, and that resulted in her medical problems, had been wrongfully provided.

The complaint she submitted to the hospital's complaint committee was found to be justified. The hospital's Executive Board also sent her a letter stating that it acknowledged that the relevant doctors had not acted according to their professional standard, and apologised to her. The respondent subsequently filed a claim alleging the hospital to be liable for the harm she had suffered. In her view, it was evident that the relevant doctors had not met the professional standard and were therefore liable for her medical problems, partly in view of statements made by the doctors during the complaints procedure (it was not specified what these statements were), as well as the decision by the complaints committee and the letter of apology sent by the Executive Board.

The District Court did not accept the respondent's claim that liability could simply be assumed. A decision by a complaints committee does not set any precedent in a civil law case, while the issue of a causal relationship between the mistakes made and the medical problems had not been examined by the complaints committee. So far, this does not signify anything new. Then, however, there followed an interesting passage about offering apologies:

> Similarly, a letter from the hospital's Executive Board does not constitute an admission of liability. The letter simply acknowledges that the relevant doctors had not acted according to their professional standard. Apologies by a hospital are seen as very important by patients and should be viewed strictly separately from admissions of liability as, otherwise, hospitals will avoid offering the apologies that patients regard as so important. The letter sent by the Executive Board clearly seeks to offer apologies and not to admit liability. (District Court of The Hague, 25 October 2012, para. 4.3.)

In its judgement, the District Court emphasised the importance for patients of receiving apologies from the hospital or the doctors, or both, after an incident. If apologies were to become intertwined with admissions of liability, hospitals and doctors might very well think twice before offering them (District Court of The Hague, 25 October 2012).

The next case to be discussed also clearly emphasises that apologies do not constitute an admission of liability, but instead an acknowledgement of the injured party's feelings.

3.3.2. District Court of The Hague, 3 February 2016: acknowledgement of feelings rather than an admission of liability

In this case, the parents of three young children sought a court ruling to the effect that the State of the Netherlands had acted wrongfully towards them "by negligently and biasedly performing an investigation before requesting the children's court to order that the children should be removed from the parental home and placed under supervision". (District Court of The Hague 3 February 2016, para. 3.2.)

The parents accused the Child Care and Protection Board ('the Board') of failing to investigate the children's situation carefully and of steering the investigation towards the conclusion that it would be better for the children to be removed from the parental home. The parents had already submitted a complaint to the Board's complaints committee and to the National Ombudsman at an earlier stage, and

some aspects of these complaints had in any event been upheld. In response to a report by the National Ombudsman, the parents received a letter containing the following passage from the Board's national executive:

> I understand from the National Ombudsman's report that the Board has not performed well in many respects, and in retrospect I can imagine why the National Ombudsman formed that view. In my opinion the Board did not act as a government organisation could be expected to act. Although, unfortunately, I cannot turn the clock back, I would like to acknowledge your feelings. During our earlier discussions I offered my apologies to you, and I would like to reiterate these apologies in writing. (District Court of The Hague 3 February 2016, para. 1.17.)

The District Court did not attach any decisive significance to the National Ombudsman's report when assessing the issue of liability, whereas the parents' claims were regarded by the court as being heavily reliant on this report. The parents' claim was rejected on the grounds that, in the circumstances, the court did not regard it as incomprehensible or negligent for the Board to have applied for a protection order at the time. The District Court added that:

> Contrary to what the parents believe, the sole fact that the Board has stated that it can retrospectively accept the complaints found to be justified by the complaints committee and the National Ombudsman does not imply any admission of civil law liability or create any related right to compensation. Accordingly, the State has emphasised that, in so doing, the Board sought solely to acknowledge the parents' feelings and to emphasise that the Board would take serious note of the suggestions made by the National Ombudsman for improving the Board's operating methods. (District Court of The Hague 3 February 2016, para. 4.18.)

3.4. Apologies do not constitute liability

The above examples show that the offering of apologies does not as such allow an actual or alleged injured party successfully to claim that it was reasonable for these apologies to be interpreted as constituting an admission of liability. And even if a doctor literally encourages a patient to hold him liable for an operation in which the doctor is convinced he made a mistake (as in the case of the ENT specialist), this does not justify concluding that liability can be assumed. This view aligns with the views of Wansink, Van Tiggele and Salomons (Wansink 2006, p. 376, Wansink *et al.* 2012, no. 592), who write, with reference to the above Dutch Supreme Court case of 10 January 1992, in which an insurer made statements relating to admission of liability, that they consider it to be "conceivable" for "an insured person to respond to an accident by spontaneously admitting liability in an emotional state of mind". This does not mean, however, that the injured party (i.e. the patient in the case of an adverse event) can automatically assume the insured (i.e. the healthcare provider) to be liable.[16] This can be the case *only* if the insured person is not a healthcare provider, but instead a lawyer or other legal expert, as in the above example of the personal injury firm.[17]

4. Closing comments

Although healthcare providers are expected to be open and honest to patients about adverse events and to apologise if any mistake is made, various studies have found that, in practice, such parties are still not being open (or entirely open). The general public, and even doctors themselves, seem often to assume that healthcare providers are not allowed by their insurers to offer apologies or to make any statements, including apologies, which could be taken to constitute an admission of liability.

[16] Wansink (2006, p. 376) refers to the 1986 Explanatory Memorandum on the old text of the Draft of the Act establishing Title 7.17, in which the phenomenon of "all too rapid admission, influenced by the accident" is mentioned with regard to provisions in an insurance policy prohibiting admissions of liability. See Parliamentary Papers II 1985/86, 19 529, no. 3, p. 26 (Explanatory Memorandum).
[17] District Court of Assen, 1 February 2006, case no. 47277 / HA ZA-04-475 (not published).

These assumptions are one of the reasons why some authors have suggested that, from a legal perspective, caution should be exercised when offering apologies. To the best of my knowledge, however, this advice is not substantiated by any empirical research. The influence of apologies on legal (and other) decisions and rulings has been examined in a number of studies, primarily in the United States, and most of these found that offering apologies either had a positive effect on the aggrieved party (see, for example, Robbennolt and Lawless 2013, Part III), or no effect (see, for example, Rachlinski *et al*. 2006, p. 1253 *et seq.*, 2013, p. 1209 *et seq.*).[18] Admittedly these studies did not set out to examine any direct relationship between apologies and liability, but instead sought to determine, for example, the extent to which apologies influenced settlement results (Robbennolt 2008, p. 361) or the effect that apologies had on bankruptcy courts' decisions on whether to discharge credit card debts (Rachlinski *et al*. 2006, p. 1253 *et seq.*).[19]

In other words, the suggestion that, for legal reasons, caution should be exercised before offering apologies is not substantiated by empirical research. Furthermore, this suggestion is socially undesirable and in direct opposition to the trend towards greater openness that has been underway in practice for quite some years. These days, being open and honest to patients about adverse events and, where appropriate, offering apologies are regarded as inherent elements of the professional standards with which healthcare providers are expected to comply. The largest medical liability insurers in the Netherlands have been aware of this for years and – in contrast, regrettably, to other professional liability insurers – have actively highlighted the need to deal with adverse events properly, while also removing any provisions from their policy conditions that prohibit admission of liability. The introduction of Article 10.3 of the Healthcare Quality, Complaints and Disputes Act (*Wkkgz* 2015) on 1 January 2016 has now made it a formal statutory requirement for healthcare providers to communicate openly and honestly with patients after an adverse event.

The advice to exercise caution is not only socially undesirable – given that it wrongly takes no account of patients' often compelling needs – but is also not substantiated in law. As demonstrated by the case law discussed, the offering of apologies – and even literal acknowledgement of liability by healthcare providers – does not mean that a patient can successfully claim that it was reasonable for him to interpret a healthcare provider's statement as constituting an admission of liability. The advice given to healthcare providers should, therefore, be that rather than being discouraged, openness and apologies should in fact be encouraged (or encouraged even more).

References

Allianz, s.d. *Verzekeringsvoorwaarden (Beroeps)aansprakelijkheidsverzekering* [online]. Available from: https://www.allianz.nl/dam/jcr:84cbbbf2-d225-4a24-a9c4-4ab473b08973/Verzekeringsvoorwaarden.pdf [Accessed 17 July 2017].

Centramed, 2013. *Zin & onzin over medische aansprakelijkheid* [online]. Zoetermeer: Centramed. Available from: http://www.centramed.nl/images/Brochures/zin_en_onzin.pdf [Accessed 17 July 2017].

Centramed, s.d. *Eerste hulp bij aansprakelijkheid Medisch incident en u bent aansprakelijk gesteld. Wat nu?* [online]. Zoetermeer: Centramed. Available

[18] In said article, Rachlinski *et al*. (2013) report on the results of six experimental studies examining the effect that apologies have on court decisions. Studies 1, 2 and 3 found no effect. Study 4 found that people convicted of speeding and who had apologised to the court were given higher fines than those who did not offer apologies (i.e. a negative effect). Studies 5 and 6, on the other hand, found a positive effect. In all these studies, the defendant had admitted liability separately from the apologies offered, or had already been found guilty of a criminal offence.

[19] For a detailed overview of research examining legal consequences of apologies, see Wijntjens (2016, para. 3).

from: http://www.centramed.nl/images/Brochures/Eerste_hulp_bij_Aansprakelijkheid_folder_2012.pdf [Accessed 17 July 2017].

De Letselschade Raad, 2010. *Gedragscode Openheid medische incidenten; betere afwikkeling Medische Aansprakelijkheid (GOMA)* [online]. Den Haag: MediaCenter Rotterdam. Available from: https://deletselschaderaad.nl/downloads/GOMA1.pdf [Accessed 31 July 2017].

Delta Lloyd, s.d. *Voorwaarden Beroepsaansprakelijkheidsverzekering* [online]. Available from: http://www.deltalloyd.nl/images/M03229_beroepsaansprakelijkheidsverzekering_voorwaarden_tcm48-163031.pdf [Accessed 17 July 2017].

District Court of The Hague, 25 October 2012, ECLI:NL:RBSGR:2012:BY2540, *Jurisprudentie Aansprakelijkheid* 2013/29, annotated by A.M. Zwart-Hink.

District Court of The Hague, 3 February 2016, ECLI:NL:RBDHA:2016:503

Dutch Civil Code, Article 953, Book 7 [online]. Available from: http://wetten.overheid.nl/BWBR0005290/2017-07-01#Boek7_Titeldeel17_Afdeling2_Artikel953 [Accessed 31 July 2017].

Dutch Supreme Court, 10 January 1992, ECLI:NL:HR:1992:ZC0470, *Nederlandse Jurisprudentie* 1992, 606.

Hartkamp, A.S., and Sieburgh, C.H., 2014. *Mr. C. Assers Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel III. Algemeen Overeenkomstenrecht.* Deventer: Kluwer.

Hoogenboezem, K.P., and Hees, M.C., 2014. Het verbod tot erkenning van aansprakelijkheid. *Weekblad voor Privaatrecht, Notariaat en Registratie*, 7025, 638-642.

Inspectie voor de Gezondheidszorg, s.d. *Wet kwaliteit klachten geschillen zorg* [online]. Available from: https://www.igz.nl/onderwerpen/handhaving_en_toezicht/wetten/wet_kwaliteit_klachten_geschillen_zorg/ [Accessed 17 July 2017].

KNMG, 2007. *Omgaan met incidenten, fouten en klachten: wat mag van artsen worden verwacht?* [online]. Utrecht: KNMG. Available from: https://www.knmg.nl/web/file?uuid=620f5dd4-087f-4d45-b08d-5d72fb0beab7&owner=5c945405-d6ca-4deb-aa16-7af2088aa173&contentid=1029&elementid=174595 [Accessed 17 July 2017].

Laarman, B.S. *et al*., 2016. *OPEN: open en eerlijke omgang na klachten en incidenten in het ziekenhuis. Schriftelijk verslag van project OPEN* [online]. Utrecht: NIVEL. Available from: http://www.nivel.nl/sites/default/files/bestanden/Rapport_OPEN_eerlijke_omgang_klachten-ziekenhuis.pdf [Accessed 13 July 2017].

Legemaate, J., 2007. Recht op informatie over fouten van artsen. *Tijdschrift voor Vergoeding Personenschade*, 1, 1-4.

Legemaate, J., 2016. Openheid over medische fouten vereist beleid. *Nederlands Juristenblad*, 91 (2), 115-116 [art. 72].

Parliamentary Papers II 1999/2000, 19 529, no. 5. Vaststelling van titel 7.17 (verzekering) en titel 7.18 (lijfrente) van het nieuwe Burgerlijk Wetboek. Nota van Wijziging [online]. Available from: https://zoek.officielebekendmakingen.nl/kst-19529-5.html [Accessed 31 July 2017].

Rachlinski, J.J., Guthrie, C., and Wistrich, A.J., 2006. Inside the Bankruptcy Judge's Mind. *Boston University Law Review*, 86 (5), 1227-1259.

Rachlinski, J.J., Guthrie, C., and Wistrich, A.J., 2013. Contrition in the Courtroom: Do Apologies Affect Adjudication? *Cornell Law Review* [online], 98 (5), 1189-1234. Available from: http://scholarship.law.cornell.edu/clr/vol98/iss5/4/ [Accessed 17 July 2017].

Reitsma, M., *et al*., 2012. *Zorggebruikers denken minder positief dan artsen over de afhandeling van klachten binnen de gezondheidszorg*. Utrecht: NIVEL.

Robbennolt, J.K., 2008. Attorneys, Apologies and Settlement Negotiations. *Harvard Negotiation Law Review,* 13 (2), 348-397.

Robbennolt, J.K., and Lawless, R.M., 2013. Bankrupt Apologies. *Journal of Empirical Legal Studies*, 10 (4), 771-796.

Smeehuijzen, J.L. *et al*., 2013. *Opvang en schadeafwikkeling bij onbedoelde gevolgen van medisch handelen.* Amsterdam: VU.

Smeehuijzen, J.L., and Akkermans, A.J., 2013. Medische aansprakelijkheid: over grote problemen, haalbare verbeteringen en overschatte revoluties. In: *Ontwikkelingen rond medische aansprakelijkheid*. (Preadviezen Vereniging voor Gezondheidsrecht). The Hague: SDU, 13-88.

Stichting De Ombudsman, 2008. *Over leven in de medische letselschadepraktijk* [online]. Hilversum: Stichting De Ombudsman. Available from: http://www.robinswilwordtwet.nl/wp-content/uploads/2012/05/Rapport_Over_leven_in_de_letselschadepraktijk.pdf [Accessed 17 July 2017].

Univé Verzekeringen, 2016. *Voorwaarden Beroepsaansprakelijkheidsverzekering* [online]. Available from: https://www.unive.nl/binaries/content/assets/pdfs/zakelijk/beroepsaansprakelijkheidsverzekering/voorwaarden-unive-beroepsaansprakelijkheidsverzekering.pdf [Accessed 17 July 2017].

Van Dijck, G., 2015. Emotionele belangen en het aansprakelijkheidsrecht. *Nederlands Juristenblad* [online], 90 (36), 2530-2536 [art. 1787]. Available from: https://pure.uvt.nl/portal/files/8528238/NJB36_Wetenschap_1.pdf [Accessed 17 July 2017].

VMS – Veiligheidsmanagementsysteem, 2013a. *Actief omgaan met incidenten* [online]. Available from: http://www.vmszorg.nl/Onderwijs-and-Opleiding/Actief-omgaan-met-incidenten [Accessed 17 July 2017].

VMS – Veiligheidsmanagementsysteem, 2013b. *Ontstaan* [online]. Available from: http://www.vmszorg.nl/over-ons/ontstaan [Accessed 17 July 2017].

VvAA, 2011. *Medische fouten. Zorgaanbieders alert op medische fouten* [online]. Utrecth; VvAA. Available from: http://docplayer.nl/10887738-Wat-geld-t-in-de-zorg.html [Accessed 31 July 2017].

VvAA, s.d. *Algemene voorwaarden* [online]. Available from: https://www.vvaa.nl/over-vvaa/algemene-voorwaarden [Accessed 17 July 2017].

Wansink, J.H., 2006. *De algemene aansprakelijkheidsverzekering.* Deventer: Kluwer.

Wansink, J.H., Van Tiggele-van der Velde, N., and Salomons, F.R., 2012. *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 7. Bijzondere overeenkomsten. Deel IX. Verzekering*. Deventer: Kluwer.

Wijntjens, L.A.B.M., 2016. Excuses en aansprakelijkheid: In hoeverre en op welke wijze beïnvloeden excuses het oordeel van de rechter? *Weekblad voor Privaatrecht Notariaat en Registratie*, 7092, 82-88.

WKKGZ, 2015. Wet van 7 oktober 2015, houdende regels ter bevordering van de kwaliteit van zorg en de behandeling van klachten en geschillen in de zorg

(Wet kwaliteit, klachten en geschillen zorg) [online]. Available from: https://zoek.officielebekendmakingen.nl/stb-2015-407.html [Accessed 18 July 2017].