

Promoting and Protecting Apologetic Discourse through Law: A Global Survey and Critique of Apology Legislation and Case Law

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Abstract

The year 2016 was a milestone for the law-and-apology field, marking the thirtieth anniversary of the first general law aimed at enabling apologies for civil wrongs, introduced in Massachusetts in 1986, as well as the tenth anniversary of the *Apology Act*, enacted in British Columbia in 2006. The *Apology Act* seeks to promote apologies and apologetic discourse as an important form of out-of-court dispute resolution, chiefly by making apologetic statements inadmissible for proving liability in civil wrongs. It has served as a benchmark from which subsequent law reform efforts in Canada and abroad have been measured. In 2017, that benchmark was passed with the enactment in Hong Kong of the most ambitious apology law yet, which privileges not only statements of remorse, but also statements of facts embedded in apologies. This article summarises global apology legislation and court decisions to date. Part I considers each major jurisdiction, starting with the USA and concluding with Hong Kong. Part II draws some conclusions about where we have been and where we are going in our efforts to promote or protect apologetic discourse, including recommendations on interpreting existing laws and on drafting or redrafting apology legislation.

Key words

Apology; apology legislation; dispute resolution; evidence

Resumen

El año 2016 supuso un hito en el campo del derecho y las disculpas, marcando el trigésimo aniversario de la primera ley general destinada a permitir las disculpas para daños civiles, aprobada en Massachusetts en 1986, así como el décimo aniversario de la *Ley de Disculpa*, aprobada en la Columbia Británica en 2006. La *Ley de Disculpa* busca promover las disculpas y el discurso de arrepentimiento como una forma importante para resolver disputas fuera de los tribunales, principalmente haciendo que las afirmaciones de arrepentimiento no fueran admisibles para probar la responsabilidad por daños civiles. Ha servido como

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ejemplo con el que comparar siguientes intentos de reforma jurídica en Canadá y el extranjero. En 2017 dejó de ser ejemplo a raíz de la promulgación en Hong Kong de una ley de disculpa más ambiciosa todavía, que da un trato de favor no sólo a las afirmaciones de arrepentimiento, sino también a las afirmaciones de hechos integradas en las disculpas. Este artículo resume la legislación general sobre disculpas y las decisiones judiciales hasta la fecha. La parte I considera cada jurisdicción principal, empezando por Estados Unidos y acabando por Hong Kong. La parte II plantea unas conclusiones sobre de dónde venimos y hacia dónde vamos en nuestros esfuerzos para promover o proteger el discurso del arrepentimiento, incluyendo recomendaciones sobre la interpretación de leyes existentes y en la redacción o reforma de la legislación sobre perdón.

Palabras clave

Disculpas; legislación sobre disculpas; resolución de conflictos; pruebas

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In memory of Aaron Lazare (1936–2015), a leader in the study of apology, as in many other things. (UMass Medical School Communications 2015)¹

1. Overview

The year 2016 was a dual anniversary for the law-and-apology field. It marked the thirtieth anniversary of the first general law aimed at enabling apologies for civil wrongs, introduced by Massachusetts senator Robert Buell in 1986 at the behest of his predecessor, William Saltonstall. According to a story that has become part of the law-and-apology canon, Saltonstall's daughter was hit and killed by a car while riding her bicycle, and the driver never apologised despite wanting to; Saltonstall later learned that this was so because "[the driver] dared not [as] it could have constituted an admission in the litigation surrounding the girl's death." (Taft 2000, p. 1151) This view arises from the general rule that a party's out-of-court statement or conduct against interest, not otherwise protected by privilege (e.g., the privilege associated with settlement discussions), is admissible against that party at trial even though it would otherwise be excluded as hearsay evidence. The Massachusetts bill sought to provide a "safe harbour" for such would-be apologisers by rendering their sympathetic words or "benevolent gestures" inadmissible in a civil action,² and spawned comparative initiatives in almost every US state.

The Massachusetts enactment protects expressions of sympathy—as in "we truly regret that this happened"—but not fault. It is also restricted to "accidents," thus excluding intentional wrongdoing. The bill's restricted scope stands in marked contrast to the 2006 enactment of the first comprehensive legislation in the common-law world—British Columbia's *Apology Act*.³ In an article written at the time, I characterized this as an example of a legislature "thinking like a human," (Kleefeld 2007)⁴ in an only partly tongue-in-cheek dig at lawyers' advice (at least some lawyers' advice) to their clients to avoid doing what basic morality and ingrained socialization have taught us to do—to say "I'm sorry; what I did was wrong." The act protects apologies that include admissions of fault, both by rendering them inadmissible for proving liability and by overriding insurance clauses that might hinder insured persons from making apologies to those whom they injure. Thus 2016 also marked the tenth anniversary of the first Canadian legislation on the subject—legislation that has served as a benchmark from which subsequent law reform efforts in both Canada and abroad have been measured.

Apart from this, there have, in this same period, been unprecedented efforts by governments to apologise—or to take steps towards apologising—for historical wrongs, including slavery, racial and sexual intolerance, colonization, improper takings of lands, sexual and physical abuse of students in residential or day schools, and mass internments or genocide of peoples. Such apologetic discourse has been seen in New Zealand,⁵ Australia,⁶ Canada⁷ and the United States of

¹ For Lazare's influential book on apology, see Aaron Lazare (2004).

² Mass. Gen. Laws ch. 233 § 23D.

³ *Apology Act*, SBC 2006, c 19.

⁴ I draw on parts of this article in what follows herein.

⁵ During the tenure of former prime minister Helen Clark (subsequently Administrator of the United Nations Development Programme until her retirement in April 2017) and continuing to the present, New Zealand completed or is completing settlements relating to longstanding Maori claims that include detailed apologies from the Crown for historic violations against the Maori people. These apologies form part of the settlements and are incorporated directly into settlement legislation in English and Maori. See (in alphabetical order): *Affiliate Te Arawa Iwi and Hapu Claims Settlement Act 2008*; *Hineuru Claims Settlement Act 2016*; *Maraeroa A and B Blocks Claims Settlement Act 2012*; *Maungaharuru-Tangitū Hapū Claims Settlement Act 2014*; *Mokomoko (Restoration of Character, Mana, and Reputation) Act 2013*; *Ngāa Rauru Kīitahi Claims Settlement Act 2005*; *Ngāi Tahu Claims Settlement Act 1998*; *Ngāi Takoto Claims Settlement Act 2015*; *Ngai Tāmanuhiri Claims Settlement Act 2012*; *Ngāti Apa (North Island) Claims Settlement Act 2010*; *Ngāti Apa ki te Rā Tō, Ngāti Kuaia, and Rangitāne o Wairau Claims Settlement Act 2014*; *Ngāti Awa Claims Settlement Act 2005*; *Ngāti Hauā Claims Settlement Act 2014*; *Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement*

America,⁸ and in some cases, incorporated into legislation or processes for resolving legal claims. While outside the scope of this article, these apologies merit scholarly attention as a public counterpart to the legislative initiatives that govern private disputes between citizens.

Act 2014; Ngāti Koroki Kahukura Claims Settlement Act 2014; Ngāti Kuri Claims Settlement Act 2015; Ngāti Manawa Claims Settlement Act 2012; Ngāti Manuhiri Claims Settlement Act 2012; Ngāti Mutunga Claims Settlement Act 2006; Ngāti Pāhauwera Treaty Claims Settlement Act 2012; Ngāti Porou Claims Settlement Act 2012; Ngāti Rangiteaorere Claims Settlement Act 2014; Ngāti Rangiwewehi Claims Settlement Act 2014; Ngāti Ruanui Claims Settlement Act 2003; Ngāti Tama Claims Settlement Act 2003; Ngāti Tūrangitukua Claims Settlement Act 1999; Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005; Ngāti Whare Claims Settlement Act 2012; Ngāti Whātua o Kaipara Claims Settlement Act 2013; Ngāti Whātua Ōrākei Claims Settlement Act 2012; Pouakani Claims Settlement Act 2000; Raukawa Claims Settlement Act 2014; Rongowhakaata Claims Settlement Act 2012; Tapuika Claims Settlement Act 2014; Te Arawa Lakes Settlement Act 2006; Te Kawerau ā Maki Claims Settlement Act 2015; Te Rarawa Claims Settlement Act 2015; Te Roroa Claims Settlement Act 2008; Te Uri o Hau Claims Settlement Act 2002; Tūhoe Claims Settlement Act 2014; Waikato Raupatu Claims Settlement Act 1995; and Waitaha Claims Settlement Act 2013. An example of the language used in this legislation comes from *Ngāti Awa Claims Settlement Act 2005*, ss 10(7)-(9): “The Crown profoundly regrets and unreservedly apologises for the destructive impact and demoralizing effects of its actions which have caused significant damage to the welfare, economy, and development of Ngāti Awa. ... Accordingly, with this apology, the Crown seeks to atone for these wrongs and begin the process of healing and looks forward to building a relationship of mutual trust and co-operation with Ngāti Awa.” Clark (2002a) also issued formal, albeit unlegislated, apologies for New Zealand’s poll tax and other discriminatory policies directed at Chinese immigrants and to Samoa for New Zealand’s “incompetent early administration” of the island nation (Clark 2002b) and (BBC News 2002).

⁶ See the 2008 apology by then Prime Minister Kevin Rudd to members of the “Stolen Generations”—indigenous people taken from their homes as children. While the apology was not framed as legislation, it was introduced as a motion forming part of the parliamentary record, along with supporting speeches. (HR 2008a, 167–173 Rudd, 173–177 Nelson) See also HR (2008b, 427 Owens, 2008c, 778–827 various members, 2008d, 1346 report of main committee, motion agreed to by House). In 2013, Australia’s then prime minister Julia Gillard delivered a national apology in Parliament to thousands of unwed mothers forced by government policies to give up their babies for adoption (The Guardian 2013). The Australian state of Victoria became the first government in the world to apologise to people convicted under historical laws against homosexuality, along with plans to expunge the convictions. (Davey 2016) This was followed by other initiatives elsewhere (see, e.g., The Guardian 2017).

⁷ The Government of Canada has made several significant historic apologies over the last 30 years. In 1988, then Prime Minister Brian Mulroney formally apologised to Japanese-Canadian survivors and their families for being uprooted from their homes and interned in camps during World War II. The apology was accompanied by a \$300 million compensation package (CBC 1988). In 2006, the Prime Minister Stephen Harper apologised for “the racist actions of our past” as reflected in a head tax imposed on Chinese-Canadian immigrants between 1885 and 1923. (Clark 2006) Two years later, Harper made another historic apology in Parliament, this time to former students of Indian Residential Schools. (CBC 2008, Harper 2008) The apology followed a 2006 class action settlement, the Indian Residential Schools Settlement Agreement (2006), that provided mechanisms for dealing with claims and for setting up a Truth and Reconciliation Commission. In 2016, Prime Minister Justin Trudeau formally apologised in the House of Commons for the 1914 *Komagata Maru* incident, in which hundreds of passengers were denied entry to Canada and forced to return to a violent fate in India. (CBC News 2016)

⁸ In the last 30 years, the US government has made several apologies to atone for historic wrongs. See *Civil Liberties Act of 1988*, Pub. L. 100–383, 102 Stat. 903, 50 U.S.C. App. §1989 (2000 ed.) (apology and reparations for interning Japanese citizens during World War II); *Radiation Exposure Compensation Act of 1990*, Pub. L. 101–426, 104 Stat. 920, notes following 42 U.S.C. §2210 (2000 ed. and Supp. V) (apology and “partial restitution” for those exposed to atmospheric nuclear testing during the Cold War or exposed to radon gas and other radioactive isotopes arising from uranium mining for nuclear weapons production); *Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii*, Pub. L. 103–150, 107 Stat. 1510, 1513 (not classified to the US Code, but for related information, see 20 U.S.C. §7512 and accompanying notes) (apology to native Hawaiians for America’s role in the overthrow of the Kingdom of Hawaii on the centenary of that event); and *Joint Resolution of Apology to Native Peoples of the United States*, included in *Department of Defense Appropriations Act of 2010*, Pub. L. 111–118, 123 Stat. 3409, 3453, §8113 (apology for the “many instances of violence, maltreatment, and neglect inflicted on Native Peoples”). These apologies were all joint resolutions signed into law by US presidents; in addition, in 1997, President Bill Clinton apologised for the US-sponsored 1932 Tuskegee syphilis study, in which researchers studied effects of syphilis on poor black men who had the disease but who went untreated even after treatments were discovered (The White House Office of the Press Secretary 1997). Also, in 2008 and 2009, the House and Senate passed separate resolutions apologising for slavery and segregation laws: H.Res.194 (passed 29 July 2008) and S.Con.Res. 26 (passed 18 June 2009). In the US, though, the apologetic trend has not been universal, with some large-scale apologies even having been recently retracted (Garcia 2017).

Has civil society become any more apologetic, or are lawyers and other advisors counselling their clients to apologise, as a result of these efforts? That is a question I would like to answer—but it is beyond my capabilities at this point. Some have begun to answer it, at least in the health care context, where much of the US legislation has been focused.⁹ Experimental research suggests that the applicable evidentiary rule may make little difference; in other words, an injured party may be unlikely to discount an apology just because it would be protected from later admissibility in a civil proceeding. (Robbennolt 2003, 2006)¹⁰ However, that is a different question from whether evidentiary rules are promoting more apologetic discourse in the first place. Empirical research may give us more and better information; if so, that would be useful for policy-making. In the meantime, I will employ the lawyer's dodge, and try to answer—at least partly answer—another question: what progress have we made in using the law to promote and protect apologetic discourse, and what principles or lessons can be drawn from that experience?

To do so, I first summarize apology legislation around the world, both existing and pending, followed by an overview of the case law considering it. This summary can be found in Part I and is organized by major jurisdiction, starting with the US and concluding with Hong Kong, whose legislation is the most recent and was passed at the time of writing. In Part II, I draw some conclusions about where we have been and where we are going in our efforts to promote or protect apologetic discourse; this includes recommendations on the interpretation of existing laws as well as on the drafting or redrafting of apology legislation.

Before beginning, I wish to address a point of terminology and a point of scope.

The point of terminology is the expression “apologetic discourse.” Academics have a penchant for using two or more words where one will do, and I confess to being open to criticism on that account. But I defend the use of “apologetic discourse” rather than the simpler term “apology” on at least two grounds.

First, “apology” is a contested concept, with some insisting that only a “full” apology merits the use of the term. In my original article, I characterized the elements of a full apology, recognized by various authors, as comprising “four Rs”: *remorse, responsibility, resolution and reparation*. (Kleefeld 2007, p. 790) Remorse can be thought of as “I’m sorry” or “I apologise”; responsibility, as “I know what I did was wrong”; resolution, as “I promise this won’t happen again”; reparation, as “how can I make this up to you?” (Kleefeld 2007, p. 790) Some say that all four elements, or at least the first two, must be present to constitute an apology. On this view, a general “I’m sorry,” without specifying the words or deeds to which the putative regret applies, hardly counts as an apology, and the notorious “I’m sorry for whatever I may have done” is more likely to be seen as a “non-apology” or botched apology than a true apology. Yet I would count all such statements as attempts at “apologetic discourse” in a general sense, and reserve judgment for their effects in the context of particular statements in particular cases. As I use the term, then, “apologetic discourse” exists on a spectrum, and can include both full and partial apologies, as well as apologies that may be effective or ineffective, depending not only on the statements themselves, but on the contexts in which they are given.

⁹ See, e.g., Ho and Liu (2011a). Based on econometric analysis of 225,319 payment reports from the National Practitioner's Data Bank made over a 17-year period, the authors conclude—somewhat tentatively—that the “apology laws’ combined effect is to increase apologies and decrease expected settlement time, and should in the long term speed up settlements and reduce the total number and value of malpractice payments” (162). In a related study, the same authors conclude that apology laws account for an average \$32,342 (12.8 percent) decrease in the size of malpractice payments over the period. See Ho and Liu (2011b).

¹⁰ For subsequent experimental studies on how admissibility regimes might affect how *lawyers* would treat apologies, see Robbennolt (2008).

The second ground on which I defend “apologetic discourse” is that it conveys the notion of a dialogue between would-be apologetiser and hoped-for apology recipient. As Nicholas Tavuchis (1991, p. 23) explains, an apology, or attempt at one, is one side of a moral equation; the other is the injured party’s response: “whether to accept and release by forgiving, to refuse and reject the offender, or to acknowledge the apology while deferring a decision.” Tavuchis refers to an “injured party” and an “offender,” terms that may themselves be problematic, especially in the context of apologies by or to proxies, as with apologies for historical wrongs committed by a collective. But I accept Tavuchis’s basic premise, and think that law-and-apology scholarship must attend to both sides of the equation. Hence the added term “discourse.”

The point of scope is that my survey and critique takes place chiefly within the context of civil—i.e., “non-criminal”—wrongs and proceedings that flow from them, and focuses on the law as it relates to the admissibility of apologies as evidence in such proceedings. I include in this category administrative and professional disciplinary proceedings, even though both of these share some of the attributes of criminal proceedings, such as a greater focus on the public interest than on private rights, remedies and interests. This is not to underrate the role of apology in criminal law, especially in sentencing. But the chief developments in the law have been in the civil arena, and it is those to which I direct my attention.

2. Part I: Legislation and Case Law

I find it convenient to cast legislative efforts as falling into two broad categories: *apology-enabling* and *apology-enacting*.

Apology-enabling legislation includes provisions that seek to promote or protect apologetic discourse generally, as well as those that seek to do so in specific contexts. My emphasis is on legislation that tries to achieve these goals by limiting the admissibility of apologies for proving civil liability. Legislators hope is that in so doing, civil disputes will be resolved more amicably and less expensively. British Columbia’s *Apology Act*, or its model-act equivalent in Canada, the *Uniform Apology Act*, aims to do this for civil disputes generally. Other statutory provisions, notably in the US, aim to do this in the health care context. However, there is also a lot of other legislation that could be characterized as apology-enabling. Examples include “libel and slander” acts that direct courts to consider evidence of apologies in mitigation of damages, as well as administrative statutes that—questionably, in my view—authorize human rights tribunals to order apologies as remedies in discrimination cases.¹¹

Apology-enacting legislation includes provisions that seek to enshrine or encourage apologetic discourse in a symbolic or substantive way, as part of a settlement or acknowledgement of historical wrongdoing, or as part of a process of truth and reconciliation. I include in this category formal resolutions of parliamentary or legislative assemblies, even where such resolutions do not take the form of statutory enactments. Some of this legislation—or legislative efforts, as in bills that keep getting introduced into legislative sessions without ever being passed—fall more in the political or public realm than the realm of private disputes. Yet some may be linked to compensation schemes that require proof of individual harm, thus overlapping with the private realm.

This article focuses on a particular type of apology-enabling legislation—that which seeks to limit the admissibility of apologies for proving civil liability. It may do so as a stand-alone statute, as a provision or provisions within rules relating to evidence, or as part of a separate statutory scheme, as in legislation dealing with health care reform.

¹¹ For good treatments of this topic, expressing views that are more optimistic than mine, see Carroll (2013); Zwart-Hinck *et al.* (2014); and van Dijck (2017).

2.1. United States of America

As noted, the first apology legislation was introduced in Massachusetts in 1986. Since then, other states, as well as the capital district¹² and the territory of Guam, have followed with various legislative initiatives. There are nearly 50 of these in force,¹³ as shown in Table 1. The first column gives the state and year in which the enactment came into force; the second gives a citation and, where available, a hyperlink to a non-proprietary version; the third shows the type of evidentiary protection and the subject matter to which it applies.

As to type of protection, some provisions are silent on apologies that include acknowledgments of fault or mistake, some expressly include fault within the scope of admissible statements, and some expressly exclude it, limiting protection to statements of sympathy but not fault. As to subject matter, the division tends to be between accidents, following the Massachusetts lead, and health care, with the state of Washington having a provision for each of these categories. Only three states—Hawaii, Indiana and Missouri—have provisions whose language appears to cover any subject matter. The accompanying sidebar shows two different provisions—a narrow form of protection for statements made in the accident context, as enacted in Massachusetts, and a broader form of protection for statements in the medical context, as enacted in Connecticut.

A glance at Table 1 shows that most provisions relate to expressions of sympathy for “unanticipated outcomes” in health care, referred to less euphemistically in some statutes as “medical malpractice” or “medical error.” In other words, most of these are restricted to a specific context. They supplement other, longstanding, rules that render evidence of benevolent conduct inadmissible for proving liability—e.g., promising to pay for hospital bills incurred as a result of an injury.¹⁴

Massachusetts

Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action. Mass. Gen. Laws ch. 233 § 23D (the section also defines the words “accident,” “benevolent gestures” and “family”).

Connecticut

In any civil action brought by an alleged victim of an unanticipated outcome of medical care, or in any arbitration proceeding related to such civil action, any and all statements, affirmations, gestures or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion or a general sense of benevolence that are made by a health care provider or an employee of a health care provider to the alleged victim, a relative of the alleged victim or a representative of the alleged victim and that relate to the discomfort, pain, suffering, injury or death of the alleged victim as a result of the unanticipated outcome of medical care shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest. Conn. Gen. Stat. ch. 899 tit. 52 § 184d (the section also defines “health care provider,” “relative,” “representative” and “unanticipated outcome”).

¹² That is, Washington, DC—formally the District of Columbia, under the exclusive jurisdiction of the US Congress.

¹³ I have not shown bills that appear to have died without being passed by the time the most recent legislative session ended. At the time of writing, there were such bills in Kansas, Kentucky and New York.

¹⁴ See, e.g., 28 USCA, FRE Rule 409 (“Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury”) or comparable state rules, such as Cal Evid Code §1152 (“Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.”)

Of the provisions dealing with apologetic communications, most provide the weaker type of protection. In other words, if a physician, surgeon or other health care worker makes a statement of sympathy to an injured patient or a member of the patient's family over an "unanticipated outcome," the statement will generally be inadmissible, at least for proving liability; but if accompanied by an admission of fault, the fault portion of the statement can still be proffered as evidence going to liability. Other restrictions may also apply. For example, Illinois's first legislative attempt shielded "any expression" of apology or explanation but only if made within 72 hours of the unanticipated outcome (the provision ended up being a casualty of an attack on the enacting statute's constitutionality¹⁵); Vermont and Washington protect apologetic statements made within 30 days of learning of a medical error; South Carolina renders inadmissible a health care provider's apologetic statements or conduct, but only if made at a meeting scheduled by the health care provider; South Dakota protects apologetic statements except to impeach a witness. In contrast, Arizona, Colorado, Connecticut, Georgia, Oklahoma, Oregon, South Carolina, Vermont, Washington, West Virginia and Wyoming provide what appears to be broad protection in the health care field, using language like "any and all statements."

Table 1: US Legislation Protecting Apologies from Admissibility in Civil Actions

State (year in force)	Legislative reference	Type of protection (subject matter)
Alaska (2014)	Alask. Stat. Ann. tit. 9 ch. 55 §544	Statements of sympathy or apology but not fault (health care)
Arizona (2005)	Ariz. Rev. Stat. ch. 17 §12-2605	Statements of sympathy and fault for "unanticipated outcome" (health care)
California (2000)	Cal. Evid. Code div. 9 ch. 3 §1160	Statements of sympathy or benevolent gestures but not fault (accidents)
Colorado (2003)	Colo. Rev. Stat. tit. 13 §25-135	Statements of sympathy and fault for "unanticipated outcome" (health care)
Connecticut (2005)	Conn. Gen. Stat. ch. 899 tit. 52 §184d	Statements of sympathy and fault for "unanticipated outcome" (health care)
Delaware (2006)	Del. Code Ann. tit. 10 ch. 43 §4318	Statements of sympathy but not fault, for "unanticipated outcome" (health care)
District of Columbia (2007)	D.C. Code div. II tit. 16 ch. 28 §2841	Statements of sympathy but not fault (health care)
Florida (2001)	Fla. Stat. tit. 7 ch. 90 §4026	Statements of sympathy but not fault (accidents)
Georgia (2006) ¹⁶	Ga. Code Ann. tit. 24 ch. 4 § 416	Statements of sympathy and fault for "unanticipated outcome" (health care)
Guam, Territory of (2008)	Guam Code Ann. tit. 10 ch. 11 §11112	Statements of sympathy but not fault (health care)
Hawaii (2007)	Ha. Rev. Stat. tit. 33 §626-1, art. IV, Rule 409.5	Statements of sympathy but not fault (for any "event in which the declarant was a participant") ¹⁷
Idaho (2006)	Id. Stat. tit. 9 ch. 2 §207	Statements of sympathy but not fault for "unanticipated outcome" (health care) ¹⁸

¹⁵ See note 19, *infra*.

¹⁶ The provision was originally in force in 2006 as §24-3-37.1; it was part of a wholesale repeal, replacement and renumbering of laws (Ga Laws 2011, Act 52, §2) that took effect on 1 January 2013.

¹⁷ A commentary to the rule directs courts, when distinguishing an expression of sympathy from an acknowledgment of fault, to "consider factors such as the declarant's language, the declarant's physical and emotional condition, and the context and circumstances in which the utterance was made."

¹⁸ Subsection (1) defines an apology to include "any accompanying explanation," which appears to give broad protection against admissibility. However, subsection (2) says that a statement of fault that "is part of or in addition to a statement [in subsection (1)] shall be admissible."

State (year in force)	Legislative reference	Type of protection (subject matter)
Illinois (2005)	none ¹⁹	
Indiana (2006)	Ind. Code tit. 34 art. 43.5-1-5	Statements of sympathy but not fault (torts, including medical malpractice)
Iowa (2007) ²⁰	Iowa Code tit. 25 ch. 622 §31	Statements of sympathy (health care)
Louisiana (2005)	La. Rev. Stat. Ann. tit. 13 ch. 17 §3715.5	Statements of sympathy but not fault inadmissible for any purpose, including impeachment (health care)
Maine (2005)	Me. Rev. Stat. Ann. tit. 24 ch. 21 §2907	Statements of sympathy but not fault for “unanticipated outcome” (health care)
Maryland (2004)	Md. Code Ann. [Cts. & Jud. Proc.] §10-920	Statements of apology or regret but not fault ²¹ (health care)
Massachusetts (1986)	Mass. Gen. Laws ch. 233 §23D	Statements of sympathy (accidents)
Michigan (2011)	Mich. Comp. Laws Ann. ch. 600 §2155	Statements of sympathy but not fault (medical malpractice)
Missouri (2005)	Mo. tit. 36 ch. 538 §229	Statements of sympathy but not fault (civil actions) ²²
Montana (2005)	Mont. Code Ann. tit. 26 ch. 1 §814	Statements of sympathy or apology (medical malpractice)
Nebraska (2007)	Neb. Rev. Stat. tit. 27 §1201	Statements of sympathy but not fault for “unanticipated outcome” (health care)
New Hampshire (2006)	N.H. Rev. Stat. Ann. tit. 52 §507-E:4	Statements of sympathy but not fault (health care)
North Carolina (2004)	N.C. Gen. Stat. ch. 8C-1, Rule 413	Statements of apology for “adverse outcome” (health care)
North Dakota (2007)	N.D. Century Code tit. 31 ch. 4 §12	Statements of sympathy or apology (health care)
Ohio (2004)	Ohio Rev. Code Ann. tit. 23 ch. 2317 §43	Statements of sympathy or apology (health care)
Oklahoma (2004)	Okla. Stat. Ann. tit. 63 ch. 1 art. 17 §1-1708.1H	“Any and all” statements of sympathy or apology for “unanticipated outcome” (health care)
Oregon (2003)	Or. Rev. Stat. tit. 52 §677.082	Statements of apology or regret (health care)
Pennsylvania (2013)	P.L. 665, No. 79 tit. 35 P.S. ch. 61 § 10228.1-3 ²³	“Benevolent gestures” but not statements of fault (health care)

¹⁹ Efforts to introduce apology legislation in Illinois have had a tortured history. The original section of the civil code dealing with admissibility (P.A. 82-280, § 8-1901, effective 1 July 1982) was amended in 2005 to add protection for “any expression” of grief, apology or explanation within 72 hours of an “unanticipated outcome” in health care. The provision was enacted as part of Public Act 94-677 (effective 25 August 2005) and continued to be cited as (an expanded) § 8-1901. Public Act 94-677 also included other changes to tort law, including caps on noneconomic damages in medical malpractice cases. Those caps were constitutionally challenged and, in *Lebron v. Gottlieb Memorial Hospital*, 930 N.E.2d 895 (Ill. 2010), held unconstitutional by a majority of the Illinois Supreme Court, which also held this provision not to be severable from the rest of the act. In response, P.A. 97-1145 (in force 18 January 2013) re-enacted this section separately so as to remove any question of its validity—but stripped the apology aspects from it, returning it to the 1982 text.

²⁰ There were two prior versions, both with the same numbering. The enactment can be traced to 1999.

²¹ On 11 February 2015, the *Medical Liability Efficiency Act of 2015* (H547) was introduced; among the amendments proposed was the deletion of the subsection that retains admissibility of statements relating to fault. In other words, if passed, the legislation would broaden existing protection for apologetic statements in health care in Maryland.

²² The section appears to have general application, even though the heading for chapter 538 is titled “Tort Actions Based on Improper Health Care.”

²³ Also cited as *Benevolent Gesture Medical Professional Liability Act* (in effect 24 December 2013).

State (year in force)	Legislative reference	Type of protection (subject matter)
South Carolina (2006)	S.C. Code tit. 19 ch. 1 §190 ²⁴	“Any and all” statements of sympathy or apology made at a “designated meeting” (health care)
South Dakota (2005)	S.D. Codified Laws tit. 19 ch. 19 §411.1 ²⁵	Statements of apology except admissions against interest for purposes of impeachment (health care)
Tennessee (2003)	Tenn. R. Evid. art. IV Rule 409.1	Statements of sympathy but not fault (accidents)
Texas (1999)	Tex. Civ. Prac. & Rem. Code Ann. tit. 2 §18.061	Statements of sympathy but not fault (accidents)
Utah (2006)	Utah Code Ann. tit. 78B ch. 3 §422 ²⁶	Statements of apology or explanation of events for “unanticipated outcome” (health care)
Vermont (2006)	Vt. Stat. Ann. tit. 12 ch. 81 §1912	Oral expressions of apology within 30 days of learning of an error; includes “good faith explanations” of how the error occurred (health care)
Virginia (2005) ²⁷	Va. Code Ann. tit. 8.01 §581.20:1	Statements of sympathy and apologies but not fault for “unanticipated outcome” (health care)
Washington (2002)	Wash. Rev. Code §5.66.010	Statements of sympathy but not fault (accidents)
Washington (2006)	Wash. Rev. Code §5.64.010	Statements of apology, including remedial actions, made within 30 days of learning of an error (health care)
West Virginia (2005)	W. Va. Code §55-7-11A(b)(1)	All statements of sympathy or apology (health care)
Wisconsin (2014)	Wis. Stat. Ann. ch. 904 §14	Statements of sympathy or apology (health care)
Wyoming (2004)	Wyo. Stat. tit. 1 ch. 1 §130	“Any and all” statements of sympathy or apology (health care)

There are several U.S. cases on the admissibility of apologies in evidence under these statutes, almost entirely in the health care field. I will outline the case law briefly under three headings: (i) decisions in jurisdictions that lack an apology statute or decisions predating enactment of one; (ii) decisions in which an apology statute was held to *bar* admissibility of a purported apology; and (iii) decisions in which an apology statute was held to *allow* admissibility of a purported apology. I depart slightly from this ordering in the case of Ohio, where there has been comparatively more litigation and in which the interpretation of the statute is under consideration by Ohio’s Supreme Court. Also, I note that there is some arbitrariness about the division between the second and third categories because, as we will see, courts sometimes parse apologetic statements pursuant to a statute, admitting portions of them and excluding others. Most of the decisions are at the level of state courts, though some are at the federal level, typically applying state law.²⁸

²⁴ Also cited as *South Carolina Unanticipated Medical Outcome Reconciliation Act*.

²⁵ Previously numbered as 19-12-14.

²⁶ Previously numbered as 78-14-18.

²⁷ Amendments in 2009 extended the language beyond expressions of sympathy and a general sense of benevolence to include statements of “commiseration, condolence, compassion” and apologies.

²⁸ I have restricted myself to appellate cases, whether at the mid-level appellate courts or at state supreme courts. These comprise most of the cases, and the few decisions I found at the trial level—mostly based on motions *in limine* (requests for orders limiting or preventing certain evidence from being presented by the other side), do not add anything of substance to the analysis presented here.

2.1.1. Decisions in jurisdictions that lack an apology statute

In several decisions, a health care professional's apology to a patient or the patient's family or friends, whether expressed as a statement of fault or of regret, has been held not to constitute evidence of a breach of the standard of care or, if there was such a breach, that the statement was evidence that the breach caused the patient's loss. Typically, the alleged apologetic statement is not excluded from evidence but simply held insufficient to prove liability. An authoritative case, predating the earliest apology statute by 14 years, is *Cobbs v Grant*.²⁹ A surgeon allegedly "blamed himself" for his patient needing a second surgery in connection with a duodenal ulcer.³⁰ The surgeon denied making the statement. Justice Mosk, speaking for a six-member bench of the California Supreme Court, held that even if the jury had chosen to believe that the surgeon said it, the statement signified "compassion, or at most, a feeling of remorse, for plaintiff's ordeal."³¹

Several decisions note that where expert evidence of the standard of care is required, as is typical in medical cases, a physician's apology or admission alone does not prove liability. Some US courts have held this to be so even where the statement was precise about admitting fault or facts. For example, in *Locke v Pachtman*,³² a majority of the Michigan Supreme Court held that where a needle broke off in the patient's arm and the resident surgeon allegedly said that she "knew the needle was too small when I used it,"³³ this was insufficient to establish fault in the face of equivocal expert evidence of the standard of care for using the particular needle. A dissenting opinion held that the surgeon's statement conveyed her *own* expert view that it was unsound practice to use the needle she used, and that this went to liability.³⁴ Decisions consistent with *Cobbs v Grant* and the majority in *Locke v Pachtman* can be found in Alabama,³⁵ Pennsylvania,³⁶ and Vermont.³⁷ Some cases, though, are more consistent with the *Locke* dissent. In *Woods v Zeluff*,³⁸ for example, the Utah Court of Appeals held that a doctor's alleged statements that he "missed something," "jumped the gun," and "shouldn't have done this surgery" tended "to reflect a medical expert's assessment of his own care,"³⁹ and should have been admitted into evidence.⁴⁰

In some decisions, rules barring admissibility of voluntary payments for medical, hospital, or similar expenses have been applied in much the same way as apology statutes. The Colorado Court of Appeals considered such a rule in *Bonser v Shainholtz*,⁴¹ in which the plaintiff complained that her dentist had given her fillings without diagnosing her susceptibility to temporal mandibular joint (TMJ) disorder. On learning that she needed subsequent treatment, the dentist said, "I'm sorry, I'll do what I can for you" and sent her two "goodwill" cheques to cover the cost of TMJ treatments.⁴² A jury found in the plaintiff's favour based in part on this evidence, but the Court of Appeals reversed, saying that the non-admissibility rule was "the

²⁹ *Cobbs v Grant*, 8 Cal.3d 229, 502 P.2d 1104 Cal.Rptr. 505 (1972).

³⁰ *Ibid* at Cal.3d 238.

³¹ *Ibid*.

³² *Locke v. Pachtman*. 446 Mich. 216, 521 N.W.2d 786, 42 A.L.R.5th 743 (1994) [*Locke*].

³³ *Ibid* at Mich. 221.

³⁴ *Ibid* at 234–235.

³⁵ *Giles v. Brookwood Health Services, Inc.*, 5 So. 3d 533 (Ala. 2008).

³⁶ *Schaaf v. Kaufman*, 50 A.2d 655, 2004 PA Super 129 and *Wooding v. U.S.*, 2007 WL 951494 (W.D. Pa. 2007) (applying Pennsylvania law).

³⁷ *Senesac v. Associates in Obstetrics and Gynecology*, 141 Vt. 310, 449 A.2d 900 (1982) and *Phinney v. Vinson*, 158 Vt. 646, 605 A.2d 849 (1992).

³⁸ *Woods v. Zeluff*, 2007 UT App 84, 158 P.3d 552 (Utah Ct. App. 2007).

³⁹ *Ibid* at P.3d 556.

⁴⁰ The Utah Court of Appeals does not mention the Utah apology legislation, passed in 2006. In any case, the alleged admissions do not appear to have been made in the context of an apology, and the trial proceedings likely predated the enactment of the legislation.

⁴¹ *Bonser v. Shainholtz*, 983 P.2d 162 (Colo. App. 1999), rev'd on other grounds, 3 P.3d 422 (Colo. 2000).

⁴² *Ibid* at 164.

product of a desire to encourage humanitarianism," a goal that "would be undercut if an offer to pay medical expenses were penalized by allowing it as evidence against the payor."⁴³ Not only that, said the Court, but allowing this sort of evidence would discourage "even simple expressions of sympathy, goodwill, and civil behavior."⁴⁴

2.1.2. Decisions in which an apology statute was held to bar admissibility of a purported apology

Generally, US courts have tried to give effect to apology legislation by barring statements that can even loosely be described as "apologetic." This is especially so where the legislative language provides a strong form of protection. For example, in *Airasian v. Shaak*,⁴⁵ a doctor removed a large portion of a patient's colon and then had to perform an emergency colostomy after discovering that much of the remaining colon was necrotic. At trial, the patient sought to adduce evidence of his wife's observations that the doctor went "white as his jacket" and was "quite upset" after the second surgery, as well as the doctor's statement to her immediately afterwards: "This was my fault."⁴⁶ The Georgia Court of Appeals noted that the apology statute protected "any and all statements, affirmations, gestures, activities, or conduct expressing benevolence, regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence which are made by a health care provider,"⁴⁷ and held that the alleged observations and statements clearly fell within the provision. This was so even though the surgeon didn't use the words "sorry" or "apologize." This conclusion seems correct under the statutory wording: while the Court didn't precisely say so, the alleged observations could be considered "gestures" conveying a sense of "regret;" the alleged admission of fault, an expression of "mistake" or "error." In another second-surgery case, *Estate of Johnson v Randall Smith, Inc.*,⁴⁸ the patient had to be transferred to a different hospital because of complications resulting from a bile-duct injury, a risk of gall bladder surgery. Before the transfer, the patient became distraught, and her surgeon took her hand and tried to calm her by saying, "I take full responsibility for this. Everything will be okay."⁴⁹ The Ohio Supreme Court rejected an argument that this amounted to an admission of fault, but rather was "designed to comfort [the doctor's] patient" and thus "precisely the type of evidence that [the legislation] was designed to exclude as evidence of liability."⁵⁰

In the health care context, apologetic statements are often made by someone other than the original personnel involved in the patient's case. Unless the statute provides otherwise, these too should fall within the scope of the inadmissibility rule. In *Ronan v Sanford Health*,⁵¹ the South Dakota Supreme Court affirmed a trial court's ruling that excluded apologetic statements allegedly made, not by a doctor, but by high-level employees of a clinic where the patient had been treated. The patient, himself a doctor (Dr Ronan), claimed medical negligence in failing to pursue a diagnosis in connection with an infectious disease he had acquired. According to notes taken by his wife at a meeting with the clinic's chief operations officer and risk manager, the Ronans were told such things as "I am so sorry we failed you" and "we let you down." The apology statute provided that "[n]o statement made by a health care provider apologizing for an adverse outcome in medical treatment [and] no offer to undertake corrective or remedial treatment or action" was admissible to prove liability. The Court concluded that the alleged

⁴³ *Ibid* at 166.

⁴⁴ *Ibid*.

⁴⁵ 289 Ga. App. 540, 657 S.E.2d 600 (2008).

⁴⁶ *Ibid* at Ga. App. 540.

⁴⁷ OCGA § 24-3-37.1(c). See note 16, *supra*.

⁴⁸ *Estate of Johnson v. Randall Smith, Inc.*, 135 Ohio St.3d 440, 989 N.E.2d 35 (2013).

⁴⁹ *Ibid* at Ohio St. 3d 441.

⁵⁰ *Ibid* at 446.

⁵¹ *Ronan v. Sanford Health*, 2012 SD 6, 809 N.W.2d 834 (S.D. 2012).

statements had properly been excluded under the statute. Moreover, it noted other problems. First, the Ronans hadn't offered their own testimony as to the meeting but had sought to prove the statements simply by listing the clinic employees as their witnesses and tendering the notes alone in their case in chief. This, the Court held, was insufficient evidentiary context for the notes. Second, when the chief operations officer and risk manager were later questioned,⁵² neither could recall making the statements in the notes. This was significant because of the last sentence in the South Dakota provision: "Nothing in this section prevents the admission, for the purpose of impeachment, of any statement constituting an admission against interest by the health care provider making such statement." The plaintiffs asserted that the statements were admissible to impeach the defendants' "general position and defenses."⁵³ But the Court noted that impeachment requires a procedure: a witness's alleged prior inconsistent statement is generally *not* admissible unless the witness has an opportunity to explain or deny it. The clinic employees were listed as the Ronans' own witnesses and hadn't testified at the time the statements were offered, nor had the Ronans called them as rebuttal witnesses. Hence the Court concluded that at that point in the trial, the notes were not being offered to impeach, and had thus been properly excluded. While this may seem like a technical ruling, it shows a sensitivity both to the statute's underlying purpose and to the seriousness of the concept of impeachment.

2.1.3. Decisions in which an apology statute was held to allow admissibility of a purported apology

In a widely cited case, *Davis v Wooster Orthopaedics & Sports Medicine, Inc.*,⁵⁴ the patient, Barbara Davis, died after back surgery performed by an Ohio orthopaedic surgeon. The surgeon allegedly told the patient's husband that he nicked an artery during the surgery and that he took full responsibility for it. Evidently, the insurer had a different view, and the case went to trial against the surgeon and his clinic. A jury awarded \$3 million in damages. On appeal, it was argued for the defendants that distinguishing between an acknowledgment of fault and an expression of sympathy would violate the statute's intent because an apology commonly includes "an expression of fault, admission of error, or expression of regret for an offense or failure."⁵⁵ However, the Court of Appeals of Ohio, Ninth District, reviewed the apology statutes then extant in the US and noted that most of them explicitly distinguished between statements of sympathy and admissions of fault, while some had chosen to exclude both types of statements from evidence. A third group of statutes, including Ohio's, used language that could be seen as ambiguous enough to require interpretive effort. Applying that effort, the Court held that the term "apology," when read along with "the litany of other sentiments to be excluded under the statute" (sympathy, commiseration, condolence, compassion, or a general sense of benevolence), meant that "the statute was intended to protect [only] apologies devoid of any acknowledgment of fault."⁵⁶ The Ohio Supreme Court accepted the case for appeal on this point,⁵⁷ but the parties settled thereafter.⁵⁸

The *Davis* decision was applied in 2016 in another Ohio case, *Stewart v. Vivian*,⁵⁹ in which the Court of Appeal's Twelfth District reached the opposite conclusion to the Ninth District in *Davis*; that is, it concluded that the statute was intended to exclude

⁵² Presumably by the defendants' lawyers, in their own case in chief—the judgment does not make this clear, but based on what happened subsequently, this seems to be the logical interpretation.

⁵³ *Ibid* at N.W.2d 838.

⁵⁴ *Davis v Wooster Orthopaedics & Sports Medicine, Inc.*, 193 Ohio App.3d 581, 952 N.E.2d 1216 (9th Dist. 2011), appeal accepted for review 130 Ohio St.3d 1493, 958 N.E.2d 956 (2011), cause dismissed 131 Ohio St. 3d 1481, 963 N.E.2d 822 (2012) [*Davis*].

⁵⁵ *Ibid* at 193 Ohio.App.3d 584.

⁵⁶ *Ibid* at 486.

⁵⁷ See note 54, *supra*.

⁵⁸ Correspondence with I. Keyse-Walker, Tucker Ellis LLP (28 January 2016), on file with the author.

⁵⁹ *Stewart v. Vivian*, 64 N.E.3d 606, 2016 WL 2621524, 2016 Ohio 2892 [*Stewart*].

from evidence *all* statements of apology—including those admitting fault.⁶⁰ In that case, a patient, Michelle Stewart, had died after hanging herself while in a hospital. Her psychiatrist, Dr Vivian, had ordered her to be on 15-minute observation; a key issue was whether she should have been placed on constant observation instead. This in turn put in issue the psychiatrist's knowledge of the patient's state. Before she died, and while recovery efforts were being made in the intensive care unit, Dr Vivian allegedly came and told her family that "he didn't know how it happened; it was a terrible situation, but she had just told him that she still wanted to be dead, that she wanted to kill herself."⁶¹ The trial court held that these statements were an "ineffective attempt at commiseration"⁶²—in other words, an apology, even if a botched one—and inadmissible pursuant to the apology statute, a result upheld by the Twelfth District. This conclusion seems on shakier ground than some of the other case law: when a defendant makes a statement, not just as to fault but as to facts going to the very issue being tried (here, Dr Vivian's knowledge of Ms Stewart's suicidal tendencies), a good case can be made that such a statement should be admissible. The case becomes stronger when there is statutory ambiguity as to the protection to be accorded to the statement, and when there is no other practicable means of eliciting the evidence. Given the split in the interpretation of the statute between the Ninth and Twelfth Districts, the case is now heading to Ohio's Supreme Court for further consideration.⁶³

A similar "litany" to that which appears in the Ohio apology statute is found in its Maine counterpart, but the Maine provision says that nothing in the statute prohibits admissibility of a statement of fault. That didn't stop the parties in *Strout v Central Maine Medical Center*⁶⁴ from heading to the Maine Supreme Court after the patient had been incorrectly diagnosed with Stage 4 hepatic or pancreatic cancer and had received a \$200,000 verdict for the stress that the misdiagnosis had caused. The medical centre's president had written a letter explaining the doctor's error and apologising for it; in the subsequent case, the defendants sought to exclude the letter from evidence and were largely successful except for a single sentence: "That being said, [the doctor] realizes now that prior to sharing his clinical impressions with you, he needed to wait for the results of the biopsy to confirm what the cancer was."⁶⁵ On appeal, Justice Silver, speaking for a unanimous Court, held that the statute meant what it said, and that "statements of fault are admissible, even when coupled with other statements that may be inadmissible"⁶⁶ and that there had been no error in admitting the single sentence. The case raises a nice question about the common defence strategy of seeking to exclude letters such as the one written here. The empathetic parts of the letter—that is, the parts that might have swayed at least some jury members to the doctor's side⁶⁷—were stripped out; the admission that the doctor had erred stayed in, without any context to explain it. I revisit this theme when discussing some Canadian cases that also feature parsed or redacted statements.

⁶⁰ *Ibid* at 47.

⁶¹ *Ibid* at 50.

⁶² *Ibid* at 20.

⁶³ The Ohio Constitution mandates this in the case of a conflict. Article IV.03(4) says: "(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." One might have thought that this would have been previously resolved by *Estate of Johnson v. Randall Smith, Inc.*, *supra* note 48, but in that case the question before the Ohio Supreme Court appears to have been only whether a certain statement could be considered an admission of fault—not whether the statute should be construed so as to exclude statements of fault. The Court eventually certified the conflict and heard the appeal on 6 April 2017. See <http://bit.ly/2iDOnTP> (decision pending as of this writing).

⁶⁴ *Strout v. Central Maine Medical Center*, 94 A.3d 786, 2014 ME 77 [Strout].

⁶⁵ *Ibid* at A.3d 789.

⁶⁶ *Ibid* at 790.

⁶⁷ Especially those who might have thought the plaintiff ungrateful for getting a new lease on life. Under the original diagnosis, he would likely have died within a year; under the revised diagnosis of B-cell non-Hodgkins lymphoma, he was facing a five-year survival rate in excess of 85 per cent.

Even when an apology statute has been applied to parse or sever a statement of fault from an apology, some courts have ruled that the statement can still be excluded from evidence for other reasons. Thus in *Lawrence v MountainStar Healthcare*,⁶⁸ a patient, Jonna Lawrence,⁶⁹ sued for damages allegedly caused by an emergency room nurse improperly administering epinephrine to her—that is, intravenously rather than subcutaneously. The parties agreed that the nurse had breached the standard of care (the physician had ordered subcutaneous administration), but disagreed as to whether the breach caused any damage other than a short-term reaction—heart palpitation and nausea—that Lawrence experienced in the hospital. The Utah Court of Appeals noted that some of the later statements by hospital staff could fairly be understood as promises or offers to pay Lawrence’s medical expenses, including a risk manager saying that “we will take care of all of it” and assurances to Lawrence’s father that “you don’t need to be concerned about treatment or whatever it takes to get her well.”⁷⁰ The Court thought that the statements could also be construed as expressions of “apology, sympathy, commiseration, condolence, compassion, or [a] general sense of benevolence,” that being the language of the apology provision. In either case, they would be inadmissible. However, some ancillary statements, to the effect that there had been a “complication” and that “[w]e messed up,”⁷¹ fell within neither category, said the Court. Rather, they seemed like statements of fault. The Court noted that the *Davis* decision⁷² had already categorized Utah’s apology statute as excluding fault-admitting statements, in part because the statute protects words describing the “sequence” or “significance” of the “events relating to the unanticipated outcome of medical care.” Words like that arguably help establish fault or liability. However, the Court felt that the *Davis* interpretation was not the only reasonable one, and that there was enough ambiguity that it needed to analyse the legislative history. It found that “fault” was included in the draft bill, but after the judiciary interim committee reviewed it, the bill’s sponsor deleted “fault” from the list of excluded statements and continued to maintain in legislative debates that admissions of fault would not be protected under the bill.⁷³ Based partly on this, the Utah Court construed the apology statute as *not* protecting statements of fault. But that wasn’t the end of the story. The Court explained that a fault-admitting statement may “be an admission that the health care provider breached the standard of care without also admitting that the breach caused any injury to the patient.”⁷⁴ Here, statements to the effect that there had been an “incident” or “complication” or that someone had “messed up” admitted “only a breach of the standard of care and thus [were] simply cumulative of the stipulation that [the nurse’s] intravenous administration of the epinephrine breached the standard of care.”⁷⁵ Thus, although the trial court should not have excluded the statements based on the interpretation of the statute now announced by the Utah Court of Appeal, Lawrence could show no prejudice from it having done so, and was ultimately unsuccessful in her case.

2.2. Australia

In contrast to the US approach to legislation on the admissibility of apologies, which has focused chiefly on the health care setting, Australia tried to reform negligence law more generally by enacting civil liability statutes and other amendments in the

⁶⁸ *Lawrence v. MountainStar Healthcare*, 2014, 320 P.3d 1037, 754 Utah Adv. Rep. 12, 2014 UT App 40, certiorari denied 329 P.3d 36 [Lawrence].

⁶⁹ Referred to in the case by the surname “Shannon,” her name before she changed it to “Lawrence.”

⁷⁰ *Lawrence v. MountainStar Healthcare*, *supra* note 68 at P.3d 1048.

⁷¹ *Ibid* at 1049.

⁷² See *Davis*, *supra* note 54 and accompanying text.

⁷³ *Lawrence v. MountainStar Healthcare*, *supra* note 68 at P.3d 1050—51.

⁷⁴ *Ibid* at 1051.

⁷⁵ *Ibid*. A stipulation is a term used in the US to indicate an agreement between opposing parties as to facts, issues or conclusions of law. Its purpose is to simplify or shorten litigation.

early 21st century. In all six states and the Northern Territory and Australian Capital Territory, apologies have some form of protection, summarized in Table 2. While varying by jurisdiction, the legislation typically has four elements: (i) a definition of “apology” (i.e., whether it includes expressions of responsibility or just expressions of regret); (ii) a declaration that apologies are not admissions of legal liability; (iii) a declaration that apologies are not relevant to determining liability; (iv) a stipulation that apologies are inadmissible in civil proceedings as evidence of liability; and (v) subject matter specificity.

Table 2: Australian Legislation Protecting Apologies from Admissibility in Civil Actions

State (year in force)	Legislative reference	Type of protection (subject matter)
Australian Capital Territory (2003)	Civil Law (Wrongs) Act 2002 , ss 12-14	Statements of sympathy, including fault (any matter except defamation and actions under the Discrimination Act 1991 or Workers Compensation Act 1951)
New South Wales (2002)	Civil Liability Act 2002 , ss 67-69	Statements of sympathy, including fault (any matter except defamation and an extended list of actions set out in s 3B of the statute; Defamation Act 2005, s 20 has a similar provision)
Northern Territory (2003)	Personal Injuries (Liabilities and Damages) Act, 2003 , ss 11-13	Statements of regret but not fault (personal injury)
Queensland (2003, 2010) ⁷⁶	Civil Liability Act 2003 , ss 68–72, 72A–72D	Statements of sympathy, including fault (personal injury and any other actions excluded under ss 5 and 72A of the statute)
South Australia (2002, 2016)	Civil Liability Act 1936, s 75	Statements of sympathy, including fault (any matter except defamation and any liability excluded by regulation)
Tasmania (2002)	Civil Liability Act 2002 , ss 6A-7	Statements of sympathy but not fault (any matter except those actions set out in s 3B of the statute)
Victoria (2002)	Wrongs Act 1958, ss 14I-14J	Statements of sympathy but not fault (“civil proceedings” for “injury” as defined in s 14I)
Western Australia (2003)	Civil Liability Act 2002 , ss 5AF-5AH	Statements of sympathy but not fault (any matter except as provided in s 3A and 4A of the statute)

The statutes in the Australian Capital Territory, New South Wales and Queensland have all the first four elements; as to subject matter specificity, each applies to civil liability “of any kind” other than what the statute specifically excludes. New South Wales excludes intentional torts, sexual assault, dust diseases, injury from tobacco products, and matters under several other statutes, such as workers’ compensation legislation. The Australian Capital Territory has a somewhat narrower set of exclusions. South Australia’s legislation originally had the weakest form of protection, saying only that “no admission of liability or fault [in tort] is to be inferred from the fact that the defendant . . . expressed regret for the incident out of which the cause of action arose.” However, in 2016, s 75 of the Civil Liability Act was amended⁷⁷ to follow the recommendations of the state’s Ombudsman, resulting in the more robust form of legislation seen in New South Wales and some other Australian states. Thus as in the US, Australian apology provisions vary in both subject matter and degree of protection, making it hard to predict how a particular apologetic statement will be treated. The roster of exclusions and lack of uniformity

⁷⁶ In 2010, ss 72A-72D were added, extending the scope of protection for apologetic statements.

⁷⁷ Statutes Amendment (Attorney-General’s Portfolio) Act 2016 (SA), s 5 (assented to 16 June 2016).

in the Australian acts has prompted calls for a reform of the reforms, suggesting as a model Canada's *Uniform Apology Act*, discussed later in this paper.⁷⁸

Despite the legislative hodgepodge, Australian case law shows much understanding of the purpose of apologies in civil disputes, as well as deference to the principles that animate apology legislation. The leading case is *Dovuro Pty Limited v Wilkins*,⁷⁹ decided by the High Court of Australia after the Australian apology provisions were enacted, but on facts occurring before then. Dovuro, a seed producer, had imported from New Zealand the canola seed "Karoo," designed to tolerate the herbicide triazine. Dovuro sold the seed through various channels, including a Western Australia distributor, who in turn sold it to Wilkins. A third party certified that the seed was over 99 percent pure and complied with Australian regulations. However, after growers like Wilkins had sown the seed, AgWest, the government department responsible for agriculture in Western Australia, advised that Karoo had been found to contain "undesirable weeds," including cleaver, redshank and field madder. AgWest also used its powers to bar importation of these species. After this news, Wilkins brought a representative action Dovuro for negligence. The trial judge placed great weight on certain documents, including a Dovuro press release that read in part as follows:

Weed seeds ... have been detected in certified seed of the triazine-resistant canola cultivar 'Karoo' imported from New Zealand in April/May 1996 ... *We apologise to canola growers and industry personnel. This situation should not have occurred but due to strong interest in Karoo the unusual step was made of undertaking contract seed production in New Zealand to assist rapid multiplication.*⁸⁰

An outsider might be forgiven for reading this apology as a form of Australasian rivalry, with Dovuro implying that some of the blame lay in the untamed lands of New Zealand. But in any case, another document, a letter from Dovuro's Western Region Manager to a grower-based organization, seemed to seal Dovuro's liability. It said:

I'd like to stress at this stage that this does not excuse Dovuro in failing in its duty of care to inform growers as to the presence of these weed seeds. We got it wrong in this case, and new varieties will not be brought on the market again in this manner.⁸¹

The trial judge found Dovuro negligent, postponing the issue of damages; the Federal Court of Appeal upheld 2:1.⁸² The High Court of Appeal, though, reversed. Justice Gummow concluded that Dovuro's out-of-court statements must not usurp a court's role in deciding questions of law or of mixed fact and law—in contrast, e.g., to admissions on the pleadings. This is particularly so where "the suggested admission includes a conclusion which depends upon the application of a legal standard."⁸³ In negligence law, the question of whether a defendant breached the standard of care is one of mixed law and fact: the standard itself is a question of law; whether it was breached is a question of fact. Thus what the *Dovuro* court⁸⁴ teaches is that a decider of fact or law should not typically treat an apology—even a fault-admitting one—as an admission of liability. To do so is to pre-empt the decision-maker's role of deciding the law, finding the facts and applying the law to them to decide whether a legal standard was breached. The same reasoning applies

⁷⁸ Such a call was made in 2013 by the Deputy Ombudsman for New South Wales (Wheeler 2013). Victoria's Ombudsman made similar recommendations in 2017 (Glass 2017).

⁷⁹ *Dovuro Pty Limited v Wilkins*, [2003] HCA 51, 215 CLR 317, 77 ALJR 1706 [*Dovuro*].

⁸⁰ *Ibid* at para 67 (emphasis in original).

⁸¹ *Ibid* (emphasis in original).

⁸² (2000) 105 FCR 476.

⁸³ *Ibid* at para 70.

⁸⁴ The High Court split 5:2 on the result but Gleeson CJ, one of the dissenting judges, agreed with the majority that the apologies could not be construed as admissions of legal liability, even though they acknowledged fault. Thus *Dovuro* is a 6:1 decision on the apology point, and remains very instructive on that point.

to other elements of a negligence claim, such as whether a breach caused the alleged loss, and whether any defences exist.⁸⁵

Nothing in *Duvoro*, though, detracts from the notion that while an apology may not be a determinative admission of liability, it may contain admissions of fact that can be used to establish liability. Indeed, Chief Justice Gleeson pointed this out in his own reasons on the issue. This is where apology legislation and its interpretation and application become important, for under a statutory provision that is narrowly drafted or narrowly construed, such admissions may be considered severable. However, two cases from New South Wales suggest that at least in that state, even a fact-admitting apology will be construed broadly so as to render it inadmissible, and courts will be reluctant to sever or parse factual admissions that are bound up with the apology.

In the first case, *Wagstaff v Haslam*,⁸⁶ a husband and wife, the Wagstoffs, sued a bar and its licensee, Mr. Haslam, after an assault by three drunken men at the bar. In determining whether the defendants owed a duty of care under the circumstances, evidence was tendered about something Mr. Haslam had said to the Wagstoffs, to the effect that the men had “already caused trouble in the bar earlier that night” and that just before the incident, he had told the men that “he was serving them their last drink,” and that “he apologised [to the Wagstoffs] and said words to the effect that he just didn’t know what to do.” Citing the apology legislation, Justice Studdert of the New South Wales Supreme Court disregarded that evidence, but nevertheless held that the defendants owed a duty of care based on other evidence that they knew the bar patrons were intoxicated. Although the Court of Appeal reversed on this point, it did so without relying on the apologetic statement.⁸⁷ While one might ask whether Mr. Haslam’s comments about the men having caused trouble earlier in the night could have been severed from the apology, the decision to exclude his statement seems consistent with the broad definition of “apology” in the New South Wales legislation: “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.”⁸⁸

In the second case, *Westfield Shopping Centre Management Company Pty Ltd v Rock Build Developments Pty Ltd (No 2)*,⁸⁹ District Court Judge Cogswell had to rule on the admissibility of an email from the operations manager of a contractor, Rock Build, who had done work for a shopping centre owner, Westfield. During the work, something had caused water damage, and Rock Build’s operations manager emailed his counterpart at Westfield to apologise, to promise to institute procedures to prevent or minimise further damage, and to “offer our COMPLETE cooperation in completing any restitution that may be required.”⁹⁰ Apparently, the cooperation wasn’t complete enough, because Westfield sued. Acknowledging that “apologies” were protected under the legislation, Westfield’s counsel nevertheless argued that the court could isolate the part of the email that he said was not an apology and admit it in the summary judgment proceeding. Cogswell DCJ had a twofold response. First, he thought that the closer to the event the statements were made, the more likely they will be regarded as having been part of an “apology”; second, he thought that if litigation was not anticipated or had not commenced at that

⁸⁵ Note that out-of-court apologies typically take place well before a claim is filed. Thus a pre-claim apology cannot truly be seen as an admission to the formal claims and defences that comprise a pleaded case. While this point was not stressed in *Duvoro*, it supports the reasoning and the holding in the case.

⁸⁶ [2006] NSWSC 294, 2006 WL 1077099.

⁸⁷ [2007] 69 NSWLR 1, 2007 WL 594415.

⁸⁸ Civil Liability Act 2002, s 68.

⁸⁹ *Westfield Shopping Centre Management Company Pty Ltd v Rock Build Developments Pty Ltd (No 2)*, [2013] NSWDC 306, 2013 WL 8350343 [*Westfield*].

⁹⁰ *Ibid*, from the email appended to the judgment in full—a salutary practice and a boon for scholars who want to study how people actually apologise.

stage, the more likely it is that the statements will be regarded as apologetic. In this case, the email had been sent within a few days of the incident, and litigation wasn't contemplated. Cogswell DCJ also noted that the email's undertaking with respect to future conduct was consistent with the purpose behind protecting apologetic discourse—the "resolution" element of apologies:

It might be seen as a natural part of an apology, especially one made by a layperson before litigation and soon after the event, that it would often include an indication that such an event would not happen again. It may even indicate the steps which would be undertaken so that the event would not recur. The person writing might think that a simple apology could be rather hollow without an indication of intended future conduct.

The passage which [the plaintiff's counsel] wants to sever as an undertaking about future conduct is just such an indication. That, to my mind, should be regarded as a natural part of an apology.⁹¹

In the result, Cogswell DCJ ruled that the whole email was an "apology" and thus inadmissible to prove Rock Build's fault or liability.

The next case, *Hardie Finance Corporation Pty Ltd v Ahern (No 3)*,⁹² is notable for several reasons. First, it comes from Western Australia, which has a narrow form of apology protection—statements of sympathy but not fault. Second, it relies on, and applies, *Dovuro*, even though the litigation occurred after enactment of the Western Australian legislation, which might have been thought to reduce the relevance of *Dovuro*. Third, it provides analytical depth on the wording of a published apology for an improper repossession of goods—including the apology's relevance, not to the first action, but to a second, related, action. Fourth, one of the apologisers was a lawyer, in itself making for an interesting angle on the case.

This complex decision may be summarized briefly for present purposes. In 1997, a restaurant opened in retail space owned by Hardie Finance Corporation Pty Ltd (Hardie). It was called Spageddies Italian Kitchen (Spageddies) and was owned by Pac-Am Restaurants (WA) Pty Ltd (Pac-Am). Pac-Am engaged Ferguson Corporation Pty Ltd (Ferguson) to fit out the restaurant at great cost. Things went poorly. Spageddies closed within two years, and by the fall of 1999 Pac-Am was in liquidation. Among its creditors was Hardie, by then owed unpaid rent of more than \$300,000. Such were the key corporate parties in this *dramatis personae*; there was also an individual party, Marcus Ahern, a barrister and solicitor who advised and acted for Ferguson.

Within months of Ferguson fitting out Spageddies, a dispute arose as to whether Pac-Am had paid Ferguson what it was owed. Representatives of Ferguson entered Spageddies and repossessed many items. In doing so, Ferguson acted on the legal advice of Ahern, who attended during the repossession. As a result of the repossession, which involved workmen tearing out fixtures from walls and ceilings, Pac-Am had to close Spageddies for almost two weeks, suffering business and reputational losses as a result, and had to get a court order for return of the goods and fixtures. Pac-Am then sued Ferguson and Ahern for trespass and conversion. This case—the "Pac-Am action"—settled in two stages: (i) Ahern, in his capacity as Ferguson's solicitor, published an apology in *The West Australian* (see sidebar); and (ii) Ferguson paid \$120,000 to Pac-Am.⁹³

⁹¹ *Ibid* at paras 10–11.

⁹² *Hardie Finance Corporation Pty Ltd v Ahern (No 3)*, [2010] WASC 403, 2010 WL 5587011 [*Hardie*].

⁹³ I have simplified the facts considerably; for more details of the Pac-Am action, see *ibid* at paras 165–171; the text of the published apology is taken from para 168.

Enter Hardie—to assert that Pac-Am never recovered from the losses Spageddies sustained as a result of the repossession, that Pac-Am's demise was attributable to the repossession, and, in a novel allegation, that Ahern and Ferguson owed it—Hardie—a duty to take reasonable care not to cause it economic loss, and that their conduct in relation to the repossession breached that duty. In other words, Hardie, unable to recover its unpaid rent from Pac-Am, devised a legal stratagem—the “Hardie action”—by which it might recover from Ahern and Ferguson instead. One aspect of the Hardie action was the apology published in the Pac-Am action, which, Hardie asserted, was an admission of fault by Ahern and Ferguson. It is worth reproducing in substantial part what Justice Pritchard said to that assertion:

[Hardie's counsel] submitted that the apology ... unequivocally admitted the defendants' liability in trespass [This] ignores several features of the apology. First, in so far as Mr Ahern is concerned, the apology did not contain any admission that Mr Ahern had removed any goods from the Premises, but rather stated only that [Ferguson's representatives] (acting on legal advice) had done so. Secondly, the apology admitted that [Ferguson's representatives] “wrongly removed” the goods, but did not indicate why, or the basis on which, it was said that the goods were wrongly removed. Thirdly, both defendants acknowledged that the claims which formed the basis for the removal of the goods were subject to a bona fide dispute between [Ferguson] and Pac-Am. Fourthly, the apology noted that [Ferguson] had admitted liability to Pac-Am in the Pac-Am action, and that Mr Ahern's insurers had agreed to indemnify [Ferguson] in respect of Spageddies' (ie Pac-Am's) damages claim, but that [Ferguson] would contest the quantum of damages being claimed by Pac-Am. Finally, both defendants apologised for the distress caused to Spageddies, Pac-Am, its management and staff, and the public ... arising from their conduct. There was, in my view, a considerable degree of ambiguity about precisely what the apology signified. It was not written in sufficiently clear terms to be construed as an admission of liability by either or both defendants of trespass to land or goods arising from the Repossession.⁹⁴

Justice Pritchard went on to recount the cross-examination of the defendants on the apology. She noted that Ferguson said he signed the apology “based on legal advice” rather than to convey acceptance of liability, and that Ahern “was at pains

Apology by Ferguson and Ahern in *The Western Australian* (27 February 1999)

We acknowledge that on 21 March 1998 we attended ‘Spageddies Italian Kitchen’ restaurant operated by [Pac-Am] and representatives of [Ferguson] (acting on legal advice) wrongly removed goods, equipment and fixtures from ‘Spageddies Italian Kitchen’ damaging the restaurant and interfering with its trade.

We acknowledge that the claims which formed the purported (and unfounded) basis for the removal were subject to a bona fide dispute between [Ferguson] and [Pac-Am]. The dispute had nothing to do with the solvency of ‘Spageddies Italian Kitchen’ and we regret that our actions may have wrongly suggested otherwise.

‘Spageddies’ restaurant immediately commenced proceedings in the Supreme Court of Western Australia seeking damages and also successfully obtained, by Court order, the return of its removed goods, equipment and fixtures.

[Ferguson] has admitted liability to [Pac-Am] and Marcus Ahern's insurers have agreed to indemnify [Ferguson] in respect of Spageddies claim for damages in the Supreme Court proceedings which will now proceed to a hearing to [assess] the damages payable to ‘Spageddies Italian Kitchen’. [Ferguson] will contest the amount of damages payable to [Pac-Am] at the hearing to assess damages.

We sincerely and unreservedly apologise for the distress and damage to ‘Spageddies Italian Kitchen’, [Pac-Am], its management and staff and to the public at large for the disruption to the business of ‘Spageddies Italian Kitchen’ caused by our actions.

⁹⁴ *Ibid* at para 335.

to point out that the meaning of the apology was confined to the particular words used,"⁹⁵ which, for example, didn't mention liability for wrongful conduct or trespass to goods and premises. Nor, said Ahern, did the apology "say anything about the court action [or] about the pleadings or the matters in issue in the pleadings."⁹⁶ Justice Pritchard noted the *Dovuro* caution, which, in her words, meant that "care must be taken in identifying what precisely is being admitted in an apology, the relevance of that admission to the matters in issue in legal proceedings, and whether, by its nature, the admission may be relied on by a court in the application of the legal principles applicable to the action."⁹⁷ She thought that even if the apology could be construed as an admission of trespass by Ferguson, no reliance could be placed on it because to do so would constitute a legal conclusion that Ferguson, at least, was not in a position to reach.

Justice Pritchard also adverted to a theme echoed later by Cogswell DCJ in *Westfield*⁹⁸—that the impetus to settle affects the kinds of apologetic statements people are willing to make, and that this needs to be considered when assessing the relevance of such statements:

[The] context in which the apology was issued needs to be borne in mind. An acceptance of [Ferguson's] legal liability for trespass [and] the seized property is not the only possible explanation for why the apology was made. In cross-examination, Mr Ferguson said that he signed the apology "to bring the matter to the course [sic], to bring a resolution" and that "the letter was drawn up to bring that issue to a head" ... I asked Mr Ferguson whether he had any understanding about the meaning of the words in the apology and what effect they might have had, or whether he signed the apology without really understanding what he was doing. Mr Ferguson's evidence was that "I had no other way to go. I had to agree with what the lawyers were saying. ... [I]t was basically saying to admit this so that the case against Pac-Am could be settled and everybody walks away."⁹⁹

Accordingly, Justice Pritchard concluded that the apology didn't help Hardie to prove that Ferguson or Ahern had engaged in trespass or conversion, and declined to use it for that purpose.¹⁰⁰ While caution might be advised as to the weight to put on an apologist's explanations of what an apology was or wasn't intended to mean, Ferguson's and Ahern's testimony has a familiar ring—that of a client willing to say what is needed so that everyone can "walk away," and of a lawyer drafting an apologetic statement that says enough to satisfy the opposing parties, but without admitting liability.

2.3. New Zealand

Although New Zealand has not enacted legislation to exclude apologies for the purpose of proving civil liability, it has been called on to do so. Nina Khouri (2014), for example, has concluded that, despite New Zealand's accident compensation scheme, which one might think would lead to more apologies because of the absence of a fault element, the fear of incurring liability remains a concern. She has recommended a statute along the lines of the Canadian ones, discussed below.

2.4. Canada

Against this American and Australasian backdrop, several initiatives came together in early 2006 in British Columbia, Canada's westernmost province. The most notable of these was a government discussion paper, referencing the literature and the US and Australian legislation. (British Columbia, Ministry of Attorney General

⁹⁵ *Ibid* at para 337.

⁹⁶ *Ibid*.

⁹⁷ *Ibid* at para 339.

⁹⁸ *Supra* note 89.

⁹⁹ Hardie, *supra* note 92 at para 343.

¹⁰⁰ The case ended with Hardie also losing on the other key issues, including duty of care, causation, and failure to mitigate: *ibid* at para 825.

2006)¹⁰¹ The BC Discussion Paper reviewed arguments for and against excluding apologies for establishing fault and considered the scope of protection that any statute should offer. It concluded that the narrow form of protection in many jurisdictions would likely have little effect, since mere expressions of condolence are not generally construed as admissions of fault anyway; nor would such protection encourage “true apologies”—and may well encourage insincere ones for strategic purposes. The BC Discussion Paper also concluded that there was little principled basis for removing intentional torts from the legislation’s ambit, as in the New South Wales legislation, which otherwise offered a broad form of protection. After the consultation period, the British Columbia government adopted the recommendations and enacted the *Apology Act*, which came into force on 18 May 2006.

Shortly after this, Saskatchewan adopted the BC wording verbatim, doing so by adding s 23.1 to the province’s *Evidence Act* rather than enacting standalone legislation.¹⁰² At about the same time, the Steering Committee of the Civil Section of the Uniform Law Conference of Canada decided to draft a *Uniform Apology Act*.¹⁰³ The ULCC meets annually to consider the adoption of model laws across Canada’s provinces. The text of the *Uniform Apology Act*, reproduced in the accompanying sidebar, was also virtually identical to the BC wording, and was endorsed at the ULCC’s annual meeting in Charlottetown, Prince Edward Island in September 2007. The text in square brackets reflects language that provincial legislatures may want to tailor to their own jurisdictions.

Several features of the *Uniform Apology Act* are worth noting here.

First, it adopts the broadest form of apology protection from among the available models, as well as the broadest subject matter coverage. This follows from the phrase “whether or not the words or actions admit or imply an admission of fault” in s 1 and in the words “in connection with any matter” in s 2.¹⁰⁴ Thus, for example, the act applies both to intentional torts and negligence. Again, other statutes restrict the matters to which they apply, such as negligence generally or a species of it, like medical malpractice.

Second, the restriction on the legal effect of apologies is accomplished through both adjective (procedural) and substantive law. Sections 2(1)(a) and (d) and s 2(2) deal with an apology’s relevance or admissibility in determining fault or liability and thus fall under evidence law—generally an adjectival or procedural domain. Section 2(1)(b), on the other hand, bars using an apology to confirm a cause of action (acknowledge liability) so as to extend a limitation period, this being an area of substantive law in Canada.¹⁰⁵ Section 2(1)(c) is also substantive, in that it affects the rights and duties of parties to an insurance contract. This reflects a policy choice to broaden the act’s ambit, in contrast to jurisdictions that have protected apologies solely by amending evidence laws.

¹⁰¹ For the other initiatives, see Kleefeld (2007, p. 784–785).

¹⁰² SS 2007, c 24 (assented to 17 May 2007), amending SS 2006, c E-11.2, s 23.1.

¹⁰³ The working group comprised Janice Brown of Nova Scotia, Douglas Kropp of the Government of Canada, John Gregory of Ontario, Averie McNary of Alberta, Marie Riendeau of the Government of Canada, Madeleine Robertson of Saskatchewan, and Russell Getz of British Columbia. Getz (2007), the key government official who had overseen the development and drafting of the BC *Apology Act*, chaired the group.

¹⁰⁴ However, the words “any matter” must be read as “any civil matter.” In Canada, legislative authority over criminal law lies with the federal government, and provincial legislation does not alter the way apologies are treated in the criminal law or in any other area of exclusive federal legislative jurisdiction. See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 91(27) and 92(13), rep’d in RSC 1985, App II, No. 5.

¹⁰⁵ See *Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon*, [1994] 3 SCR 1022, 120 DLR (4th) 289 (deciding that, contrary to the common-law rule, limitation periods should be considered substantive, not procedural).

Third, since the act covers apologies made by or on behalf of “a person,” it typically applies to corporate and governmental actors as well as to individuals; this is by virtue of provincial acts that define the word “person” where it appears in legislation, as well as statutes regarding proceedings against the Crown.¹⁰⁶

Fourth, the act does not “legislate” apology in the sense of mandating it; nor does it transform the making of an apology into a means of avoiding liability altogether. Rather, it enables apologies by making them irrelevant and inadmissible for the purposes of proving liability or confirming a cause of action. Liability can still be proven, and a cause of action confirmed, by other means. The legislation also has no effect on an apology’s relevance or admissibility for the purpose of assessing damages.

Fifth, these features are in a single act, though they can be implemented by amending other acts, such as evidence and insurance acts. Packaging the changes in a single act sends a stronger political message and underlines the need to understand the background to the statute and the interests of the polity underlying this initiative.

Most Canadian provinces and territories have now enacted the *Uniform Apology Act* or legislation based on it. The details, with citations, are provided in Table 3, but can be summarized briefly here. In British Columbia, Saskatchewan, and Newfoundland and Labrador, the wording is the same as the uniform law. Alberta, Nova Scotia and Nunavut also follow its text, but also declare the legislation inapplicable to the prosecution of provincial or territorial offences. Manitoba’s statute is the same except for s 2(c)—implying that an apology *can* constitute confirmation of a cause of action or acknowledgement of a claim so as to extend a limitation period. Ontario has changed both provisions—it expressly excludes from protection any statements that could constitute acknowledgment of a claim under limitations legislation and it declares the *Apology Act* inapplicable to provincial offences. The Ontario act also excludes apologies made while testifying at civil proceedings, which includes out-of-court examinations (depositions) connected to such proceedings. This exception to the exclusion is likely implied anyway, but it probably should be added to the uniform law for the sake of completeness. Prince Edward Island has

Uniform Apology Act (Uniform Law Conference of Canada, 2007)

1. Definitions

In this Act:

“apology” means an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate;

[“court” includes a tribunal, an arbitrator and any other person who is acting in a judicial or quasi-judicial capacity.]

2. Effect of apology on liability

2(1) An apology made by or on behalf of a person in connection with any matter

(a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter,

(b) does not constitute [a confirmation of a cause of action or acknowledgment of a claim] in relation to that matter for the purposes of [appropriate section of the applicable limitation statute],

(c) does not, despite any wording to the contrary in any contract of insurance and despite any other enactment or law, void, impair or otherwise affect any insurance coverage that is available, or that would, but for the apology, be available, to the person in connection with that matter, and

(d) may not be taken into account in any determination of fault or liability in connection with that matter.

(2) Despite any other enactment or law, evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any court as evidence of the fault or liability of the person in connection with that matter.

¹⁰⁶ See, e.g., *Legislation Act*, 2006, SO 2006, c 21, Sched F, s 87 (definition of “person”) and *Proceedings Against the Crown Act*, RSO 1990, c P.27, s 5 (liability of the Crown in tort).

taken the most restrictive approach: although the legislative text is similar to the model law, the subject matter is restricted to the health care setting. New Brunswick and Quebec have not enacted legislation, nor have the Yukon and Northwest Territories. The government of Canada also has not done so for matters of federal jurisdiction, despite federal government officials being part of the working group that drafted the *Uniform Apology Act*. Table 3 outlines the Canadian situation by jurisdiction, comparing each enactment to the *UAA*.

Table 3: Canadian Legislation Protecting Apologies from Admissibility in Civil Actions

Jurisdiction	Legislation	Definitions	Effect of Apology on Liability	Evidentiary Scope
Alberta	Alberta Evidence Act, RSA 2000, c A-18, s 26.1 ¹⁰⁷	same as <i>UAA</i>	same as <i>UAA</i> (referencing Limitations Act generally)	same as <i>UAA</i> , except s 26.1 declares that the act doesn't apply to prosecution of offences
British Columbia	Apology Act, SBC 2006, c 19	same as <i>UAA</i>	same as <i>UAA</i> (referencing s 5 of the Limitation Act)	same as <i>UAA</i>
Manitoba	Apology Act, CCSM, c A98	same as <i>UAA</i>	same except for <i>UAA</i> 2(b)—implying that an apology <i>can</i> constitute confirmation of a cause of action or acknowledgement of liability so as to extend a limitation period	same as <i>UAA</i>
Ontario	Apology Act, 2009, SO 2009, c 3	same as <i>UAA</i> , except "court" isn't defined (further sections specify types of proceedings covered)	same as <i>UAA</i> 2(a), 2(c) and 2(d) with minor wording changes, but another section expressly <i>excludes</i> from protection any statements that could constitute acknowledgment of liability or a claim under the Limitations Act, 2002 , s 13	like <i>UAA</i> , but refers to "any civil proceeding, administrative proceeding or arbitration" and "any person" rather than " <i>the</i> person"; excludes statements given in <i>testimony</i> , as well as offence prosecutions
New Brunswick	no legislation			
Newfoundland & Labrador	Apology Act, SNL 2009, c A-10.1	same as <i>UAA</i>	same as <i>UAA</i> (referencing Limitations Act generally)	same as <i>UAA</i>
Northwest Territories	no legislation			

¹⁰⁷ Added by SA 2008, c 11, s 2; amended by SA 2009, c 48, s 1 (replacing "cause of action" with "claim").

Jurisdiction	Legislation	Definitions	Effect of Apology on Liability	Evidentiary Scope
Nova Scotia	Apology Act, NS 2008, c 34	same as <i>UAA</i>	same as <i>UAA</i> (referencing Limitations of Actions Act generally)	same as <i>UAA</i> , but excludes "prosecution for a contravention of an enactment"
Nunavut	Legal Treatment of Apologies Act, SNU 2010, c 12	same as <i>UAA</i> , but uses an extended definition for "action" that is consistent with <i>UAA</i>	same as <i>UAA</i> , but refers to an "action" and references Limitation of Actions Act generally	same as <i>UAA</i> , but excludes "admissibility of evidence in the prosecution of an offence" and "the use that may be made in any legal proceeding of a conviction for an offence"
Prince Edward Island	Health Services Act, SPEI 2009, c H-1.6 , s 32	s 26 defines "apology" per <i>UAA</i> , but also has extended definition of "incident" and "legal proceeding"	same as <i>UAA</i> , but protection is limited to apologies made "in connection with the provision of a health service" and there is no equivalent to <i>UAA</i> (b)—implying that an apology <i>can</i> constitute confirmation of a cause of action or acknowledgement of a claim so as to extend a limitation period	same as <i>UAA</i> , with scope limited to "health services," defined in s 1(e)
Quebec	no legislation			
Saskatchewan	Evidence Act, SS 2006, c E-11.2 , s 23.1 ¹⁰⁸	same as <i>UAA</i> , except "court" is defined in s 2 of the <i>Act</i>	same as <i>UAA</i> (referencing s 11 of the Limitations Act)	same as <i>UAA</i>
Yukon Territory	no legislation (an early attempt at introducing a bill did not succeed)			
Canada	no legislation			

The case law under these statutes is a mixed bag. Some decisions show a broad understanding of the legislative intent; others, a narrower one, particularly when it comes to parsing apologetic statements into admissible and non-admissible portions.

¹⁰⁸ Added by *Evidence Amendment Act, 2007*, SS 2007, c 24.

I will first consider British Columbia, the originating province for this legislation, but where judicial treatment of the *Apology Act* has been sparse. The sole appellate case in the province is *Vance v Cartwright*.¹⁰⁹ Vance, an unhelmeted driver of an unlicensed dirt bike, had collided with Cartwright, the driver of a car. Cartwright had stopped at an intersection, intending to turn, and had begun to creep forward. Vance, approaching the intersection perpendicularly to her from her left, veered behind her vehicle and clipped the rear of her car, whereupon his body flew over the car's trunk and hit a stop sign. He got up and, seemingly unhurt, apologised and said the accident was all his fault. Later that day, he also gave Cartwright's father \$1,000 to repair her car. He must have had a change of heart, a change of medical condition, or both, for he then sued Cartwright. The trial judge found Vance solely at fault, though expressing surprise that "in this age of smartphones, no one took a picture of the accident scene."¹¹⁰ On appeal, Vance's counsel objected to the trial judge's reference to his admission of fault, based on the statutory definition of "apology" and the prohibition on using one to determine liability. However, the Court dismissed the appeal, saying that, in context, the "clear purpose for referring to [the apology] was only to explain why no photograph of the position of Ms. Cartwright's vehicle had been taken to establish where it had been stopped when Mr. Vance crashed into its left rear fender [and not to establish fault]."¹¹¹

The case is unusual because it was an attempt by the *plaintiff* to exclude his own apology. Normally, the defendant would be the one wanting to exclude an apology, though the roles can switch, as when contributory negligence is in issue, when there is a counterclaim, or when, as this case shows, perceptions of relative fault change. The decision also confirms something that I only guessed at in 2007. In speculating on how courts would actually deal with such situations, I analogized to the policy that excludes evidence of post-accident repairs, lest its admission discourage making them, contributing to yet more accidents. (Kleefeld 2007, pp. 800-801) But a competing policy is that evidence probative of negligence should generally be admitted. Courts sometimes try to honour both policies. For example, in *Anderson v Maple Ridge (District)*,¹¹² another accident case involving a stop sign, the plaintiff alleged that the municipality had placed the stop sign negligently and wanted to introduce evidence of it having been moved after the accident. The Court admitted the evidence, not to establish negligence directly, but as proof of the sign's pre-accident visibility. What the Court did in *Vance* can be seen as akin to what it did in *Anderson*, and in this case, seems the right decision.

A few other decisions, some in the personal injury realm and some from administrative proceedings, round out the British Columbia case law.¹¹³

One personal injury case, *Danicek v Alexander Holburn Beaudin & Lang*,¹¹⁴ involved a relatively straightforward application of the *Apology Act*, though made more interesting by the presence of a "Mary Carter" agreement. Such an agreement, named after the case in which it was invented,¹¹⁵ is a somewhat controversial way of reaching partial settlements in multi-party actions. In such an agreement: (i) the settling defendant guarantees the plaintiff a monetary recovery that caps that defendant's exposure; (ii) the settling defendant remains in the action; and (iii) the settling defendant's liability decreases in proportion to the increase in the non-settling defendant's (or defendants') liability, as determined at trial. In Canada,

¹⁰⁹ 2014 BCCA 362 [Vance].

¹¹⁰ *Ibid* at para 3 (citing the trial judgment at para 34).

¹¹¹ *Ibid* at para 8 per Lowry JA (MacKenzie and Tysoe JJA concurring).

¹¹² *Anderson v Maple Ridge (District)*, (1992), BCLR (2d) 68 (CA) [*Anderson*].

¹¹³ The cases that follow number slightly fewer than the cases that result from noting up the *Apology Act*. However, upon examining all the cases retrieved from the noting-up process, it seems that in some the *Apology Act* played little or no role in the decision and may have even been mistakenly cited by one of the parties. I have only included those cases that, in my judgment, appear to be relevant to the exclusion or admissibility of apologetic discourse for the purpose of establishing fault.

¹¹⁴ *Danicek v Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 [*Danicek*].

¹¹⁵ *Booth v. Mary Carter Paint Co.*, 202 So.2d 8 (Fla. Dist. Ct. App., 1967).

parties generally must reveal the existence of such agreements to other parties and the court as soon as they are entered into (a court-developed criterion that addresses some of the controversy over *Mary Carter* agreements), though it is in the court's discretion as to whether parties must also reveal all the agreement's terms, such as the cap on the settling defendant's exposure. The requirement to disclose recognizes that such agreements significantly alter the relationship among parties to litigation and that party positions will have changed from those set out in the pleadings.¹¹⁶

The facts in *Danicek* were as follows. Michelle Danicek was an associate lawyer at a Vancouver law firm that had sponsored parties involving dinner, drinks and dancing. At one such party, Jeremy Poole, another associate, fell backwards onto Danicek, knocking her down and causing her serious injuries. Poole apologised profusely, both then and later, and Danicek's action eventually settled as between her and Poole. But Danicek had also sued the law firm, alleging vicariously liability for Poole's negligence. Out of this, an issue arose as to whether the firm's insurance policy would cover the claim. Accordingly, Poole added the insurer, Lombard, as a third party, while admitting liability in his agreement with Danicek. Lombard argued that Danicek hadn't proved that Poole was negligent, that the incident was no more than an unfortunate accident, or that Danicek had been contributorily negligent. Thus a classic *Mary Carter* scenario unfolded in which Poole's trial position (being examined in chief by *plaintiff's* counsel and admitting liability) diverged sharply from his position in the pleadings and, indeed, from his answers on the examination for discovery that had taken place before the settlement had been reached.¹¹⁷ However, the trial judge didn't think that the agreement had caused Poole to improperly change his story or provide inaccurate evidence; rather, the logical inference was that after the settlement, Poole was no longer under pressure to avoid admitting fault. Among the submissions by Danicek's counsel was that "Poole's repeated apologies and explanation that he fell on Michelle and the phone call from the hospital and again when they delivered Michelle home is totally consistent with his being responsible."¹¹⁸ Lombard objected to this evidence, citing the *Apology Act*. The trial judge agreed, but said that "without considering the apologies, on all the evidence I find that Mr. Poole breached the duty of care he owed to Ms. Danicek in consuming alcohol to the extent that his impairment caused him to lose his balance and fall on top of the plaintiff."¹¹⁹ In other words, the case confirms that the *Apology Act* does not bar a party from proving fault by other means, including both facts and inferences from facts, as happened here.

Danicek also shows that insurance considerations can change a case's complexion greatly. I raise this because one objection to apology legislation—an objection I can appreciate—is that parties should, in apologising, take responsibility for their acts or omissions; to later retract a sincere apology by making it inadmissible can seem morally questionable. But the story of a defendant having a change of heart and wanting to exclude a former apology is far too simplistic to capture the range of possibilities that arise in modern litigation, including situations in which interests of parties and their insurers diverge. Here, Poole would have been only too glad to have his apologetic discourse with Michelle admitted into evidence, but the *Apology Act* served to protect other interests—those of insurers and their insureds—that would have been adversely affected by such an admission, if made to establish another party's fault.

Some other personal injury cases, arising from motor vehicle accidents, illustrate the more classic circumstance in which apology legislation might be invoked. In

¹¹⁶ For a discussion on this point, at least of the Ontario law, see *Moore v Bertuzzi*, 2012 ONSC 3248.

¹¹⁷ See *Danicek*, *supra* note 114 at paras 63–70.

¹¹⁸ *Ibid* at para 73.

¹¹⁹ *Ibid* at para 75.

Dupre v Patterson,¹²⁰ a driver hit a cyclist, who fell and injured her shoulder. The cyclist, "embarrassed by the attention the accident had caused," apologized to the driver (this happened in Canada, after all), and the driver's lawyer later tried to have it admitted into evidence. The trial judge noted that the cyclist "did not remember saying anything about having over-extended or pushed herself too far on the bike ride" and that, in any case, "[r]oadside admissions at accident scenes are unreliable, since people tend to be shaken and disorganized."¹²¹ The judge said that whatever the statements were, they did not affect the conclusion that it was the driver, not the cyclist, who was negligent. In *Varga v Kondola*,¹²² a car driver (Varga) on a multi-lane road crossed into the leftmost lane to make a left turn, and was hit from behind by a truck, causing the car to mount the median, land on the other side, and hit an oncoming vehicle. Four lawsuits resulted, with liability being tried in one of them and the factual findings applied to all. Citing the *Apology Act*, the trial judge gave no weight "to Ms. Varga's reported statements at the accident scene to the effect that she was sorry."¹²³ However, the trial judge thought that a witness's account of the immediate aftermath, including a much-shaken Varga telling her that "she was running late to go to an epicure or pedicure appointment, and was unsure of where she was going,"¹²⁴ "went beyond an apology to describe facts ... consistent with the most likely scenario of why Ms. Varga made a sudden lane change."¹²⁵ She was found 75% liable; the truck driver, 25%. The decision on admitting the witness's statement into evidence seems to be right: there is no indication that Varga's explanation was made to the witness in the context of an apology, and it would seem wrong to exclude relevant evidence¹²⁶ simply by landing on some other connection to an apologetic statement.

I turn next to the administrative proceedings.

In *Boehler v Canfor (No 3)*,¹²⁷ the applicant, Boehler, alleged that Canfor, his former employer, had discriminated against him on the basis of a physical disability. One aspect of the case was that Boehler had secretly taped back-to-work meetings with Canfor's management, with the knowledge of Brown, the union president. On learning of this, Canfor managers were outraged, especially as the taping had taken place with Brown's connivance. Brown later wrote an apology letter for his role in the taping, which Canfor introduced into evidence. Boehler objected, citing the *Apology Act*. But the tribunal member held that the statute didn't apply because "Canfor relied on [the letter] to demonstrate one of the repercussions to Mr. Boehler's secret taping and not for any other purpose."¹²⁸ Had the tribunal member stopped there, her ruling would seem unobjectionable, especially as the apology was by a third party to the proceeding, Brown, regarding his conduct, not the conduct of either of the parties.¹²⁹ However, she went on to say that the *Human Rights Code* "entitles me to receive and accept ... evidence and information that I consider necessary and appropriate, whether or not [it] would be admissible in a court of law." If by this the tribunal member meant that the *Human Rights Code* trumps the *Apology Act*, that cannot be right, as s 1 of the *Apology Act* deems an administrative tribunal to be a court of law and s 2 declares that its admissibility provisions apply "despite any other enactment or law."

¹²⁰ *Dupre v Patterson*, 2013 BCSC 1561.

¹²¹ *Ibid* at para 42.

¹²² *Varga v Kondola*, 2016 BCSC 2406.

¹²³ *Ibid* at para 104.

¹²⁴ *Ibid* at para 81.

¹²⁵ *Ibid* at para 105.

¹²⁶ In this example, the evidence would be classified as *res gestae* or an "excited utterance"—a recognized exception to the general rule against admitting hearsay statements.

¹²⁷ *Boehler v Canfor (No 3)*, 2011 BCHRT 73 [*Boehler*].

¹²⁸ *Ibid* at para 48.

¹²⁹ "I personally want to acknowledge that my actions, as Local President severely damaged the relationship between the company and local 1133. Further, I acknowledge that my actions were in appropriate and that if I had the opportunity to manage this situation again, I would make very different choices." *Ibid* at para 397.

In *Sleightholm v Metrin (No 3)*,¹³⁰ the same administrative tribunal dealt with a more straightforward application of the *Apology Act*. The applicant alleged that her employer's principal had sexually harassed her, after which he had written an apology letter that she wished to introduce into evidence. The letter suggested that the principal was taken by surprise at the allegations and was "truly apologetic for any part he had in causing her 'disaffection.'"¹³¹ The exclusion of the apology may have been made easier by the tribunal member's finding that fellow office staff were equally surprised by the allegations; easier still, perhaps, by the applicant's own testimony that she wouldn't have brought the human rights claim had the employer paid her the additional wages that she claimed were owing to her.¹³²

An Alberta case, *Robinson v Cragg*,¹³³ is important for showing how much depends on the judicial stance towards the legislation and raises questions about parsing apologetic statements into components such as expressions or gestures of regret, admissions of fault, and statements of fact. Robinson and his investment company sued Cragg, a lawyer, for negligently discharging mortgages in respect of a real estate refinancing. As a result of the discharges, other lenders gained mortgage priority over Robinson, leading to the loss of his investment. After discovering the errors, Cragg wrote a letter that stated in pertinent part:

It only came to my attention that we have mistakenly filed Discharges of Mr. Robinson's security when I received an e-mail from Mr. Jaeger in late February wishing to confirm the registration order of the Jaeger et al mortgage and Mr. Robinson's mortgage at Land Titles. I assure you that our registration of the Discharges was through inadvertence and I apologise for doing so. As you are aware, Mr. Robinson's original security was registered in August of 2005 and June of 2006. The Jaeger et al security was registered in August of 2007. Clearly the Jaeger et al mortgage was behind Mr. Robinson[s] security and it was only through the inadvertence of my office that the situation has now changed.¹³⁴

In the ensuing litigation, the defendants brought an interlocutory motion to have the letter declared inadmissible pursuant to s 26.1 of the *Alberta Evidence Act*—that section being substantially the same as the *Uniform Apology Act*. Master Laycock, who heard the motion, held that "the underlined portion of the letter contains an expression of sympathy or regret and an admission of fault"¹³⁵ and should be redacted; the rest of the letter, though, "contain[ed] factual admissions relating to liability and should not be excluded."¹³⁶

Commenting on the case, Nina Khouri (Khouri 2014, p. 625) finds this redaction "problematic." I agree. While purporting to follow the legislation, the Master construed it narrowly—contrary to the "large and liberal construction" mandated by the *Interpretation Act*¹³⁷ and contrary to exhortations about the legislation's purpose found in sundry discussion papers and academic articles, some of which were cited to the Court. As Khouri (2014, p. 625) notes, Cragg—a lawyer, it should be remembered—would most likely not have made the factual statements but for the expectation that the whole letter would be seen as a statement of regret combined with an admission of fault, and thus inadmissible. Furthermore, even following the Master's logic, the decision appears internally inconsistent: it is hard to see why "mistakenly" should be redacted but "inadvertence of my office" should be left in.

¹³⁰ *Sleightholm v Metrin (No 3)*, 2013 BCHRT 75.

¹³¹ *Ibid* at para 63.

¹³² *Ibid* at paras 72–73.

¹³³ *Robinson v Cragg*, 2010 ABQB 743 [*Robinson*].

¹³⁴ *Ibid* at para 7 (underlining added by the court: see discussion *infra*).

¹³⁵ *Ibid* at para 21.

¹³⁶ *Ibid*.

¹³⁷ *Interpretation Act*, RSA 2000, c I-8, s 10. Similar statutory provisions apply across Canada.

Saskatchewan, which has had apology legislation for almost as long as British Columbia, has had only two cases. In *Bilan v Wendel*,¹³⁸ an action following a parking lot collision, the plaintiff testified that the defendant “apologized to her and told her that he had not heard her honking her horn.”¹³⁹ Provincial Court Judge Hinds thought it clear that the legislation prohibited such an apology being used to prove fault, and found the defendant wholly liable based on other evidence. Notably, there was no suggestion that the words “he had not heard her honking her horn” could be severed and admitted as a statement of fact.

In the other case, *Saskatchewan Government Insurance v Wilson*,¹⁴⁰ an insured (Wilson) successfully sued her insurer (SGI) for failing to deal with her claim in good faith. On appeal, SGI asserted various errors, including that the trial judge had considered the fact that SGI’s senior executive officer had apologized to Wilson in open court for its handling of her claim and the conduct of SGI’s legal counsel. The Court of Appeal found this argument without merit, noting that the trial judge had “very pointedly attributed her conclusion of bad faith to the particular factual circumstances that comprised the manner in which SGI’s adjuster had handled Ms Wilson’s claim.”¹⁴¹ Thus a phrase from the trial judge’s reasons—“[c]onsidering as a whole all of SGI’s conduct, which I have outlined”—was not meant to include the apology; and even if it did, said the Court, it was not intended as an admission of wrongdoing but “a genuine expression of the executive officer’s candid regret and sincere sympathy for Ms Wilson’s predicament.”¹⁴² I might add that an apology made during court proceedings should not necessarily be treated the same as one made before the commencement of such proceedings; there is good reason to believe that the legislation should not cast such a broad net, especially if one of the key rationales for the legislation is to encourage out-of-court dispute resolution.

The remaining cases are from Ontario.

I will start with some law that illustrates threshold points that may seem trite law but that are sometimes forgotten. The first point is that an apology must meet the relevance threshold for the *Apology Act* to even be in play. Evidence is relevant if it helps to prove something in issue; otherwise it is not. The second point is that any statement sought to be excluded pursuant to the statute must meet the statutory definition of “apology.” These points were addressed in *Cardinal Meat Specialists Limited v Zies Food Inc.*¹⁴³ The defendant and his companies had defrauded his employer of about \$1.8 million; when the fraud was uncovered, the defendant suggested that he continue with the company and work off the amount owing. The employer, unimpressed with this suggestion, sued him instead. It also applied for a Mareva injunction to preserve the defendant’s assets pending a judgment at trial.¹⁴⁴ At some point, an objection was raised over the admissibility of the defendant’s suggestion that he work off his ill-gotten gains. Justice Ricchetti noted, first of all, that the proceeding was an interlocutory one to determine whether the record supported the granting of a Mareva injunction. In other words, the purpose was not to determine liability, which would be the trial judge’s province, so there was no question of any statement being used for that purpose. Secondly, the employee’s suggestion that he work off the amount was not “an expression of sympathy or regret ... or any other words or actions indicating contrition or commiseration”—rather, it was a straightforward admission of wrongdoing.¹⁴⁵ The third point is that

¹³⁸ *Bilan v Wendel*, 2010 SKPC 148.

¹³⁹ *Ibid* at para 4.

¹⁴⁰ *Saskatchewan Government Insurance v Wilson*, 2012 SKCA 106, [2013] 5 WWR 286; 405 Sask R 8.

¹⁴¹ *Ibid* at para 28.

¹⁴² *Ibid* at para 29.

¹⁴³ *Cardinal Meat Specialists Limited v Zies Food Inc.*, 2014 ONSC 1107.

¹⁴⁴ Also known as a Mareva order or freezing order, this form of relief aims to stop a defendant from dissipating assets or moving them out of the jurisdiction in an attempt to be judgment-proof. See *Mareva Compania Naviera SA v International Bulkcarriers SA*, [1975] 2 Lloyd’s Rep 509 (CA), [1980] 1 All ER 213.

¹⁴⁵ *Cardinal Meat Specialists Limited v Zies Food Inc.*, *supra* note 143 at paras 17, 57.

apology legislation, like most legislation, is not retroactive unless it is expressly stated to be. This was the holding in *Lane v Kock*,¹⁴⁶ in which a statement—assumed to count as an “apology” for the purposes of the proceeding—was admitted into evidence because it had been made some three years before the *Apology Act* came into force.

In another case, *Simaiei v Hannaford*,¹⁴⁷ Master Short considered whether an apology referenced in a statement of claim could stand. On the basis that a party “cannot plead facts that go nowhere,”¹⁴⁸ he decided that it could not, and ordered it to be struck. Apart from this sensible outcome,¹⁴⁹ the judgment is notable for drawing on the legislative background and the Master’s own experience in “the value of an apology in reaching a mutually acceptable out-of-court resolution.”¹⁵⁰ My only critique is in relation to his statement that the *Apology Act* is intended to allow someone to express sympathy “without having to worry whether or not a spontaneous utterance will be drawn (sic) back in their face at a later date.”¹⁵¹ I agree, but the statute is not restricted to protecting “spontaneous utterances.” Non-spontaneous—even calculated—utterances and writings can also be protected. The litmus test, I suggest, is whether the purpose of the apologetic discourse was to express sympathy or regret, such as to help the wronged person’s healing and to promote dispute resolution.

This point seems to have been at least partly lost in *Cormack v Chalmers*,¹⁵² a jury trial in which the plaintiff, Rumiana Cormack, had been badly injured by a motor boat propeller while she was swimming in a harbour. She settled with Benjamin Chalmers, the boat’s pilot, but continued the action against her hosts, Shannon Pitt and Eric Rubadeau. Her lawyers submitted some pre-trial “will-say” statements (outlines of what a witness is expected to say), one of which was contested under the *Apology Act*. Justice Ray, the trial judge, had to rule on the admissibility of the following “will-say” statement from a witness named Asen:

Asen spoke with Shannon Pitt and Eric Rubadeau. Shannon told Asen that she was sorry and she could not forgive herself. She said that she always tells people not to swim behind the dock and has told her father not to go swimming there. Shannon regretted not telling Rumiana.¹⁵³

Relying partly on the Alberta parsing precedent, *Robinson*,¹⁵⁴ Ray J concluded that “the anticipated evidence contains separate sentences, with each sentence a separate thought” and that “the second and fourth sentences ... should be redacted so as to conform with the requirements of the *Apology Act*.”¹⁵⁵ The will-say statement thus survived as:

Asen spoke with Shannon Pitt and Eric Rubadeau. She said that she always tells people not to swim behind the dock and has told her father not to go swimming there.¹⁵⁶

From the defendants’ perspective, the result must have seemed like the worst of both worlds. They failed in having the factual parts excluded, and by virtue of the redaction, lost the apologetic parts that might have rendered a jury sympathetic to Shannon’s omission. One could argue that having regard to the purposes of the

¹⁴⁶ *Lane v Kock*, 2016 ONSC 184.

¹⁴⁷ *Simaiei v Hannaford*, 2015 ONSC 5041.

¹⁴⁸ *Ibid* at para 41.

¹⁴⁹ That outcome was endorsed by Perell J in *Coles v Takata Corporation*, 2016 ONSC 4885, but for a different reason; namely, that pleadings must “contain a concise statement of the material facts on which the party relies but not the evidence by which those facts are to be proved.” (para 23).

¹⁵⁰ *Ibid* at para 30.

¹⁵¹ *Ibid* at para 38.

¹⁵² *Cormack v Chalmers*, 2015 ONSC 5599 [*Cormack*].

¹⁵³ *Ibid* at para 4.

¹⁵⁴ *Supra* note 133.

¹⁵⁵ *Cormack v Chalmers*, *supra* note 152 at para 9.

¹⁵⁶ *Ibid*.

Apology Act—healing of the injured party, responsibility-taking by the injurer, etc.—the whole statement might have gone in. It was not even directed to Rumiana, the injured party, but to a third party, Asen. Unless Asen was to serve as a go-between for conveying the statement to Rumania, it is hard to see how the statement would have helped Shannon express contrition to, or commiseration with, Rumania. One could also argue that the whole of the statement should have been excluded. The statutory definition of “apology” does not require that the apology be directed to the injured person, and there are various scenarios when fault-admitting apologies could be made to someone else; e.g., an apology to the family of a deceased person. This may seem to make recourse to purpose and principle annoyingly indeterminate, though as I will argue in the conclusion, I believe there is a way out of this indeterminacy that works better than the hashed parsing of apologetic discourse.

2.5. *England and Wales*

The Compensation Act 2006¹⁵⁷ was enacted “to tackle perceptions that can lead to a disproportionate fear of litigation and risk averse behaviour; to find ways to discourage and resist bad claims; and to improve the system for those with a valid claim for compensation.” (Parliamentary Under-Secretary of State 2005) Section 2 of the statute contains what is probably the briefest form of apology-enabling legislation anywhere:

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

As the Ministry of Justice acknowledged in an assessment of the statute’s impact, this section merely “reflected and did not change the law,” (United Kingdom Ministry of Justice 2012, p. 20) which is also what the section’s official explanatory note says. The Ministry thus did not think s 2 warranted a “detailed examination of individual decisions in an attempt to determine whether the courts had struck the right balance between the interests of the parties.” (United Kingdom Ministry of Justice 2012, p. 20) In England and Wales,¹⁵⁸ then, government policy on the admissibility of apologies in civil actions is decidedly “hands-off”—it is up to courts to decide on a case-by-case basis.¹⁵⁹

2.6. *Scotland*

In early 2016, the Scottish Parliament passed the Apologies (Scotland) Act 2016. Given its four-year gestation and the large amount of consultation and reports leading to it,¹⁶⁰ the statute is something of a let-down. It started as an initiative of an independent member of Parliament, Margaret Mitchell, in the form of a consultation report and proposal.¹⁶¹ Curiously, while extolling the virtues of comprehensive apologies, the report suggested that to ensure that the act is “not open to abuse,” it would not protect apologies insofar as they admitted fault or contained statements of fact.¹⁶² It would, though, protect a statement of regret over an act, omission or outcome as well as an undertaking to look at the

¹⁵⁷ Compensation Act 2006, c 29. Although it is a UK statute, most of it applies only to England and Wales.

¹⁵⁸ Except for a few sections, the statute applies only to England and Wales: Compensation Act 2006, s 17.

¹⁵⁹ For further discussion of this section, as well as UK case law on the admissibility of apologies at common law, see Vines (2008). A search on BAILII turned up very little, which makes the section in the Compensation Act rather perplexing. Most cases dealing with apology and law seem to be in the context of mitigating defamation damages rather than admissibility to prove liability in civil actions.

¹⁶⁰ The history and supporting documents are on a website of the Scottish Parliament: <http://www.parliament.scot/parliamentarybusiness/Bills/86984.aspx>. (Subsequent documents cited below can be accessed either through their own URLs or through this website.)

¹⁶¹ Apologies (Scotland) Bill, Consultation by M. Mitchell MSP, Member for Central Scotland Region (29 June 2012). Available from: http://www.parliament.scot/S4_MembersBills/Apologies_Consultation.pdf.

¹⁶² Consultation document, *ibid* at 18.

circumstances giving rise to the incident with a view to preventing a similar occurrence again. Following the consultation period, Ms Mitchell was converted to the view that fault-admitting statements should be included within the scope of protection, as well as fact-admitting portions of apologies, as long as the facts could still be proved by other means.¹⁶³

A bill was introduced on this basis in March 2015, with what would have been very robust protection for apologetic statements made with respect to an adverse act, omission or outcome. The bill's definition of an apology was intended to include: "(a) an express or implied admission of fault in relation to the act, omission or outcome; (b) a statement of fact in relation to the act, omission or outcome; or (c) an undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing a recurrence."¹⁶⁴ The bill would have applied to most civil proceedings, with some limited exceptions. (It did not have a provision relating to insurance policies, as the Scottish Parliament lacks legislative competence over insurance; that is reserved to the UK Parliament.)

However, the bill as put forth received stiff opposition from certain quarters. The Association of Personal Injury Lawyers, for example, said in its written submission that the bill risked "turning the Scottish civil justice system into a second rate system compared to the criminal justice system"¹⁶⁵ and risked "denying injured people access to justice."¹⁶⁶ The Faculty of Advocates thought that the bill was "unlikely to encourage or discourage spontaneous apology at or shortly after an adverse event," and said that barring such "de recenti" apologies from evidence would be "an unwelcome outcome."¹⁶⁷ These submissions were more vociferous than, for example, that of Core Solutions, a mediation services provider, opining that the scope of protection "ha[d] been the subject of much consideration and ... that the correct balance ha[d] been achieved."¹⁶⁸ It soon became evident that the Justice Committee and the government would support the bill only if the definition of "apology" were changed.¹⁶⁹ Rather than lose that support, Ms Mitchell agreed to what ended up being significant changes. Sections 3(a) and (b) in the bill (see above) were deleted, (Scottish Parliament 2015b, 2015a) leaving only the parts about statements of regret and undertakings to look into the circumstances so as to prevent recurrences. The resulting definition of "apology," as passed, thus reads:

In this Act an apology means any statement made by or on behalf of a person which indicates that the person is sorry about, or regrets, an act, omission or outcome and includes any part of the statement which contains an undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing a recurrence.¹⁷⁰

2.7. Ireland

In 2015, Ireland amended its Civil Liability and Courts Act 2004 to include Part 2A (ss 32A–32D): Clinical Negligence Actions.¹⁷¹ This Part, which came into effect in

¹⁶³ Proposed Apologies (Scotland) Bill, Summary of Consultation Responses (2 April 2014). Available from: http://www.parliament.scot/S4_MembersBills/Apologies_summary_final.pdf at 27.

¹⁶⁴ Apologies (Scotland) Bill [As Introduced]. Available from: [http://www.parliament.scot/S4_Bills/Apologies%20\(Scotland\)%20Bill/b60s4-introd.pdf](http://www.parliament.scot/S4_Bills/Apologies%20(Scotland)%20Bill/b60s4-introd.pdf), s 3.

¹⁶⁵ Justice Committee—Apologies (Scotland) Bill, Written submission from the Association of Personal Injury Lawyers. Available from: http://www.parliament.scot/S4_JusticeCommittee/Inquiries/A5_APIL.pdf at 1.

¹⁶⁶ *Ibid* at 2.

¹⁶⁷ Justice Committee—Apologies (Scotland) Bill, Written submission from Faculty of Advocates. Available from: http://www.parliament.scot/S4_JusticeCommittee/Inquiries/A6_Faculty_of_Advocates.pdf at 3.

¹⁶⁸ Justice Committee—Apologies (Scotland) Bill, Written submission from Core Solutions http://www.parliament.scot/S4_JusticeCommittee/Inquiries/A13_Core_Solutions.pdf at 3.

¹⁶⁹ See in particular the comments of Paul Wheelhouse, Minister for Community Safety and Legal Affairs (Scottish Parliament 2015a, p. 8–10).

¹⁷⁰ Apologies (Scotland) Act 2016, s 3.

¹⁷¹ The amendment was accomplished through s 219(1) of the Legal Services Regulation Act 2015. See <http://www.irishstatutebook.ie/eli/2015/act/65/enacted/en/print.html>.

July 2016, is one of a number of legislative reforms connected to health care. Section 32D relates to apologies in that context, and without defining the term “apology,” says that an apology does not constitute an express or implied admission of fault or liability, invalidate insurance coverage, and, despite any other enactment, is inadmissible as evidence of fault or liability in a clinical negligence action.” In early 2017, Cabinet approved an amendment to the *Civil Liability (Amendment) Bill 2017* that would facilitate a voluntary disclosure scheme in the health care context, designed to protect information or apologies given by a “health services provider” at an “open disclosure meeting” in respect of a “patient safety incident” (the quoted expressions are all defined terms). The bill and its proposed amendments were under consideration at the committee stage at the time of writing.¹⁷²

2.8. Hong Kong

As of this writing, Hong Kong is the most recent jurisdiction to pass apology legislation—and in doing so, the legislature has taken the boldest steps so far in this field. As with Scotland, the process of developing a proposed bill involved multiple rounds of consultation. However, unlike Scotland, the initiative was, from inception, under the aegis of a government committee—the Department of Justice’s Steering Committee on Mediation. Further, and even more unlike Scotland, the committee’s provisional view was that protection should be comprehensive, and, subject to certain safeguards, should extend to both fault-admitting and factual portions of apologetic statements. This conclusion came about as a result of a consultation report published in June 2015, (Hong Kong Department of Justice, Steering Committee on Mediation 2015) followed by a report and request for further submissions on two remaining issues, published in February 2016. (Hong Kong Department of Justice, Steering Committee on Mediation 2016)

The bill, called the Apology Ordinance,¹⁷³ applies to a broad range of matters (other than criminal proceedings and a narrow range of proceedings under other statutes) and goes beyond the scope of the Canadian *Uniform Apology Act* and its provincial analogues in that it explicitly excludes as evidence “a statement of fact in connection with the matter.” (s 8(2)) Noting the contentiousness of such a provision in the Scottish proposal, the Committee initially indicated the provisional nature of this language, and sought further input on it. (Hong Kong Department of Justice, Steering Committee on Mediation 2016, p. 70-73) The Committee suggested three possible approaches:

- (1) Statements of fact in connection with the matter in respect of which an apology has been made should be treated as part of the apology and should be protected. The Court does not have any discretion to admit the apology containing statements of fact as evidence against the maker of the apology. (“First Approach”)
- (2) The wordings regarding statements of fact are to be omitted from the apology legislation and whether the statements of fact should constitute part of the apology would be determined by the Court on a case by case basis. In cases where the statement of fact is held by the Court as forming part of the apology, the Court does not have any discretion to admit the statement of fact as evidence against the maker of the apology. (“Second Approach”)
- (3) Statements of fact in connection with the matter in respect of which an apology has been made should be treated as part of the apology and be protected. However, the Court retains the discretion to admit such statements of fact as evidence against the maker of the apology in appropriate circumstances. (“Third

¹⁷² See [http://www.justice.ie/en/JELR/Pages/Civil_Liability_\(Amendment\)_Bill_2017](http://www.justice.ie/en/JELR/Pages/Civil_Liability_(Amendment)_Bill_2017) (explaining the bill and providing its proposed text, dealing with periodic payment orders in catastrophic personal injury cases) and <https://www.oireachtas.ie/documents/bills28/bills/2017/117/b0117s-scn.pdf> (providing the proposed text for the “open disclosure” scheme).

¹⁷³ Gazetted version is available at <http://www.gld.gov.hk/egazette/pdf/20172129/es12017212912.pdf> (posted 21 July 2017).

Approach") (Hong Kong Department of Justice, Steering Committee on Mediation 2016, p. 70-71)

The Committee thought that the advantage of the First Approach was clarity and certainty, "in that people who intend to make apologies would know clearly in advance the legal consequence." (Hong Kong Department of Justice, Steering Committee on Mediation 2016, p. 71) The advantage of the Second Approach, thought the Committee, was flexibility, which may nevertheless be a "perceived as uncertainty, and hence may be inconsistent with the ultimate objective of encouraging people to make apologies." (Hong Kong Department of Justice, Steering Committee on Mediation 2016, p. 72) As to the Third Approach, the Committee thought it could address the concern that some claims may be stifled for lack of evidence, but worried that it could "render the legislation uncertain which may considerably affect the efficacy of the legislation or even defeat [its] whole purpose." (Hong Kong Department of Justice, Steering Committee on Mediation 2016)

Ultimately, after careful consideration of all the views, the Committee recommended the Third Approach, and a bill embodying that approach was gazetted and passed second reading in the Legislative Council of Hong Kong, whereupon it was referred to a legislative committee for further study.¹⁷⁴ Ultimately, that is the version that passed, and without the sort of controversy that accompanied the debates on the Scottish bill.

I am more attracted to the Committee's Third Approach, or a variant of it, than to either the First or Second Approaches. If we are really serious about the purpose of apology legislation, statements of fact that are closely bound up with an apology should generally be protected, unless the court decides otherwise. That is because an apology that is fact-specific is more likely to be satisfactory to the recipient and to meet the legislative goals of healing and early dispute resolution. However, I also see residual discretion for admitting facts as essential even where, as I view it, courts sometimes err in their application of apology laws. I return to this theme in the concluding section of this article.

3. Part II: Conclusions and recommendations

From this survey of apology law, a number of conclusions can be drawn, as well as some recommendations for interpreting and drafting apology laws.

First, where the law is well developed—that is, where there are mid- or high-level appellate decisions at common law or under an apology statute—the weight of opinion is that apologies alone should typically not be construed as admissions of fault or liability. As *Dovuro*¹⁷⁵ explains, to do so is to pre-empt the adjudicative roles of deciding the law, finding the facts and applying the law to the facts to reach conclusions on liability. Furthermore, this principle applies to each element of a cause of action. In a negligence action, for example (the most common type of tort case and the most common type of case in which out-of-court apologies feature), this means separately considering each element—duty of care, standard of care, breach, causation and damages. Thus in *Lawrence*,¹⁷⁶ statements that there had been an "incident" or that someone had "messed up" were accepted as admissions of a breach of the standard of health care, but not of causation, the central issue in dispute.

¹⁷⁴ See Hong Kong Legislative Council, *Position Report on Bills Committees and subcommittees* (3 April 2017). Available from: <http://www.legco.gov.hk/yr16-17/english/hc/papers/prpt20170403.pdf> at 2; Hong Kong Department of Justice, *Press Releases and Speeches* online: http://www.doj.gov.hk/eng/public/pr/20170208_pr1.html (especially the Secretary of Justice's second-reading speech on 8 February 2017 and his speech on 3 April 2017, in which he emphasizes passing the apology bill "as soon as possible" and discusses mediation initiatives designed to make Hong Kong a leader in international dispute resolution).

¹⁷⁵ *Supra*, note 79.

¹⁷⁶ *Supra*, note 68.

Second, this principle tends to apply, not just to statements of regret, but also to statements of fault and sometimes even to embedded facts. Examples include *Dovuro*¹⁷⁷ (“the unusual step was made of undertaking contract seed production in New Zealand ... new varieties will not be brought on the market again in this manner”); *Locke*,¹⁷⁸ in which the surgeon allegedly said that she “knew the needle was too small,” but expert evidence on the standard of care for using the needle was equivocal; and *Hardie*,¹⁷⁹ where a lawyer’s published apology admitted that goods were wrongly removed from a restaurant but didn’t say why they were removed—at least not in clear enough terms to make out a case of conversion.

Third, where there is doubt as to whether a statement counts as an inadmissible apology or an admissible statement of fault or fact, courts will use various methods to try to resolve the doubt. Thus the suggestion in *Westfield*¹⁸⁰ that a statement made close to the event or before litigation is anticipated is more likely to be seen as having been part of an “apology,” whatever its actual wording. Applying this test, the psychiatrist’s statement in *Stewart*,¹⁸¹ to the effect that the patient had told him that she had wanted to kill herself, was excluded: it was made in the ICU shortly after the event, well before any family members thought of a wrongful death action, and was an attempt to commiserate, even if ineffective. Whether the Ohio Supreme Court will agree with this conclusion is yet to be seen.¹⁸²

We have also seen that courts sometimes parse statements to separate admissible portions from inadmissible portions—an exercise that apology legislation may actually compel. There is some irony here: a party hoping to gain an evidentiary benefit by excluding an apologetic statement can find that the most inculpatory parts remain, while the exculpatory parts—or at least the parts that cast the party in a more favourable light—are excluded. Thus in *Strout*,¹⁸³ a thoughtful and responsive apology letter was mostly excluded from evidence, but a single sentence from it was admitted about a doctor needing to have waited for the results of a biopsy to confirm the type of cancer. Similarly, in *Cormack*,¹⁸⁴ the defendant’s statement that “she always tells people not to swim behind the dock” was admitted, but her statements of guilt over failing to communicate the same information to her house guest, the plaintiff, were excluded. More fundamentally, attempting to split statements into components of regret, fault and fact is problematic. Such an exercise risks taking words out of context and seems to run counter to the legislative purpose, especially the purpose underlying the more broadly worded statutes, as we saw from the letter in *Robinson*.¹⁸⁵

What then, of the concern that excluding statements of fault or facts is unfair to plaintiffs? This theme runs through some of the cases, such as *Woods v Zeluff*,¹⁸⁶ as well as the voices of lobby groups like the Association of Personal Injury Lawyers, so successful in eviscerating the Scottish apology bill.¹⁸⁷ I suspect that this fear of unfairness is overblown, even if it makes for impressive advocacy. Parties generally prove what they need to prove—facts or fault—through other means, such as expert witnesses and documentary or photographic evidence. Where an artery is nicked, a red light is run, or a spill goes unmopped, such facts can usually be elicited, and breach of a duty established, without resort to an apology that states the facts and admits the fault. Yet there are cases where the only practicable method of proof lies in tendering an apologetic statement that was

¹⁷⁷ *Supra*, note 79.

¹⁷⁸ *Supra*, note 32.

¹⁷⁹ *Supra*, note 92.

¹⁸⁰ *Supra*, note 89.

¹⁸¹ *Supra*, note 59.

¹⁸² See note 63, *supra*, and accompanying text.

¹⁸³ *Supra*, note 64.

¹⁸⁴ *Supra*, note 152.

¹⁸⁵ *Supra*, note 133.

¹⁸⁶ *Supra*, note 38.

¹⁸⁷ See note 165, *supra* and accompanying text.

made at the time and that included facts helping to explain the incident. If, for example, the issue being tried is a doctor's knowledge of a patient's suicidal tendencies, it may be that the doctor's admission of that knowledge cannot be proved by any other means, and is essential to the plaintiff's case.

What we might need, then, is a mechanism that excludes apologies in the vast majority of cases but admits them if an injustice were to result from the exclusion. This would help to reconcile the conflict between the present needs of persons in dispute—that is, both injured and injurers, for apologies are important to each—and the future needs of parties to a civil action. Where the subject matter of the dispute is not covered by an apology statute, this can be accomplished through the court's equitable jurisdiction or simply its jurisdiction to adapt rules of evidence to achieve justice in the case before it. Where an apology statute is open to interpretation or a candidate for amendment, a similar effect could be accomplished with the legislative drafting approach of excluding apologies "unless the court otherwise orders," leaving it to courts to work out the circumstances in which statements of fault or fact might be excepted from the general exclusionary rule. Another approach would be to have a stand-alone section in the statute that gives courts authority to make exceptions and provides guidance for when they may do so. For instance, if a relevant fact cannot be proven by any other means, the court could allow a statement of it into evidence, even if included in apology. A statement of fact included in an apology could also be allowed into evidence for impeaching a witness; indeed, one US state, South Dakota, expressly provides for this.¹⁸⁸ In such a case, evidence of the apologetic statement is not tendered to directly prove fault, but to cast doubt on a witness's credibility. The objection might be made that this leaves the law too uncertain. But if this brief survey has shown anything, it is that apology legislation, like any legislation, is subject to interpretation, which rarely happens seamlessly. The quest for perfect certainty is something of a chimera; we should be satisfied if we get a reasonable degree of certainty in the majority of cases.¹⁸⁹ I suggest that if guidance is to be provided by courts or legislatures, it be done in the form of a non-exhaustive list, which would give courts the discretion they need to deal with the multi-varied cases that will continue to arise.

In conclusion, I would say that we have made progress in using the law to promote and protect apologetic discourse, but that the progress is uneven. In most jurisdictions, such discourse is protected in only a subset of disputes—typically, those relating to health care—and only to the degree that apologetic statements express sympathy *simpliciter*, rather than admissions of fault or fact. Ironically, this may be no different from the common law, as I have tried to show. But having it expressed in statutory form may increase awareness of the need for apologetic discourse as part of a healthy dispute resolution system. The Hong Kong legislation, along with the Canadian *Uniform Apology Act* and its provincially enacted analogues, are still the statutes providing the most protection in the world, both in terms of excluding apologies as evidence of liability in a civil action and allowing insured persons to apologize without fear of losing their coverage. Judicial stance towards the legislation and interpretation of its sections are crucially important and will remain so. Some of the best lessons come from comparing the Australian and Canadian cases; they show that even where there is a skeletal form of protection,

¹⁸⁸ S.D. Codified Laws tit. 19 ch. 19 §411.1. Contrast with Louisiana, where health care statements of sympathy, but not fault, are inadmissible for any purpose, *including* impeachment. La. Rev. Stat. Ann. tit. 13 ch. 17 §3715.5. The South Dakota provision was applied by the state's Supreme Court in *Ronan v Sanford Health*, note 51. The Court construed the exception narrowly—meaning that it construed the apology law broadly—and did not allow the defendant-doctor's apologetic statements into evidence. This was because the patient-plaintiff had tendered them in his case-in-chief, and thus not for impeachment purposes.

¹⁸⁹ A good argument can also be made that statements of fact occurring in testimony, whether in court or a court-based process such as an examination of discovery or deposition, shouldn't be excluded just because they come wrapped in an apology. Indeed, while this might seem obvious, Ontario has taken the precaution of saying so in its legislation: *Apology Act*, 2009, SO 2009, c 3.

courts may interpret it broadly to limit admissibility of apologetic discourse; conversely, a broadly worded statute may be interpreted narrowly, parsing the discourse into inadmissible and admissible portions. I have also argued that even where a statute provides very broad protection, courts need to have some discretion to admit statements of fault or fact where not to do so would cause an injustice in an individual case. In short, the intersection of law and apology continues to be a fascinating field, and the promotion of apologetic discourse a continued work in progress.

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