Disingenuous or Novel? An Examination of Apology Legislation in Canada

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This Thesis provides an analysis of Apology Legislation in Canada, more specifically focusing on its influence on Canadian Courts & Contracts of Insurance. Apology legislation, as an amendment to the Evidence Act of a province or a stand-alone piece of legislation, was created to restrict the admissibility of acts or words of remorse or benevolence given by one person to another. Apology Legislation in Canada is said to be a positive measure on the road to making the justice system more accessible, affordable and effective. This piece will explore the framework of Apology Legislation in several common law jurisdictions, leading to an examination of the socio-economic and legal benefits it is purported to confer. This Thesis will also consider legal and policy changes that could help to alleviate the burden on the judicial system while contributing to the creation of a safer and more sustainable health care system in Canada.
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I would like to dedicate this Thesis to my grandmother,
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DISINGENUOUS OR NOVEL: AN EXAMINATION OF APOLOGY LEGISLATION IN CANADA

INTRODUCTION

After millennia of trial and error, medicine remains an inexact if not impossible science, one that we as humans continue to do battle with in order to extend our longevity and that of future generations. Health Care Providers ("HCPs") are at the front line, working diligently to provide treatment to the needy, battling time and disease, all the while acknowledging that at best all medicine represents is the vain attempt at prolonging the inevitable. It is within this complex world that one finds the most delicate of relationships. The bond between doctor and patient, a union of trust, is a unique and challenging connection, fraught with unevenness. Since the early 20th century a new dilemma has taken hold, as HCPs have begun to lose control over self-regulation and discipline. The rise of the compensation culture, a disadvantage for HCPs, has allowed patients to take action in the event of adverse medical outcomes. Insurance and insurance premiums have become a mandatory part of professional practice placing an added burden on practitioners. HCPs have had to adapt to the changing environment, both by placing greater emphasis on education, but also by changing the manner in which health care is delivered. However, not all changes to the health care systems have resulted in positive outcomes. While the imposition of a duty of care on HCPs has the purported benefit of increasing quality of care and patient safety, it has also increased the fear HCPs have of litigation.¹ Fear within the medical community creates isolation, as HCPs are less likely to

admit and report errors for fear of losing either respect from peers or, worse yet, their licensure.

A vicious cycle was born as the fear of litigation pushed HCPs into silence, which in turn compounded systematic and personal errors, resulting in the decrease of quality and safety for patients. Such practices continued unabated until the medico-legal reformation began in the 1980’s. The Canadian government, working with both patient advocacy groups and medical regulatory bodies, interceded and began to take control over the health care system. Effort was rewarded by the implementation of numerous changes to the delivery of health care in Canada. Canadian Medical Association Guidelines were amended to reflect the need for mandatory disclosure of adverse medical outcomes.²

Organizations, such as the CPSI, were created for the enhancement of safety and quality in the Canadian Health Care System.³ However, despite the best intentions and actions of the government, a continued imbalance persisted between the insular medical community and the public. The result of unreported errors culminated in the release of the American Institute of Medicine’s report (“IOM Report”) in 1999 that found there to be between 44,000 and 98,000 preventable deaths per year in the United States, directly attributable to adverse medical outcomes.⁴ Although the IOM Report was bleak, it went on to convey

³ “The Canadian Patient Safety Institute [CPSI] was established in 2003 as an independent not-for-profit corporation, operating collaboratively with health professionals and organizations, regulatory bodies and governments to build and advance a safer healthcare system for Canadians. CPSI performs a coordinating and leadership role across health sectors and systems, promotes leading practices and raises awareness with stakeholders, patients and the general public about patient safety.” From the CPSI website. Accessed on August 23, 2009. < http://www.patientsafetyinstitute.ca/English/Pages/default.aspx>
that ‘more than ninety percent of these deaths are the result of failed systems and procedures, not negligence of physicians’. While the report centres on the American Health Care System it is apt to infer that similar results would be found in an analysis of the Canadian Health Care System.

The IOM Report was a watershed for the medico-legal community. Understanding the human cost helped to put into perspective the economic and social costs of adverse medical outcomes. Billions of lost dollars, both from litigation and loss of taxable income, now had a source as governments raced to find ways to staunch the flow. For the victims of adverse medical outcomes the desire for compensation, for both physical and mental anguish, could only be sought through dispute resolution. The only manner in which victims could come to understand what had happened was to either go through the courts or lengthy settlement proceedings. More importantly, some victims sought not monetary compensation, but also apologies or an admission of fault from HCPs with a promise that future adverse medical outcomes would be prevented through such disclosure. Indeed, some victims have found that the apology ‘was the most valuable part of settlement’. The problem, however, lies with the HCPs who are reticent and, together with the Canadian legal community, discourage apology. In the medico-legal world apologies are seen as admissions of fault, with the potential to form a basis of legal liability. While some adverse

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medical errors are the direct result of negligence, HCPs do not want to be held liable in cases where the errors occurred because of systematic deficiencies. The Canadian government, in an attempt to encourage apologies, has pursued legislative reforms intended to remove the burdens of disclosure. The provinces of British Columbia, Saskatchewan, Manitoba, Alberta and Ontario have all enacted legislative provisions intended to protect individuals in civil matters by allowing people to apologize openly for tortious acts.\(^9\)

Apology Legislation represents an opportunity to strengthen a patient’s right to information by giving HCPs the opportunity to disclose medical error without fear of liability. Such an attempt could keep the channels of communication between doctor-patient open. Apology Legislation, as an amendment to the Evidence Act or a stand-alone piece of legislation, was created to restrict the admissibility of acts or words of remorse or benevolence given by one person to another.\(^10\) The legislation protects statements that admit liability made during the course of an apology and also protects individuals from voiding contracts of insurance.\(^11\) As Canadian provinces draft and enact their own versions it is important to undertake an analysis of Apology Legislation’s strengths and weaknesses. Only through such an examination can the goals of Apology Legislation be realized and its potential properly evaluated. This Thesis discusses how Apology Legislation may become an instrument for mitigating the economic impact on medical malpractice claims while

\(^9\) See examples, infra note 39.
\(^10\) For the purposes of this Thesis the focus will be centred on Health Care Providers and the bodies associated within that professional sphere.
\(^11\) See infra Part B.
simultaneously assisting in the redevelopment of the doctor-patient relationship. Part II develops the legal genesis of the creation of Apology Legislation by looking at the historical progression of similar reforms in the United States of America and Australia. Part III considers the Canadian position with regard to apologies and comments on the potential effect Apology Legislation will have on both the Canadian Courts and contracts of insurance. Part IV delves into the assumptions made underlying the creation of Apology Legislation, namely that there is a significant economic advantage to implementing such reforms while commenting on empirical studies conducted in other jurisdictions. Part V examines the effect Apology Legislation may have on the Doctor-Patient relationship by looking at the barriers to full disclosure from HCPs and how legal reform may help reduce such obstructions. The final section provides a personal view on legal reform in the area of medical malpractice. Part VI discusses alternative reforms within the current structure of the Canadian Health and Tort Systems, whilst respecting the need to maintain the high quality of Health Care delivery in Canada.
A. HISTORICAL FRAMEWORK

(a) United States of America

Apology Legislation is relatively new in Canada but has a long history in other common law jurisdictions, specifically the United States of America. The idea was born when the state legislature of Massachusetts, in 1986, enacted ‘Safe Harbour’ provisions, allowing persons to apologize to complainants in tortious claims. Massachusetts General Laws ch. 233, Section 23D provides, “Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death or 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.”\(^{12}\) The Apology Law was heralded as a great leap forward, however, it was not without its weakness. The law remained silent on expressions that could contain admissions of fault. The spirit of the legislation was contagious and was picked up by other states that saw the legislative potential the Massachusetts legislation created. Texas was next to create Apology Legislation and went further than Massachusetts when it modified the language and removed any ambiguity concerning admissions of fault. The Texas model was largely similar to that of Massachusetts but differed by providing that “a communication, including an excited utterance... which also includes a statement or statements concerning negligence or culpable conduct pertaining to an accident or event, is admissible to prove liability[.].”\(^{13}\) The Texas model, representing the genesis of the protection of ‘partial apologies’, has been adopted by thirty-five states, including Florida and California, making

\(^{12}\) Massachusetts General Laws tit 2 ch 233, §23D (2007)
\(^{13}\) Texas Civ Prac and Rem Code Ann §18.061 (1999)
it far and away the most common type of legislation. The wording of the legislation of each state can provide large discrepancies concerning the manner in which apologies are made inadmissible but the effects are largely similar. By only protecting ‘partial apologies’ most American Apology Legislation fails to protect statements of culpability. The protection of ‘full apologies’, for statements and gestures that acknowledge fault, has found very limited support in the United States.

Two models of protection concerning ‘full apologies’ emerged in America from 2001-2003. First, and perhaps most controversial, were the legislative solutions proposed by Oregon and Colorado. Such statutes were enacted to ‘specifically protect expressions of sympathy in health-care settings’. As Jesson and Knapp note, “the Colorado law not only creates an evidentiary privilege for health-care provider statements for remorse, but for certain statements of fault as well. It applies only to ‘an unanticipated outcome of medical care’ and gives protection to statements accepting fault and anticipated outcome.” The problems with such specific legislative provisions are palpable as the Apology Laws are applied to only one professional body, HCPs, at the potential detriment of many other relevant groups of society. As Lee Taft notes:

The Colorado legislature was interested in granting blanket immunity regarding the expression of apology to one class of people: health care providers and their employees. This statute, shocking both in its breadth and in its one-sidedness...is

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14 California Evidence Code §1160; Government Code §11440.45 and Florida Stat tit 7 Ch 90 §4026 (2001)
disingenuous in that even though the proponents of this kind of statute understand that its one-sided protection is potentially unfair, they encourage its enactment.17

By granting immunity to the medical community Colorado and Oregon legislators failed to recognize the importance of apologies in all civil contexts, and have created friction between states that fail to protect ‘full apologies’ and those that seek to cover all apologies made in civil disputes.18

The work done by the legislators in Connecticut and Hawaii, culminating in the completion of Apology Legislation enacted in 2001, saw America’s first acceptance of a law protecting all apologies, including those that contained admissions of fault.19 The Connecticut bill ("An Act Concerning Statements of Apology Made after an Accident") was designed to protect apologies from being used to prove culpability by making statements to families and victims inadmissible in court.20 The Connecticut bill states:

\[
\text{In any civil action to recover damages resulting from personal injury or wrongful death... in which it is alleged that such injury or death resulted from the negligence of a party, the use of an expression of apology, whether oral or written, by such party shall not be admissible in evidence to establish culpability or state of mind.}\]

The Connecticut law was the first statute to specifically speak of apologies and although there is no specific definition of what constitutes an apology it is plausible that admissions of fault contained within statements and gestures would be considered apologies under a

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18 Ibid.
21 Connecticut General Statute Ch 899 tit 52,
liberal reading.\textsuperscript{22} Hawaii’s reform goes the furthest of any state where the 2001 bill provides:

Evidence of written or oral apologies issued by or on behalf of an individual, corporation, or government entity, whether made before or during legal or administrative proceedings relating to the subject matter of the apology, is not admissible to prove liability. Evidence of benevolent gestures made in connection with such apologies is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable or admissible merely because it is presented in conjunction with an apology. This rule also does not require exclusion when the evidence is offered for another purpose, such as negating a contention of bad faith.\textsuperscript{23}

A liberal reading of the Hawaii statute would allow for the protection of fault-based apologies while still allowing for the admission of apologies that seek to eliminate statements of bad faith. The bill is comprehensive and fair. Furthermore, as Jonathan Cohen notes:

Hawaii’s bill, which would appear to exclude fault-admitting apologies, presents three related rationales not present in [sic] earlier laws: (1) to encourage apologies through eliminating the fear that the apology will be used in court to prove liability, (2) to avoid lawsuits that could have been prevented though an apology, and (3) to foster an “Aloha” type of community, where, roughly put, people feel a humane connection to one another.\textsuperscript{24}

However, the unique nature of the Hawaiian people and the manner in which they as a society have learned to deal with apologies may not be congruent with the efforts and aims of other states. While the United States seems reluctant to accept the protection of fault-based apologies it is evident that other commonwealth jurisdictions are more accepting of legal reform.

\textsuperscript{22} Cohen, “Legislating Apology”, \textit{supra} note 20 at 831.
\textsuperscript{23} Hawaii Rev Stat §626-1 (2007)
\textsuperscript{24} Cohen, “Legislating Apology”, \textit{supra} note 20 at 833.
(b) **AUSTRALIA**

Reform in Australia was spurred from the belief that litigation rates concerning medical malpractice were rising at an alarming rate.\(^{25}\) Such fears, whether perceived or real, pushed legislators and advocacy groups to generate legal reforms concerning negligence and evidentiary burdens. The Ipp Report, prepared by the Panel for the Review of the Law of Negligence, failed to register the reforms concerning apologies, but it would become clear that Apology Legislation would impact every province in Australia.\(^{26}\) A Legal Processes Reform Group, under the auspices of the Australian Health Ministers’ Advisory Council (“AHMAC”), was asked to specifically report on issues concerning medical negligence.\(^{27}\) They recommended that, “legislation provide that an apology made as part of an open disclosure process be inadmissible in an action for medical negligence”.\(^{28}\) Apologies were, therefore, now deemed to form an integral part of the process of healing.\(^{29}\)

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\(^{28}\) Vines, supra note 25 at 486. Such reforms were part of the development of the Open Disclosure Project. The Australian Council for Safety and Quality in Health Care incorporated such projects to work in tandem with the National Open Disclosure Standard for Public and Private Hospitals.

\(^{29}\) AHMAC Report, supra note 27. Wherein it states that:

The elements which might by included in an effective initial disclosure of an adverse event to a patient (or where relevant and appropriate, their family) include:

- Factual information about what happened;
- Factual information about the immediate effect on the patient;
- An apology or expression of regret to the patient;
- Discussion of the possible consequences for the patient;
- Factual information about options to ameliorate harm done to the patient;
- A brief outline of what will be done to ensure that lessons are learned form the adverse event to prevent recurrence; and
- The identification of someone who will be able to answer any questions which the patient or family may have once they have had some time to think about it.
Following the work of the AHMAC, each province and territory undertook reform for the protection of apologies made in any matter.\textsuperscript{30} However, the type of protection offered to apologies varied dramatically in each area.

The work of Prue Vines in the categorization of Australian Apology Legislation Reform is unparalleled, demonstrated by her work “Apologising to Avoid Liability”, wherein she divides Apology based legal reform into four models.\textsuperscript{31} The foundation for her analysis was the creation of the apology provision in Part 10 of the Civil Liability Act 2002 (NSW), ss67-69 of New South Wales (“NSW”), which provides the most comprehensive protection for apologies made in a civil context.\textsuperscript{32} Vines utilizes the NSW model to highlight significant elements of the legislation, which in turn are used to show the shortcomings of

\begin{footnotesize}
\textsuperscript{30} Note: Legislators looked past the specific example of medical negligence and expanded the legislation to include apologies made in any civil context.
\textsuperscript{31} Vines, “Apologising to Avoid Liability”, \textit{supra} note 25 at 486
\textsuperscript{32} See accompanying legislation of Part 10, Civil Liability Act 2002 [NSW]:
\end{footnotesize}

\textbf{CIVIL LIABILITY ACT 2002 - Part 10}

\textbf{Application of Part}

\textbf{67 Application of Part}

(1) This Part applies to \textit{civil liability of any kind}.

(2) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B or civil liability for defamation.

\textbf{68 Definition}

In this Part: “apology” means 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.

\textbf{69 Effect of apology on liability}

(1) An apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person:

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

(b) is \textit{not relevant to the determination of fault or liability} in connection with that matter.

(2) Evidence of an apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.
other jurisdictions. In doing so Vines is able to discern and evaluate the ability of Apology Legislation to protect both fault-based apologies and 'partial' apologies. The results of her analysis show that the majority of Australian legislators have opted “to protect only the ‘safe’ or ‘partial’ apology, the expression of regret”. Thus, while the governments of NSW and the Australian Capital Territory have chosen to protect fault-based apologies the majority of Australia has followed the American models, similar to those of Texas, California and Florida. Notwithstanding such limited implementation, the NSW model provided the common law world with the broadest and most robust legal reform concerning apologies. The NSW model would become the foundation for Canadian legal reform.

(c) CANADA

Canadian legal reform concerning apologies and the Law of Negligence sprouted from a discussion paper drafted by the Ministry of the Attorney General (“MAG”) of the province of British Columbia. In the paper, the MAG suggested that the province enact legislation that would stimulate the proffering of full apologies, which in turn would act as a positive

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33Vines, “Apologising to Avoid Liability”, supra note 25 at 488. Vines lists the significant elements of the legislation:
   A: the fact that apology is defined to include admission of fault, rather than merely an expression of regret;
   B: the apology does not constitute a legal admission of fault or liability;
   C: the apology is not relevant to the determination of fault or liability; and
   D: the apology is not admissible in civil proceedings as evidence of fault or liability.

34 Vines, “Apologising to Avoid Liability”, supra note 25 at 483. Vines defines each grouping [found within Table 1 of Text at 483]:
   “Element A is significant because the apology is defined as more than a mere expression of regret.... Element B states that the apology does not constitute a legal admission of liability.... Element C emphasises this by saying that the apology is not even relevant to the determination of legal liability.... Element D prevents the apology from being admitted in civil proceedings as evidence of liability.

dispute resolution mechanism. Apology Legislation would ‘promote early, effective and affordable resolution of disputes’, a proposition that found eager support from HCPs and Governmental bodies throughout the province.\textsuperscript{36} The discussion paper, designed to elicit comment, noted that the purpose of Apology Legislation would be to “prevent liability being based on an apology, by making the apology inadmissible for purposes of proving liability and by not construing the apology as an admission of liability”.\textsuperscript{37} The discussion paper was followed immediately by a report from the Ombudsman of British Columbia who advocated legal reform. In his report he suggests:

> Often, providing an apology is simply the right thing to do. I also ask the Attorney General to consider the New South Wales Civil Liability Act (2002) as a model for legislative debate in British Columbia and I urge the Attorney General to introduce legislation to protect public officials so that they can apologize without fear of litigation on the grounds that an apology is an admission of negligence.... Providing apologies may not completely replace the option of seeking justice through litigation, but might offer an alternative to the adversarial process for those who seek recognition and remorse in order to feel justice is served. In recognition of the power behind the words of apology, this Office will continue to seek and to recommend apologies....\textsuperscript{38}

With the blessing of the bureaucracy, government bodies, and HCPs, the Honourable Wally Oppal introduced the first reading of the Apology Act on March 25, 2006. Notwithstanding vigorous debate, the legislation passed quickly and was given Royal Assent on May 18, 2006, making the Apology Act of British Columbia the first of its kind in Canada. The Act incorporated not only the essential elements of the New South Wales model but was sculpted to include specific provisions for insurance contracts and section 5 of the

\textsuperscript{36} Ibid. at 1.
\textsuperscript{37} Ibid.
\textsuperscript{38} Howard Kushner, “The Power of an Apology: removing the legal barriers, a special report by the Ombudsman of the Province of British Columbia” (2006) Special Report No 27 to the Legislative Assembly of British Columbia.
Limitations Act. Following British Columbia’s lead, legislators in Saskatchewan, Manitoba, Alberta and most recently, Ontario have pursued similar legislative reforms. Each reform has followed the same word usage and structure as the British Columbia model, including the legislative definitions of apology to include both expressions of regret and admissions of fault. The Canadian reforms are also broad in scope and allow protection not only to HCPs but to any person in any civil matter.

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[SBC 2006] CHAPTER 19 Assented to May 18, 2006

1 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;

Effect of apology on liability

2 (1) An apology made by or on behalf of a person in connection with any matter does not constitute an express or implied admission of fault or liability by the person in connection with that matter, does not constitute a confirmation of a cause of action in relation to that matter for the purposes of section 5 of the Limitation Act, does not, despite any wording to the contrary in any contract of insurance and despite 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 must not be taken into account in any determination of fault or liability in connection with that matter.

2 (2) Despite 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.

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40 The Evidence Act, 2006, S.S. 2006, c. E-11.2., s23.1, as amended by S.S. 2007, c. 24, s.2. [Saskatchewan]
41 Apology Act, C.C.S.M. c. A98 [Manitoba]
42 Evidence Amendment Act, 2008 Amends RSA 2000 cA-18. S.26(1) [Alberta]
43 Apology Act, 2009, S.O. 2009, c. 3 [Ontario]
B. CANADIAN POSITION REGARDING APOLOGIES

In 2007, the Uniform Law Conference of Canada Civil Law Section was presented a paper by Russell Getz, of British Columbia, that proposed a Uniform Apology Act for all provinces. Getz outlined the present legal position of apologies and presented arguments advocating the creation of Apology Legislation. The arguments Getz discussed were threefold and were drawn from the MAG of British Columbia’s Discussion Paper on Apology Legislation:

First, Apology Legislation could be employed to avoid litigation and encourage the early and cost-effective resolution of disputes; secondly, it could encourage natural, open and direct dialogue between people after injuries; and finally, it encouraged people to engage in the moral and humane act of apologizing after having injured another and to take responsibility for their actions. As Getz suggests: “The reasons that are advanced in favour of Apology Legislation may be characterized as legal, social, and moral: to encourage timely, less litigious modes of resolving legal disputes; to encourage interpersonal reconciliation; and to encourage personal responsibility.” This tripartite approach leads to much debate about the necessity of having a law that gives people safety and protection when apologizing. There is no doubt that such legislation produces a ‘feel good’ reaction in that it is both socially and politically appealing, but there remains a

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45 MAG Paper, supra note 35 at 1-6.
46 Ibid.
47 Ibid.
48 Ibid.
49 Getz, supra note 44 at 1-15.
question as to the substance of the legislation. Particularly, the question has arisen as to whether or not Canada has a need for such protections of apologies. While the legislation purports to have many benefits the actual impact of the legislation may not be as great as first imagined. Below is a discussion pertaining to how Canadian courts have dealt with apologies, with particular regard to civil proceedings, as well as a note concerning the effect such legislation might have on contracts of insurance.

(a) How Canadian Courts Approached Apologies

A driving force behind the implementation of Apology Legislation is the belief that apologies require legal protection, so as to encourage persons in civil disputes to apologize without fear that such admissions will be used against them in court. In Canada, prior to the implementation of Apology Legislation, the courts could admit apologies into evidence; however, such admissions were rarely, if ever, used to establish liability or fault. Furthermore, a plaintiff wishing to pursue an action for medical malpractice had still to meet the standards required of a case of negligence. As summarized by Baker and Norton, a case of negligence required the plaintiff to prove that:

i. the defendant owed the plaintiff a legal duty of care;
ii. the defendant breached the legal standard of care;
iii. the plaintiff suffered loss or injury;
iv. the defendant's conduct must have been the actual and legal cause of the plaintiff's injury.50

The apology proffered by a defendant following an adverse medical event should only be seen as an offer of sympathy and even where the medical professionals feel culpable for their actions, the apology must be seen as only the professionals’ feeling and not an admission of fault or liability. The apology does not constitute a recognition of a breach of a duty of care nor does it go even as far as to recognize that a duty was owed. Furthermore, an apology is not ‘an acknowledgement of causation’. Canadian Court’s must reinforce their roles as finders of fact to properly discern whether fault or liability exists on the part of the defendants.

Considerations of apologies in cases of negligence are sparse within Canadian jurisprudence. Other areas of the law, such as criminal law and defamation are well documented but deal with apologies only in mitigating circumstances. There are only a handful of Canadian cases that speak about apologies during the course of a negligence trial. Of those, the majority deal with motor vehicle accidents in which the courts have either not analyzed the statements of apology, found the apology to be an expression of regret not fault, or determined that the apology cannot be used as an accurate assessment of personal liability that subverts the role of the court. Two other interesting cases give divergent views on the role of apologies in negligence actions. In *Dusty’s Saloon*

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51 Catherine Morris, “Legal Consequences of Apologies in Canada,” from the workshop on “Apologies, Non-Apologies, and Conflict Resolution,” (University of Victoria, October 3, 2003) [Morris].
v. W.M.I. Waste Management of Canada Inc\textsuperscript{55}, Romaine J. found that the apology offered by W.M.I., “while not an admission of a breach of duty, [was] an acknowledgment” leading to a decision to relieve Dusty’s of its debt owed to W.M.I. but not to a finding that W.M.I. was liable for negligence. The apology was merely an instrument for the finding of fact but did not ‘adduce evidence that would establish a breach of duty’.\textsuperscript{56} Conversely, in the 2002 Alberta decision of Jordan v. Power\textsuperscript{57}, Justice Veit stated in obiter that ‘an apology could constitute an admission of negligence’ but that in the present case the evidence of the defendant was sufficient to prove that ‘the apology was not an admission that [Ms. Power] had been negligent, but merely an expression of condolence that the Jordan’s were hurt by a fire which started on, or in, Ms. Power’s property.”\textsuperscript{58}

Catherine Morris provides a succinct summary of the judicial position prior to the enactment of any provincial Apology Legislation where she concludes that:

i. Statements of apology will be admitted into evidence in Canada;

ii. Judges in Canada will not construe the statements of regret or apology as admissions of liability without carefully considering all the other evidence, as well as considering the intention of the parties in making statement;

iii. Judges may be faced with conflicting evidence as to what has actually been said by way of apology. Judges may need to sort through confused facts and weigh the credibility of various witnesses;

iv. Judges will interpret what the speaker meant and whether a statement forms any part of an admission of legal responsibility; and

v. It seems plausible to suggest that judges may be loath to punish people for making sincere apologies. Could one speculate from the tone of the cases that judges may

\textsuperscript{56} Ibid.
\textsuperscript{58} Ibid.
prefer parties who express a sense of responsibility and sympathy over those who seem to be dishonest or to press their advantage.\

From a juridical standpoint the introduction of Apology Legislation may seem to have been unnecessary, as the Courts have demonstrated in the cases above, and yet the drive to protect the legal status of apologies pushed provincial legislatures to adopt protective legislation with great haste.

Apology Legislation’s primary goal is for the reduction in litigation; however, as little time has passed since any enactment in Canada, there is no empirical data to support that conclusion. Where the legislation has had an immediate impact is on the admission of liability in civil proceedings and insurance contracts. This has had a direct impact on the medical profession as HCPs under contract are normally restricted from making an admission or compromise. To do so risked termination of the contract and exposure to personal financial liability. Therefore, HCPs now face fewer barriers in making genuine apologies.

The Legislation also has had an immediate impact on the Courts as apologies that contain admissions of fault face potential scrutiny. One of the major fears of those who wish to apologize is that their admission will be used against them in court. This is countered by the fear that the public will lose confidence in the Courts if a person is able to escape liability after an admission of liability in an apology. Unfortunately, there is no Canadian case on point. There is, however, a 2003 Australian case, *Dovuro Pry LTD v Wilkins*, which

\[\text{59 Morris, supra note 51 at 7.}\]
dealt with the issue directly. The Dovuro Company, a seed distribution company, made written statements and apologies in relation to the release of contaminated Canola seed to its customers. The apologies were ‘full apologies’ as they expressed not only regret but also admitted fault and outlined potential remedies. In their decision, the High Court of Australia ruled that an apology could not amount to an admission of liability because liability was for the court to determine. Coming only months after the enactment of Australian apology provisions, the court found that a ‘conclusion about the legal standard required... could not amount to a basis for a finding of negligence. Therefore, Dovuro showed why Apology Legislation is necessary. As John Kleefeld notes:

A true apology—or at least one ‘truer’ than a mere statement of sympathy—will, by virtue of its constituent elements, look a lot like a statement of law or of mixed fact and law. Thus to give it the force of an admission would pre-empt the court’s role as finder of fact and their ability to apply such facts to the law to decide whether a legal standard was actually breached.

The common law is therefore reinforced by Apology Legislation in that it provides clear protection for out of court apologies and ‘ease of recognition to the legal and insurance’ communities.

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60 Dovuro Pty Ltd v Wilkins [2003] HCA 51; (2003) 201 ALR 139. at 495-496.  
61 Ibid.  
62 Ibid.  
63 John C. Kleefeld, "Thinking Like a Human: British Columbia’s Apology Act" (2007) U.B.C. Law Review. 40, 798-799 [Kleefeld]. Kleefeld notes the importance of a legislative solution. "The Apology Act [British Columbia, 2006] provides that solution, in a triple-barreled manner. It has a declarative aspect—an apology does not constitute an express or implied admission of fault (paragraph 2(1)(a)); a relevance aspect—an apology must not be taken into account in any determination of fault (paragraph 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 (subsection 2(2))."  
64 Vines, "Apologising to Avoid Liability", supra note 25 at 496.
(b) **Impact of Apologies on Contracts of Insurance**

The authors of Apology Legislation in Canadian provinces have also not forgotten about the potential for apologies to be used against defendants by their own insurance providers. Doctors must secure professional liability insurance in order to practice medicine, much like motorists must hold third party liability insurance to operate their motor vehicles. Possessing coverage, a HCP may think they are safe in providing apologies to patients, believing that the insurance provider will pay for any claims arising from adverse events during work. However, there is the potential that any admission made by a HCP may void their insurance coverage. As Jonathan Cohen notes, “most insurance contracts impose upon the insured a general duty of co-operation with the insurance company in defense of the claim”.65 Indeed, some policies go as far as to state that the insured must not voluntarily assume or accept liability in settling a claim.66

If a Health Care Provider proffers an apology and there is an express provision in their insurance contract that forbids it, they may lose their coverage and could be personally liable for damages arising from a civil claim. This proposition may seem severe, but in practice the fear is unsubstantiated by precedent. Before being able to set aside a contract of insurance the insurer would have to prove that the insured breached the general duty of co-operation.67 To do so they would have to show that the apology of the insured ‘prejudiced’ the insurer and that the insured was acting in 'bad faith' when offering the

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66 Ibid.
67 Ibid. at 1025.
apology.\textsuperscript{68} Not only is this unlikely but the reverse may be found by the court in that a sincere apology by the insured may go to ‘minimizing the loss to the insurance company’ and that the apology by the insured, while damaging the bargaining power of the insurance company during settlement, only reveals information that would have arisen in discovery or trial.\textsuperscript{69} Even in the event that the insured admits fault and apologizes in direct contravention of the provisions of the contract of insurance, it is exceedingly rare that the contract will be voided.\textsuperscript{70}

In cases involving HCPs, my research has failed to reveal a single case in either Canada or the United States that involves the voiding of an insurance contract stemming from the insured offering an apology. Courts may be unwilling to void contracts in part because of the affect such decisions would have on public policy. The purpose of insurance is to repay damages when adverse events occur, not to be the subject of moral judgment.\textsuperscript{71} Furthermore, medico-legal groups such as the Canadian Medical Protective Association (“CMPA”) have instructed physicians to take responsibility for adverse events that are ‘indisputably due to [their] improper care’.\textsuperscript{72} With advice from the CMPA and the Canadian Patient Safety Institute (“CPSI”) instructing HCPs how and when to apologize it seems unlikely that insured HCPs will lose their coverage through apologies to patients. However, if there is further concern, the implementation of clause 2(1)(c) of the Apology

\textsuperscript{68} Ibid. at 1026.
\textsuperscript{69} Ibid.
\textsuperscript{70} Ibid.
\textsuperscript{71} Ibid.
\textsuperscript{72} Ibid. at 1025. See also Tracey M. Bailey, Elizabeth C. Robertson and Gergely Hegedus, “Erecting Legal Barriers: New Apology Laws in Canada and the Patient Safety Movement: Useful Legislation or a Misguided Approach?” (Health Law in Canada, No.2 28, 2007) 38 [Bailey].
Act of British Columbia\(^{73}\) eliminates the contractual limitations of any insurance policy concerning apologies. Section 2(1)c removes the ability of an insurer to later claim that an apology given by a HCP to a patient, including one made without the insurer’s written consent, voids, impairs or otherwise affects the HCPs coverage under their insurance contract.\(^{74}\) Any insurer who attempts to void a HCPs contract of insurance because of an apology will find themselves subject to review by the courts of provinces that have enacted Apology Legislation.

At the time of writing, there have not been any challenges presented to the courts, nor have any decisions concerning contracts of insurance and apologies been handed down, but a reviewing court of law should find that clause 2(1)(c) has the effect of rendering such contractual conditions null and void.\(^{75}\) The effect of Apology Legislation on contracts of insurance is profound and if concern from HCPs and their insurers regarding legal liability continues, then action by Canadian Courts may be necessary.\(^{76}\)

\(^{73}\) Reproduced in other provinces as either an Amendment to the Evidence Act (AB and SASK) or the Apology Act (ON, MAN)

\(^{74}\) Apology Act, S.B.C. 2006, c. 19 [British Columbia]

\(^{75}\) Bailey, supra note 72 at 35.

\(^{76}\) Ibid. at 35.
C. ASSUMPTIONS ENCOURAGING THE CREATION OF APOLOGY LEGISLATION

In her most recent work, “Apologies and Civil Liability”, Professor Prue Vines presents a poignant though limited view on the motivating factors spurring the creation of Apology Legislation in Common Law jurisdictions. Vines believes that behind such legislation live a number of assumptions:

i. That there has been a dramatic increase in litigation which has increased costs and damaged the insurance industry; and that the increase is caused by a compensation culture or culture of blame in which people no longer take responsibility for themselves.

ii. That apologies may amount to admissions which will be deemed to create liability by the courts, as a result of which insurers will have to pay claims.

iii. That apologies may amount to admissions which will breach an admission or compromise clause in an insurance contract, making it void, with the result that the defendant will be liable but have no recourse against the insurers.

iv. That apologies are so prejudicial that they automatically tend to attract liability.

v. That all assumptions lead to lawyers advising clients not to apologize for accidents and that this advice has a significant and unwelcome impact on civil society.77

Vines posits that Apology Legislation was created in part to deal with such assumptions. She furthers the belief that any apology is better that nothing at all. Vines states that Apology Legislation, “will reduce litigation, and that making an apology inadmissible as evidence will reduce its prejudicial effect and therefore reduce liability and costs to both defendants and insurers”.78 The legislative protection offered to apologies is also founded

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78 Ibid. at 205.
on the belief that such apologies will ‘reduce the propensity of victims of accidents to sue’
however, such views may not be convincing.\(^\text{79}\) The simplicity of assuming that the
proffering of an apology will lead to a reduction in litigation fails to take into account
nuanced social and legal considerations created through legislative protection. With such
insight it is possible to evaluate the credibility of Vines assumption’s and look to further
explanations for the creation of Apology Legislation and the potential of such measures.

(a) The Economic Argument

The principle argument of Getz’s paper to the Uniform Law Conference was the probable
affect Apology Legislation would have on medical malpractice claims and settlements in
Canada.\(^\text{80}\) Following similar arguments presented to governments of both the United
States and Australia, Canadian legislators seized upon what they felt was a legislative
solution to the perceived increase in medical malpractice claims and the preceding
preventable medical errors. The adoption of Apology Legislation, offering a narrow
evidentiary protection for HCPs, is premised on the belief that those persons who are
offered timely, authentic apologies (combined with full-disclosure of the adverse event in
question) will forego litigation, or be partially placated and accept lower settlement
values.\(^\text{81}\) Unfortunately, Apology Legislation on its own is not capable of being a cure-all
for the medical community of Canada. The economic impetus of the legislation is
attractive, but there are a wealth of factors that are capable of affecting the potency of such

\(^{79}\text{Ibid.}^{80}\text{Getz, supra note 44 at 1-15.}^{81}\text{Davenport, supra note 6. See also Charles Vincent, Magi Young and Angela Philips, “Why Do People Sue
Doctors? A Study of Patients and Relatives Taking Legal Action”, (The Lancet, June 25, 1994, 343, 8913) 1609-1613 [Vincent]; and Shuman, supra note 7 at 180-189.}
economic claims, the least of which is the lack of empirical data concerning the Canadian Health Care model. During the research and recommendations period, before the implementation of Apology Legislation in Canada, proponents of the legislation incorporated and extolled the findings of certain international studies.82

Prior to the study of full-disclosure models concerning the communication of adverse medical outcomes to patients, preliminary studies were conducted to establish whether the communication of apologies by physicians shaped a patient’s decision to pursue litigation. In Charles Vincent’s study of “Why Patients Sue Doctors,” findings suggested that 37% of British families would not have pursued litigation if offered a prompt apology combined with full disclosure.83 Furthermore, the apology (or lack thereof) was given more weight in the decision over whether or not to litigate for monetary compensation.84 The results of Vincent’s study prompted dispute resolution experts to begin advocating full-disclosure apologies. Jonathan Cohen, both a lawyer and ethicist, has written extensively on the effects of apologies on litigation practices. Cohen’s writings suggest that although the actual percentage of patients who may be affected by apologies, to such as degree as to impact decisions regarding potential litigation is indeterminable, even a

82 Vincent, supra note 81 see also; Gerald B. Hickson et al., “Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries” (1992), 267 JAMA 1359 [Hickson]; Amy Witman et al., “How Do Patients Want Physicians to Handle Mistakes”, (1996) 156 ARCHIVES OF INTERNAL MED. 2565, 2568 (stating that in cases of moderate physician error, only 12% would sue if informed of error, but 20% would do so if later learned of error).
83 Ibid.
84 Care must be taken when discussing monetary compensation, however, as certain groups in society may find themselves encouraged to either settle for lower compensation or accept an apology as full compensation. To use a Canadian example we could point to abuse claims of those persons attending Residential School’s during the 20th Century and the apologies offered by the religious denominations that ran them.
small number could validate the creation of Apology Legislation.\textsuperscript{85} Lucinda E. Jesson and Peter B. Knapp, both advocates of apology and disclosure, argue that the legislation goes further than the mere economic argument. They see apologies “not simply as a risk management tool, but as a way to improve the physician-patient relationship and, in doing so, achieve better patient outcomes.”\textsuperscript{86} The difficulty with such scholarly statements is that there is little empirical research to support or refute such assertions.

\textbf{(i) Apologies and Legal Settlement: An Empirical Examination}

In 2003, Jennifer Robbennolt began to study ‘how apologies affect dispute resolution and the prevalence of physician disclosure and apology after medical error’.\textsuperscript{87} Robbennolt conducted a large empirical study which categorized the responses of individuals to three separate situations.\textsuperscript{88} Participants were asked to play the role of accident victim and to assess a settlement offer from a fictional wrongdoer. The study looked at three different scenarios. The first gave participants ‘full’ apologies which included both benevolent gestures and expressions of sympathy combined with an assumption of responsibility.\textsuperscript{89} The second scenario gave participants a ‘partial’ apology, consisting of benevolent

\textsuperscript{85} Cohen, “Legislating Apology”, \underline{supra} note 20 at 844. Cohen states that: “It is impossible to know with perfect certainty what fraction of patients would not have sued if they had received an apology. Some skepticism is warranted. When a patient says that he would not have sued if he had received an apology, you can never know for sure what he would have done if he had. But surely some patients can be taken at their word . . . I can’t say for sure whether the percentage of patients who would have forgone suit if they had received an apology is 5%, 15%, 25% or perhaps even 35%. But if the percentage is even half of what these studies suggest, it is a sizable percentage.”


\textsuperscript{87} Ibid.

\textsuperscript{88} Robbennolt, “Apologies and Legal Settlement”, \underline{supra} note 8.

\textsuperscript{89} Ibid. at 484.
gestures and expressions of sympathy but with the no assumption of responsibility\textsuperscript{90}, and finally, the last group was given no apology at all.\textsuperscript{91} The results were positive with regard to full apologies. While 52\% of participants would accept the settlement offer under any scenario, 73\% of participants in the ‘full’ apology scenario agreed to the settlement. Robbennolt’s empirical examination of potential claimants was further supported by her work with lawyers in a successive study. Robbennolt’s second study, published as “Attorneys, Apologies, and Settlement Negotiation”, incorporated lawyers as test subjects. The fact pattern was varied for the type of apology given, the evidentiary rule governing apology admissibility, and the strength of the plaintiff’s case.\textsuperscript{92} The research produced near identical results. The study found that the lawyers were affected by both the type of apology, whether full or partial, and the type of evidentiary rule.\textsuperscript{93} Robbennolt explained her findings in a subsequent article involving where she found that:

[a]pologies, particularly those that accepted responsibility for having caused injury, favorably influenced a variety of attributions made about the situation and the other party, including perceptions of the character of and the degree of regret experienced by the other party, expectations about the way in which the other party would behave in the future, and expectations about the relationship between the parties going forward. Similarly, apologies, influenced the emotions that participants reported they would feel—decreasing anger toward the other party and increasing sympathy for the other’s position. Full, responsibility-accepting apologies showed these effects consistently. Apologies that merely expressed sympathy were more context dependent, favorably influencing these attributions under some circumstances, but not in others.\textsuperscript{94}

\textsuperscript{90} Ibid. at 484-485.
\textsuperscript{91} Ibid. at 484.
\textsuperscript{92} Ibid. at 19–20.
\textsuperscript{93} Ibid. at 22.
Where the two studies parted was in the lawyers’ assessment of the settlement. The lawyers were more likely to reject the settlement when given full-disclosure with an assumption of responsibility. The expectations of higher settlements potentially fuelled the responses of the lawyers.\textsuperscript{95} Robbennolt commented that this “has the potential to change the dynamics of negotiations involving apologies.”\textsuperscript{96} What is certain is that apologies have the ability to affect change in the behaviour of patients, particularly regarding settlements, and that the implementation of Apology Legislation will have an effect on medical malpractice claims.\textsuperscript{97}

(ii) Veterans Affairs Hospitals in Lexington, Kentucky, USA

Empirical examinations are an important step towards realizing the potential of apologies in the medical malpractice setting. In order to ascertain the probable effects of Apology Legislation it is important to understand how such measures work in a real world situation. Proponents of full-disclosure, which include specific provisions for apologies, point to the success of the Veterans Affairs Medical Center in Lexington, Kentucky (“Lexington VA”).\textsuperscript{98} While other medical centres across America have instituted similar disclosure practices\textsuperscript{99}, the use of the Lexington VA example is essential within the current dialogue as it correlates to the method of health care delivery found in Canada. As

\textsuperscript{95} \textit{Ibid.} at 41.
\textsuperscript{96} \textit{Ibid.} at 30.
\textsuperscript{97} See concluding statements in both Robbennolt studies. \textit{Supra} notes 8 and 92.
\textsuperscript{98} See the work of Albert, W. Wu, “Handling Hospital Errors: Is Disclosure the Best Defense?”, (1999) 131 ANN. INTERNAL MED. 970 [\textit{Wu}].
\textsuperscript{99} University of Michigan, Stanford University Medical Center, Children’s Hospitals and Clinics of Minnesota and the Kaiser Permanenta hospitals.
Marlynn Wei notes, “the VA system is a government-based system that offers comprehensive, nearly free universal coverage”, which is abnormal in the American Health Care landscape but finds commonality with the Canadian Health Care system¹⁰⁰. The modified universal healthcare model used in the Veterans Affairs, which is different from the mainstream American health care system, allows Canadian legislators an interesting comparator. As a result, the guidelines relating to disclosure and the practice of apologizing can be reconciled with the efforts of Canadian HCPs.

The Lexington VA system was unique as the centre ‘instituted a new policy of mandatory disclosure’.¹⁰¹ The center took a pro-active approach to adverse medial events by openly accepting responsibility when the hospital was at fault. As Rebbeca Rubel-Seider notes in her analysis of successful disclosure programs, the Lexington VA “adopted a policy that requires the disclosure of all medical errors to patients and families, even in cases where it is unlikely that the patient was aware of the error. They take a proactive approach to medical error, even going so far as to call families after discharge to explain that an error occurred.”¹⁰² Such radical steps make use of what Doug Wojcieszak and others call effective disclosure¹⁰³, which has helped the hospital to acknowledge and reduce

¹⁰⁰ Wei, supra note 1 at 42.
¹⁰¹ Ibid. at 42.
¹⁰³ Sorry Works, supra note 86 at 345.

"The four steps to effective disclosure require: (1) Explanation; (2) Acceptance of Responsibility; (3) Apology; and (4) Fair Compensation."
mistakes.\textsuperscript{104} After seventeen years of full disclosure and apology, the Veterans Affairs Medical Centers reported that only three cases ended in trial judgments, with an average settlement of $16,000, which paled in comparison to the national average of $98,000.\textsuperscript{105} The Veterans Affairs Cases in question were resolved within two to four months, which was much more expeditious than the national average of two to four years.\textsuperscript{106} The success of Apology Legislation in the Veterans Affairs system is not isolated. Since 2002, hospitals at the University of Michigan have been encouraged to adopt a full disclosure model. The adoption of full disclosure has resulted in annual lawyers’ fees dropping from three million dollars to one million dollars, and malpractice suits and notices of intent to sue have dropped from 262 to approximately 130 per year.\textsuperscript{107} Therefore, due in large part to a reduction in the need for medical malpractice lawyers and associated fees, arguably, there is potential for Apology Legislation to achieve similar success in the Canadian Health Care System.

\textsuperscript{105} Cohen, “Apology and Organizations”, supra note 102 at 1454.
\textsuperscript{106} Ibid.
\textsuperscript{107} Ibid.
(c) Criticism

Despite the numerous case studies presented by academics in the United States and other Common Law jurisdictions, there has been no definitive study conducted in Canada on the affect apologies have in medical malpractices cases. Throughout the legislative implementation process there has been an underlying assumption that Apology Legislation will have the tangible effect of reducing the number of medical malpractice claims and the subsequent lowering of settlement expenditures in such claims. However, the adoption of protective measures for apologies has coalesced with the renewed efforts for open disclosure, thereby making the accurate calculation of the power which apologies have in medical malpractice nearly impossible. Studies in the United States have attempted to argue that apologies, combined with full-disclosure, have reduced claims and settlement amounts, but such studies have not been attempted in Canada.108

Furthermore, the effect of reducing litigious practices may not be in the best interests of Canadian patients. As Tracey Bailey et al note, a crucial question that has continually been over-looked in the discussion of patient safety is whether a reduction in medical malpractice claims produces positive or negative results.109 In their work, “Erecting Legal Barriers”, Bailey asks a series of important questions surrounding the perceived benefits of implementing Apology Legislation in Canadian provinces. Bailey’s seminal observation, concerning the reduction of legal actions by patients in Canada, shows that there is a pre-

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109 Bailey, supra note 72 at 35-36.
existing trend with regard to Canadian malpractice claims.\textsuperscript{110} Citing the results of the Annual Reports of the Canadian Medical Protective Association ("CMPA"), it is evident that, following a ten-year observation, there has been a declining number of claims against HCPs. In 2007, of the 95 claims that went to trial, only 25 cases resulted in judgment for the plaintiff.\textsuperscript{111} As Bailey et al note, “Since 1996, CMPA physicians have won at trial at least 70 per cent of the time. If one includes cases which settle before trial, patients have been successful in only 33 per cent of cases.”\textsuperscript{112} With litigation numbers in decline and an already low rate of settlement/judgment the introduction of Apology Legislation may have an unintended negative impact.

Apology Legislation protects statements/expressions of regret from HCPs and in doing so makes it harder for a plaintiff to prove liability. As noted above, the admission of such expressions of regret and fault by HCPs into evidence is unlikely to provide a foundation for the court’s finding of liability.\textsuperscript{113} Legitimate claims may fail and patients deserving of compensation may go wanting as the legislation provides an unintended hurdle in the path to successful malpractice litigation. The insightful legislative comments of the late Dugald Christie raise such issues. In Christie’s view, Apology Legislation could possibly work against vulnerable segments of society, who either receive inadequate settlements or are

\begin{thebibliography}{9}
\bibitem{Ibid.} Ibid.
\bibitem{Bailey, supra note 72 at 35. Bailey also notes that certain types of legislation produce unexpected hurdles for plaintiffs. Litigation concerning 'informed consent' has a less than 20 per cent success rate for plaintiffs. See also G. Robertson, "Informed Consent Ten Years Later: The Impact of Reibl v. Hughes" (1991) 70 Can. Bar. Rev. 423 at 428.
\bibitem{Cohen, "Apology and Organizations", supra note 102 at 1454.
\end{thebibliography}
unable to establish liability in court due to the omission of apologies.\textsuperscript{114} There is potential for abuse by those who may offer apologies that are insincere. Vulnerable persons, particularly patients, may require compensation to allay physical and emotional pain. Christie contends that ‘an insincere apology is a dangerous matter. It can result in the arousal and not the abatement of passions’.\textsuperscript{115} As Christie and Bailey et al argue, the imposition of legal barriers by Apology Legislation is unnecessary and counterproductive.\textsuperscript{116} The countervailing argument, advocated by Bailey et al, reveals that patients and physicians are better served through alternative measures.\textsuperscript{117} The development of new procedures, guidelines and policies by organizations, such as the CPSI, together with the continued education of HCPs concerning legal, ethical and professional obligations, should result in an environment more conducive to full disclosure and apologies.\textsuperscript{118} However, the benefits Apology Legislation cannot be dismissed so easily. Further to the economic arguments in favour of apology laws there are those who believe the legislation will strengthen the relationship between doctor and patient.

\textsuperscript{115} Dugald Christie, “Will an “Apology” satisfy Woodlands Survivors?”, (2006) Summer Transition 24 763. Furthermore, Christie believes that Apology Legislation ‘will work all manner of mischief, all of which will further complicate the long and tortuous road to justice that victims have to travel’.
\textsuperscript{116} Christie, supra note 114 and Bailey, supra note 72 at 35-36.
\textsuperscript{117} Bailey, supra note 72 at 36.
\textsuperscript{118} Ibid.
D. APOLOGY LEGISLATION AND THE DOCTOR-PATIENT RELATIONSHIP

As both Getz and Vines have noted, there are many factors which prompted the creation of Apology Legislation, those of an economic nature and of course those of a social and moral persuasion. The focus of the following section will centre on the arguments made both for and against Apology Legislation as a means of improving the doctor-patient relationship. Over generations the bond between doctor and patient has weakened. Many factors have contributed to this phenomenon, whether it is the imposition of a duty of care on HCPs or the rise of what academics have dubbed the compensation culture. What is certain is that HCPs today face far greater risks when interacting with patients. The result is reduced communication within the relationship, a problem that leads not only to confusion and anger on the part of patients, but has the corollary whereby HCPs become more susceptible to systemic and personal errors. Notwithstanding the fact that the economic arguments surrounding the rise in medical malpractice litigation cannot be substantiated beyond a reasonable doubt, there is still the need to rectify what all observers, including the Institute of Medicine (“IOM”), have revealed to be a devastating number of preventable adverse medical events.\(^{119}\) The IOM’s 2000 report, “To Err is Human”, gave the public access to information about medical errors that were previously only known to HCPs. The report concluded that between 44,000 and 98,000 patients in the United States annually perish as a result of preventable medical errors.\(^{120}\) The shock and horror of such a revelation has propelled countries, including the United States and Canada, to undertake

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\(^{119}\) IOM Report, supra note 4.  
\(^{120}\) Ibid.
the monumental task of implementing measures to reduce the number of medical errors and to encourage the reporting of errors currently suppressed by the medical profession.

Apology Legislation, including related laws and regulations, has been heralded as the cure to the deterioration of the doctor/patient relationship. As Russell Getz noted above, one of the primary arguments made in favour of the adoption of Apology Legislation in Canada is that it could encourage natural, open and direct dialogue between people after injuries.\textsuperscript{121} Specifically, the legislation was intended to free the conscience of HCPs and allow them to discuss with patients not only the remorse and empathy related to an adverse medical event, but also admit fault for errors made during the course of treatment. The legislation provides a shield for HCPs behind which they are protected from liability for any statements made. Even though the legislation acts in a narrow evidentiary fashion, the belief is that such protection will offer HCPs the opportunity to address both patients and colleagues after errors have occurred in hopes of strengthening the lines of communication and preventing future error.\textsuperscript{122} However, as Marlynn Wei describes in her brilliant work on Apology Laws, there are many factors outside of accountability and legal liability that create ‘strong, pervasive resistance’ by HCPs in the disclosure of medical errors.\textsuperscript{123} Apology Legislation protects HCPs from being found liable for their statements to patients but there is more at risk to HCPs then the avoidance of litigation.

\textsuperscript{121} Getz, supra note 44 at 1-15.  
\textsuperscript{122} Wei, supra note 1 at 159.  
\textsuperscript{123} Ibid. at 112.
HCPs, particularly physicians, have a long tradition of self-regulation. Their independence, from setting standards for admission into the profession to discipline of conduct, is integral to their professionalism. As Wei suggests, HCPs enjoy the control they have over their own profession and have a great dislike for intrusions and recommendations made by nonphysicians.\textsuperscript{124} For centuries the medical profession created and maintained a status that exempted them from critics and oversight. It wasn’t until the late 20\textsuperscript{th} Century that governments and the public began to demand accountability from the medical community. The culmination of these efforts is today’s state, where the ‘quality control and patient safety movement’ has taken back much of the power the medical profession once held.\textsuperscript{125} Groups such as the CPSI have brought medical errors and accountability into the public eye.\textsuperscript{126} However, as the medical community began to lose control over it’s self-regulation it sought to insulate itself from public scrutiny. All efforts for full-disclosure, including the implementation of Apology Legislation, may be futile if HCPs continue to hide and underreport errors as evidenced by the numbers disclosed in the aforementioned IOM Report. The fear of loss of control is compounded by the publicity HCPs now face for reporting errors. This can lead to a host of social and moral implications that further erode the relationship between HCP and patient.

\textsuperscript{124} \textit{Ibid.} at 143.
\textsuperscript{125} \textit{Ibid.}
\textsuperscript{126} CPSI at \url{http://www.patientsafetyinstitute.ca/English/Pages/default.aspx} lists many of the past and present initiatives for patients rights advocacy.
HCPs face a unique dilemma as healers when patients come to see their care givers as infallible. The discovery and pronouncement of an error exposes the vulnerability of HCPs, which in turn can affect the public’s view of the medical profession. As Wei notes:

[The] image of perfection reinforces and feeds two fundamental aspects of the physician-patient relationship: the physician’s position or authority and the physician as a source of certainty – both of which are foundations for trust. The authority of the physician figure is deeply connected with the idea of both moral and clinical perfection.127

HCPs stay at their best when they are confident in their own skill set and are able to banish uncertainty from their work. Uncertainty can breed fear and fear can breed indecision. Both of which HCPs cannot and are told not to share with patients.128 In the event of a medical error it is possible to imagine how a HCP would hesitate before communicating to the patient the full extent of the adverse event. To do so puts the HCP’s confidence at risk. However, this cannot be a decisive factor in the failure to offer full disclosure. The greater risk for HCPs following disclosure is the potential loss of trust from the patients. As Wei suggests, though the claims are controversial, HCPs view the current state of medicine as a potential factor for the risk of lost trust.129 HCPs claim that ‘shorter visits, loss of physician autonomy, and an increasingly difficult environment for strong physician-patient relationships’ leads patients to lose trust in their HCPs faster and with less chance of meaningful disclosure.130

127 Wei, supra note 1 at 144.
128 Ibid.
129 Ibid.
130 Ibid. at 147
Whether disclosure successfully buffers the erosion of trust is uncertain. As a result, physicians are faced with a paradox of self-defeat: In order to restore trust, physicians must reveal mistakes, events that may be viewed as a betrayal of trust. The physician-patient relationship must first be put into jeopardy before it can be redeemed. And to remain silent betrays a patient’s trust even more. The process of disclosure to physicians is anxiety producing not only because it leaves them exposed to the patient’s distrust, but also because it exposes them to their own distrust of themselves.\textsuperscript{131}

Distrust is a dangerous position for HCPs as it can breed fear, guilt and shame. The purpose of full-disclosure is to affirm the doctor-patient relationship but care must be given to the reactions of both parties. If full-disclosure is to succeed, as it purports to in the Michigan and Veterans Affairs hospitals, a network must be put in place to help HCPs deal with the stress and emotion connected to medical errors. As Dr. Atul Gawande notes, “[D]octors will sometimes falter, and it isn't reasonable to ask that we achieve perfection. What is reasonable is to ask that we never cease to aim for it.”\textsuperscript{132}

This leads to the final factor that may affect the doctor-patient relationship. Even in the event of full-disclosure there exists what Wei describes as the ‘asymmetry in medicine’. HCPs have an ‘inherent imbalance of knowledge' that offers them the opportunity to hide errors.\textsuperscript{133} Patients rarely have the medical knowledge necessary to understand whether an error has occurred. However, this does not mean that HCPs cannot use disclosure as a means to reconstruct the relationship, but it further evidences how they are left vulnerable. If HCPs are truthful, they face potential criticism, scrutiny and possible

\textsuperscript{131} Ibid. at 149.
\textsuperscript{133} Wei, supra note 1 at 151.
discipline. If they hide the truth, HCPs may “leave the strength of the physician-patient relationship untested – as well as their own ethic unfulfilled”.\textsuperscript{134}

What is certain is that the presence of Apology Legislation alone is not enough to bridge the divide that currently exists in the doctor-patient relationship. The empirical studies noted above suggested that the likelihood of litigation may decrease through the offer of an apology and explanation, however, as I have discussed, HCPs still face many issues with full disclosure. The answer lies not in a single solution, but in the development and implementation of a number of measures. There can be no cure-all, no matter how attractive and politically attractive a single piece of legislation may seem. The restructuring and reinforcement of the doctor-patient relationship will come about on a variety of different levels. As Wei notes, efforts must be made to allow HCPs to develop trust in the tort system. Through legal reforms Wei believes that there is the possibility to initiate trust in the system by implanting, among others, key changes to the manner in which medical experts are certified and the creation of health courts.\textsuperscript{135} Other academics, such as Michelle Mello and David Studdert, also advocate the reform of the medico-legal system with their poignant and persuasive arguments for the creation of health courts.\textsuperscript{136} As Wei argued for reform to assist HCPs, Mello and Studdert argue that Health Courts can also function as a key reform for patient safety and patient rights:

\textsuperscript{134} Ibid. at 153.
\textsuperscript{135} Ibid. Wei is not alone as members of the United States senate have pushed for similar reforms. In the 2006 MEDiC Bill, Senators Hillary Clinton and Barack Obama advocated for the creation of specialized courts with a medico-legal focus. See Clinton & Obama, \textit{supra} note 5.
Health courts hold the promise of deterring injuries in a way that tort law never can. While it will continue to be important to seek market-based and regulatory mechanisms of improving and monitoring patient safety rather than relying principally on the liability system, the liability system could help improve safety more constructively than it has in the past.137

Health courts present a radical shift from the present system, one that will involve significant debates about ‘cost, fairness and feasibility’, but it is one of many options that are proving to be favourable compared to the present situation.138

Reform comes in many ways, and in Canada the passage of Apology Legislation has not deterred national and provincial organizations from making significant policy shifts as they seek to improve patient safety without jeopardizing the doctor-patient relationship. The Canadian Medical Association (“CMA”) has led the charge to reform medical error disclosure, as evidenced by section 14 of the CMA Code of Ethics, which requires physicians “to take all reasonable steps to prevent harm to patients and to disclose harm to patients if it happens’.139 The CMA is not alone, as the CPSI has created ambitious strategies for medical error disclosure and the education of HCPs in disclosure and reporting.140 The work of the CPSI and other patient safety groups is believed by some academics, notably Tracey Bailey and Elizabeth Robertson, to be the seminal reform necessary to bring balance to the doctor-patient relationship. They propose that education and training is necessary to inform HCPs of their ‘legal, ethical and professional

137 Ibid. at 488
138 Ibid.
140 CPSI at http://www.patientsafetyinstitute.ca/English/Pages/default.aspx. Go on to list some of the many initiatives going on at the CPSI.
obligations' with regard to error reporting and effective communication with their patients. While Bailey and Robertson conclude that there is no basis for legislative reform concerning apologies, all reforms, including those of an educational and legislative nature, should be sought to achieve the goals of improved patient safety, which in turn will strengthen the doctor-patient relationship.

141 Bailey, supra note 72 at 36
142 Ibid.
E. RECOMMENDATIONS

Apology Legislation, as envisaged by Canadian legislators, was a politically inviting and economically attractive legal reform. It was meant to address a number of legal ailments suffered by individuals, organizations and governments. However, despite Apology Legislation’s restrictions, it faces the stiff criticism of being too narrow in its scope. As evidenced above, beneath the popular and protective veneer there lies a potential for Apology Legislation to do harm to some victims who now face an even harder task of fulfilling the evidentiary burden of fault in civil claims. The immunity offered by Apology Legislation is arguably unnecessary as Canadian courts have dealt with apologies in a uniform manner. Furthermore, one of the primary positive attributes of the Apology Legislation is its potential to reduce litigation rates, relying on the ability of HCPs to provide timely disclosure that will in turn prompt patients to forego litigation. This premise could be viewed as a success for HCPs, insurers and the tort system but it fails to account for the vulnerable section of patients who may require compensation but are not aware of their true needs. The potential for reduction of litigious claims may not necessarily translate into a reduction of patients who deserve adequate compensation. Apology Legislation is a positive step towards fulfilling the goals laid out by Russell Getz, but it should only be seen as a preliminary approach. The Canadian Health Care System, together with our adversarial court system, must adapt to face the changing needs of both HCPs and patients. From duties of care to the requirements of full disclosure, the doctor-patient relationship has shown the ability to evolve and so must the medico-legal systems. As Bailey et al have noted, there are many avenues of reform open to Government and
HCPs. From the education of HCPs on ethical, legal and professional responsibilities, to the re-examination of a no-fault compensation system, the possibilities are infinite. In an effort to spur the creation of further reform, the following recommendation should be made a subject of the current debate. No single option can provide an adequate solution that solves every problem within the existing legal structure but a series of reforms may net positive results.

(a) **Parallel Compensation System**

In my view, Apology Legislation may fall short of what is actually needed, namely a bipartisan federal and provincial restructuring of the law relating to compensation and negligence. Canadian legislators should reopen the debate surrounding the feasibility of a parallel compensation scheme. The tort system could be replaced by a partial no-fault compensation alternative, similar to what the Chief Medical Officer of the National Health Service of the United Kingdom calls ‘a composite package of reform’. The creation of a parallel compensation scheme, similar in structure to the system advocated by the 2006 Redress Act of the United Kingdom, would not only help to alleviate the pressures on our already strained judicial system, but would also serve to regulate the insurance industries. The United Kingdom, which has a tort-based liability system like Canada’s, passed the Redress Act in 2006 in a bid to make it easier for patients who suffer harm to have their adverse medical outcome investigated, and to receive an explanation, apology

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144 NHS Redress Act 2006 (c. 44)
and compensation without the need for litigation.\textsuperscript{145} The Redress Act is expected to increase annual spending on compensation in the short term, caused by initial increases in claims within the system, but will produce savings in expenditures on legal costs over time.\textsuperscript{146} The Canadian system, at present, is marred by complexity, high costs and lengthy waiting periods. Apology Legislation goes some distance in providing patients with reassurances about improvements, compensation and disclosure but it does not go far enough. A composite reform package offers a compromise between no-fault schemes, like that of New Zealand, and the current Canadian adversarial tort system. The potential to further reduce the costs of litigation and the ability to increase the number of deserving patients receiving compensation suggests that future reform, such as the Redress Act, could be beneficial to our Canadian system. Such reforms warrant investigation.

\textsuperscript{145} Gilmour, \textit{supra} note 143 at 132.
\textsuperscript{146} \textit{Ibid.} at 138.
F. CONCLUSION

Whether perceived or real, there is a growing concern surrounding medical malpractice claims and the effect such claims have on both HCPs and Patients. The implementation of Apology Legislation is a step forward in the attempt to control the increase of insurance premiums and boost HCP confidence; however, more can and must be done to improve patient safety. Critics have called Apology Legislation a narrow evidentiary reform or blanket immunity for tortious acts, but Apology Legislation has the potential to deliver many positive elements. As noted above, apologies play a crucial role in the healing process following the disclosure of an adverse medical outcome. They have the ability to enable healing, but they also have the potential to reduce litigation and the costs associated with pursuing compensation. Together with the potential benefits associated with strengthening the doctor-patient relationship, Apology Legislation may yet prove to be an integral step in the design of a Health Care System that strives to eliminate mistakes and improve quality and safety. It is with care then, that I conclude, that Apology Legislation in Canada is a positive measure on the road to reforming the adversarial model of medico-legal litigation in our courts. Its purpose, to make the justice system more accessible, affordable and effective, will be measured in the coming years and one hopes to see that it has achieved its goals and spurs the creation of further reforms that help better our legal and health care systems.
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