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Draft working paper presented October 3, 2003, Dunsmuir Lodge, University of Victoria, at a workshop on "Apologies, Non-Apologies, and Conflict Resolution"

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# Legal Consequences of Apologies in Canada

**Draft working paper presented October 3, 2003,  
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"Apologies, Non-Apologies, and Conflict Resolution"**

**Catherine Morris<sup>(\*)</sup>**

"Never apologize." Is this always the best legal advice? In the case of car accidents, professional errors and other civil wrongs (unintentional "torts"),<sup>(1)</sup> the popular wisdom is that persons who face the prospect of being blamed should avoid apologizing or making statements about the incident in question. This advice is aimed at preventing statements from being turned against you if you are sued. Apologies are seen as risky because the apology could be interpreted as an admission of liability.

This paper considers the following topics:

1. [Canadian case law on apologies](#) made in contexts considered "unprotected" from a legal perspective;
2. [So-called "protected" settings](#) in which an apology can be made are outlined. In particular, the mediation setting is considered;
3. [Some policy options for creating "safe harbours" for apologies](#) are briefly discussed.
4. [Some conclusions and recommendations](#)

## 1. "Unprotected" apologies

### 1.1 An apology is not necessarily an admission of fault or liability

Apologies may not be as "dangerous" as popularly believed. While an apology can be admitted into evidence in court, a judge will not necessarily interpret it as an admission of fault or liability. A plaintiff must still prove all the elements of a particular case. For example, most accident and professional malpractice cases are cases of "negligence;"<sup>(2)</sup> a successful negligence action must meet several requirements. It must be proven by the plaintiff that:

- the defendant owes the plaintiff a legal duty of care;
- the defendant breached the legal standard of care;
- the plaintiff suffered loss or injury;
- the defendant's conduct must have been the actual and legal cause of the plaintiff's injury.<sup>(3)</sup>

An apology does not necessarily prove negligence, because an apology is not *necessarily* an

acknowledgement of duty of care, or a breach of the legal standard of care, or an acknowledgement of causation. An apology may be evidence only of concern and sympathy. Even if an apology reasonably suggests that the apologizer *feels* culpable, it may be evidence only of the apologizer's personal feeling. The following cases indicate how some judges in Canada have viewed apologies in cases alleging negligence.

## 1.2 Some Canadian negligence cases

This section does not purport to be an exhaustive review of Canadian cases in which apologies have been judicially considered.<sup>(4)</sup>

### ***Kotter v. Foss (Saskatchewan, 1984)***

*Kotter v. Foss*<sup>(5)</sup> is a 1984 Saskatchewan car accident case in which Ms. Kotter's nose was broken. A police officer at the scene "immediately took the position that the defendant Foss was responsible and gave Mr. Foss a ticket charging him with failing to yield the right of way." The plaintiff Ms. Kotter said that the defendant, whom she met in the hospital after the accident, had "apologized to the plaintiff and said he was sorry." The defendant, Mr. Foss, said in court that he had told the plaintiff, Ms. Kotter, that "he was sorry about her broken nose because it was obvious that she was in pain . . . The plaintiff's "interpretation of the apology by Foss that this was an admission of liability for the accident." The judge did not find the plaintiff to be credible and said she had exaggerated her injuries. The judge also found she was not wearing her seat belt and if she had been she would not likely have broken her nose. The judge found that the cause of the accident was a tire blow out for which the plaintiff was responsible because her car had "two worn-out rear tires." The effect of the apology on the judge's assessment is not stated per se, but it can be inferred that the defendant's version of the statement was preferred. The judge's decision does not analyse the statement of apology; the judge looked primarily at the other evidence.

### ***Zojaji vs. Cowan (British Columbia, 1994)***

In a 1994 BC motor vehicle accident case, *Zojaji vs. Cowan*,<sup>(6)</sup> the plaintiff, Hossein Zojaji, was described by the judge as "a 27 year-old man ... presently employed in the colour department of a lithography company." He had been injured in a car accident when he had entered an intersection and struck the defendant's vehicle which was turning left into the intersection. The judge's decision describes the 25 year old defendant, Jana Cowan, as "a part-time student [who] works in two restaurants." Mr. Zojaji said that the defendant Ms. Cowan made a sharp left turn in front of him in an intersection. Mr. Zojaji did not know what colour the traffic light was on entry. The defendant Ms. Cowan said she had put on her left turn signal 90 feet from the intersection. She said she had entered the intersection on the amber light.

The plaintiff said that immediately after the accident the defendant came to his car, asked if he was "ok" and then said "I am sorry - I didn't see you." The plaintiff's friend, who had been in the car with the plaintiff at the time of the accident, said that seconds after the collision the defendant driver came to their car with tears in her eyes. She repeatedly said to the plaintiff that she was sorry and that it was her fault. The judge records the defendant's version of this as follows:

She got out of her car and went to the plaintiff's vehicle to check whether the people in that car were injured. The plaintiff had his door open and she asked approximately four times whether the plaintiff and the passenger were "ok". They would not acknowledge her presence. They both rolled their eyes and did not answer her. She said "I'm sorry

this happened" and left to look for witnesses.

The judge found that "the veracity of the plaintiff's testimony left much to be desired," and that defendant Ms. Cowan was more credible. The judge found as follows:

"... If she had made any such admission of fault as alleged [by the plaintiff], then surely she would not have immediately gone to look for witnesses. I find that what she said was, "I'm sorry this happened." I do not consider that to be an admission of fault. Nor do I consider that statement to be an apology. She was merely expressing her feeling of regret that the accident happened."

The judge relied on evidence by two other independent witnesses who said she had turned on a green light. The judge found that defendant was in no way at fault for the accident and dismissed the claim. It is not clear what the judge might have decided if he had believed the plaintiff's version of the events and the apology. The defendant is portrayed in a sympathetic light in the language of the judgement; one can only speculate as to whether the defendant's apologetic approach at the time of the accident might have influenced the judge in her favour.

### ***Cuff v. Carey (Newfoundland, 1999)***

The 1999 Newfoundland case of *Cuff v. Carey*<sup>(7)</sup> involved a motor vehicle accident after which the defendant immediately acknowledged to the plaintiff that the accident was her fault, and apologized to the plaintiff. Later at trial, the judge points out that "the defendant said that she should not have said this to the Plaintiff since she believed, on reflection, that the accident was not her, but his fault." The judge continues:

"I realize that she was likely upset after the accident occurred and probably blurted out the words of self-blame and accompanying apology without due consideration. As a result I do not make too much of it other than to say that it may have been an accurate, if hasty, assessment by her of the relative liabilities of herself and the Plaintiff for the accident. At least it accords, in part, with my own assessment of the situation, even considering that I have had a much better opportunity to reflect on the situation than did the Defendant when she made her analysis. . . I have noted that the Defendant's summary assessment of fault accords "in part" with my own. I say this because she was prepared, at the scene, to accept full responsibility for the accident. I do not think that full responsibility should lie with her."

### ***Dusty's Saloon v. W.M.I. Waste Management of Canada Inc. (Alberta, 2001)***

An apology is discussed in the 2001 Calgary case of *Dusty's Saloon v. W.M.I. Waste Management of Canada Inc.* Dusty's Saloon made a contract with WMI for temporary porta-potties to deal with Calgary Stampede crowds of between 1100 and 1700 people. A dispute arose concerning the servicing of what were euphemistically called "portolets." On two occasions "there was a foul and disgusting odour emitted at Dusty's" during the visits of the servicing truck. Testimony from "Dusty" of Dusty's Saloon "described the odour as not drifting, but coming in with force." According to the judge's decision, Dusty "found a scene of chaos inside the Saloon, with patrons panicking, talking about getting sick, and leaving in droves... the exhaust fans couldn't cope with the odour, and it took in excess of an hour to get it cleared out of the building. During that time, no food could be served." Dusty's sued the waste management company for lost business and loss of reputation. The Defendant, WMI, counter-claimed for payment of its outstanding bill for service. In defence of the counter-claim, Dusty's alleged breach of contractual obligation to maintain and

service the "portolets." The judge found that Dusty's was unable to establish that the Defendant was liable in negligence for any damage caused by the incidents, but that in the circumstances, it was also inequitable to allow the Defendant to collect the debt owing to it under the contract. At one point, Mr. Humphries from WMI wrote a letter of apology to Dusty's which appeared "to acknowledge that his truck was the source of the foul odour." However, the judge found that "this letter is not an admission of breach of duty. Mr. Humphrey testified that he in fact had not noticed a problem with odour, and had written the letter at the request of his employer shortly after the complaint was made as an attempt to appease Dusty's." The judge found that Dusty's failed "to prove negligence in that it has failed to adduce evidence that would establish a breach of duty." However, the letter of apology, "while not an admission of a breach of duty, is an acknowledgement that the odours came from his truck."<sup>(8)</sup> Thus, while the letter of apology was proof of some relevant facts, it was not considered an admission of negligence, and did not relieve the plaintiff from proving all the elements of negligence. The text of the letter was not included in the judgement.

### ***Jordan v. Power (Alberta, 2002)***

In the 2002 Alberta case of *Jordan v. Power*, the plaintiffs, Mr. and Mrs. Jordan, suffered damage to their uninsured property when a fire which began in the defendant Ms. Power's car spread to their condominium. The plaintiffs were unsuccessful providing evidence of negligence by the defendant. They tried to use Ms. Power's apology as an admission of negligence. Justice Veit stated: "An apology could constitute an admission of liability" and accepted the evidence that the defendant had "approached the Jordans, apologized to them, and asked them if they were mad at her." However, the judge also accepted the evidence of Ms. Power "that the apology was not an admission that she had been negligent, but merely an expression of condolence that the Jordans were being hurt by a fire which started on, or in, Ms. Power's property."<sup>(9)</sup>

## **1.3 What can we learn from the Canadian cases?**

While there are very few cases to consider, we may be able to draw the following conclusions:

- Statements of apology will be admitted into evidence in Canada.<sup>(10)</sup>
- Judges in Canada will not construe the statements of regret or apology as admissions of liability without looking carefully considering all the other evidence, as well as considering the intention of the parties in making statement.
- Judges may be faced with conflicting evidence as to what has actually been said by way of apology. Judges may need to sort through confused facts and weigh the credibility of various witnesses.
- Judges will interpret what the speaker meant and whether a statement forms any part of an admission of legal responsibility.
- It seems plausible to suggest that judges may be loath to punish people for making sincere apologies. Could one speculate from the tone of the cases that judges may prefer parties who express a sense of responsibility and sympathy over those who seem to be dishonest or to press their advantage?

## **1.4 The litigation process: Most cases settle**

Most cases do not go to court. They settle before trial. However, settlement negotiations are always

conducted in the "shadow of the law." Lawyers are bound to make sure they protect their clients from adverse consequences in case the matter ends up before a judge. This is why lawyers are careful to protect their client from making statements that could later come back to haunt them if the matter does not settle before trial as everyone hopes.

- The few Canadian cases (above) may be insufficient to cause defendants' lawyers to make any changes to their practice, except, perhaps to cause them to consider facilitating statements of sympathy by their clients, which courts do not consider to be admissions of liability.
- Lawyers may need to be encouraged to consider the growing evidence that apologies, particularly partial apologies, may not be as dangerous as they may think. A sincere statement of concern and sympathy by a defendant appears for the most part to be both safe and desirable, and lawyers should consider them more often.
- But... lawyers will not be persuaded by anecdotal or statistical evidence that sincere apologies may facilitate earlier and lower settlements against defendants. Lawyers are interested in protecting the interests of their *particular* client who is not a statistic or someone else's happy-ending story.
- Lawyers are rightly concerned about their clients' making statements that go beyond sorrow to admissions of fault. This is why some jurisdictions in the United States and Australia have been considering "safe harbour" legislation, discussed later.

## 1.5 Insurance

Insurance is another area of legal concern for those who might like to make apologies that go beyond statements of sympathy.

- Generally, insurance policies require that the insured cooperate with the insurance company in the defence of a claim against the insured.
- Some insurance contracts prohibit an insured from voluntarily assuming liability or settling a claim.<sup>(11)</sup>

## 1.6 Experiments with apologies in the United States

Much of the documented experimentation with apologies is in the medical-legal area in the United States.<sup>(12)</sup> Some hospitals and medical insurers have been finding that policies of disclosure and apology seem to reduce the costs of litigation and malpractice settlements.<sup>(13)</sup>

The Veterans Affairs Medical Center in Lexington, Kentucky, a 400 bed hospital, changed its policy on medical error in the late 1980s. Prior to 1987, its usual approach was characterized by limited disclosure and adversarial responses. In 1987, two verdicts were given against the hospital which cost a total of US\$1.5 million. This prompted the hospital to embark on a radically changed policy. The new policy included:

- encouragement of hospital workers to report mistakes;
- investigation by a risk management committee to determine the root cause of the error;
- if the error had a systemic cause, efforts at reform of the system;
- if the mistake resulted in harm to a patient, the patient was informed, whether or not the patient was aware of the mistake;
- brainstorming of the risk management committee to assist the patient with further treatment,



benefits and compensation;

- meetings between the committee and the patient (and often the patient's family and lawyer);
- verbal apology to the patient if the risk management committee felt the hospital or employees had been at fault, followed up with a written apology;
- offer of a fair settlement offer.

The implementation of this new policy usually resulted in rapid settlements. Under the new policy, the hospital's payments for medical error were comparable to those of similar facilities, but settlements were more rapidly reached, and expenses of litigation were reduced. In 1995, the whole Department of Veterans' Affairs adopted a risk management policy, and in the late 1990s two other veterans' hospitals adopted policies similar to the Lexington hospital.

## **1.7 The Canadian situation**

It appears policy changes may be occurring in Canada, as well.<sup>(14)</sup>

### **1.7.1 Two contrasting examples from a BC Children's Hospital**

#### **Hospital in BC in 1997**

In 1997, a hospital in British Columbia "apologised for the death of a little girl who had been treated for leukemia because of a medication error. In a voice cracking with emotions, the hospital president begged the family's forgiveness: 'There are no words that can adequately communicate our apologies or regret to this girl's family... there is nothing we can do to bring their child back tot hem and we are devastated by that knowledge.' The hospital president noted that the doctor, who had been practising medicine for more than ten years and teaching advanced pediatriic oncology, also apologized to the family and reported the incident to the medical and supervisory authorities. The doctor was so shaken by the error that he stopped treating patients, but continues to work on research. The hospital president promised: 'We commit to [the family] and to British Columbians that we will do everything in our power to learn from this error so that such a tragedy never occurs again. . . . We must do better and honour the memory of this little girl.'

#### **Hospital in BC in 1990**

This 1997 BC apology was applauded in the 1997 Report of the Ombudsman of British Columbia which had dealt with a complaint involving the death of a five year old girl in the same hospital in 1990.

According to the BC Ombudsman's 1997 Annual Report<sup>(15)</sup>, Ms. Dana Brynelsen's five-year-old daughter, Erendira, died in 1990 in the Post Anaesthetic Care Unit (PACU) at BCs Children's Hospital (BCCH) after a fairly routine surgery. Ms. Brynelsen had not been allowed to be in the PACU with her daughter after the surgery. Following her daughter's death, Ms. Brynelsen attempted to have a Coroner's inquest into the death, to have the hospital acknowledge responsibility and to have changes made in the policy regarding the presence of parents in the PACU. The following interview with the Ombudsman highlights her concerns and the results of her efforts:

"It was extremely difficult to get information about my daughter's death. The hospital was reluctant to discuss her death with me. The coroner's report took four months, was complimentary to BCs Children's Hospital, and was inaccurate.

"Over the next five years, correspondence regarding her death and my request for changes in recovery room practices were often not responded to by senior hospital employees.

"Immediately following Erendira's death, I asked that hospital policies be changed to permit parents to be with their child in the recovery room. Changes were promised by BCCH administration in 1990, but they did not happen. Research was clear and acknowledged by the senior anaesthetist at BCCH that there were only benefits to children, parents and staff when parents were permitted to be in the PACU. To this day I do not understand why it took seven years for policies at BCCH to change. I received the package of information on the PACU and the booklet *Your Child's Surgery or Procedure* on the seventh anniversary of my daughter's death, October 4, 1997. Had the Ombudsman's Office not been involved two years earlier, practices would not have changed and I would still be working for this reform....*I do believe, however, that the public explanation and apology for the death of a young child at BCCH in June 1997 reflects a true value change at the administrative level. The dialogue with the parents, media, public and their own staff, and complete acceptance of responsibility is a remarkable shift in practice. Health systems all over the world will be impacted by their honest and open approach to that tragedy. The public as well benefits immensely by this honesty, and children are safer when we are all reminded so painfully that mistakes happen. I was later told by a senior BCCH administrator that they changed practice, in part, as a result of Erendira, their response to her death and the lessons they have learned from it.* [italics added]

### **1.7.3 Public Education by Health Canada**

The Health Canada website features a report by Baker and Norton.<sup>(17)</sup> It points out the tension in which physicians find themselves when they make an error:

"... offering an apology for harming a patient should be considered to be one of the ethical responsibilities of the profession of medicine. Monetary compensation alone is not to be offered as a charitable gesture; rather, it should be accompanied by an apology to demonstrate the responsibility of the physician to the trusting patient. Full and honest disclosure of errors is most consistent with the mutual respect and trust patients expect from their physicians. Clearly, physicians' ethical responsibilities sometimes differ from their legal and risk-management responsibilities."<sup>(18)</sup>

### **1.7.4. Hospital Committees in British Columbia: Protected settings for apologies?**

Amendments to the *Evidence Act* in British Columbia in 1998 now protects the disclosure in legal proceedings of statements and discussions made in medical staff committees under Section 41 of the Hospital Act, or committees set up for the purposes of improving medical or hospital care.<sup>(19)</sup>

Apologies are not specifically mentioned in this legislation, however, such statements would be like any other statements made in the course of the work of one of these committees. Thus, in BC, there exists legislative protection that would, arguably, make it possible for hospitals in BC to adopt the kinds of policies of the Veterans hospitals in the United States. This brings us to questions of other kinds of settings for "protected apologies."



## 2. "Protected" apologies

### 2.1 Negotiations in aid of settlement: "Without prejudice"

The courts have long held that communications made in the course of efforts to settle litigation are not admissible in court. The reason for this exception to the normal rules that all relevant evidence is admissible is that there is a high public interest in settling disputes without resort to the courts. Efforts to settle would be undermined if litigants felt that evidence of admissions, concessions or offers given in the course of settlement negotiations might be put before the court.

The term "without prejudice" in a written communication is the usual indication that a communication is intended to be a part of a negotiation in aid of settlement. Therefore, one possible "safe place" to give an apology would be in "without prejudice" communication aimed at settling a dispute.

### 2.2 Mediation: How safe is it?

Mediation is also seen to be a safe place to apologize. Mediation may be protected in one of three ways:

#### 2.2.1 Extension of "without prejudice."

First, mediation may be considered an extension of "without prejudice" communications in aid of settlement, as discussed in the preceding section.

#### 2.2.2 Mediation agreements: confidentiality clauses

Second, professional mediators generally make a contract indicating how the information generated or exchanged during the mediation process will be used. Most of the time, a mediation agreement stipulates that everything said in mediation session will be confidential and that the parties will not bring into court evidence of anything said during the mediation. While judges may take note of such agreements, they may not consider themselves bound by such a contract. This is because they have a discretion to hear what evidence they consider relevant, subject to any statutes or the common law.

#### 2.2.3 Judicial discretion

Third, judges in Canada have discretion to exclude evidence if there are public policy reasons to do so. By the same token, judges have discretion to admit evidence or to compel witnesses despite any agreement between the parties to the contrary. McHale notes that in making decisions, judges weigh competing policy values including:

- "The need to protect communications so that litigants will freely engage in settlement discussions (the law's interest in settlement);
- The need to see justice done with the best evidence possible (court's control over its own process)."<sup>(20)</sup>

In the absence of a statute, judges will use the common law to decide whether to find that evidence

is privileged and should be excluded. A common law privilege is found in the "Wigmore Rules" which were affirmed by the Supreme Court of Canada in 1975 in *Slavutych v. Baker*,<sup>(21)</sup> and in 1991 in *R. v. Gruenke*.<sup>(22)</sup>

Wigmore's conditions for finding a privilege are as follows (italics in original):

1. The communications must originate in a *confidence* that they will not be disclosed;
2. This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
3. The *relation* must be one which, in the opinion of the community ought to be sedulously *fostered*.
4. The *injury* which could inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of the litigation.<sup>(23)</sup>

Wigmore's tests have been used to exclude evidence of what happened in mediation in at least two family mediation cases, *Porter v. Porter*,<sup>(24)</sup> and *Sinclair v. Roy*,<sup>(25)</sup> and at least one civil mediation case, *Marchand v. Public General Hospital of Chatham*.<sup>(26)</sup>

However, judges are likely to admit into evidence or compel a witness to testify concerning what happened during mediation:

- if safety of children is at stake (this could well be a subject of an apology in a family mediation),
- if there have been criminal threats uttered in mediation.<sup>(27)</sup> (This is unlikely to be an apology!)

### 2.2.3 Statutory confidentiality

Several Canadian jurisdictions have legislation that discusses confidentiality in mediation. In BC, mediators should note the following (see appendix for citations)

- *Law and Equity Act*, Notice to Mediate (General) Regulation
- *Insurance (Motor Vehicle) Act*, Notice to Mediate Regulation
- *Homeowner Protection Act*, Notice to Mediate (Residential Construction) Regulation
- *School Act*, Education Mediation Regulation
- *Child, Family and Community Service Act*, section 24
- Practice Direction in the Supreme Court of British Columbia, November 17, 1997, "Re: Rule 35 Judicial Alternate Dispute Resolution."
- Federal Court Rules, 1998, [SOR/98-106]. See sections 386, 388

Jerry McHale points out that this list is "by no means exhaustive" and suggests that there is "a trend towards statutory confidentiality, and a policy bias toward protecting disclosures made in mediation, which bias we also see in common law and in the cases."<sup>(28)</sup>

Some scholars and policy makers have been recommending that the confidentiality of mediation be clarified through more uniform legislation.<sup>(29)</sup> Two issues are seen to require statutory clarification:

- "what communications should be protected from disclosure of any kind,"<sup>(30)</sup> and

- "what testimonial immunity the mediator should have."<sup>(31)</sup>

In the United States, a "Uniform Mediation Act"<sup>(32)</sup> has been created by dispute resolution practitioners and scholars. This model statute suggests that there be a general prohibition against disclosure with a number of exceptions including agreements by the parties to the contrary, threats of bodily injury, communications used to plan or commit a crime, evidence of abuse or neglect in proceedings involving children, evidence of professional misconduct or malpractice by the mediator or a representative of a party, the validity and enforceability of a settlement agreement, or other need for the evidence that substantially outweighs the interest in protecting confidentiality.<sup>(33)</sup> It remains to be seen whether the Uniform Mediation Act will be used as a model by Canadian legislators.

### **3. Policy options for protection of apologies through "safe harbour" legislation**

There has been a fair amount of debate in the United States about the usefulness of "safe harbour" legislation. There is by no means a consensus. Little debate has occurred so far in Canada.

#### **3.1 Pros and Cons**

The arguments in favour of apology legislation are:

- Apologies tend to facilitate settlement and should be encouraged as a matter of public policy.
- Apologies tend to humanize conflict, and this should be encouraged as a matter of public policy;
- Apology legislation will make it more attractive for people to take responsibility for their actions that harm others without fear of being punished later for trying to do the right thing.<sup>(34)</sup>
- Failure to create safe harbour legislation maintains the status quo, which may disadvantage some people who for gender-based, cultural or religious reasons may apologize more than others. This may include member of some cultures who apologize more than North Americans do.<sup>(35)</sup> It may include women, who (it is suggested) may apologize more than men do as a matter of politeness and form,<sup>(36)</sup> and members of some groups for whom it is a religious duty to apologize to people they have harmed or offended.<sup>(37)</sup>

Arguments against apology legislation include the following:

- apology legislation might encourage insincere and strategic apologies by sophisticated defendants who may thus take advantage of less sophisticated plaintiffs;<sup>(38)</sup>
- apology legislation might preclude evidence of admissions that some plaintiffs might need to prove their case;
- apologies encouraged by such legislation might create an emotional vulnerability in plaintiffs who might accept low and unfair settlements.<sup>(39)</sup>

In general, there are two types of "safe harbour" legislation, discussed below.

#### **3.2 Protection of partial apologies: Expressions of sympathy**

The less controversial and most common type of legislation excludes statements that are expressions of condolence or sympathy, but not statements that admit fault. This type of legislation has been passed in Massachusetts, Texas, Florida, California. The concerns with this type of legislation include:<sup>(40)</sup>

- This type of "half a loaf"<sup>(41)</sup> legislation will not make enough difference, since expressions of condolence do not do much if any harm to a person who apologizes, since they are not admissions of fault.
- People who read newspaper headlines that apologies are now "safe" might be misled into thinking that their fault-admitting apology cannot be used against them ("half a loaf may be worse than a whole loaf"<sup>(42)</sup>).
- Such legislation does not really accomplish the goal of encouraging true apologies, and may encourage insincerity for strategic purposes.

### **3.3 Protection of full apologies: Admissions of fault**

Few jurisdictions have considered statutory protection of full apologies, that is, apologies in which fault is admitted. The pros and cons outlined above apply mainly to this type of apology legislation.<sup>(43)</sup> Colorado seems to be the only state that has excluded apologies which include statements of fault ( in cases involving medical care only). New South Wales (NSW) in Australia recently passed legislation providing for exclusion of apologies that admit or imply fault. Section 69 of the NSW legislation says:

1. An apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person:
  - a. does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and
  - b. is not relevant to the determination of fault or liability in connection with that matter.
2. Evidence of an apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.<sup>(44)</sup>

"Apology" in the NSW legislation is defined as

"... an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter."<sup>(45)</sup>

The act does not exclude admissions made in intentional torts, such as assaults. Since most of this legislation is quite new, it remains to be seen how the various kinds of "safe harbour" legislation will affect litigants and the litigation process in the jurisdictions in question.

## **4. Conclusions**

Concluding recommendations include the following:

- More policy discussion needs to be conducted among mediators and government policy makers in Canada to clarify how communications made in mediation are to be treated by

parties, mediators and the courts.

- More Canadian research, stakeholder analysis, and policy discussions are needed to begin to weigh carefully the pros and cons of "safe harbour" legislation.
- There is a need for research and discussions among lawyers about standards of legal advice to potential apologisers. Comparative case analysis on how Canadian judges interpret and treat apologies in various areas of the law would be useful. Empirical research would be useful to ascertain how Canadian litigants view apologies, and how plaintiffs act when they receive various kinds of apologies.<sup>(46)</sup>

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## Notes

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1. This paper excludes discussion of apologies in defamation and contempt of court cases. Apologies have long been useful in defamation cases to reduce the measure of damages, and may provide evidence that a defamatory statement was not malicious in intent. In cases of contempt of court, an apology by the one found in contempt usually purges the contempt in the eyes of the judge.

2. This paper excludes discussion of the law of contract, or the doctrine of "vicarious liability" on which I could find no Canadian cases or legal literature in which the legal effects of apologies in such cases were discussed.

3. Summarized by G. Ross Baker and Peter Norton, "Patient Safety and Healthcare Error in the Canadian Healthcare System: A Systematic Review and Analysis of Leading Practices in Canada with Reference to Key Initiatives Elsewhere," (Ottawa: Health Canada, 2002)., citing Canadian Encyclopedic Digest, 1994, Sec.109, and E.I. Picard and Robertson G. B., *Legal Liability of Doctors and Hospitals in Canada* (Scarborough: Carswell, 1996).

4. This paper does not review cases on defamation or criminal cases in which apologies are often used in mitigation of the consequences of these types of wrongs. There are also numerous cases involving contempt of court in which an apology will often "purge" the contempt. For Canadian material on the law pertaining to these kinds of cases, see e.g, Susan Alter, "Apologising for Serious



Wrongdoing: Social, Psychological and Legal Considerations," (Ottawa: Law Commission of Canada, 1999), available online September 15, 2003 [http://epe.lac-bac.gc.ca/100/200/301/lcc-cdc/apologising\\_serious\\_wrong-e/apology.html](http://epe.lac-bac.gc.ca/100/200/301/lcc-cdc/apologising_serious_wrong-e/apology.html); Raymond E. Brown and Jeremy S. Williams, *The Law of Defamation in Canada*, 2nd ed. (Scarborough, ON: Carswell, 1994), Jeffrey Miller, *The Law of Contempt in Canada* (Scarborough, ON: Carswell, 1997).

5. *Kotter v. Foss* [1984] S.J. No. 328 Q.B. No. 674 A.D. 1981 J.C.R.

6. *Zojaji v. Cowan* [1994] B.C.J. No. 1567 Vancouver Registry: B924896 British Columbia Supreme Court Vancouver, British Columbia Mackoff J. Heard: April 20 - 22 & 25, 1994. Judgment: filed July 11, 1994.

7. *Cuff v. Carey* [1999] N.J. No. 251 Court No. 98-167, Newfoundland Provincial Court, Judicial Centre of Clarenville, Handrigan Prov. Ct. J. Judgment: September 9, 1999.

8. *Dusty's Saloon, a division of A.P. Woznow & Sons Enterprises Ltd. v. W.M.I. Waste Management of Canada Inc.* [2001] A.J. No. 108 Action No. 9601-14505, Alberta Court of Queen's Bench, Judicial District of Calgary Romaine J., January 31, 2001.

9. *Jordan v. Power* [2002] A.J. No. 1080 2002 ABQB 794 Action No. 9803 11672 Alberta Court of Queen's Bench Judicial District of Edmonton Veit J. Heard: September 3, 2002.

10. Apologies will be admitted as an exception to the rule of evidence that precludes hearsay from being admitted into evidence to prove the truth of the statement. The theory of this exception to the hearsay rule is that a statement is likely to be true if it was an uncoerced statement that against the interest of the person making the statement.

11. For example, the Insurance Corporation of BC IA regulations require an insured to "cooperate with the Corporation in the defence of any action or proceeding, or in the prosecution of any appeal, taken by the Corporation on behalf of the insured." An insured must not "voluntarily assume liability or settle any claim except at his or her own cost..." Canadian insurance law literature and cases were not canvassed for this paper.

12. British literature was not reviewed for this paper.

13. Jonathan R. Cohen, "Apology and Organizations: Exploring an Example from Medical Practice," *Fordham Urban Law Journal* 27, no. 5 (2000). Also see Cohen's excellent article, Jonathan R. Cohen, "Advising Clients to Apologize," *California Law Review* 72 (1999).

14. It was beyond the scope of this preliminary research to locate and canvass reports on risk management from Canadian hospitals, nor were any hospital risk managers interviewed.

15. Ombudsman of British Columbia, "For the Safety of Children: Highlights 1997 Ombudsreport," (Victoria: BC Office of the Ombudsman, 1997).

16. William Beilby, "Disclosing Adverse Clinical Outcomes," (Ottawa: The Canadian Medical Protective Association, 2001).

17. Health Canada is the Canadian federal department of health.

18. Baker and Norton, "Patient Safety and Healthcare Error in the Canadian Healthcare System: A Systematic Review and Analysis of Leading Practices in Canada with Reference to Key Initiatives Elsewhere," available September 15, 2003 online [http://www.hc-sc.gc.ca/hcs-sss/pubs/care-soins/2002-patient-securit-rev-exam/index\\_e.html](http://www.hc-sc.gc.ca/hcs-sss/pubs/care-soins/2002-patient-securit-rev-exam/index_e.html), [http://www.hc-sc.gc.ca/hcs-sss/alt\\_formats/hpb-dgps/pdf/pubs/2002-patient-securit-rev-exam/2002-patient-securit-rev-exam\\_e.pdf](http://www.hc-sc.gc.ca/hcs-sss/alt_formats/hpb-dgps/pdf/pubs/2002-patient-securit-rev-exam/2002-patient-securit-rev-exam_e.pdf).
19. BC *Evidence Act*, Section 51 "Health Care Evidence", available online at [http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_96124\\_01#section51#section51](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96124_01#section51#section51).
20. Jerry McHale, "Mediation: Confidentiality, Privilege and Compellability" (Unpublished talk, Victoria: 2001).
21. *Slavutych v. Baker* (1975) 4 WWR 620 (SCC)
22. *R. v. Gruenke* [1991] 3 S.C.R. 263 at 195, L'Heureux-Dub? J.
23. J.H. Wigmore, "Evidence in Trials at Common Law," (Boston: Little Brown, 1961)., emphasis in original
24. *Porter v. Porter* 32 RFL (2d) 413 (Ont. Unified Family Court);
25. *Sinclair v. Roy* 47 RFL (2d) 15 (BCSC)
26. *Marchand (Litigation Guardian of) v. Public General Hospital of Chatham* [1997] O.J. No. 1805 (Ont. Ct. (Gen. Div.)) (Q.L.)
27. Owen V. Gray, "Protecting the Confidentiality of Communications in Mediation," *Osgoode Hall Law Journal* 36, no. 4 (1998), available (pdf file) online at <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1551&context=ohlj>; McHale, "Mediation: Confidentiality, Privilege and Compellability."
28. McHale, "Mediation: Confidentiality, Privilege and Compellability.". It was not possible for this project to research on additional regulations in Canada.
29. See, e.g. Gray, "Protecting the Confidentiality of Communications in Mediation."
30. *Ibid.*: 701.
31. *Ibid.*
32. National Conference of Commissioners on Uniform State Laws, "Uniform Mediation Act," (White Sulphur Springs, West Virginia: National Conference of Commissioners on Uniform State Laws, 2001), available September 15, 2003 <http://www.pon.harvard.edu/guests/uma/UMAFinal.pdf>
33. *Ibid.*
34. See Aviva Orenstein, "Apology Expected: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It," *Southwestern University Law Review* 28 (1999).
35. Max Bolstad, "Learning from Japan: The Case for Increased Use of Apology in Mediation," *Cleveland State Law Review* 48, no. 3 (2000), John O. Haley, "Comment: The Implications of

Apology," *Law & Society Review* 20, no. 4 (1986), Hiroshi Wagatsuma and Arthur Rosett, "The Implications of Apology: Law and Culture in Japan and the United States," *Law & Society Review* 20, no. 4 (1986).

36. Orenstein, "Apology Expected: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It." See also Deborah Tannen, "I'm Sorry, I'm Not Apologizing," in *Talking from 9 to 5: Women and Men in the Workplace: Language, Sex and Power* (New York: Avon Books, 1994).

37. Jonathan R. Cohen, "Legislating Apology: The Pros and Cons," *University of Cincinnati Law Review* 70, no. 3 (2002).

38. Lee Taft, "Apology Subverted," *Yale Law Journal* 109 (2000).. There is some evidence that statements of sympathy are being routinized in the case work of some defendants' lawyers. I recently received a sympathy and regret form letter (which made no admissions) from an American lawyer, but this was from a lawyer in a jurisdiction that does not have "safe- harbour" legislation.

39. The question has also been raised as to whether those who receive apologies should be too quick to forgive. What if a statement of moral forgiveness by an offended person is taken to mean the legal forgiveness of a debt or liability? I have seen no literature on this point.

40. Cohen, "Legislating Apology: The Pros and Cons.", Orenstein, "Apology Expected: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It."

41. Cohen, "Legislating Apology: The Pros and Cons."

42. Ibid.

43. Ibid, Orenstein, "Apology Expected: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It."William K. Bartels, "The Stormy Seas of Apologies: California Evidence Code Section 1160 Provides a Safe Harbor for Apologies Made after Accidents," *Western State University Law Review* 28 (2001).

44. New South Wales *Civil Liability Act* 2002 No 22, section 68, available online September 15, 2003, at <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+22+2002+pt.10-sec.68+0+N/>.

45. New South Wales *Civil Liability Act* 2002 No 22, section 68, available online September 15, 2003, at <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+22+2002+pt.10-sec.68+0+N/>.

46. Canadian empirical research might consider and modify research being conducted in the United States. See, e.g. Jennifer K. Robbennolt, "Apologies and Legal Settlement: An Empirical Examination," *Michigan Law Review* (forthcoming 2003).