University of Western Australia

University of Western Australia-Faculty of Law Research Paper

2015-9

Apology Legislation and its Implications for International Dispute Resolution

Robyn Carroll, Christopher To and Marc Unger

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Introduction

Dispute resolution practitioners will be familiar with the legal principles and legislation that can render what is said in 'without prejudice' settlement negotiations and mediation (which includes apologies) inadmissible as evidence in civil proceedings.[1] Apology legislation[2] operates in a similar way to exclude evidence of an apology offered, for example, in response to mishaps,

* Robyn Carroll is a Professor at University of Western Australia Law School. Christopher To is an Adjunct Professor, Master of Laws in Arbitration and Dispute Resolution (LLMArbDR) Programme Leader, School of Law, City University of Hong Kong. Marc Unger is an Associate with the national Canadian law firm Borden Ladner Gervais (BLG). The opinions and thoughts expressed herein are intended to provide an overview of the subject matter at hand, are solely those of the authors and should not be construed as an endorsement thereof by BLG.

1 The 'apology legislation' referred to in this article applies only to civil proceedings. In most cases this is by implication based on the nature of the proceedings to which the legislation applies. In some jurisdictions, the legislation expressly excludes criminal proceedings (see eg, Ontario Apology Act, 2009, s 3). Nonetheless, the application of apology legislation to only civil proceedings can also result from a jurisdiction's constitutional division of powers, whereby the central government (as opposed to provincial/state governments) will have exclusive authority over criminal proceedings. In turn, apology legislation adopted by a provincial/state government will then only apply to matters within its jurisdiction, namely civil proceedings, as opposed to criminal proceedings.

2 The legislation is not necessarily standalone and titled 'apology' legislation. We use the term 'apology legislation' in this article to refer to statutory provisions enacted in the United States, Australia, England and Wales and Canada that was introduced for the explicit purpose of removing or reducing the adverse legal significance of an apology. For a detailed table of apology legislation in different jurisdictions, see Annex 3 to the Hong Kong Steering Committee on Mediation, *Consultation Paper on the Enactment of Apology Legislation in Hong Kong* (2015): www.doj.gov.hk/eng/public/pdf/2015/apology.pdf accessed 6 July 2015 [Consultation Paper].

accidents and civil claims, even before settlement negotiations, mediation and other dispute resolution processes are underway. Apology legislation offers this evidential protection on an ongoing basis until settlement or trial. Apology legislation therefore offers wider protection to apologies and, in some jurisdictions, even more comprehensive protection than what is available for communications made during settlement negotiations or mediation.

Since 1986, apology legislation has been introduced in 56 jurisdictions, including the United States,[3] Australia,[4] Canada,[5] England and Wales,[6]

3 Important to note that although several state legislatures in the US and the District of Columbia have adopted apology legislation or amended their statutes accordingly, no federal legislation has been adopted. Arizona, Arizona Revised Statutes s 12-2605; California, California Evidence Code s 1160 (2000); Colorado, Colorado Revised Statutes s 13-25-135 (2003); Connecticut, Connecticut General Statutes s 52-184d (2005); Delaware, Delaware Code Title 10 s 4318 (2006); District of Columbia, DC Code s 16-2841 (2007); Florida, Florida Statutes s 90.4026 (2004); Georgia, Georgia Code s 24-4-416; Hawaii, Hawaii Revised Statute s 626-1, Hawaii Rules of Evidence Rule 409.5; Idaho, Idaho Code s 9-207; Illinois, 735 ILCS 5/8-1901 (2005); Indiana, Indiana Code s 34-43.5; Iowa, Iowa Code s 622.31 (2006); Louisiana, Louisiana Revised Statute s 13:3715.5 (2005); Maine, Maine Revised Statute 24 s 2907 (2005); Maryland, Maryland Code, Courts and Judicial Proceedings s 10-920; Massachusetts, Massachusetts General Laws, Chapter 233 Witnesses and Evidence s 23D (1986); Missouri, Missouri Revised Statutes s 538.229 (2005); Montana, Montana Code s 26-1-814 (2005); Nebraska, Nebraska Revised Statute s 27-1201 (2007); New Hampshire, New Hampshire Revised Statute s 507-E:4 (2005); North Carolina, North Carolina General Statute s 8C-1, Rule 413 (2004); North Dakota, North Dakota Century Code s 31-04-12 (2007); Ohio, Ohio Revised Code s 2317.43 (2006); Oklahoma, Oklahoma Statutes Title s 63-1-1708.1H; Oregon, Oregon Revised Statute s 677.082 (2003); South Carolina, South Carolina Code of Laws s 19-1-190 (2006); South Dakota, South Dakota Codified Laws s 19-12-14 (2005); Tennessee, Tennessee Code s 409.1; Texas, Texas Civil Practice and Remedies Code s 18.061 (1999); Utah, Utah Rules of Evidence, Rule 409; Vermont, Vermont Statutes Title 12 Court Procedure s 1912 (2006); Virginia, Virginia Code s 8.01-581.20:1 (2005); Washington, Washington Revised Code s 5.64.010 (2002); West Virginia, West Virginia Code s 55-7-11a (2005); Wyoming, Wyoming Statutes s 1-1-130.

4 All six Australian states and the two mainland territories have adopted apology legislation or amended their statutes accordingly; however, no federal legislation has been adopted. Australian Capital Territory, Civil Law (Wrongs) Act 2002, ss 12–14; New South Wales, Civil Liability Act 2002 No 22, ss 67–69; Northern Territory, Personal Injuries (Liabilities and Damages) Act 2003, ss 11–13; Queensland, Civil Liability Act 2003, ss 68–72, 72A–72D; South Australia, Civil Liability Act 1936, s 75; Tasmania, Civil Liability Act 2002, ss 6A–7; Victoria, Wrongs Act 1958, ss 14I–14J; Western Australia, Civil Liability Act 2002, ss 5AF–5AH.

5 Save for the provinces of Quebec and New Brunswick and the Yukon territory, all other Canadian provinces and territories have adopted apology legislation or modified their civil rules of procedure accordingly; however, no federal legislation has been adopted. Alberta, Alberta Evidence Act, RSA 2000, c A-18, s 26.1; British Columbia, Apology Act, SBC 2006, c 19; Manitoba, The Apology Act, CCSM, c A98; Newfoundland and Labrador, *Apology Act*, SNL 2009, c A-10.1; Northwest Territories, Apology Act, SNWT 2013, c 14; Nova Scotia, Apology Act, SNS 2008, c 34; Nunavut, Legal Treatment of Apologies Act, SNu 2010, c 12; Ontario, Apology Act, 2009, SO 2009, c 3; Prince Edward Island, Health Services Act, RSPEI 1988, c H-1.6, ss 26 and 32; Saskatchewan, The Saskatchewan Evidence Act, SS 2006, c E-11.2, s 23.1.

6 Compensation Act 2006 (UK), s 2.

and a Private Member's Bill has been tabled in the Scottish Parliament.[7] More recently, in June 2015, a *Consultation Paper on the Enactment of Apology Legislation in Hong Kong* (the 'Consultation Paper')[8] has been released and public consultation is underway to seek views on whether to enact apology legislation in Hong Kong. Given the growing number of jurisdictions in which apology legislation applies, practitioners involved in international dispute resolution need to understand the rationale and operation of this type of legislation. While the scope of apology legislation varies between jurisdictions there has been a discernible trend towards the adoption of apology legislation that provides: 1. boarder legal protection than just the inadmissibility of an apology as evidence of fault or liability; and 2. wider coverage in terms of the types of proceedings covered.[9] Consequently, practitioners involved in international dispute resolution should be conversant with the different apology legislation in operation and how it may affect their cases or clients.

7 Namely, the Proposed Apologies (Scotland) Bill 2015. The Bill was introduced in March 2015 but has not yet been enacted.

8 The Consultation Paper and the associated Executive Summary were released for comment on 22 June 2015. The Consultation Paper was prepared by the Steering Committee on Mediation chaired by the Secretary for Justice of the Government of the Hong Kong Special Administrative Region (the 'Steering Committee'). It contains seven recommendations in relation to the proposed enactment of apology legalisation in Hong Kong, viz: 1. an apology legislation is to be enacted in Hong Kong; 2. the apology legislation is to apply to civil and other forms of non-criminal proceedings including disciplinary proceedings; 3. the apology legislation is to cover full apologies; 4. the apology legislation is to apply to the Government; 5. the apology legislation expressly precludes an admission of a claim by way of an apology from constituting an acknowledgment of a right of action for the purposes of the Limitation Ordinance; 6. the apology legislation expressly provides that an apology shall not affect any insurance coverage that is, or would be, available to the person making the apology; and 7. the apology legislation is to take the form of a standalone legislation. These recommendations, and any views set out in the Consultation Paper, were put forward with a view to facilitating comments and discussions. They do not, however, represent the final views of the Steering Committee. For background to the Hong Kong legislation see James Chiu, 'Apology Legislation for Hong Kong?' The Forum 59.

9 See for example, Consultation Paper, n2 above, Chapter 4, 22–24, for more detailed discussions regarding the development of apology legislation in different jurisdictions.

There is well documented support regarding the benefit that apologies can have in the settlement of claims,[10] negotiations[11] and mediations.[12] Practical guidance is available on apologies and apologising,[13] which can usefully be applied to dispute resolution more generally.[14] Yet, it is also well documented that the fear that an apology will be treated as an admission of liability can put a 'chill' on engaging in apologetic behaviour when there is potential for civil disputes to arise,[15] notwithstanding the potential for apologies to 'oil the wheels of tort',[16] to allow for 'thinking like a human'[17] within our civil justice systems and to promote a civil society.[18] The fear that apologising will be legally prejudicial to a potential defendant or a

10 See for example, Jonathan R Cohen, 'Apology and Organizations: Exploring an Example from Medical Practice' (2000) 27 Fordham Urb LJ 1447 [Cohen].

11 See for example, Jennifer Brown, 'The Role of Apology in Negotiation' (2003–2004) 87 Marq L Rev 665. More generally in settlement of tort claims, see eg, Daniel Shuman, 'The Role of Apology in Tort Law' (2000) 83 Judicature 180; W Jonathan Cardi, 'Damages as Reconciliation' (2008) 42 Loy LA L Rev 5; Craig Brown, 'Apology Legislation: Oiling the Wheels of Tort' (2009) 17 Tort L Rev 127 [Brown].

12 Stephen B Goldberg et al, 'Saying You're Sorry' (1987) 3 Negotiation J 221; Deborah L Levi, 'The Role of Apology in Mediation' (1997) 72 NYU L Rev 1165; Carl D Schneider, 'What it Means to be Sorry: The Power of Apology in Mediation' (2000) 17 Mediation Q 265; Max Bolstad, 'Learning from Japan: The Case for Increased use of Apology in Mediation' (2000) 48 Clev St L Rev 565; Elizabeth Latif, 'Apologetic Justice: Evaluating Apologies Tailored Towards Legal Solutions' (2001) BU L Rev 289; Donna L Pavlick, 'Apology and Mediation: The Horse and Carriage of the Twenty-First Century' (2003) 18 Ohio St J Disp Resol 829. Note, however, some authors have expressed reservations about the use of apology in the context of legal proceedings, see for example, Lee Taft, 'Apology Subverted: The Commodification of Apology' (2000) 109 Yale L J 1135. More recently see also Lee Taft, 'When More than Sorry Matters' (2013) 13(1) Pepp Disp Resol L J 181, where Taft proposes an ethical framework for apologetic discourse in a legal setting involving a lawyer, a client and a mediator.

13 See for example, Aaron Lazare, *On Apology* (Oxford University Press 2004) and, more particularly, chapter 10 therein.

14 See for example, A Brenninkmeijer, 'Apologies in Public Administration' (March 2010): www.nationaleombudsman.nl/uploads/jv_2009_apologies_in_public_administration_-_engels_artikel.pdf accessed 20 July 2015; Ombudsman New South Wales, 'Apologies: A Practical Guide' (2nd edn, 2009): www.ombo.nsw.gov.au/__data/assets/pdf_file/0013/1426/Apologies-Guidelines-2nd-edition.pdf accessed 20 July 2015.

15 See for example, British Columbia Ministry of Attorney General, *Discussion Paper on Apology Legislation* (Ministry of Attorney General 2006); Special Report No 27 to the Legislative Assembly of British Columbia, *The Power of an Apology: Removing the Legal Barriers* (British Columbia Office of the Ombudsman 2006); Proposed Apologies (Scotland) Bill, Consultation by Margaret Mitchell MSP, Member for the Central Scotland Region (29 June 2012) Draft and Final Proposals: www.scottish.parliament.uk/parliamentarybusiness/Bills /52684.aspx accessed 6 July 2015 [Consultation – Draft and Final Proposals]. See also Consultation Paper, n2 above.

16 See Brown, n11 above.

17 John C Kleefeld, 'Thinking Like a Human: British Columbia's Apology Act' (2007) 40(2) UBC L R 769 [Kleefeld].

18 Prue Vines, 'The Power of Apology: Mercy, Forgiveness of Corrective Justice in the Civil Liability Arena?' (2007) 1 Pub Space: J L & Soc Just 1, 39.

defendant is often an overreaction. A key aim of apology legislation is to remove, or at least lessen, this 'chill'.[19]

This article discusses apologies and apology legislation in the context of civil disputes and the practical implications of apology legislation for international dispute resolution practitioners and their clients. The aim is to raise awareness regarding this type of legislation and to encourage debate about its role within civil justice systems.

The article then uses a factual illustration to examine one notable instance where a corporation accepted full responsibility for a tragic situation, in order to highlight the potential benefits of apologetic discourse. This factual illustration reminds us that some individuals and corporations are willing to apologise even without the benefit of apology legislation. For many, however, including governmental defendants, formal protection in the form of legislation is considered necessary.

The article then provides an overview of the aims and scope of apology legislation, with particular attention given to the comprehensive provisions that apply in most Canadian jurisdictions,[20] the proposed legislation in Scotland and provisions now under consideration in Hong Kong.[21]

Next, the article provides some case illustrations of how apology legislation can operate before the final section discusses an area of recent debate and the practical issues that arise for consideration by dispute resolution practitioners. It is concluded that apologies and apology legislation can play an important role in the resolution of civil disputes by addressing some of the legally-focused fears associated with apologising when loss and harm have occurred in circumstances that may give rise to civil proceedings.

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19 See for example, Johnathan R Cohen, 'Legislating Apology: The Pros and Cons' (2002) 70(3) U Cin L Rev 819 [Cohen]; see Kleefeld, n17 above; Prue Vines, 'Apologising to Avoid Liability: Cynical Civility or Practical Morality?' (2005) 27(3) Sydney L Rev 483 [Vines]; Robyn Carroll, 'When 'Sorry' is the Hardest Word to Say, How Might Apology Legislation Assist?' (2014) 44(2) Hong Kong L J 491 [Carroll]; Nina Khouri, 'Sorry Seems to Be the Hardest Word: The Case for Apology Legislation in New Zealand' [2014] NZL Rev 603 [Khouri].

20 Although the statute references for various Canadian provinces and territories are listed at n5 above, for comprehensive tables setting out the scope and operation of legislation in Canada, the US, Australia and England and Wales see Consultation Paper, n2 above, Annex 3.

21 For a comprehensive review of apology legislation currently in force and arguments in favour of the enactment of similar legislation in New Zealand see Khouri n19 above.

A factual illustration of the benefits of offering an apology

During the summer of 2008, Canada's worst recorded episode of food contamination unfolded on a national stage, leading to tragic consequences. As a result of a listeriosis[22] infection, traced back to certain cold cut meats prepared on two processing lines at Maple Leaf Inc's ('Maple Leaf') North York, Ontario Bartor Road plant, some 22 individuals died amongst 57 confirmed cases of listeriosis.[23]

Although Michael McCain, Maple Leaf's President and CEO, has repeated on several occasions[24] that the company had no formal crisis management strategy in place, Mr McCain's handling[25] of the crisis has been referred to as being the new 'textbook example' for crisis management. Commentators and a substantial portion of the general public have acknowledged that Maple Leaf and Mr McCain's timely, candid and repeated offers of both sympathy and apology to consumers as being central to this result.[26]

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22 Elisabeth Birk-Urovitz, in her article entitled 'The 2008 Canadian Listeriosis Outbreak: A Result of Knowledge Ignored' (2008) 8(1) MUMJ 65, provides information regarding listeriosis: '[l]isterosis is a relatively rare infection caused by *Listeria monocytogenes* – one of six known *Listeria* species. *L monocytogenes* is a facultatively anaerobic, gram-positive bacterium that is pervasive in the environment: it can be found in soil, decomposing vegetation and water, and may also form part of the fecal flora of various mammals, including some healthy humans. Almost all listeriosis cases are believed to arise through the foodborne route. *L. monocytogenes* may be present in raw vegetables, fruits, and meats, as well as unpasteurised dairy products. *Listeria* may contaminate certain foods, such as deli meats and hot dogs, during processing. […] [T]here is no change to the appearance, smell or taste of foods harbouring *Listeria*, so it is impossible for the food handler or a consumer to identify contaminated products.'[References omitted.]

23 Government of Canada, *Report of the Independent Investigator into the 2008 Listeriosis Outbreak* (July 2009): www.cpha.ca/uploads/history/achievements/09-lirs-rpt_e.pdf accessed 13 July 2015 [2009 Independent Report].

24 See for example, Dawn Calleja, 'Maple Leaf CEO McCain Took Your Questions' *Globe and Mail* (Toronto, 2 December 2008): www.theglobeandmail.com/report-on-business/maple-leaf-ceo-mccain-took-your-questions/article22502266/ accessed 14 July 2015; Gordon Pitts, 'The Testing of Michael McCain' *Globe and Mail* (Toronto, 28 November 2008): www.theglobeandmail.com/report-on-business/the-testing-of-michael-mccain/article598005/?page=all accessed 14 July 2015 [Pitts].

25 McCain went on to be voted the Canadian Press' 'Newsmaker of the Year' for 2008. Kristine Owram, 'Newsmaker of the Year: A Hero in a Hard Time' *Winnipeg Free Press* (Toronto, 1 February 2009): www.winnipegfreepress.com/business/the_canadian_press_business_newsmaker_of_the_year_a_hero_in_a_hard_time.html accessed 14 July 2015.

26 Josh Greenberg and Charlene Elliott, 'A Cold Cut Crisis: Listeriosis, Maple Leaf Foods, and the Politics of an Apology' CJC (2009) 34(2) 189, 196–197 [Greenberg and Elliott]. See also, Tony Wilson, 'The Best Legal Advice is Often an Apology' *Globe and Mail* (Toronto, 1 February 2011): www.theglobeandmail.com/report-on-business/small-business/sb-growth/day-to-day/the-best-legal-advice-is-often-an-apology/article626797/ accessed 14 July 2015; Morgen Witzel, 'Maple Leaf Food's Response to a Crisis' *Financial Times* (29 April 2013): www.ft.com/intl/cms/s/0/8c8d3668-adb5-11e2-82b8-00144feabdc0.html accessed 14 July 2015; see Pitts n24 above.

Timeline[27]

On 4 August 2008, a series of 11 food samples taken from the home tested positive for *Listeria monocytogenes*. As a result, on 7 August 2008, the Canadian Food and Inspection Agency (CFIA) initiated a food safety investigation. On 17 and 19 August 2008, on the basis of preliminary sampling results, the CFIA issued successive 'Health Hazard Alerts' warning the public not to consume or serve certain Maple Leaf cold meat products. Thereafter, between 20 August and 6 September, the source of the outbreak[28] was confirmed to be Maple Leaf's Bartor Road plant, a hold and test protocol for the plant was implemented, and daily public health press conferences were held.

The Maple Leaf response

Maple Leaf's response to the crisis was both immediate and highly visible. Maple Leaf undertook a series of steps in order to directly confront the situation, reassure the public regarding its commitment to their health and welfare and offered its sincerest apologies for the situation:

- 17 August 2008 – Maple Leaf voluntarily recalled two types of products from the Barton Road plant that were suspected of having been infected.[29]
- 20 August 2008 – Maple Leaf voluntarily expanded the scope of its recall and announced that the Barton Road plant would be temporarily closed, with Maple Leaf's President of its Consumer Foods division adding that '[w]e believe it is important to take these broader preventive actions to respond to this situation promptly, comprehensively, and in the best interests of our consumers.'[30]
- 23 August 2008 – Maple Leaf then further expanded its voluntary recall so as to cover all 191 products (ie, tens of thousands of individual packages) that would have been manufactured at the Bartor Road plant. The same press release contained a statement from Mr McCain that '[t] his week our best efforts delivering the highest quality, safe food have failed us. For that we are deeply sorry. We know this has shaken consumer

27 The following timeline is drawn from the 2009 Independent Report and is not intended to be all encompassing; rather, it seeks to provide the reader with an overview of some of the key developments that took place.

28 The 2009 Independent Report concluded that the source of the contamination was likely resulted from the accumulation of meat residue within the slicing machines of processing lines 8 and 9 at the Bartor Road plant. See 2009 Independent Report n23 above, 32.

29 *Ibid*, 55.

30 'Maple Leaf Broadens Product Recall from Toronto Plant as a Precautionary Measure' *CNW* (Toronto, 20 August 2008): http://archive.newswire.ca/en/story/280199/maple-leaf-broadens-product-recall-from-toronto-plant-as-a-precautionary-measure accessed 14 July 2015.

confidence in us. Our actions will continue to be guided by putting their interest first.'

- 24 August 2008 – Maple Leaf issued an additional news release, through which Mr McCain reiterated that Maple Leaf's 'actions [were] guided by putting the public health first.'[31]
- 25 August 2008 – During the course of a news conference held on this date, Mr McCain made the following statement:
  'Going through the crisis there are two advisers I've paid no attention to. The first are the lawyers, and the second are the accountants. It's not about the money or the legal liability, this is about being accountable for providing consumers with safe food.'[32]
  In a Maple Leaf news release published that same day, Mr McCain expressed that the company remained steadfast in its 'belief that our actions must continue to be guided by what is in the best interests of public health'[33] and, in a nationally televised message, a simply-dressed, weary looking Mr McCain passed along a similar message containing a direct apology:
  'When listeria was discovered in the product, we launched immediate recalls to get it off the shelf, then we shut the plant down. Tragically our products have been linked to illness and loss of life. To Canadians who are ill and to the families who have lost loved ones, I offer my deepest sympathies. Words cannot begin to express our sadness for your pain […]
  But this week, our best efforts failed and we are deeply sorry. This is the toughest situation we have faced in 100 years as a company. We know this has shaken your confidence in us; I commit to you that our actions are guided putting your interests first.'[34]
- 27 August 2008 – During the course of a news conference held that afternoon, Mr McCain underscored Maple Leaf's ongoing efforts to take full responsibility for the situation:

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31 'Maple Leaf Expands Product Recall from Toronto Plant as a Precautionary Measure' *CNW* (Toronto, 24 August 2008): http://archive.newswire.ca/en/story/271237/maple-leaf-expands-product-recall-from-toronto-plant-as-a-precautionary-measure accessed 14 July 2015.

32 Elizabeth Church and Omar El Akkad, 'Meat Recall Expands; Ottawa Warns of Higher Toll' *Globe and Mail* (Toronto and Ottawa, 25 August 2008): www.theglobeandmail.com/news/national/meat-recall-expands-ottawa-warns-of-higher-toll/article658674/ accessed 14 July 2015.

33 'Maple Leaf Delays Toronto Plant Reopening' *CNW* (Toronto, 25 August 2008: http://archive.newswire.ca/en/story/280775/maple-leaf-delays-toronto-plant-reopening accessed 14 July 2015.

34 See Greenberg and Elliott, n26 above, 195.

> 'I absolutely do not believe this is a failure of the Canadian food safety system or the regulators. Certainly knowing there is a desire to assign blame, I want to reiterate that the buck stops here. We have an unwavering commitment to keep food safe, and we have excellent systems and processes in place but this week it's our best efforts that failed not the regulators or Canadian food safety system.'[35]

The legal aftermath

Class action lawsuits were immediately instituted in several Canadian provinces, on behalf of those who became ill or died from consuming the Maple Leaf products infected with listeriosis.[36] It is important to note that a total of CA$100m in compensation had been claimed in the class actions.[37]

However, in what has been characterised as an uncommon result,[38] by December 2008 the class actions were settled[39] and Maple Leaf agreed to pay those who fell ill and the estates of those who died up to a total of CA$27m,[40] an amount described as 'modest' given the circumstances.[41]

Both the short period of time it took to reach a settlement and the quantum thereof are noteworthy. First, the overall amount of legal costs for all the parties was minimised. Secondly, for Maple Leaf, the legal and commercial uncertainty arising from its exposure to substantial, potential damages were equally minimised. Thirdly, for the victims and the families of the deceased, the lengthy, successive series of interlocutory motions and

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35 CTV News Staff, ''Buck Stops' at Maple Leaf Foods, Says President' (27 August 2008): www.ctvnews.ca/buck-stops-at-maple-leaf-foods-says-president-1.319379 accessed 14 July 2015.

36 Ontario, *Bilodeau v Maple Leaf Foods Inc*, Ontario Superior Court of Justice File No CV-08-361464CP; Quebec, *Melvin, Guay et Option Consommateurs c Maple Leaf Foods Inc et Fonds d'aide aux recours collectifs*, Quebec Superior Court of Justice File No 500-06-000445-086; Saskatchewan, *Bishay Estate v Maple Leaf Foods Inc*, Queen's Bench for Saskatchewan Docket No QBG No 1173/2008.

37 'Bad Meat Victims to Get $25M' *Windsor Star* (19 December 2008): www.canada.com/story.html?id=b8156fbf-e694-447a-a39d-d9472b034f91 accessed 14 July 2015.

38 Craig Brown, 'Apology Legislation Benefits Insurers' *The Lawyers Weekly* (15 January 2010): www.canadian-lawyers.ca/Understand-Your-Legal-Issue/Insurance/Apology-Legislation-Benefits-Insurers.html accessed 14 July 2015 [C Brown]; Rosana Zammit, 'How to Say You Are Sorry: A Guide to the Background and Risks of Apology Legislation' (LLM Thesis, University of Toronto, 2009) [unpublished] 17: https://tspace.library.utoronto.ca/bitstream/1807/19010/16/Zammit_Rosana_200911_LLM_thesis.pdf accessed 14 July 2015 [Zammit].

39 Pending final approval thereof by the respective courts, which was ultimately achieved.

40 Falconer Charney LLP, 'Maple Leaf Foods Class Action Lawsuit': www.mapleleaffoodsclassaction.com/ accessed 14 July 2015. For additional information regarding the amounts to be provided by Maple Leaf Foods, one can refer to the 'Details of Settlement' found on the site.

41 See C Brown n38 above; see Zammit n38 above, 17.

numerous appeals following a prolonged trial on the merits were short-circuited, with compensation to have followed soon thereafter.[42]

The positive result achieved for all parties in the context of settling the litigation was facilitated by Maple Leaf's consistent transparency, Mr McCain's acceptance of accountability and the company's acceptance of responsibility. The resulting benefits that flowed in favour of both Maple Leaf and plaintiffs in the class actions are a good illustration of how an apology in the context of an error can generate widespread positive effects for those directly impacted.

Individuals and corporations are willing to apologise[43] even without the benefit of apology legislation.[44] Nonetheless, legislators in several jurisdictions have concluded that the benefits of apologies are so important that legislation is required to create a more conducive environment for this discourse. As detailed in the following sections, the scope of legislative protection afforded to an apology varies in each jurisdiction and therefore so will the resulting judicial treatment of an apology. This reality not only gives rise to a certain degree of uncertainty as to the limits of the protection

42 It would appear there was some delay in the processing/administering the claims made by the more than 5,000 class members and provision of the resulting compensation. Ultimately, as of 3 February 2012, cheques to the class members were issued. During the intervening period both the class members and Maple Leaf expressed their mutual frustration regarding the length of time it took for the cheques to be issued. In this regard, in early December 2011, Mr McCain made the following statement: 'We are dismayed and frustrated at how long this process has taken, given we paid $25 million to settle these claims almost three years ago […] While Maple Leaf had no control over the process, we did everything we could to help get money to victims, including me personally contacting premiers to urge their provincial health authorities to reach a settlement.' Cited in Petti Fong, 'Listeriosis victims still waiting for compensation' *The Toronto Star* (Toronto, 8 December 2011): www.thestar.com/news/canada/2011/12/08/listeriosis_victims_still_waiting_for_compensation.html accessed 17 July 2015; Joanna Smith, 'Listeriosis victims finally receive cheques from Maple Leaf Foods settlement' *The Toronto Star* (Toronto, 9 February 2012): www.thestar.com/news/canada/2012/02/09/listeriosis_victims_finally_receive_cheques_from_maple_leaf_ foods_settlement.html accessed 17 July 2015.

43 In addition to the works cited at n6, n7, and n8 above, which address the benefits that apologies can have in the settlement of claims, negotiations and mediations, the reader is also invited to take note of the article by Kish Vinayagamoorthy, 'Apologies in the Marketplace' (2013) 33 Pace L Rev 1081, which focuses on similar benefits, but in business/commercial marketplace settings.

44 The tragic events occurred during the summer of 2008 and Ontario's Apology Act, 2009 came into force on 23 April 2009. As a result, when Maple Leaf issued its various statements, Ontario's apology legislation did not apply. Although a preliminary review of the legislative debates and other published materials establishes no direct link between the Maple Leaf incident and the introduction of the bill giving rise to the Apology Act, 2009, we note that Bill 108 (the bill giving rise to the adoption of Ontario's apology legislation) was introduced on 7 October 2008, very shortly after the tragedy and Maple Leaf's statements.

afforded by apology legislation, but also to a need for members of the public, the legal profession and insurance industry to be made specifically aware thereof.

The aims and scope of apology legislation

In general terms, apology legislation aims to encourage apologies by removing legal disincentives to apologising. Associated with this premise are the aims referred to in legislative debates and by commentators, namely that of promoting the settlement and resolution of disputes and reducing litigation.[45] In considering the enactment of apology legislation in Hong Kong, for instance, the Department of Justice said, its main objective is 'to promote and encourage the making of apologies in order to facilitate the amicable settlement of disputes by clarifying the legal consequences of making an apology'.[46]

The extent to which legislation can effectively achieve its aims will depend on a number of factors, including: 1. how apology is defined for the purposes of the legislation and therefore what 'apologetic' statements will be protected; 2. the type of protection provided by the legislation; 3. the type of civil proceedings to which the legislation will apply; and 4. as is the case with most legislation, the extent to which the protections provided by the legislation are availed of successfully by legal advisors and their clients. These factors are discussed in turn below.

Defining apologies[47]

Most, but not all,[48] apology legislation defines 'apology' for the purposes of the legislation. The meaning attributed to 'apology' will depend on the intent behind the particular legislation. Variation in the 'types' of apology protected reflects the fact that the legislation in some jurisdictions only excludes from evidence an apology that does not include an admission or acknowledgement of fault (often referred to as a 'partial' apology),

45 See for example, Cohen – Medical, n10 above; Kleefeld, n17 above; Vines, n19 above.

46 Department of Justice of the Government of the Hong Kong Special Administrative Region (Press Release), 'Public Consultation on Enactment of Apology Legislation Starts': www.doj.gov.hk/eng/public/pdf/2015/pr20150622e1.pdf accessed 18 July 2015.

47 What follows in this section is a brief discussion of apology legislation definitions of apology for the limited purposes of this article rather than a detailed analysis of the various legislative definitions or the meaning of 'apology' as understood in society. For discussion of the former, see for example, Consultation – Draft and Final Proposals, n15 above and Consultation Paper, n2 above. For discussion of the latter, see for example, Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford University Press 1991); Nick Smith, *I Was Wrong: The Meanings of Apology* (Cambridge University Press 2008).

48 See, most notably, Compensation Act 2006 (UK).

while other legislation excludes from evidence an apology, irrespective of whether the words or actions admit fault or liability or imply an admission of fault or liability (often referred to as a 'full' apology). In this article, a 'partial' apology will refer to an apology that offers an expression of regret or sympathy but that does not incorporate an admission of fault or wrongdoing; whereas, a 'full' apology will incorporate both.

In the US, more states have favoured the protection of a partial apology, as opposed to a full apology.[49] There is also jurisdictional variation in Australia as to whether 'apology' is defined to include an admission of fault or liability and therefore applies to full or partial apologies.[50] The Canadian apology legislation protects full apologies. The UK Compensation Act (2002) does not appear to offer this level of protection. As tabled, the Apologies (Scotland) Bill proposes to protect full apologies[51] and it is similarly recommended in the Consultation Paper that full apologies be protected in Hong Kong.[52]

Types of legal protection

The extent of protection that apology legislation provides also varies between jurisdictions. The most extensive protection is provided in the legislation adopted by a number of Canadian provinces and territories. For example, in British Columbia section 2 of its Apology Act[53] provides that in addition to rendering an apology inadmissible in any court as evidence of the fault or liability, an apology does not constitute an express or implied admission of fault or liability, it does not constitute an acknowledgment of liability for purposes of limitations periods, it does not void or otherwise affect any insurance coverage that is available and it must not be taken into account in any determination of fault or liability in connection with that matter.

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49 Save for the states of Arizona, Georgia, Colorado, Connecticut and South Carolina, whose apology legislation protects full apologies, all other states (including the District of Columbia) who have adopted apology legislation (see n3 above) have chosen to favour the protection of partial apologies. For further information see Benjamin Ho and Elaine Liu, 'What's an Apology Worth? Decomposing the Effect of Apologies on Medical Malpractice Payments Using State Apology Laws' (2011) 8 J Empirical Legal Stud 179, 183 [Ho and Liu].

50 An analysis of the key dimensions of state and territory apology laws in Australia, by jurisdiction, is provided in David M Studdart and Mark W Richardson 'Legal Aspects of Open Disclosure: A Review of Australian Law' (2010) 193 Med J Aust 273, 274.

51 Clause 3.

52 See Consultation Paper, n2 above [6.11] and Chapter 7, Recommendation 3.

53 SBC 2006, c 19, s 2.

This provision is discussed in detail by John C Kleefeld in 'Thinking Like a Human: British Columbia's Apology Act'[54] where he states:

> '[I]n the absence of a codified law of evidence, a legislative solution is needed. The *Apology Act* provides that solution, in a triple-barrelled manner. It has a declarative aspect—an apology does not constitute an express *or implied* admission of fault (s. 2(1)(a)); a relevance aspect – an apology must not be taken into account in *any* determination of fault (s. 2(1)(d)); and a procedural aspect – an apology is inadmissible as evidence of fault in connection with the matter for which the apology was given (s. 2(2)). This is about as strong a message as the Legislature could send that it wants apologies protected, and while there may be cases that test the limits of that protection, the *Apology Act* is likely to keep evidence of most out-of-court apologies out of courtrooms.'

Kleefeld succinctly and aptly highlights that the province's legislation operates in multiple ways. This is in addition to the provisions in British Columbia's Apology Act (and other Canadian acts enacted subsequently) that relate to insurance coverage and limitation periods.[55]

To date there is no legislation outside Canada that provides that an apology does not constitute an acknowledgment of liability for purposes of limitations periods, nor void or otherwise affect insurance coverage.[56] That said, it is worthy to note that Hong Kong is considering including provisions of this nature. In particular, it is recommended in the Consultation Paper that the apology legislation in Hong Kong should:

- *Expressly preclude an admission of a claim by way of an apology from constituting an acknowledgment of a right of action for the purposes of the Limitation Ordinance*: This is to ensure that an apology cannot be used to extend a limitation period if the matter is not settled. Such provision would remove a disincentive to apologising arising from the fear of attracting the undesirable consequences of having the limitation period extended and is considered to be consistent with the purpose of the apology legislation to prevent further escalation of disputes into legal action or to make it more likely for the legal action to be settled;[57] and

54 See Kleefeld, n17 above.

55 *Ibid*, 801–802.

56 The policy statement on apology legislation by the Uniform Law Conference of Canada also focuses on the choice between protection of partial or full apologies and does not discuss in detail insurance coverage and limitation act provisions. See Russell J Getz, *Policy Paper on Apology Legislation* (Uniform Law Conference of Canada 2007) www.ulcc.ca/en/home-en-gb-1/119-josetta-1-en-gb/uniform-actsa/apology-act-presentation-dexcuses/1128-policy-paper-on-apology-legislation accessed 17 July 2015.

57 See, for example, Consultation Paper, n2 above [5.61], [6.12] and Chapter 7, Recommendation 5.

- *Expressly provide that an apology shall not affect any insurance coverage that is, or would be, available to the person making the apology*: This is considered an important component of the apology legislation as it responds to reported anecdotal evidence of defendants and their lawyers that apologies are often not made because of the fear that doing so will render insurance coverage void or otherwise affected to the detriment of the defendant. Such provision would remove a disincentive to apologising arising from a concern to preserve insurance coverage and is considered necessary to achieve the purpose of the apology legislation.[58]

It remains to be seen, however, as to how the public and the relevant stakeholders would respond to the recommendations in the Consultation Paper and how the exact form of the proposed apology legislation in Hong Kong would take shape.

Types of civil proceedings to which the legislation applies

All apology legislation is directed at circumstances where a plaintiff might seek to admit into evidence an admission of fault by a defendant to prove liability. There is considerable variation in different jurisdictions, however, as to the scope of civil claims to which the legislation applies.[59] In many of the states in the US the legislation is applicable only to apologies offered in a medical or health care setting.[60] Other legislation applies to 'negligence or beach of statutory duty'[61] or, as in Australia, more generally to civil actions except those specifically excluded by the legislation.[62] Apologies are also given evidentiary protection in defamation legislation in all states and territories in Australia.[63] The legislation with the broadest application to

58 See, for example, Consultation Paper, n2 above [5.63], [6.13] and Chapter 7, Recommendation 6.

59 The apology legislation referred to in this article only applies to civil proceedings (see n1 above).

60 See for example, statutes adopted in the states of Arizona, Colorado, Connecticut, Delaware, Georgia, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Vermont, Virginia, Wyoming, West Virginia and Washington, as well as the District of Columbia, all referenced at note 3 above. For comprehensive tables setting out the scope and operation of legislation in the US, Australia, Canada and England and Wales; see Consultation Paper, n2 above, Annex 3

61 Compensation Act 2002 (UK), which applies in England and Wales, and notably s 2 thereof.

62 This is the case in most Australian apology legislation. See for example, Civil Liability Act 2002 (NSW), s 3B. The statute references for Australian states and territories listed at n 4 above; for comprehensive tables setting out the scope and operation of legislation in Australia, the US, Canada and England and Wales; see Consultation Paper, n2 above, Annex 3; see also, Prue Vines, 'Apologies and Civil Liability in the UK: A View from Elsewhere' (2008) 12 Edin L R 200, 224–230, Tables 1 and 2 [Vines – UK].

63 See, for example, Defamation Act 2005 (WA), s 20.

date is in Canada, which applies to any civil matter and is not confined to areas such as medical liability or personal injuries claims. Subsection 2(3) of the Ontario Apology Act, 2009[64] states that evidence of an apology is not admissible in 'any civil proceeding' as well as in 'any administrative proceeding or arbitration'. The Apologies (Scotland) Bill refers to 'all civil proceedings (including inquiries, arbitrations and proceedings before tribunals)' except fatal accident and sudden death inquiries and defamation proceedings. It is proposed in the Consultation Paper that the Hong Kong apology legislation should apply to civil and other form of non-criminal proceedings, including disciplinary proceedings;[65] and that civil proceedings in Hong Kong generally refer to 'proceedings in any civil or commercial matters'[66] and include, for example, civil actions in court, before a tribunal and arbitration.[67]

Use and effectiveness of apology legislation

Uncertainty about the legal and evidential consequences of an apology is frequently mentioned as one reason why defendants in civil cases are sometimes advised not to offer apologies. Anecdotally, it appears that a similar degree of caution also surrounds expressions of regret or sympathy, even when the apology includes no admission of fact or fault. Another significant deterrent to apologising is the possibility that a defendant's insurance contract will provide that the policy will be voided by any admission of fault or liability by the defendant.

Does apology legislation remove the 'chill' and bring greater certainty to the legal and evidential consequences of an apology? The answer to this question depends largely on the scope of the legislation in question which, as we have seen above, varies significantly between jurisdictions. In any case, it will be difficult to predict the outcome of a challenge to the admissibility of an apology that incorporates some form of admission if the intended scope of the protection conferred on apologies and admissions is unclear[68] or untested.

64 SO 2009, c 3.

65 See, for example, Consultation Paper, n2 above Chapter 7, Recommendation 2. Public comments are sought as to whether the legislation ought to apply to 'regulatory proceedings' (ie, proceedings involving the exercise of regulatory powers of a regulatory body under an enactment, such as proceedings brought before the Market Misconduct Tribunal or the Securities and Futures Appeals Tribunal) as well. For discussion on whether the legislation should cover disciplinary proceedings and regulatory proceedings, see Consultation Paper, n2 above [6.14] – [6.39] and [6.40] - [6.42].

66 Hong Kong Evidence Ordinance (Cap 8), s 74.

67 Hong Kong Evidence Ordinance (Cap 8), ss 60(1) and 68(1).

68 See, for example, Compensation Act 2006 (UK), s 2 as a case in point. For a detailed discussion on this issue, see Vines – UK, n62 above.

There is, as yet, no statistical evidence of how often apology legislation is relied upon, nor any empirical studies specific to apology legislation after enactment, which prove the effectiveness of the legislation in achieving any or all of its stated aims. There is, however, research that shows the positive impact of an apology on rates of litigation and settlement.[69] In the medical field, it is reported that many patients expect to receive both an explanation for what happened and an apology and that, once received, they are then less likely to pursue legal action.[70] In the area of civil disputes, more generally, the work of Professor Robbennolt has provided significant insight into the psychological significance of apologies for parties to civil disputes and their attorneys.[71] Overall, her findings support the conclusion that apologies can facilitate legal settlement and that legislative protection for apologies does not necessarily devalue an apology.[72]

It is also instructive to see how courts have treated apologies in civil proceedings. Reported decisions highlight the difficulty of advising, with certainty, whether a particular apology constitutes an admission of fault or liability or evidence relevant to liability, for example as an admission of fact. The outcome of each case will depend on exactly what was said and the significance attached thereto by the court.[73] The High Court of Australia made it clear in *Dovuro Pty Ltd v Wilkins*[74] that an apology, even if it contains an admission of fault, does not of itself establish liability in negligence because that is a finding of law that must be left to the court.

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69 Recent empirical research by behavioural economists Ho and Liu provides data on the economic effectiveness of apologies. Using a novel model of apologies and malpractice in order to examine whether state apology laws have an impact on medical malpractice lawsuits and settlements and a difference in differences estimation, they conclude that apology laws could expedite the resolution process. They also find that apology laws account for a decrease in the size of malpractice payments. Importantly for the debate as to whether legislation ought to protect full or only partial apologies, they find no significant difference in states with full versus partial apologies. Benjamin Ho and Elaine Liu, 'Does Sorry Work? The Impact of Apology Laws on Medical Malpractice' (2011) 43(2) J Risk Uncertainty 141, 163; Ho and Liu, n49 above, 180–181.

70 Charles Vincent, Magi Young and Angela Phillips, 'Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action' (1994) 343 (8913) The Lancet 1609, 1611. See also, Cohen – Medical, n10 above, 1458; Rick Iedema et al, 'Patients' and Family Members' Experiences of Open Disclosure Following Adverse Events' (2008) 20(6) Int J Qual Health Care 421, 430.

71 Jennifer K Robbennolt, 'Attorneys, Apologies and Settlement Negotiations' (2008) 13(2) Harvard Negot L Rev 349.

72 More generally, see Carroll, n19 above, 499–506.

73 See for example, *Hardie Finance Corp Pty Ltd v Ahern* (No 3) [2010] WASC 403, where Pritchard J found that a published apology in that case did not constitute an admission of liability for trespass to land or conversion.

74 (2003) 215 CLR 317.

This does not rule out the possibility, however, that the words contained in an apology may be relevant to findings of fact or to ascertaining liability.[75] How much this conclusion will be altered by the application of apology legislation depends on the scope of the provisions contained therein.

Decisions illustrating the operation of apology legislation

A number of Canadian decisions since the coming into force of the applicable apology legislation, provide some guidance on the operation of said apology legislation on the inadmissibility of an apology in civil proceedings. By way of a first example, in *Vance v Cartwright*[76] it was argued unsuccessfully on appeal that the trial judge had erred by taking into account an apology made by a motorcyclist at the accident scene following his collision with a car. Immediately following the accident, the motorcyclist said to the car's driver that he was sorry and later that same day gave the driver's father CA$1,000 for repairs to be undertaken on the car. The motorcyclist subsequently brought an action for damages against the car's driver, but was unsuccessful. The motorcyclist appealed the decision and argued that the trial judge wrongly attached significance to the apology he had made to the car's driver. The Court of Appeal held that even if what was said by the appellant (ie the motorcyclist) did amount to an apology, as defined, it could not be said that the trial judge had taken it into account in the sense of treating it as an admission or acknowledgment of fault. The Court found the trial judge's purpose for referring to what was said 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'.[77] The Court of Appeal concluded that, 'the judge has not been shown to have found Mr Vance to be solely at fault for the accident in any way that would offend the provisions of the *Act*.'[78] This decision illustrates the effectiveness of subsection 2(2) of British Columbia's Apology Act for excluding an apology from evidence in civil proceedings for the purpose of determining fault or liability.

A second decision, from the Canadian province of Alberta, *Robinson v Cragg*,[79] illustrates the effectiveness of apology legislation for excluding an admission of fault from being admitted as evidence in a negligence action. The court had to decide whether words of apology written in a

75 *Ibid* [25] (Gleeson CJ), [116] (Kirby J) and [173] (Hayne and Callinan JJ).
76 2014 BCCA 362, aff'g 2013 BCSC 2120.
77 *Ibid* [8] (Loury JA).
78 *Ibid* [11] (Loury JA).
79 2010 ABQB 743.

letter combined with an admission of fault were inadmissible. In that case, the plaintiff lenders made loans to a developer of a condominium project in Calgary. The plaintiffs' loan was secured by a mortgage against the development loans. The plaintiffs brought an action for damages against the attorneys they retained to secure their interest in the land, alleging their negligence in the discharge and reregistration of a mortgage. The defendant attorneys wrote a letter to the plaintiffs saying that mistakes had been made and that steps were being taken to address those mistakes. The letter included the sentence 'I assure you that our registration of the Discharges was through inadvertence and I apologise for doing so'.

The defendant made an application for a declaration that the letter in which the apology was made was inadmissible, relying on section 26.1 of the Alberta Evidence Act,[80] which states:

> '(1) In this section, "apology" means an expression of sympathy or regret, a statement that one is sorry or 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 expression 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 purpose 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.'

The defendant argued that the letter contained an expression of sympathy or regret or a statement that it was sorry and that it contained an admission of fault. Master Laycock, who heard the matter, agreed. Having established

80 RSA 2000, c A-18.

that the letter contained an apology, the defendant asked for an order that the court declare the entire letter inadmissible. The plaintiffs argued that only the phrase 'and I apologise for doing so' should be excluded.

The master determined that the words of apology referred to by the plaintiffs as well as other specified words in the letter that constituted admissions of fault (in particular, 'mistakenly' and 'inadvertence') were inadmissible and should be redacted from the letter. In reaching this decision, Master Laycock noted that the legislature had determined that an expression of sympathy or regret combined with an admission of fault that is 'unfairly prejudicial' should be 'kept away from the trier of fact'.[81] The balance of the letter was ruled admissible because it contained factual admissions relating to liability that were not combined with the apology. This decision gives effect to the intent of the legislation. Nonetheless, it remains to be seen how closely connected the 'admission' and other words of 'apology' will need to be before both will be redacted or excluded completely.

This decision is consistent with the general position, aside from legislation, that an apology lacks evidentiary value to establish liability if it does not incorporate or attach to an admission of fact or law. It follows that apology legislation is not necessary to protect a party who makes an apology that contains no admission of any kind. Where an apology does contain an admission(s), *Robinson v Cragg* confirms that apology legislation, depending on its provisions, can be effective for rendering inadmissible words expressing emotion and expressing or implying admissions of fault or liability. The possibility remains, however, that an admission of fact could be admissible under the Canadian provisions. By contrast, if the facts of this case were to arise in a jurisdiction where protection is only available to an apology that does not contain an admission of fault, only the phrase 'and I apologise for doing so' would be inadmissible.

In *Bilan v Wendel*[82] there was a collision in a shopping centre parking lot between two cars, driven by the plaintiff and the defendant, respectively. After the collision occurred the two drivers got out of their vehicles. Ms Bilan testified that Mr Wendel apologised to her and told her he had not heard her honking her horn. The Court identified two issues.[83] First, what is the effect on liability, if any, of the apology from the defendant to the plaintiff? Secondly, had the plaintiff proved on a balance of probabilities that the defendant was responsible for the accident in whole or in part?

81 *Robinson* (n79) [20].
82 2010 SKPC 148.
83 *Ibid* [6].

The Court referred to section 23.1 of the Saskatchewan Evidence Act[84] which addresses the effect of an apology on liability. In response to the first issue, Justice Hinds concluded that while Mr Wendel apologised to Ms Bilan following the minor collision between their two vehicles, paragraph 23.1(2)(a) of the Evidence Act made it clear that such an apology did not constitute an express or implied admission of fault or liability by Mr Wendel. Accordingly, the Court could not and did not take the apology into account in determining liability.[85] Based upon the evidence presented at trial, however, including the diagrams and photos, and for the reasons stated in the judgment, the Court held Mr Wendel to be solely at fault for the collision and the plaintiff's action was granted.

There are a number of other decisions that illustrate that evidence of an apology continues to be admissible in civil proceedings for purposes other than those for which it is excluded by apology legislation. For example, in *Boehler v Canfor Pulp (No 3)*[86] the British Columbia Human Rights Tribunal was required to determine whether the employer, Canfor Pulp, had discriminated against the applicant with respect to his employment on the basis of his physical disability, contrary to section 13 of the British Columbia Human Rights Code.[87] Canfor relied on evidence of an apology as evidence to demonstrate one of the repercussions of the applicant's alleged misconduct. The issue arose whether evidence of the apology made by another employee was admissible in the proceedings. The applicant argued that the British Columbia Apology Act excluded evidence of the apology from being admitted into evidence and taken into consideration by the Tribunal. The Tribunal held that the province's Apology Act was not applicable to the matter and accepted the evidence tendered at the hearing of the other employee's apology on that basis.[88]

Other decisions confirm that aside from the longstanding relevance of apologies to the assessment of damages in defamation and contempt proceedings, evidence of an apology is admissible in proceedings where the applicable apology legislation is not applicable. This will be the case where the purpose of admitting the evidence is undertaken for reasons other than to establish fault or liability, for example as evidence of contrition by a third party to the proceedings[89] or as evidence of an admission of a legal obligation to repay money improperly received.[90]

84 SS 2006, c E-11.2.
85 *Bilan* (n 82) [8].
86 2011 BCHRT 73.
87 RSBC 1996, c 210.
88 *Boehler* (n86) [48].
89 *Boehler* (n86).
90 *Cardinal Meat Specialists Ltd v Zies Foods Inc* 2014 ONSC 1107.

A recent area of debate and practical issues arising for practitioners

This article has shown that there is considerable variation in the scope of apology legislation, even though the broad aims of the legislation are similar in all jurisdictions. Views differ as to how broadly 'apology' ought to be defined and, accordingly, whether full or only partial apologies ought to be protected. Views also differ as to the types of disputes and civil proceedings in which apologies ought to be afforded protected status. Most recently, there has been debate and deliberation on the question whether 'apology' ought to be defined to include not only an admission of fault or liability, but also an admission of fact in relation to the act, omission or outcome in question.

This issue has been expressly considered, for instance, in the consultation process in Scotland. Statements of fact are potentially relevant to determinations of liability.[91] Therefore, a court will need to decide what evidential weight should be attached to a factual statement if it is admitted. The proponent of the Private Member's Apologies (Scotland) Bill, Margaret Mitchell, proposed in her Final Report that 'any factual information conveyed in the apology will not be admissible in proceedings covered by the Bill.'[92] Two arguments are advanced in the Final Report in support of this proposal. First, without a factual explanation of the cause of the event(s), which may include facts about to the incident, an apology may not fully satisfy the needs of the intended recipient. Second, facts admitted by a defendant, but excluded with the apology, can still be relied upon as evidence of liability if they can be independently proven by a plaintiff.

Clause 3 of the Scotland (Apologies) Bill, published subsequently, defines 'apology' to mean:

> '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 –
>
> ...(b) a statement of fact in relation to the act, omission or outcome...'.

This broader definition of apology, if applied to the Canadian province of Alberta where the apology legislation is currently silent on whether it covers statements of fact, may have led to a different outcome in the case of *Robinson v Cragg* discussed above.

Nina Khouri in her article 'Sorry Seems to be the Hardest Word: The Case for Apology Legislation in New Zealand' criticised the way in which the court in *Robinson v Cragg* separated the 'apology words' from the accompanying factual statements as being 'problematic'. She argued that:

91 See Vines – UK, n62 above, 217.

92 See Consultation – Draft and Final Proposals, n15 above, Final Report 27.

> '[T]he defendants would most likely not have made the factual statements at all if not for the expectation that the letter would be protected from admission into evidence. As argued unsuccessfully by the defendants, it is analogous to saying that a without prejudice settlement letter becomes admissible simply by redacting the proposed settlement amount. This would be legally wrong; all common law jurisdictions protect surrounding statements made in connection with the attempt to settle the dispute. This narrow interpretation of the legislative protection is inconsistent with the legislation's aim of encouraging apologetic, pro-settlement discourse. Instead, it will have a chilling effect on defendants' willingness to apologise.'[93]

Arguably, Khouri's submission goes further than the Scottish proposal. Khouri argues that 'apologetic pro-settlement discourse' should be excluded from evidence. This is to avoid the possibility that admissions of fact will be used to determine liability, which will in turn have a 'chilling effect' on a defendant's willingness to apologise.[94] Using the decision in *Robinson v Cragg* to illustrate her point, Khouri argues that the narrow interpretation of the legislative protection applied by Master Laycock in that case is inconsistent with the legislation's aim of encouraging apologies.

While the authors agree that the sharp distinction drawn in *Robinson v Cragg*, between the 'factual content of the letter' and 'the expression of sympathy or regret combined with the admission of fault',[95] amounts to a challenge for achieving the aims of apology legislation, it is considered that Master Laycock was correct to redact some of the words but not to exclude the whole letter as sought by the defendant. It is not the aim of apology legislation to protect settlement discourse in a letter or other document or other circumstance whenever an apology is offered as part of that discourse. To do so could be seen as undue encouragement of strategic apologies.

The issue at stake is how to strike a balance between encouraging apologies that can benefit the parties, but not unfairly disadvantage a plaintiff who tenders evidence of facts admitted by a defendant in their apology, which may be relevant to the issue of liability. The authors are not persuaded that a fair balance requires a broad, wholesale exclusion of statements of fact for the following reasons:

- Within both law and social science accounts it is possible to distinguish between apologies on the one hand and explanations or factual accounts on the other. The latter can be given without an apology being offered.

93 See Khouri, n19 above, 625.

94 *Ibid*, 625.

95 *Robinson* (n79) [20].

- It is not clear that admissions of fact on their own are sufficiently detrimental to a defendant to justify their exclusion in all cases. Arguably, they are less likely to be prejudicial to a defendant than an admission of fault or liability and therefore the argument for protecting them is less compelling.
- Parties are still able to use privileged circumstances ('without prejudice' negotiations and mediation privilege) to disclose facts and give an account or explanation that goes beyond an apology.[96]

Ultimately, the question whether a statement of fact accompanying or incorporated in an apology is inadmissible under a particular piece of legislation, even under the proposed clause 3(b) of the Scottish Bill, will depend on the closeness of the connection between the apologetic statement and any other statement(s) of fact. It is recognised that uncertainties will persist as to where the legislative protection of an apology begins and ends and that parties, lawyers and the courts need to establish what the legislation intends to exclude. It is also acknowledged that uncertainty about the scope of legislative protection may continue to inhibit apologies by wary defendants. In the end, however the legislation is framed, the public and the legal profession and insurance industry need to be made aware of the aims of the legislation and that there are limits of the protection it provides.

In Hong Kong, the Steering Committee on Mediation has not yet reached a conclusion, even after a thorough consideration of the Apologies (Scotland) Bill development and the Canadian experience, as to whether the proposed apology legislation should also apply to statements of fact accompanying an apology. Public comments and opinions are being sought in this regard.[97] It would be interesting to see as to how the law in this area will develop and how it may impact on the use and effectiveness of apology legislation in different jurisdictions.

Concluding comments

The potential benefits of apologies for the resolution of civil and commercial disputes should not be overlooked. It is equally important for dispute resolution practitioners to understand the legal as well as the social and psychological benefit and importance of apologies. At the same time

96 Even in these contexts concerns have been expressed about exclusion of disclosures and the proper balance to be struck between encouraging disclosure and excluding evidence in subsequent proceedings. An enduring concern about mediation relates to the ability of a defendant to deliberately 'sterilise' evidence by admitting facts knowing that a plaintiff will not be able to use this admission as evidence. On the flipside there is the concern that a plaintiff is able to go on a 'fishing expedition' and use disclosures in mediation to prepare their case relying on evidence other than the direct evidence of defendant.

97 See Consultation Paper, n2 above, [5.38].

it is important to bear in mind that an offer of apology is only one of the responses a person might be seeking after an accident or other harmful event. We know from experience, supported by research particularly in the medical area, that victims and families of those who are injured or die in circumstances where they consider someone is responsible want disclosure, information about what went wrong, explanations, and apologies.[98] In many cases they want assurances that changes will be made so that the same accident or harm will not happen again.[99]

In reality, many cases settle and it is important to recognise that there will be numerous factors, other than apologies, that influence the decision to commence and to settle proceedings. In some cases an apology will be a term of a compromise agreement. The apology will often be a partial apology and the terms of settlement will state that a defendant does not admit liability. In these circumstances, the enactment of apology legislation, even if it offers protection in the broadest terms, is unlikely to alter the decision of a defendant to offer a partial apology. At the same time it is also important that practitioners and their clients understand that apology legislation does not diminish a person's right to pursue compensation through civil proceedings, even if they have received an offer of a partial or full apology.

Canadian decisions to date indicate that apology legislation can be effective to exclude evidence of an apology as an admission or to prove fault or liability. These cases demonstrate that apology legislation is effective to preclude an apology being treated as an admission of fault or liability and from being taken into account in the determination of fault and liability. Some of these cases show that a plaintiff can still be successful in making out their civil claim notwithstanding that evidence of an apology would be excluded by apology legislation. Overall, it is concluded that apology legislation has an important role in the resolution of civil disputes by addressing some of the fears associated with apologising when loss and harm has occurred in circumstances that may give rise to civil proceedings.

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98 For an empirical study highlighting the importance of explanation to parties to health complaints see Christian Behrenbruch and Grant Davies, 'The Power of Explanation in Health Care Mediation' (2013) 24 ADRJ 54.

99 Meeting these needs has been at the centre of initiatives aimed at providing open disclosure in medical cases and to support settlement of medical malpractice disputes. In Australia, see for example, the Australian Commission on Safety and Quality in Health Care, *Open Disclosure Framework* (March 2013): www.safetyandquality.gov.au/our-work/open-disclosure/the-open-disclosure-framework/ accessed 22 July 2015.