

# I'M SORRY (Please Don't Sue Me)

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Alberta now has apology legislation. Historically lawyers advised their clients – “*Don't apologize, it can be construed as an admission of guilt in litigation.*” Litigation, unfortunately puts people in adversarial positions that generally prevent open and forthright dialogue between the opposing parties. Apology legislation is intended to allow parties to apologize for making an error without the apology being used in the litigation process as evidence of wrongdoing. It does not mean a person can no longer sue. It simply means that the apology can't be used in the lawsuit. The goal of apology legislation is to prevent litigation. In some cases, plaintiffs simply want some closure, some acceptance of responsibility and aren't necessarily looking for financial compensation. Apologies can have significant, and some feel almost magical, properties in resolving conflict and restoring relationships. There is an emotional component in all disputes and if that component can be reduced or satisfied, some of those disputes may be resolved without proceeding to court.

## Introduction

In November 2008, the Alberta legislature passed an amendment to the existing *Alberta Evidence Act*, R.S.A. 2000, c. A-18 (the “Act”), geared at protecting apologizing parties from risks of legal liability and loss of insurance coverage. Section 26.1 of the Act provides that an apology does not constitute an express or implied admission of fault or liability.

Apology legislation is not new to Canada. In May 2008, British Columbia became the first province to enact such legislation, with Manitoba and Saskatchewan soon following suit. Whereas the B.C. provisions are contained in a stand-alone act, Saskatchewan, like Alberta, introduced the new provisions as an amendment to its *Evidence Act*, S.S. 2006, c. E-11.2. To date, seven provinces have enacted such legislation, including Ontario, Nova Scotia and Newfoundland and Labrador.

## The Alberta Legislation

The Alberta legislation prohibits the admissibility of apologies as evidence in court for the purposes of establishing fault or liability. Further, the new provisions provide that an insurer may not rely on an insured's apologies as grounds for voiding, impairing or otherwise affecting an insured's rights under an insurance contract.

“Apology” is defined broadly under the Act, to mean an expression of sympathy or regret, a statement that one is sorry or any other words of 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. While this inclusive definition affords expansive protection under the Act, there are limits on the protection insofar as the provisions do not apply to the prosecution of an offence in criminal proceedings.

## Background to Apology Legislation

The origins of apology legislation arose in the context of medical malpractice.<sup>1</sup> In studies conducted with patients and families that had commenced litigation against medical professionals and care facilities in Canada, it was found that litigation was generally commenced for the purposes of obtaining information, receiving an acknowledgment that harm was caused by error, and addressing treatment of an affected party following an adverse event. In these studies, an adverse event referenced an event that results in unintended harm to the patient and is related to the care or services provided to the patient, rather than to the patient's underlying medical condition.<sup>2</sup> Significantly, the studies suggested that patients considered financial compensation unhelpful and not a primary motivator of litigation.<sup>3</sup>

At the same time, the studies found that healthcare providers and organizations were often reluctant to provide an apology out of fear that such statements would be used against them as admissions of liability in subsequent litigation.<sup>4</sup> These studies articulated a long-existing gap between the responses that affected parties seek from healthcare providers following an adverse event, and what institutions, as a policy, are willing to provide.

It has therefore been the hope of the new wave of apology protection legislation to reduce litigation and facilitate fair settlement by freeing professionals to apologize and thereby provide affected parties with the primary relief that they would otherwise be seeking through litigation.

As stated in debate leading up to the passage of the Alberta Act, the goal is to allow for “social services and health care providers to operate in a humane manner without incurring legal liability”.<sup>5</sup> This is consistent with a general movement in healthcare towards a patient-centred approach with a focus on disclosure, over and above the entrenched legal and ethical obligations of medical professionals to disclose errors. In line with this development, is the increasing recognition that apology is a part of meaningful disclosure and consistent with principles of honesty and transparency that are integral to a system of shared accountability.<sup>6</sup>

As to whether apology legislation in fact discourages litigation, it is still too early to say.<sup>7</sup> In the United States, Veterans Health Administration and the University of Michigan Health Services have reported significant savings in litigation-related costs since implementing full disclosure practices, with the University of Michigan citing figures of \$2 million per annum.<sup>8</sup> In Canada,

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<sup>1</sup> Jennifer Hunter, “Recent Legislative Changes: Apologies, Pathologists and New Reporting Obligations” (2009) 11 R.M.C.H.C. 65 at 65 [Hunter].

<sup>2</sup> *Canadian Disclosure Guidelines* (2008), The Canadian Patient Safety Institute [Guidelines]; and Jill Taylor, “The Impact of Disclosure of Adverse Events on Litigation and Settlement” (Paper presented to The Canadian Patient Safety Institute, October 2007) at s. 6.11 [unpublished] [Taylor].

<sup>3</sup> Taylor, *supra* note 2 at s. 6.11.

<sup>4</sup> *Ibid* at s. 5.2.

<sup>5</sup> *Alberta Hansard Excerpts*, Committee of the Whole – Bill 30 – *Alberta Evidence Amendment Act, 2008*, online: <<http://www.justice.gov.ab.ca/hansard/default.aspx?id=5507>>.

<sup>6</sup> Guidelines, *supra* note 2 at 23.

<sup>7</sup> Taylor, *supra* note 2 at s. 5.6.

<sup>8</sup> Hunter, *supra* note 1 at 68; and Taylor, *supra* note 2 at s. 4.1.

studies have yet to be undertaken on the effect of apology legislation on the incidence of litigation.<sup>9</sup>

### **The Value of Apology**

Notwithstanding this paucity of empirical evidence of the efficacy of such legislation, there is much academic commentary on the inherent value of apology and its importance in redress. In his Special Report No. 47 to the Legislative Assembly,<sup>10</sup> the Ombudsman of British Columbia, Howard Kushner, explores the possible meaning of apology to a recipient. He cites Aaron Lazare's *On Apology*<sup>11</sup> in reasoning that apologies have the power to heal broken or damaged relationships insofar as they satisfy a need on the part of the recipient to hear an acknowledgement that a mistake has been made and an indication that the responsible party is taking responsibility for the wrongdoing. It is this combination that gives strength to apology.<sup>12</sup> Apology as an expression of remorse conveys that the offending party will make an ongoing commitment to change its behaviour to the end that the offending act will not be repeated.<sup>13</sup>

In one case study offered by Kushner, an investigation was carried out by the Ombudsman of Tasmania in response to allegations from adults that they had been abused as children while in the care of the state.<sup>14</sup> When claimants were asked what outcomes they sought, most requested an apology. Indeed, the report of the findings of the investigation noted that while the claimants appreciated the government's offers of assistance and the opportunity to have their stories heard, for many of them, final closure would not be achieved until they received an apology.<sup>15</sup>

However, it is trite to note that an apology is not restorative *per se*. Kushner reports another case study relating to the abuse of deaf students at Jericho Hill School, a residential school.<sup>16</sup> The Ombudsman in that case had recommended that a personal and formal apology accompany any government offer of compensation. In misguided compliance with this recommendation, a form apology letter was sent to those claimants who had accepted the compensation offer. Those who did not accept the compensation package were not provided with an apology letter. One of the recipients of the generic apology letter noted that such apology failed to bring the closure he sought because it failed to acknowledge his experience in enduring and overcoming the abuse.

Indeed, Barbara Benoliel has written that the value of an apology can be calculated as a function of three factors: 1) an injured party's expectation of or need for an apology; 2) the timing of the offered apology; and 3) perception of appropriate accompanying emotions by the one making the

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<sup>9</sup> Hunter, *supra* note 1 at 68.

<sup>10</sup> Howard Kushner, "The Power of an Apology: Removing the Legal Barriers" (Special Report No. 27 to the Legislative Assembly of British Columbia, February 2008) [Special Report].

<sup>11</sup> Aaron Lazare, *On Apology* (New York: Oxford University Press, Inc., 2004) [Lazare].

<sup>12</sup> Special Report, *supra* note 10 at 4.

<sup>13</sup> *Ibid* at 14.

<sup>14</sup> *Ibid* at 10.

<sup>15</sup> *Ibid* at 10.

<sup>16</sup> *Ibid* at 2.

apology.<sup>17</sup> Underlying this calculation is a societal expectation that involvement in harmful behaviour is itself shameful and should elicit in offending parties, an appropriately remorseful reaction in a timely manner.<sup>18</sup>

If the affected party is unsatisfied that the wrongdoer is sincerely empathetic or distressed – that he or she understands the damage done – then apology protection legislation will do little to decrease the frequency of lawsuits. Similarly, and in the particular context of healthcare, where the harm caused by an adverse effect is severe, research suggests that disclosure and apology tend not to discourage civil claims.<sup>19</sup>

If, however, apology protection legislation in fact encourages sincere expression of regret and remorse, and if satisfaction of an emotional need for apology can direct rational thought in affected parties, then apology legislation may very well contribute to settlement of disputes.

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<sup>17</sup> Barbara Benoliel, “Apologies in Mediation: Who’s Sorry Now?” (2008) 17 Can Arbitr Mediat J 26 at 27.

<sup>18</sup> *Ibid* at 27.

<sup>19</sup> Taylor, *supra* note 2 at s.7.1.

# ALBERTA EVIDENCE ACT

## Chapter A-18

### Apology

#### Effect of apology on liability

**26.1(1)** In this section, “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.

- (2) 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 or acknowledgment of a claim in relation to that matter for the purposes of the *Limitations Act*,
  - (c) does not, notwithstanding any wording to the contrary in any contract of insurance and notwithstanding any other enactment, 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) shall not be taken into account in any determination of fault or liability in connection with that matter.
- (3) Notwithstanding any other enactment, 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.
- (4) This section does not apply to the prosecution of an offence.

2008 c11 s2;2009 c48 s1